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Briefing on How To Use the Federal Register
For information on a briefing in Washington, DC, see announcement on the inside cover of this issue.

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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:

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

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

WASHINGTON, DC

WHEN: January 31, 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.
DIRECTIONS: North on 11th Street from Metro Center to southwest corner of 11th and L Streets

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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.

DEPARTMENT OF AGRICULTURE

Federal Grain Inspection Service

7 CFR Parts 800 and 810

RIN 0580-AA12

U.S. Standards for Canola

AGENCY: Federal Grain Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Federal Grain Inspection Service (FGIS) is establishing U.S. Standards for Canola under the authority of the U.S. Grain Standards Act, as amended (USGSA). This action will result in canola shipped outside the United States being officially inspected and weighed, except under certain provisions. Official inspection and weighing will be available, upon request, for domestic shipments. This action will provide uniform Federal inspection procedures and will facilitate marketing of the canola crop.

EFFECTIVE DATE: February 28, 1992.

FOR FURTHER INFORMATION CONTACT: George Wollam, Federal Grain Inspection Service, USDA, room 0632–S, Box 96454, Washington, DC 20090–6454. Telephone (202) 720–0292.

SUPPLEMENTARY INFORMATION:

Executive Order 12291

This final rule has been issued in conformance with Executive Order 12291 and Departmental Regulation 1512–1. This action has been classified as nonmajor because it does not meet the criteria for a major regulation established in the Order.

Regulatory Flexibility Act Certification

John C. Foltz, Administrator, FGIS, has determined that this final rule will not have a significant economic impact on a substantial number of small entities because those persons that apply the standards and most users of the inspection service do not meet the requirements for small entities as defined in the Regulatory Flexibility Act (5 U.S.C. 610 *et seq.*). Further, the standards are applied equally to all entities.

Information Collection and Recordkeeping Requirements

In compliance with the Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35) and section 3502 (h) of that Act, the information collection and recordkeeping requirements contained in this rule have been approved by OMB and assigned OMB No. 0580–0013.

Background

Production of canola in the United States is increasing. In 1989 and 1990, U.S. producers planted approximately 75,000 and 100,000 acres of canola, respectively (Ref. 1). This year production may reach 200,000 acres (Ref. 2).

Consumer interest in canola oil has grown due to its nutritional characteristics. It is low in saturated fat (6 percent) compared to corn oil (13 percent), olive oil (14 percent), soybean oil (15 percent), and palm oil (51 percent) (Ref. 3). Canola oil is also characterized by a relatively high level of a monounsaturated fatty acid, oleic acid, and an intermediate level of the polyunsaturated fatty acids, linoleic and linolenic acids.

The use of canola meal has also increased in the United States. In 1989, canola meal usage exceeded 270 thousand metric tons versus 140 thousand metric tons in 1985 (Ref. 4). By the end of the century, forecasters predict that the United States will use 600 thousand metric tons of canola meal per year (Ref. 5). Canola meal is used as a component of livestock, swine, and poultry rations. Based on nutrient content and a unit weight basis, canola meal is worth 70 to 75 percent of the value of 44 percent soybean meal for feeding poultry and approximately 75 to 80 percent of the same for feeding swine and ruminants (Ref. 6).

Comment Review

As a result of growing interest in canola varieties of rapeseed in the United States, FGIS requested public comments on the need for official U.S. Standards for Canola in the May 3, 1991, **Federal Register** (56 FR 20374). FGIS received a total of 16 comments during a 60-day comment period. The comments were submitted from all segments of the canola/rapeseed industry including producer and trade associations, foreign associations and commissions, processors, producers, grain handlers, seed/biotechnological companies, a U.S. senator, and an official grain inspection agency.

All commentors expressed strong support for the development of standards as reflected by the following statement of the U.S. Canola Association:

> The adoption of appropriate U.S. grading standards is an important step toward creating the conditions necessary to further the establishment of canola as a viable commercial crop. Setting standards that reflect consistency with foreign grading factors and tolerances, particularly those used in Canada, will encourage the acceptance of U.S.-produced canola in international trade.

On the basis of the comments and other available information, FGIS is establishing U.S. Standards for Canola under the authority of the USGSA, as amended, to provide uniform Federal inspection procedures and to facilitate marketing of the crop. Under the USGSA, canola shipped outside the United States must be officially inspected and weighed, except under certain provisions of the USGSA and § 800.18 of the regulations. Official inspection and weighing will be available, upon request, for domestic shipments.

Dockage

Of the 16 commentors, 5 commentors supported the inclusion of dockage as a grading factor at export.

Further, four commentors supported the proposed standards in general. Three commentors opposed and two commentors did not address the dockage provision.

The five supporting commentors stated that the inclusion of dockage as a grading factor at export would send a clear message to international buyers that U.S. canola is of the highest quality. The three commentors who opposed this provision, however, stated that a grade limit on export canola could disrupt the movement of canola between domestic

and export markets. One commentor, the National Grain and Feed Association, specifically stated:

> We believe this will effectively create a two-tiered market for canola in the United States that will inhibit the acceptance and marketing of that commodity in this country. The U.S. marketing system does not and should not distinguish between domestic and export markets without clear and convincing justification. In our judgment, justification for neither has been established in the proposal.

Based upon available information, including the comments received, FGIS will not establish dockage grading limits for exported canola at this time because this could potentially increase unnecessarily the handling costs in the export market. FGIS believes, however, that information about the percentage of dockage conveys important quality information to both buyers and sellers of canola. As a result, FGIS will report the percentage of dockage, to the nearest tenth of a percent, as part of the overall grade designation in accordance with § 810.106 of the Official United States Standards for Grain.

Glucosinolate and Erucic Acid Monitoring

Five commentors supported FGIS' proposal to require that each canola inspection for grade include screening for glucosinolates. Furthermore, they supported FGIS' proposal to monitor a percentage of all canola inspections for glucosinolate and erucic acid levels to identify any specific incidence where non-canola varieties of rapeseed are represented as canola. Five commentors generally supported the proposed standards. One commentor did not oppose screening for glucosinolates but questioned whether a rapid, inexpensive screening method exists.

FGIS will use the 00-Dip-Test developed at the Institute for Plant Breeding, University of Gottingen, Germany, to screen each canola sample for glucosinolates. The test is both rapid, requiring only several minutes to perform, and inexpensive. Those lots which test high for glucosinolates will be graded as not standardized grain.

Due to the current absence of a rapid screening method, FGIS will not routinely test canola lots for erucic acid content as part of the inspection for grade. Except in those instances where an applicant requests a test for erucic acid content, inspectors will issue a statement in the "Remarks" section of official certificates indicating that each lot was not tested for erucic acid content.

However, FGIS will monitor a percentage of all canola inspections for glucosinolate and erucic acid levels. FGIS will use this monitoring program to identify any specific incidence where non-canola varieties of rapeseed are represented as canola.

Definition of Canola

Two commenters stated that the definition of canola as proposed was incomplete. They proposed that instead of stating that, "* * * the air-dried, oil free meal shall contain less than 30.0 micromoles per gram of glucosinolates," the definition should include the specific glucosinolates which are measured. One of these commentors also stated that to be botanically correct, the definition should refer to the genus "Brassica" and not to the Brassica species. The definition was originally proposed as follows:

> Seeds of the Brassica species from which the oil shall contain less than two percent erucic acid in its fatty acid profile and the air-dried, oil free meal shall contain less than 30.0 micromoles per gram of glucosinolates. Before the removal of dockage, the seed shall contain not more than 10.0% of other grains for which standards have been established under the United States Grain Standards Act.

FGIS agrees with the comments received. Accordingly, FGIS will revise the definition of canola to read as follows:

> Seeds of the genus *Brassica* from which the oil shall contain less than two percent erucic acid in its fatty acid profile, and the solid component shall contain less than 30.0 micromoles of any one or any mixture of 3-butenyl glucosinolate, 4-pentenyl glucosinolate, 2-hydroxy-3-butenyl glucosinolate, or 2-hydroxy-4-pentenyl glucosinolate per gram of air-dried, oil free solid. Before the removal of dockage, the seed shall contain not more than 10.0% of other grains for which standards have been established under the United States Grain Standards Act.

Stones, Ergot, Sclerotinia, and Garlicky Canola

One commentor voiced specific approval for the proposed grade limits for ergot (0.05% for U.S. Nos. 1, 2, and 3) and sclerotinia (0.05%, 0.10%, and 0.15% for U.S. Nos. 1, 2, and 3, respectively). Another commentor stated that the grade limits for sclerotinia may be too low and are not consistent with the Canadian grade limits. The limits for sclerotinia and ergot as proposed and made final here are consistent with the Canadian export grade requirements for canola/rapeseed.

Two commentors stated that the proposed limit of 0.10% on stones for all grades is inconsistent with the Canadian limit of 0.05% for all grades. FGIS agrees; and, to promote consistency between the U.S. and Canadian standards, FGIS will use the Canadian limit of 0.05% for all grades.

One commentor indicated that the inclusion of a special grade for garlicky canola is inconsistent with the Canadian standards. FGIS agrees but also realizes that garlic infestation of canola fields may occur in particular regions of the United States. Garlic bulblets impart an off-flavor and odor to canola oil and meal. Therefore, to better describe the quality of U.S. canola products, FGIS believes it is necessary to provide information on garlic in the form of a special grade.

Also, FGIS has determined that the portion size indicated in the definition, 1,000 grams, is inaccurate. Accordingly, FGIS will revise the definition of garlicky canola to read as follows:

> Canola that contains more than two green garlic bulblets or an equivalent quantity of dry or partly dry bulblets in approximately a 500 gram portion.

Conspicuous Admixture, Damaged Kernels and Ergot

FGIS has determined that the definition of conspicuous admixture as originally proposed in § 810.302(a) was too brief and, as a result, unclear. The definition of conspicuous admixture was originally proposed as follows:

> All matter other than canola which is conspicuous and readily distinguishable from canola and which remains in the sample after the removal of dockage.

For the sake of clarity, FGIS will revise the definition of conspicuous admixture to read as follows:

> All matter other than canola, including but not limited to ergot, sclerotinia, and stones, which is conspicuous and readily distinguishable from canola and which remains in the sample after the removal of machine separated dockage. Conspicuous admixture is added to machine separated dockage in the computation of total dockage.

FGIS has also determined that several terms, as proposed in § 810.302(b), sprout-damaged, mold-damaged, and otherwise materially damaged, were inadvertently omitted from the definition of damaged kernels as originally proposed. Accordingly, FGIS will revise the definition of damaged kernels to read as follows:

> Canola and pieces of canola that are heat-damaged, sprout-damaged, mold-damaged, distinctly green-damaged, frost-damaged, rime-damaged, or otherwise materially damaged.

FGIS will also revise the definition of ergot as proposed in § 810.302(e) for clarity. The definition of ergot is revised to read as follows:

Sclerotia (sclerotium, sing.) of the fungus, *Claviceps* species, which are associated with some seeds other than canola where the fungal organism has replaced the seed.

FGIS is also making minor revisions to § 810.303 for clarity.

Final Action

FGIS is establishing U.S. Standards for Canola under the USGSA as authorized pursuant to section 4 of the USGSA (7 U.S.C. 76). The format and structure of the standards are uniform with other standards under the USGSA.

Specifically, the standards are divided into five parts and into sections which are generally the same or similar to sections in other U.S. Standards for Grain. Part I, Terms Defined, consists of § 810.301, Definition of canola, and § 810.302, Definition of other terms, which includes the terms conspicuous admixture, damaged kernels, distinctly green kernels, dockage, ergot, heat-damaged kernels, inconspicuous admixture, sclerotia, and sclerotinia. Part II, Principles Governing the Application of Standards, consists of § 810.303, Basis of determination, which references certain quality determinations together with all other determinations. Part III, Grades and Grade Requirements, consists of § 810.304, Grades and grade requirements for canola, which gives the actual grading chart. Part IV, Special Grades and Special Grade Requirements, consists of § 810.305, Special grades and special grade requirements, which includes the special grade of garlicky canola. Part V, Nongrade Requirements, consists of § 810.306, Nongrade requirements, which includes the nongrade requirement of glucosinolates.

In § 810.303, Basis of determination, determinations of total damaged kernels, heat-damaged kernels, distinctly green kernels, total conspicuous admixture, ergot, sclerotinia, stones, and inconspicuous admixture are made on the basis of the canola sample when free from dockage. Other determinations are made on the basis of the oilseed as a whole. However, the determination of odor is made on either the basis of the oilseed as a whole or the oilseed when free from dockage. Additionally, determinations of erucic acid, when requested, and glucosinolates are made on the basis of the canola sample according to procedures prescribed in FGIS instructions.

Except for ergot, sclerotinia, and stones, all percentages are stated to the nearest tenth of a percent. Ergot, sclerotinia, and stones are stated to the nearest hundredth of a percent. Percentages on the basis of count are calculated by dividing the number of unsound kernels by the total number of seeds in the representative portion and multiplying by 100. Percentages on the basis of weight are calculated by dividing the weight of the material removed by the weight of the representative portion and multiplying by 100.

Section 810.304 includes three numerical grades and a Sample grade. The grading factors are heat-damaged kernels, distinctly green kernels, total damaged kernels, ergot, sclerotinia, stones, total conspicuous admixture, and inconspicuous admixture.

Section 810.305 includes one special grade, garlicky canola. Section 810.306 includes the nongrade requirement of glucosinolates which is ascertained during the inspection process and shown on the official inspection certificate for grade.

Furthermore, FGIS is revising § 800.162(a)(2) of the regulations under the USGSA, as amended, and § 810.102(d) of the Official United States Standards for Grain to indicate that test weight is not an official factor in the canola standards. Test weight is extremely variable in canola and has not been shown to be correlated to the end-use value of the seed.

Additionally, FGIS is revising § 800.0(b)(42) of the regulations under the USGSA, as amended, to include canola and sunflower seed in the definition of grain. The United States Standards for Sunflower Seed were established in 1984 (49 FR 22761). The authority citation for part 810 would be amended for clarity. In addition, § 810.101 is amended to include canola as an oilseed for which standards are established.

It should be noted that pursuant to section 4(b) of the USGSA, no standards established or amendments or revocations of standards under the USGSA are to become effective less than 1 calendar year after promulgation unless, in the judgment of the Administrator, the public health, interest, or safety requires that they become effective sooner. Pursuant to section 4(b)(1) of the USGSA, the Administrator has determined that, in the public interest, an effective date of less than 1 calendar year after promulgation is warranted. An early effective date will facilitate domestic and export marketing and allow implementation during this crop year of the standards that are adopted. Therefore, the standards will be effective 30 days after publication.

References

(1) Kohn, F., "Is Canola Coming," Soybean Digest, March 1989, 8–10.

(2) ———, "Agriculture: A New Season," Wall Street Journal, April 18, 1991.

(3) United States Department of Agriculture, Agricultural Handbook No. 8–4 and Human Nutrition Information Service, 1979.

(4) Dixon, P., "U.S. Production—What's the Potential," presentation to the Canola Council of Canada's Annual Convention on March 20–22, 1989.

(5) Canola Council of Canada, "U.S. Canola Oil Demand Projected at 1.5 Million Tonnes by 2003," Canola Digest, April 1990.

(6) Canola Council of Canada, "Canola: The Specifics," Canada's Canola, 19–21.

List of Subjects

7 CFR Part 800

Administrative practice and procedure, Grain.

7 CFR Part 810

Exports, Grain.

For reasons set out in the preamble, 7 CFR parts 800 and 810 are amended as follows:

PART 800—GENERAL REGULATIONS

1. The Authority Citation for part 800 continues to read as follows:

Authority: Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*).

2. Section 800.0(b)(42) is revised to read as follows:

§ 800.0 Meaning of terms.

* * * * *

(b) * * *

(42) *Grain.* Corn, wheat, rye, oats, barley, flaxseed, sorghum, soybeans, triticale, mixed grain, sunflower seed, canola, and any other food grains, feed grains, and oilseeds for which standards are established under section 4 of the Act.[1]

* * * * *

3. Section 800.162(a)(2) is revised to read as follows:

§ 800.162 Certification of grade; special requirements.

(a) * * *

(2) The test weight of the grain, if applicable; * * *

* * * * *

[1] A definition taken from the U.S. Grain Standards Act, as amended, with certain modifications which do not change the meanings.

PART 810—OFFICIAL UNITED STATES STANDARDS FOR GRAIN

4. The Authority Citation for Part 810 is revised to read as follows:

Authority: Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*).

5. Section 810.101 is revised to read as follows:

§ 810.101 Grains for which standards are established.

Grain refers to barley, canola, corn, flaxseed, mixed grain, oats, rye, sorghum, soybeans, sunflower seed, triticale, and wheat. Standards for these food grains, feed grains, and oilseeds are established under the United States Grain Standards Act.

6. Section 810.102(d) is amended by revising the last sentence and adding a new sentence following the last sentence to read as follows:

§ 810.102 Definition of other terms.

* * * * *

(d) * * * Test weight per bushel for all other grains, if applicable, is recorded in whole and half pounds, with a fraction of a half pound disregarded. Test weight per bushel is not an official factor for canola.

* * * * *

7. Section 810.104(b) is amended by revising the seventh sentence to read as follows:

§ 810.104 Percentages.

* * * * *

(b) * * * The percentage of smut in barley, sclerotinia and stones in canola, and ergot in all grains is reported to the nearest hundredth percent.

* * * * *

8. Section 810.107(b) introductory text is revised to read as follows:

§ 810.107 Special grades and special grade requirements.

* * * * *

(b) *Infested barley, canola, corn, oats, sorghum, soybeans, sunflower seed, and mixed grain.* Tolerances for live insects responsible for infested barley, canola, corn, oats, sorghum, soybeans, sunflower seed, and mixed grain are defined according to sampling designations as follows:

* * * * *

9. Subparts C through L are redesignated as subparts D through M.

10. New subpart C is added to read as follows:

Subpart C—United States Standards for Canola—Terms Defined

§ 810.301 *Definition of canola.*

§ 810.302 *Definition of other terms.*

Principles Governing the Application of Standards

§ 810.303 *Basis of determination.*

Grades and Grade Requirements

§ 810.304 *Grades and grade requirements for canola.*

Special Grades and Special Grade Requirements.

§ 810.305 *Special grades and special grade requirements*

Nongrade Requirements

§ 810.306 *Nongrade requirements.*

Subpart C—United States Standards for Canola—Terms Defined

§ 810.301 Definition of canola.

Seeds of the genus *Brassica* from which the oil shall contain less than 2 percent erucic acid in its fatty acid profile and the solid component shall contain less than 30.0 micromoles of any one or any mixture of 3-butenyl glucosinolate, 4-pentenyl glucosinolate, 2-hydroxy-3-butenyl, or 2-hydroxy-4-pentenyl glucosinolate, per gram of air-dried, oil free solid. Before the removal of dockage, the seed shall contain not more than 10.0% of other grains for which standards have been established under the United States Grain Standards Act.

§ 810.302 Definitions of other terms.

(a) *Conspicuous Admixture.* All matter other than canola, including but not limited to ergot, sclerotinia, and stones, which is conspicuous and readily distinguishable from canola and which remains in the sample after the removal of machine separated dockage. Conspicuous admixture is added to machine separated dockage in the computation of total dockage.

(b) *Damaged kernels.* Canola and pieces of canola that are heat-damaged, sprout-damaged, mold-damaged, distinctly green damaged, frost damaged, rimed damaged, or otherwise materially damaged.

(c) *Distinctly green kernels.* Canola and pieces of canola which, after being crushed, exhibit a distinctly green color.

(d) *Dockage.* All matter other than canola that can be removed from the original sample by use of an approved device according to procedures prescribed in FGIS instructions. Also, underdeveloped, shriveled, and small pieces of canola kernels that cannot be recovered by properly rescreening or recleaning. Machine separated dockage is added to conspicuous admixture in the computation of total dockage.

(e) *Ergot.* Sclerotia (sclerotium, sing.) of the fungus, *Claviceps* species, which are associated with some seeds other than canola where the fungal organism has replaced the seed.

(f) *Heat-damaged kernels.* Canola and pieces of canola which, after being crushed, exhibit that they are discolored and damaged by heat.

(g) *Inconspicuous admixture.* Any seed which is difficult to distinguish from canola. This includes, but is not limited to, common wild mustard (*Brassica kaber* and *B. juncea*), domestic brown mustard (*Brassica juncea*), yellow mustard (*B. hirta*), and seed other than the mustard group.

(h) *Sclerotia (Sclerotium, sing.).* Dark colored or black resting bodies of the fungi *Sclerotinia* and *Claviceps.*

(i) *Sclerotinia.* Genus name which includes the fungus *Sclerotinia sclerotiorum* which produces sclerotia. Canola is only infrequently infected, and the sclerotia, unlike sclerotia of ergot, are usually associated within the stem of the plants.

Principles Governing the Application of Standards

§ 810.303 Basis of determination.

Each determination of conspicuous admixture, ergot, sclerotinia, stones, damaged kernels, heat-damaged kernels, distinctly green kernels, and inconspicuous admixture is made on the basis of the sample when free from dockage. Other determinations not specifically provided for under the general provisions are made on the basis of the sample as a whole, except the determination of odor is made on either the basis of the sample as a whole or the sample when free from dockage. The content of glucosinolates and erucic acid is determined on the basis of the sample according to procedures prescribed in FGIS instructions.

Grades and Grade Requirements

§ 810.304 Grades and grade requirements for canola.

Grading factors	Grades, U.S. Nos.		
	1	2	3
	Maximum percent limits of:		
Damaged kernels:			
Heat damaged	0.1	0.5	2.0
Distinctly green	2.0	6.0	20.0
Total	3.0	10.0	20.0
Conspicuous admixture:			
Ergot	0.05	0.05	0.05
Sclerotinia	0.05	0.10	0.15
Stones	0.05	0.05	0.05
Total	1.0	1.5	2.0
Inconspicuous admixture	5.0	5.0	5.0

Grading factors	Grades, U.S. Nos.		
	1	2	3
	Maximum count limits of:		
Other material:			
Animal filth	3	3	3
Glass	0	0	0
Unknown foreign substance	1	1	1

U.S. Sample grade Canola that:
(a) Does not meet the requirements for U.S. Nos. 1, 2, 3; or
(b) Has a musty, sour, or commercially objectionable foreign odor; or
(c) Is heating or otherwise of distinctly low quality.

Special Grades and Special Grade Requirements

§ 810.305 Special grades and special grade requirements.

Garlicky canola. Canola that contains more than two green garlic bulblets or an equivalent quantity of dry or partly dry bulblets in approximately a 500 gram portion.

Nongrade Requirements

§ 810.306 Nongrade requirements.

Glucosinolates. Content of glucosinolates in canola is determined according to procedures prescribed in FGIS instructions.

Dated: January 2, 1992.

John C. Foltz,

Administrator.

[FR Doc. 92-2016 Filed 1-28-92; 8:45 am]

BILLING CODE 3410-EN-M

Agricultural Marketing Service

7 CFR Part 1106

[DA-91-024]

Milk in the Southwest Plains Marketing Area; Order Suspending Certain Provisions

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Suspension of rule.

SUMMARY: This action suspends from the Southwest Plains milk order for the months of February through August 1992, the shipping standards for supply plants that were pooled during the preceding September through January and the monthly requirements that a producer's milk be received at a pool plant in order to be eligible for diversion to non-pool plants. The action was requested by Mid-America Dairymen, Inc. (Mid-Am), a cooperative association that represents producers who supply milk for the market. The action is essential to insure the efficient disposition of an increasing supply of milk from dairy farmers who have historically supplied the market's fluid milk requirements.

EFFECTIVE DATE: February 1, 1992 through August 31, 1992.

FOR FURTHER INFORMATION CONTACT: Richard A. Glandt, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 720-4829.

SUPPLEMENTARY INFORMATION: Prior document in this proceeding:

Notice of Proposed Suspension: Issued December 27, 1991; published January 3, 1992 (57 FR 221).

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this action will not have a significant economic impact on a substantial number of small entities. This action lessens the regulatory impact of the order on certain milk handlers and tends to ensure that dairy farmers will continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

This final rule has been reviewed by the Department in accordance with Departmental Regulation 1512-1 and the criteria contained in Executive Order 12291 and has been determined to be a "non-major" rule.

This order of suspension is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and of the order regulating the handling of milk in the Southwest Plains marketing area.

Notice of proposed rulemaking was published in the **Federal Register** on January 3, 1992 (57 FR 221) concerning a proposed suspension of certain provisions of the order. The notice indicated that suspension was being requested for January through August for two provisions and for February through August for a third provision. Interested persons were afforded opportunity to file written data, views, and arguments thereon. Mid-America Dairymen, Inc. (Mid-Am) requested that we modify the time period of the suspension to February through August 1992 for all three provisions for which suspension was requested. The sections for which the suspension was requested pertain to milk produced in February through August. Accordingly, the suspension will be in effect for the months of February through August 1992. Mid-Am supplied additional written materials supporting their view. Kraft General Foods also filed a written statement in support of the suspension of the requested provisions of the order.

After consideration of all relevant material, including the proposal in the notice, the comments received, and other available information, it is hereby found and determined that for the months of February through August 1992 the following provisions of the order do not tend to effectuate the declared policy of the Act:

1. In § 1106.6, the words "during the month".

2. In § 1106.7(b)(1), the words "of February through August until any month of such period in which less than 20 percent of the milk received or diverted as previously specified, is shipped to plants described in paragraph (a) or (e) of this section. A plant not meeting such 20 percent requirement in any month of such February-August period shall be qualified in any remaining month of such period only if transfers and diversions pursuant to paragraph (b)(2) of this section to plants described in paragraph (a) or (e) of this section are not less than 50 percent of receipts or diversions, as previously specified".

3. In § 1106.13, paragraph (d)(1) in its entirety.

Statement of Consideration

This action suspends for February through August 1992 the shipping standard for supply plants that were previously associated with the market. The order defines a supply plant as a plant from which fluid milk products are transferred or diverted to distributing plants during the month. It also provides that in order to be pooled under the order during the months of September through January, 50 percent of a supply plant's receipts must be shipped to distributing plants each month. A supply plant that was pooled during each of the immediately preceding months of September through January shall continue to be pooled during the following months of February through August if 20 percent of its receipts are shipped to distributing plants. That action would eliminate during the months of February through August 1992 the shipping standard for supply plants that were pooled under the order during

the immediately preceding September through January period.

This action also suspends, for February through August 1992, the monthly requisite that a producer's milk be received at a pool plant in order to be eligible for diversion to nonpool plants. The order provides that a dairy farmer's milk may be diverted to nonpool plants and still be priced under the order if at least one day's production of such person is physically received at a pool plant during the month.

This suspension was requested by Mid-America Dairymen, Inc. (Mid-Am), a cooperative association that represents a substantial number of producers who supply the market.

The action is warranted because analysis of market data for 1990 and 1991 establishes that the market's production is escalating at a rate faster than fluid milk sales. Based on the expectation that this situation will continue for the next several months, it appears that there will be sufficient supplies of milk available in the vicinity of the market's distributing plants to supply the fluid milk requirements of such plants during the months of February through August 1992. Therefore supplemental supply plant milk will not be required to supply fluid milk needs. The milk of producers can be marketed more economically during this seven month period by supplying the needs of distributing plants with nearby milk and by moving the milk of more distant producers directly from the farms to manufacturing plants in the production area. Absent a suspension action, the requirement that each producer's milk be received at a pool plant one time each month likely would result in uneconomical and inefficient movements of milk to preserve the pool status of producers who have historically been associated with the Southwest Plains market.

It is hereby found and determined that thirty days' notice of the effective date hereof is impractical, unnecessary and contrary to the public interest in that:

(a) The suspension is necessary to reflect current marketing conditions and to assure orderly marketing conditions in the marketing area in that such action will eliminate unnecessary milk movements and will guarantee that dairy farmers who regularly have supplied the market's fluid milk requirements will continue to have their milk priced under the order and thereby receive the benefits that accumulate from such pricing.

(b) This suspension does not require of persons affected substantial or extensive preparation prior to the effective date; and

(c) Notice of proposed rulemaking was given interested parties and they were afforded opportunity to file written data, views of arguments concerning this suspension. Mid-Am and Kraft General Foods filed information supporting the suspension request. No comments were filed in opposition to this action.

Therefore, good case exists for making this order effective upon publication in the **Federal Register**.

List of Subjects in 7 CFR Part 1106

Milk marketing orders.

It is therefore ordered, that the following provisions in §§ 1106.6, 1106.7, and 1106.13 of the Southwest Plains marketing order are hereby suspended for February through August 1992.

PART 1106—MILK IN THE SOUTHWEST PLAINS MARKETING AREA

1. The authority citation for 7 CFR part 1106 continues to read as follows:

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

§ 1106.6 [Suspended in part].

2. In § 1106.6, the words "during the month" are suspended.

§ 1106.7(b)(1) [Suspended in part].

3. In § 1106.7(b)(1), the words "of February through August until any month of such period in which less than 20 percent of the milk received or diverted as previously specified, is shipped to plants described in paragraph (a) or (e) of this section. A plant not meeting such 20 percent requirement in any month of such February-August period shall be qualified in any remaining month of such period only if transfers and diversion pursuant to paragraph (b)(2) of this section to plants described in paragraph (a) or (e) of this section are not less than 50 percent of receipts or diversions, as previously specified" are suspended.

§ 1106.13 [Temporarily suspended in part].

4. In § 1106.13, paragraph (d)(1) is suspended in its entirety.

Signed at Washington, DC, on January 24, 1992.

John E. Frydenlund,

Deputy Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 92–2137 Filed 1–28–92; 8:45 am]

BILLING CODE 3410–02–M

Farmers Home Administration

7 CFR Parts 1807, 1822, 1823, 1890t, 1927, 1941, 1943, 1944, 1945, 1951, 1955, and 1965

Real Estate Title Clearance and Loan Closing; Deferral of Effective Date

AGENCY: Farmers Home Administration, USDA.

ACTION: Final rule; deferral of effective date.

SUMMARY: The Farmers Home Administration (FmHA) defers the effective date of its Final Rule on Real Estate Title Clearance and Loan Closing published on Tuesday, December 31, 1991, in 56 FR 67470. The effective date is being deferred to:

(1) Allow a reasonable time period for each State Office to notify designated attorneys and title companies of the new procedural requirements;

(2) Allow sufficient time for interested parties to obtain liability and fidelity coverage in the required amounts;

(3) Avoid delays in closures of FmHA loans; and

(4) Receive and disseminate the forms associated with the new procedure.

EFFECTIVE DATE: March 31, 1992. The effective date of the Final Rule published at 56 FR 67470 on December 31, 1991 is deferred from January 30. 1992, until March 31, 1992.

FOR FURTHER INFORMATION CONTACT: James W. Craun, Branch Chief, Home Ownership Branch, Single Family Housing Processing Division, Farmers Home Administration, USDA, room 5334, South Agricultural Building, 14th and Independence Avenue, SW., Washington, DC 20250, telephone (202) 720–1482.

SUPPLEMENTARY INFORMATION: The Farmers Home Administration defers the effective date of its final rule on Real Estate Title Clearance and Loan Closing published at 56 FR 67470 on December 31, 1991, until March 31, 1992.

Dated: January 22, 1992.

LaVerne Ausman,

Administrator, Farmers Home Administration.

[FR Doc. 92–2139 Filed 1–28–92; 8:45 am]

BILLING CODE 3410–07–M

FEDERAL RESERVE SYSTEM

12 CFR Part 229

[Regulation CC; Docket No. R-0744]

Availability of Funds and Collection of Checks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Interim rule with request for comment.

SUMMARY: The Board is amendment regulation CC to conform to recent amendments to the Expedited Funds Availability Act. The amendments allow banks to extend holds, on an exception basis, to "next-day" and "second-day" availability checks and allow one-time notices of exception holds in certain cases. The Board has adopted conforming changes to regulation CC on an interim basis. The Board is requesting comment on the interim rule pending adoption of a final rule and on whether there are classes of consumer accounts for which one-time notice should be permitted.

DATES: *Effective date:* January 15, 1992.

Comment date: Comments must be submitted on or before March 27, 1992.

ADDRESSES: Comments, which should refer to Docket No. R-0744, may be mailed to the Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551, attention: Mr. William W. Wiles, Secretary; or may be delivered to the Board's mail room between 9 a.m. and 5 p.m. All comments received at the above address will be included in the public file and may be inspected at room B-1122 between 9 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Louise L. Roseman, Assistant Director, Division of Reserve Bank Operations and Payment Systems (202/452-3874); Oliver Ireland, Associate General Counsel (202/452-3625), or Stephanie Martin, Senior Attorney (202/452-3198), Legal Division. For information regarding modifications to Model Forms or appendix C, contact Jane E. Ahrens, Staff Attorney (202/452-3667), or Dale I. Nishimura, Staff Attorney (202/452-2412), Division of Consumer and Community Affairs. For the hearing impaired only: Telecommunications Device for the Deaf, Dorothea Thompson (202/452-3544).

SUPPLEMENTARY INFORMATION: The Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA," Pub. L. No. 102-242, section 225, 105 Stat. 2236 (1991)) amends the provisions in section 604 of the Expedited Funds Availability Act ("Act") (12 U.S.C. 4003) regarding safeguard exceptions to the availability schedules, effective December 19, 1991. The Board has adopted interim amendments to regulation CC (12 CFR part 229), effective January 15, 1992, to conform the regulation to the amendments to the Act. The Board is requesting comment on the interim amendments and Commentary revisions, which are described below.[1]

Background

The Board adopted regulation CC to implement the Act, which was effective September 1, 1988. Among other things, the regulation establishes availability schedules to limit the holds banks [2] can place on deposits to transaction accounts and requires banks to disclose their funds availability policy to their customers.

As a general matter, the availability of a deposit is linked to the degree of risk associated with the deposit and the amount of time necessary for a bank to learn whether a deposited check will be returned unpaid. Accordingly, nonlocal [3] checks must generally be made available for withdrawal on the fifth business day after deposit, local checks on the second business day, and certain "low-risk" checks, such as government, cashier's, certified, and teller's checks, on the next business day. (Most "next-day" checks, if not deposited in person at a staffed teller facility, must be made available for withdrawal on the second business day after deposit.)

The Act (section 604) and the regulation (§ 229.13) provide for certain safeguard exceptions to the availability schedules. Under these exceptions, the depositary bank can extend the hold on a deposit for a reasonable period of time. The exception holds apply to deposits to new accounts, daily aggregate deposits in excess of $5,000, checks that have returned unpaid and redeposited, checks deposited into an account that has been repeatedly overdrawn, checks the depositary bank may reasonably expect to be uncollectible, and checks deposited during emergency conditions, such as a computer failure, natural disaster, or other emergency beyond the bank's control.

Applicability of Exception Holds to "Next-Day" and "Second-Day" Checks

Prior to the enactment of the FDICIA, most of the exception holds did not apply to checks that must be accorded next-day or second-day availability under section 603(a)(2) of the Act and § 229.10(c) of the regulation, such as government, cashier's, certified, and teller's checks. In three reports to Congress on the implementation of the Act, the Board expressed concern that the inapplicability of the exception holds to next-day and second-day checks exposed depositary banks to substantial risk that such checks would be returned after the proceeds had been made available for withdrawal.[4] The Board noted that fraud loss reduction would benefit depository institutions as well as their customers, who otherwise may face increased service fees or decreased service levels.

Section 225 of the FDICIA amends section 604 of the Act to authorize the Board to prescribe regulations to apply most of the safeguard exception holds to checks that would otherwise receive next-day or second-day availability under section 603(a)(2) of the Act and § 229.10(c) of Regulation CC. The Board is adopting amendments to the regulation that will make the exceptions for large deposits (§ 229.13(b)), redeposited checks (§ 229.13(c)), accounts with repeated overdrafts (§ 229.13(d)), and emergency conditions (§ 229.13(f)) available for checks otherwise covered by § 229.10(c). In addition, the amendment will make the reasonable cause exception (§ 229.13(e)), which previously had applied to local and nonlocal checks and only certain next-day or second-day checks (i.e., checks drawn on Federal Reserve Banks or Federal Home Loan Banks and cashier's, certified, and teller's checks), available for all checks covered by § 229.10(c). The Board is revising the corresponding Commentary to reflect the broader scope of the exception holds.

The Board is also amending § 229.13(h), which governs the

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[1] Section 227 of the FDICIA amends section 603(e) of the Act to eliminate the shorter availability schedules for deposits at nonproprietary ATMs that were to be effective November 28, 1992. Section 212(h) of the FDICIA amends the administrative enforcement provisions in section 610(a) of the Act. The Board is requesting comment on amendments to regulation CC to implement these changes (see Docket R-0745, elsewhere in today's **Federal Register**). The proposed amendments regarding nonproprietary ATM deposits and administrative enforcement are not part of the interim rule adopted by the Board in this docket.

[2] For purposes of regulation CC, the term "bank" includes commercial banks, savings institutions, and credit unions.

[3] A check generally is "local" if the bank by which it is payable and to which it is sent for collection ("paying bank") is in the same Federal Reserve check processing region as the bank that receives the check for deposit ("depositary bank").

[4] See, Board of Governors of the Federal Reserve System, Report to Congress Under the Expedited Funds Availability Act, September 1991, March 1990, and June 1989.

availability of deposits subject to the exception holds. The Board's amendments provide that, with respect to Treasury checks, U.S. Postal Service money orders, checks drawn on Federal Reserve Banks or Federal Home Loan Banks, state and local government checks, and cashier's, certified, and teller's checks subject to the next-day (or second-day) availability requirement, the depositary bank may extend the time funds must be made available for withdrawal under the large deposit, redeposited check, repeated overdraft, or reasonable cause exception by a reasonable period beyond the delay that would have been permitted under the regulation had the checks not been subject to the next-day (or second-day) availability requirement. The additional hold is added to the local or nonlocal schedule that would apply based on the location of the paying bank. For on us checks that must be available on the next business day after the banking day of deposit under § 229.10(c)(1)(vi), the additional hold of one business day is added to the next-day requirement.

One-Time Hold Notices

Prior to the enactment of the FDICIA, section 604(f) of the Act and § 229.13(g) of the regulation provided that each time a depositary bank invoked an exception of the availability schedules under § 229.13 (b) through (f) of the regulation (the large deposit, redeposited check, repeated overdraft, reasonable cause, and emergency conditions exceptions, respectively), it had to notify the customer of the exception hold. Section 229.13(g) required that the exception hold notice be given at the time of the deposit or by the first business day following the day the facts upon which the exception hold is based become known to the depositary bank.

Although individual notices may be appropriate in the case of the reasonable cause or emergency conditions exceptions, which must be invoked on a case-by-case basis, they are less appropriate for the large deposit, redeposited check, or repeated overdraft exceptions. In these latter cases, it would be more efficient and less costly to depositary banks if the notice requirement could be tailored to the exception invoked. Customers would also benefit from receiving advance notice of any exception holds that will be in effect under certain conditions or for a certain period of time, rather than receiving on-the-spot or after-the-fact notices upon each deposit. In its three reports to Congress regarding implementation of the Act, cited above, the Board recommended that the Act be amended to provide banks with greater flexibility in giving notices of exception holds.

Section 225 of the FDICIA amends section 604(f) of the Act to authorize the Board to prescribe regulations to allow the depositary bank, in certain cases, to send one notice of an exception hold applicable to a customer's future deposits rather than sending a separate notice for each deposit. The amendments to section 604(f) set out two types of one-time notices and the circumstances under which they apply, as follows:

1. Large Deposit and Redeposited Check Exception Hold Notices

Sections 229.13(b) and (c) of the regulation provide that a depositary bank may apply exception holds to aggregate daily deposits of checks in excess of $5,000 and to deposits of checks that have been returned unpaid and redeposited. Under the amendments to section 604(f) of the Act, if a depositary bank applies the large deposit or redeposited check exception to nonconsumer accounts, it may give its nonconsumer customers a single notice at or prior to the time notice must otherwise be given. The Board has adopted interim amendments to § 229.13(g) and revisions to the Commentary to implement these amendments to the Act.

As provided in the interim amendments to § 229.13(g)(2) adopted by the Board, the one-time notice for the large deposit and redeposited check exceptions must explain the reason the exception(s) may be invoked and the time period within which deposits subject to the exception(s) would be available for withdrawal. The notice should reflect the bank's priorities in placing exception holds on deposits consisting of different types of checks, such as next-day, local, and nonlocal checks.

A depositary bank may provide a one-time notice to a nonconsumer customer under § 229.13(g)(2) only if each exception cited in the notice (the large deposit and/or the redeposited check exception) will be invoked for most check deposits to the customer's account to which the exception could apply. The Board has adopted Model Notice C–13B, which may be used by those banks that want to provide a one-time notice of these exception holds to their nonconsumer customers. A depositary bank may continue to send hold notices for each deposit subject to the large deposit or redeposited check exception in accordance with § 229.13(g)(1) (see Model Notice C–13).

Under the Board's interim amendment, consumer account-holders must continue to receive large deposit and redeposited check exception hold notices upon each deposit to which the exception is applied. The amendment to section 604(f) of the Act authorizes the Board to apply the one-time notice provision for the large deposit and redeposited check exceptions to classes of consumer accounts that generally have a large number of such deposits. The Board requests comment on whether the one-time notice provision for these types of exceptions should be extended to certain classes of consumer accounts, and if so, how those classes of accounts should be categorized. Specifically, the Board requests comment on the following questions:

i. Are there classes of consumer accounts, such as high balance accounts, that would generally have a large number of daily aggregate deposits of checks in excess of $5,000?

ii. What is a proper measurement of a "large number" of large deposits or redeposited checks, and over what period of time should such a measurement be taken?

iii. Would it be operationally feasible for depositary banks to monitor deposits to consumer accounts to determine which accounts have a large number of daily aggregate deposits of checks in excess of $5,000 or a large number of deposits of redeposited checks?

2. Repeated Overdraft Exception Hold Notice

Section 229.13(d) of the regulation provides that a depositary bank may, for a six-month period, apply longer holds to deposits to an account that has been repeatedly overdrawn. Under § 229.13(d), an account is repeatedly overdrawn if it is overdrawn on six or more banking days within the preceding six months or is overdrawn by $5,000 or more on two or more banking days within the preceding six months.

Section 229.13(g) of the regulation provides that, when invoking the repeated overdraft exception, a depositary bank must provide a notice to the customer upon each deposit. Under the amendments to section 604(f) of the Act, if an account (either consumer or nonconsumer) is subject to the repeated overdraft exception, the depositary bank may provide one notice to its customer for each time period during which the exception will apply, rather than giving a notice upon each deposit during that time period. The Board has adopted interim amendments to § 229.13(g) and revisions to the

Commentary to implement the amendments to the Act.

Section 229.13(g)(3) of the interim amendment provides that the one-time repeated overdraft notice must state the customer's account number, the fact that the exception was invoked under the repeated overdraft exception, the time period within which deposits subject to the exception will be made available for withdrawal, and the time period during which the exception will apply. A depositary bank may provide a one-time notice to a customer under § 229.13(g)(3) only if the repeated overdraft exception will be invoked for most check deposits to the customer's account. A depositary bank may send a notice, such as that contained in Model Notice C–13C, to its customer at the start of each period for which the repeated overdraft exception will be in effect.

Need for Interim Amendment

The Board believes that it is necessary to amend the regulation with an interim amendment, so that depositary banks may take immediate advantage of the new provisions regarding exception holds and hold notices without violating the regulation. The provisions of the FDICIA reflect the intent of the Congress to reduce risk and cost for banks by broadening the scope of the exception holds and providing the one-time notice requirement in certain cases. If the Board's rule is not effective immediately, banks would not be able to take advantage of the FDICIA amendments because attempting to apply the broader statutory hold provisions would result in violation of Regulation CC and attendant potential civil liability.

There was no opportunity for the Board to publish proposed regulations for comment prior to the enactment of the FDICIA amendments to the Act, which were effective December 19, 1991. Accordingly, the Board, for good cause, finds that the notice and public comment procedure normally required is impractical and contrary to the public interest under 5 U.S.C. 553(b)(B). The Board further finds that, for the same reasons, there is good cause under 5 U.S.C. 553(d)(3) to make the interim amendment effective on January 15, 1992 without regard for the 30-day period provided for in U.S.C. 553(d).

Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires an agency to publish an initial regulatory flexibility analysis with any notice of proposed rulemaking. Two of the requirements of an initial regulatory flexibility analysis (5 U.S.C. 603(b))—a description of the reasons why the action by the agency is being considered and a statement of the objectives of, and legal basis for, the proposed rule—are contained in the supplementary information above. The Board's interim rule requires no additional reporting or recordkeeping requirements, nor are there relevant federal rules that duplicate, overlap, or conflict with the proposed rule.

Another requirement for the initial regulatory flexibility analysis is a description of, and where feasible, an estimate of the number of small entities to which the proposed rule shall apply. The interim rule will apply to all depository institutions, regardless of size, as required by the amendments to the Expedited Funds Availability Act. The rule should not have a negative economic impact on small institutions, but rather will decrease the risk and cost for all depositary banks by broadening the scope of the exception holds and providing the one-time notice requirement in certain cases.

List of Subjects in 12 CFR Part 229

Banks, banking, Federal Reserve System.

For the reasons set out in the preamble, 12 CFR part 229 is amended as follows:

PART 229—[AMENDED]

1. The authority citation for part 229 continues to read as follows:

Authority: Title VI of Pub. L. 100–86, 101 Stat. 552, 635, 12 U.S.C. 4001 *et seq.*

2. In § 229.13, the term "229.10(c)," is added immediately preceding the term "229.11" in paragraphs (b), (c) introductory text, (d) introductory text, (f) introductory text, (h)(1), and (h)(3); the first sentence of paragraph (e)(1), paragraph (g)(1) introductory text and (i), paragraph (h)(2), and the first sentence of paragraph (h)(4) are revised; paragraphs (g)(1) (ii) through (v) are removed; paragraphs (g)(2) heading, (g)(2)(i), (g)(2)(ii), and (g)(3) are redesignated as paragraphs (g)(1)(ii) heading, (g)(1)(ii)(A), (g)(1)(ii)(B), and (g)(4), respectively; in newly designated paragraph (g)(1)(ii)(B), the reference "paragraph (g)(2)(i)" is revised to read "paragraph (g)(1)(ii)(A)"; and new paragraphs (g)(2) and (g)(3) are added to read as follows:

§ 229.13 Exceptions.

* * * * *

(e) *Reasonable cause to doubt collectibility*—(1) *In general.* Sections 229.10(c), 229.11, and 229.12 do not apply to a check deposited in an account at a depositary bank if the depositary bank has reasonable cause to believe that the check is uncollectible from the paying bank. * * *

* * * * *

(g) *Notice of exception*—(1) *In general.* Subject to paragraphs (g)(2) and (g)(3) of this section, when a depositary bank extends the time when funds will be available for withdrawal based on the application of an exception contained in paragraphs (b) through (f) of this section, it must provide the depositor with a written notice.

(i) The notice shall include the following information—

(A) The account number of the customer;

(B) The date and amount of the deposit;

(C) The amount of the deposit that is being delayed;

(D) The reason the exception was invoked; and

(E) The time period within which the funds will be available for withdrawal, unless the emergency conditions exception in paragraph (f) of this section has been invoked, and the depositary bank, in good faith, does not know the duration of the emergency and, consequently, when the funds must be made available at the time the notice must be given.

* * * * *

(2) *One-time exception notice.* In lieu of providing notice pursuant to paragraph (g)(1) of this section, a depositary bank that extends the time when the funds deposited in a nonconsumer account will be available for withdrawal based on an exception contained in paragraph (b) or (c) of this section may provide a single notice to the customer that includes the following information—

(i) The reason(s) the exception may be invoked; and

(ii) The time period within which deposits subject to the exception will be available for withdrawal.

This one-time notice shall be provided only if each type of exception cited in the notice will be invoked for most check deposits in the account to which the exception could apply. This notice shall be provided at or prior to the time notice must be provided under paragraph (g)(1)(ii) of this section.

(3) *Notice of repeated overdrafts exception.* In lieu of providing notice pursuant to paragraph (g)(1) of this section, a depositary bank that extends the time when funds deposited in an account will be available for withdrawal based on the exception contained in paragraph (d) of this section may provide a notice to the customer for each time period during which the

exception will be in effect. The notice shall include the following information—

(i) The account number of the customer;

(ii) The fact that the availability of funds deposited in the customer's account will be delayed because the repeated overdrafts exception will be invoked;

(iii) The time period within which deposits subject to the exception will be available for withdrawal; and

(iv) The time period during which the exception will apply.

This notice shall be provided at or prior to the time notice must be provided under paragraph (g)(1)(ii) of this section and only if the exception cited in the notice will be invoked for most check deposits in the account.

* * * * *

(h) *Availability of deposits subject to exceptions.*

* * * * *

(2) If a depositary bank invokes an exception contained in paragraphs (b) through (e) of this section with respect to a check described in § 229.10(c)(1) (i) through (v) or § 229.10(c)(2), it shall make the funds available for withdrawal not later than a reasonable period after the day the funds would have been required to be made available had the check been subject to §§ 229.11 or 229.12.

* * * * *

(4) For the purposes of paragraphs (h)(1), (h)(2), and (h)(3) of this section, a reasonable period is an extension of up to one business day for checks subject to § 229.10(c)(1)(vi), five business days for checks subject to § 229.12(b) and checks that would be subject to § 229.12(b) under in paragraph (h)(2) of this section, and six business days for checks subject to § 229.12(c) and checks that would be subject to § 229.12(c) under paragraph (h)(2) of this section.

* * *

Appendix C to Part 229—[Amended]

3. Appendix C is amended as set forth below:

a. In the introductory text, two new headings are added in numerical order under the heading "Model Notices"; and

b. New model notices C–13B and C–13C are added in numerical order to read as follows:

Appendix C–Model Forms, Clauses, and Notices

* * * * *

Model Notices

* * * * *

C–13B One-time notice for large deposit and redeposited check exception holds

C–13C One-time notice for repeated overdraft exception holds

* * * * *

Model Notices

* * * * *

C–13B—One-Time Notice for Large Deposit and Redeposited Check Exception Holds

Notice of Hold

If you deposit into your account:

• Checks totaling more than $5,000 on any one day, the first $5,000 deposited on any one banking day will be available to you according to our general policy. The amount in excess of $5,000 will generally be available on the [*number*] business day for checks drawn on [*bank*], the [*number*] business day for local checks and [*number*] business day for nonlocal checks after the day of your deposit. If checks (not drawn on us) that otherwise would receive next-day availability exceed $5,000, the excess will be treated as either local or nonlocal checks depending on the location of the paying bank. If your check deposit, exceeding $5,000 on any one day, is a mix of local checks, nonlocal checks, checks drawn on [*bank*], or checks that generally receive next-day availability, the excess will be calculated by first adding together the [ ], then the [ ], then the [ ], then the [ ].

• A check that has been returned unpaid, the funds will generally be available on the [*number*] business day for checks drawn on [*bank*], the [*number*] business day for local checks and the [*number*] business day for nonlocal checks after the day of your deposit. Checks (not drawn on us) that otherwise would receive next-day availability will be treated as either local or nonlocal checks depending on the location of the paying bank.

C–13C—One-time notice for repeated overdraft exception hold

Notice of Hold

Account Number: [*Number*]

Date of Notice: [*Date*]

We are delaying the availability of checks deposited into your account due to repeated overdrafts of your account. For the next six months, deposits will generally be available on the [*number*] business day for checks drawn on [*bank*], the [*number*] business day for local checks, the [*number*] business day for nonlocal checks after the day of your deposit. Checks (not drawn on us) that otherwise would have received next-day availability will be treated as either local or nonlocal checks depending on the location of the paying bank.

* * * * *

Appendix E to Part 229—[Amended]

4. Appendix E to part 229 is amended as set forth below:

a. In appendix E, in the Commentary under section 229.13, in the introductory text, the last sentence of the first paragraph and the first sentence of the second paragraph are revised, and the last sentence of the second paragraph is removed; in paragraph (b), the first two paragraphs are revised; in paragraph (c) a new sentence is added to the end of the first paragraph and the last sentence of the last paragraph is revised; in paragraph (d), two new sentences are added to the end of the last paragraph; in paragraph (e), the second sentence of the first paragraph is revised and a new sentence is added immediately following the second sentence of the first paragraph; in paragraph (f), two new sentences are added immediately preceding the last sentence, and the second and last sentences are revised; in paragraph (g), the first paragraph and the first sentence of the second paragraph are revised, and four new paragraphs are added immediately preceding the last paragraph; and in paragraph (h), the second sentence of the first paragraph, and the third, fourth, and fifth paragraphs are revised; and

b. In Appendix E, in the Commentary under appendix C, two new paragraphs are added in numerical order to read as follows:

Appendix E—Commentary

* * * * *

§ 229.13 Exceptions.

* * * These exceptions apply to local and nonlocal checks as well as to checks that must otherwise be accorded next-day (or second-day) availability under § 229.10(c).

Many checks will not be returned to the depositary bank by the time funds must be made available for withdrawal under the next-day (or second-day), local, and nonlocal schedules. * * *

* * * * *

(b) *Large deposits.* Under the large deposit exception, a depositary bank may extend the hold placed on check deposits to the extent that the amount of the aggregate deposit on any banking day exceeds $5,000. This exception applies to local and nonlocal checks, as well as to checks that would otherwise be made available on the next (or second) business day after the day of deposit under § 229.10(c). Although the first $5,000 of a day's deposit is subject to the availability otherwise provided for checks, the amount in excess of $5,000 may be held for an additional period of time as provided in § 229.13(h). When the large deposit exception is applied to deposits composed of a mix of checks that would otherwise be subject to differing availability schedules, the depositary bank has the discretion to choose the portion of the deposit to which it applies the exception. Deposits by cash or electronic payment are not subject to this exception for large deposits.

The following example illustrates the operation of the large deposit exception. If a customer deposits $2,000 in cash and a $9,000 local check on a Monday, $2,100 (the proceeds of the cash deposit and $100 from the local check deposit) must be made

available for withdrawal on Tuesday. An additional $4,900 of the proceeds of the local check must be available for withdrawal in accordance with the local schedule (i.e. Wednesday under the permanent schedule), and the remaining $4,000 may be held for an additional period of time under the large deposit exception.

* * * * *

(c) *Redeposited checks.* * * * This exception applies to local and nonlocal checks, as well as to checks that would otherwise be made available on the next (or second) business day after the day of deposit under § 229.10(c).

* * * * *

* * * A depositary bank that made $100 of a check available for withdrawal under § 229.10(c)(1)(vii) can charge back the full amount of the check, including the $100, if the check is returned unpaid, and the $100 need not be made available again if the check is redeposited.

(d) *Repeated Overdrafts.* * * *

* * * * *

* * * This exception applies to local and nonlocal checks, as well as to checks that would otherwise be made available on the next (or second) business day after the day of deposit under § 229.10(c). When a bank extends a hold under this exception, it need not make the first $100 of a deposit available for withdrawal on the next business day, as would otherwise be required by § 229.10(c)(1)(vii).

(e) *Reasonable cause to doubt collectibility.* * * * This exception applies to local and nonlocal checks, as well as to checks that would otherwise be made available on the next (or second) business day after the day of deposit under § 229.10(c). When a bank extends a hold under this exception, it need not make the first $100 of a deposit available for withdrawal on the next business day, as would otherwise be required by § 229.10(c)(1)(vii). * * *

* * * * *

(f) *Emergency conditions.* * * * In the circumstances specified in this paragraph, the depositary bank may extend the holds that are placed on deposits of checks that are affected by such delays, if the bank exercises such diligence as the circumstances require. * * * This exception applies to local and nonlocal checks, as well as checks that would otherwise be made available on the next (or second) business day after the day of deposit under § 229.10(c). When a bank extends a hold under this exception, it need not make the first $100 of a deposit available for withdrawal on the next business day, as would otherwise be required by § 229.10(c)(1)(vii). In cases where the emergency conditions exception does not apply, as in the case of deposits of cash or electronic payments under § 229.10 (a) and (b), the depositary bank may not be liable for a delay in making funds available for withdrawal if the delay is due to a bona fide error such as an unavoidable computer malfunction.

(g) *Notice of exception.* If a depositary bank invokes any of the safeguard exceptions to the schedules listed above, other than the new account exception, and extends the hold on a deposit beyond the time periods permitted in §§ 229.10(c), 229.11, and 229.12, it must provide a notice to its customer. Except in the cases described in paragraphs (g)(2) and (g)(3) of the regulation, notices must be given each time an exception hold is invoked and must state the customer's account number, the date of deposit, the reason the exception was invoked, and the time period within which funds will be available for withdrawal.

With respect to paragraph (g)(1), the requirement that the notice state the time period within which the funds shall be made available may be satisfied if the notice identifies the date the deposit is received and information sufficient to indicate when funds will be available and the amounts that will be available at those times. * * *

* * * * *

In those cases described in paragraphs (g)(2) and (g)(3), the depositary bank need not provide a notice every time an exception hold is applied to a deposit. When paragraph (g)(2) or (g)(3) requires disclosure of the time period within which deposits subject to the exception will be available for withdrawal, the requirement may be satisfied if the one-time notice states when on us, local, and nonlocal checks will be available for withdrawal if an exception is invoked.

Under paragraph (g)(2), if a nonconsumer account is subject to the large deposit or redeposited check exception, the depositary bank may give its customer a single notice at or prior to the time notice must be provided under paragraph (g)(1). Notices provided under paragraph (g)(2) must contain the reason the exception may be invoked and the time period within which deposits subject to the exception will be available for withdrawal (see Model Notice C–13B). A depositary bank may provide a one-time notice to nonconsumer customer under paragraph (g)(2) only if each exception cited in the notice (the large deposit and/or the redeposited check exception) will be invoked for most check deposits to the customer's account to which the exception could apply. A depositary bank may to continue send hold notices for each deposit subject to the large deposit or redeposited check exception in accordance with § 229.13(g)(1) (see Model Notice C–13).

In the case of a deposit of multiple checks, the depositary bank has the discretion to place an exception hold on any combination of checks in excess of $5,000. The notice should enable a customer to determine the availability of the deposit in the case of a deposit of multiple checks. For example, if a customer deposits a $5,000 local check and a $5,000 nonlocal check, under the large deposit exception, the depositary bank may make funds available in the amount of (1) $100 on the business day after deposit, $4,900 on the second business day after deposit (local check), and $5,000 on the eleventh business day after deposit (nonlocal check with 6-day exception hold), or (2) $100 on the first business day after deposit, $4,900 on the fifth business day after deposit (nonlocal check), and $5,000 on the seventh business day after deposit (local check with 5-day exception hold).The notice should reflect the bank's priorities in placing exception holds on next-day (or second-day), local, and nonlocal checks.

Under paragraph (g)(3), if an account is subject to the repeated overdraft exception, the depositary bank may provide one notice to its customer for each time period during which the exception will apply. Notices sent pursuant to paragraph (g)(3) must state the customer's account number, the fact the exception was invoked under the repeated overdraft exception, the time period within which deposits subject to the exception funds will be made available for withdrawal, and the time period during which the exception will apply (see Model Form C–13C). A depositary bank may provide a one-time notice to a customer under paragraph (g)(3) only if the repeated overdraft exception will be invoked for most check deposits to the customer's account.

* * * * *

(h) *Availability of deposits subject to exceptions.* * * * This provision establishes that an extension of up to one business day for on us checks, five business days for local checks, and six business days for nonlocal checks is reasonable. * * *

* * * * *

With respect to Treasury checks, U.S. Postal Service money orders, checks drawn on Federal Reserve Banks or Federal Home Loan Banks, state and local government checks, and cashier's, certified, and teller's checks subject to the next-day (or second-day) availability requirement, the depositary bank may extend the time funds must be made available for withdrawal under the large deposit, redeposited check, repeated overdraft, or reasonable cause exception by a reasonable period beyond the delay that would have been permitted under the regulation had the checks not been subject to the next-day (or second-day) availability requirement. The additional hold is added to the local or nonlocal schedule that would apply based on the location of the paying bank.

One business day for on us checks, five business days for local checks, and six business days for nonlocal checks, in addition to the time period provided in the schedule, should provide adequate time for the depositary bank to learn of the nonpayment of virtually all checks that are returned.

In the case of the application of the emergency conditions exception, the depositary bank may extend the hold placed on a check by not more than a reasonable period following the end of the emergency or the time funds must be available for withdrawal under §§ 229.10(c), 229.11 or 229.12, whichever is later.

* * * * *

Appendix C—Model Forms, Clauses, ana Notices

* * * * *

Model C–13B. This form satisfies the notice requirements of § 229.13(g)(2).

Model C–13C. This form satisifies the notice requirements of § 229.13(g)(3).

* * * * *

By order of the Board of Governors of the Federal Reserve System, January 15, 1992.

William W. Wiles,

Secretary of the Board.

[FR Doc. 92–1474 Filed 1–28–92; 8:45 am]

BILLING CODE 6210–01–M

DEPARTMENT OF STATE

Bureau of Consular Affairs

22 CFR Part 51

[Public Notice 1564]

Cancellation of All Passports To Facilitate the Foreign Travel of United States Citizens and Nationals Which Are Designated as Valid Only for Travel to Israel

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: This final rule revises the passport regulations of the Department to cancel all valid or potentially valid passports that are designated as valid only for travel to Israel. Such passports were issued by the Secretary, as an exception to the prohibition on the issuance and use of more than one passport at any one time, to facilitate the travel of United States citizens and nationals in the Middle East. The revisions are required by provisions of recently enacted statutes which prohibit the issuance of any passport designated as valid only for travel to Israel and direct the Secretary to cancel all current passports designated as valid only for travel to Israel. For information concerning the availability of replacement passports for bearers of passports cancelled by this revision to the regulations, see the notice published elsewhere in this issue.

EFFECTIVE DATE: April 25, 1992.

FOR FURTHER INFORMATION CONTACT: William B. Wharton, Director, Office of Citizenship Appeals and Legal Assistance, Telephone (202) 326–6172.

SUPPLEMENTARY INFORMATION: Current regulations reflect the long standing policy of the Department that no person should be in possession of more than one valid or potentially valid passport at any one time unless specifically authorized by the Secretary of State. At present, however, a number of countries, including the majority of Arab League nations, may reject passports and deny entrance visas to persons whose passports or other travel documents reflect their travel to Israel. As one of the exceptions to the prohibition on possession of more than one passport, and for the purpose of facilitating travel of United States citizens and nationals to both Israel and countries following Arab League policy, the Secretary therefore previously authorized issuance of an additional passport. The majority of such passports have been designated as valid only for travel to Israel. Issuance of such second passports also has been authorized in other limited circumstances.

For the purpose of seeking an end to the Arab League policy, section 129 of Public Law 102–138, as enacted into law on October 28, 1991, prohibits the Secretary of State from issuing any passport that is designated as valid only for travel to Israel and requires the Secretary to promulgate regulations by January 26, 1992 that will cancel by April 25, 1992 all currently or potentially valid Israel-only passports. To the same end, section 503 of Public Law 102–140, also enacted into law on October 28, 1991, prohibits the Secretary from using any funds appropriated by that law to issue any passport designated as valid only for travel to Israel.

Effective with enactment of the new laws, the Department ceased issuance of any passport designated as valid only for travel to Israel. Regardless of the purpose for which they are issued, all passports issued as an exception to the prohibition on possession of more than one passport at any one time, now are being issued valid without geographic restriction for an initial period of two-years from date of issue. Upon application, and a showing of continued need, the validity of such passports may be extended for additional two-year periods as long as such periods do not extend beyond the normal period of validity prescribed for such passports in the regulations.

Because these amendments are mandated by statute and involve a foreign affairs function of the United States, the provisions of 5 U.S.C. 553 as to notice of proposed rulemaking and delayed effective date do not apply; and, because no notice of proposed rulemaking is required for these amendments, the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) also does not apply. Because the amendments involve a foreign affairs function of the United States, they are not subject to Executive Order 12291 of February 17, 1981. The provisions of the Paperwork Reduction Act (44 U.S.C. Ch. 35) do not apply.

List of Subjects in 22 CFR Part 51

Passports.

For reasons set forth in the preamble, 22 CFR part 51 is amended as follows:

1. The authority citation for part 51 is revised to read as follows:

Authority: 22 U.S.C. 211a, as amended, 22 U.S.C. 2658, 3926; sec. 122(d)(3), Pub. L. 98–164, 97 Stat. 1017; E.O. 11295, 36 FR 10603; 3 CFR 1966–70 Comp. p. 507; Pub. L. 100–690; sec. 129, Pub. L. 102–138, 105 Stat. 661; sec. 503, Pub. L. 102–140, 105 Stat. 820.

2. Section 51.4 is amended to add a new paragraph (g) to read as follows:

§ 51.4 Validity of passports.

* * * * *

(g) Cancellation of passport endorsed as valid only for travel to Israel. The validity of any passport which has been issued and endorsed as valid only for travel to Israel is cancelled effective April 25, 1992. Where it is determined that its continued use is warranted, the validity of such passport may be renewed or extended for additional periods of two years upon cancellation of the Israel-only endorsement. In no event may the validity of such passport be extended beyond the normal period of validity prescribed for such passport by paragraphs (b) through (e) of this section.

Dated: January 22, 1992.

James L. Ward,

Acting Assistant Secretary for Consular Affairs.

[FR Doc. 92–1949 Filed 1–28–92; 8:45 am]

BILLING CODE 4710–06–M

22 CFR Part 193

[Public Notice 1565]

Benefits for Hostages in Iraq, Kuwait, and Lebanon

AGENCY: Bureau of Consular Affairs, State.

ACTION: Interim final rule.

SUMMARY: The Bureau of Consular Affairs, Department of State is amending regulations which implemented section 599C of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, Fiscal Year 1991 (Public Law 101–513) ("the Hostage Relief Act of 1990"). The Foreign Relations Authorization Act, Fiscal Years 1992–1993 (Public Law 102–138) makes certain changes to the Hostage Relief Act of 1990, and these amendments implement those changes. The Hostage Relief Act of 1990 made up to $10,000,000 available for monetary, health, and life insurance benefits to be paid to U.S. hostages in Iraq, Kuwait, and Lebanon, and/or their family members. Some of these funds remain available and the current Foreign Relations Authorization Act amends the Hostage Relief Act of 1990 to extend both the period of time during which the

benefits are available, and the eligibility criteria.

DATES: Effective January 29, 1992.

Comments on this interim final rule must be received on or before February 28, 1992.

ADDRESSES: Written comments should be addressed to: Director, Office of Citizens Consular Services, Bureau of Consular Affairs, room 4817, Department of State, Washington, DC 20520–4818.

FOR FURTHER INFORMATION CONTACT: Carmen A. Diplacido, Director, Office of Citizens Consular Services. Telephone (202) 647–3666.

SUPPLEMENTARY INFORMATION: Section 302 of the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, amends the Hostage Relief Act of 1990 in the following ways:

With respect to all persons covered by the Hostage Relief Act of 1990 (i.e., hostages held in Iraq, Kuwait, and Lebanon, and/or their family members), the new legislation extends availability of benefits. Under the prior law, the authorization to obligate funds expired on May 5, 1991: Thus, otherwise eligible persons who had not applied for benefits by that date were ineligible for benefits, and certain benefits terminated as of that date persons whose eligibility had been established. This change is accomplished by sections 302(a)(1) and 302(a)(5), which amend section 599C of the Hostage Relief Act so that benefits are available "during fiscal year 1991 and hereafter", so that the prior six month limitation on obligation is removed.

Section 302 contains two additional changes with respect to hostages captured in Lebanon. Section 302(a)(3) provides that health and life insurance benefits are available under certain circumstances for the period of the individual's hostage status, plus a 60-month period following the termination of hostage status. Previously, these benefits expired 12 months after the termination of hostage status, which remains the law with respect to hostages held in Iraq and Kuwait.

Section 302(a)(4) amends the definition of the term "United States hostages captured in Lebanon" to mean "United States nationals, including lawful permanent residents of the United States, who have been forcibly detained" * * * "for any period of time after June 1, 1982" in Lebanon. The prior definition did not include lawful permanent residents, and only covered persons who had been detained since January 1, 1990.

Finally section 302(b) provides that the amendments made by section 302(a) are retroactive to the date of enactment of the Hostage Relief Act of 1990, which was November 5, 1990. Waiver of Proposed Rulemaking, Executive Order 12291, Federal Regulations, Regulatory Flexibility Act, and Paperwork Reduction Act.

Compliance with 5 U.S.C. 553 of the Administrative Procedures Act relative to notice of proposed rule making and delayed effective date is impracticable and contrary to the public interest in this instance since expeditious implementation of this rule is mandated by the Congress in accordance with Public Law 101–513 effective November 5, 1990. This is not a major rule as defined under section 1(b) of Executive Order 12291 Federal Regulations, nor is it expected to have a significant economic impact on a substantial number of small entities because the regulations primarily affect United States hostages in Iraq, Kuwait, and Lebanon (Regulatory Flexibility Act). This amendment involves the collection of information subject to the Paperwork Reduction Act of 1980. This collection has been submitted to the Office of Management and Budget for review under the provisions of the Paperwork Reduction Act and 5 CFR part 1320.

List of Subjects in 22 CFR Part 193

Claims, Health insurance, Hostages, Iraq, Kuwait, Lebanon, Life insurance, Wages.

Accordingly, for the reasons set forth in the preamble, 22 CFR part 193 is amended as follows.

PART 193—BENEFITS FOR HOSTAGES IN IRAQ, KUWAIT, OR LEBANON

1. The authority citation for part 193 is revised to read as follows:

Authority: Section 599C, Pub. L. No. 101–513, 104 Stat. 2064.

2. In § 193.1, paragraph (c) is revised to read as follows:

§ 193.1 Determination of hostage status.

* * * * *

(c) In the case of Lebanon, hostage status may be accorded to United States nationals, which, for purposes of this paragraph, includes lawful permanent residents of the United States, who have been forcibly detained, held hostage, or interned for any period of time after June 1, 1982, by any government (including the agents thereof) or group in Lebanon for the purpose of coercing the United States or any other government.

* * * * *

3. In § 193.2, paragraph (d) is added to read as follows:

§ 193.2 Definitions.

* * * * *

(d) The term *lawful permanent resident* means any individual who has been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

4. In § 193.3, paragraph (e) is revised to read as follows:

§ 193.3 Applications.

* * * * *

(e) Applications should be filed as quickly as possible, because benefits are available only until the funds allocated under the Act have been spent. When funds have been expended, the Department will publish a notice in the **Federal Register** so stating.

* * * * *

5. In § 193.4, paragraph (b) is revised to read as follows:

§ 193.4 Consideration and denial of claims: Notification of determinations.

* * * * *

(b) All applications shall be considered, evaluated, and/or prepared by the Federal Benefits Section of the Office of Overseas Citizens Consular Services. All federal agencies or other interested persons should contact the office at the address listed in § 193.3(d).

* * * * *

Dated: January 16, 1992.

Elizabeth M. Tamposi,

Assistant Secretary, Bureau of Consular Affairs.

[FR Doc. 92–2144 Filed 1–28–92; 8:45 am]

BILLING CODE 4710–06–M

DEPARTMENT OF JUSTICE

28 CFR Part 16

[AAG/A Order No. 61–92]

Exemption of Records System Under the Privacy Act

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice is exempting a Privacy Act system of records entitled "U.S. Marshals Service Prisoner Transportation System, JUSTICE/USM–003," from the provisions of 5 U.S.C. 552a(c) (3) and (4), (d), (e) (1), (2), (5) and (g). The exemptions are necessary to protect the security of prisoners, informants, and law enforcement personnel; and to prevent a serious threat to law enforcement communications systems.

EFFECTIVE DATE: This rule will be effective January 29, 1992.

FOR FURTHER INFORMATION CONTACT: Patricia E. Neely (202) 514-6329.

SUPPLEMENTARY INFORMATION: A proposed rule with invitation to comment was published in the Federal Register on September 6, 1991 (56 FR 44049). The public was given 30 days in which to comment. One public comment favoring the exemptions was received.

This order relates to individuals rather than small business entities. Nevertheless, pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601-612, it is hereby stated that the order will not have a "significant economic impact on a substantial number of small entities."

List of Subjects in 28 CFR Part 16

Administrative Practice and Procedure, Courts, Freedom of Information, Privacy, and the Sunshine Act.

Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated to me by Attorney General Order 793-78, 28 CFR 16.101 is amended as set forth below.

Dated: January 7, 1992.

Harry H. Flickinger,

Assistant Attorney General for Administration.

1. The authority for Part 16 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

2. 28 CFR 16.101 is amended by redesignating paragraph (o) as paragraph (q) and by adding new paragraphs (o) and (p).

§ 16.101 Exemption of U.S. Marshals Service (USMS) Systems—limited access, as indicated.

* * * * *

(o) The following system of records is exempt from 5 U.S.C. 552a(c) (3) and (4), (d), (e) (1), (2), (5) and (g):

(1) U.S. Marshals Service Prisoner Transportation System (JUSTICE/USM-003).

These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2).

(p) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) where the release of the disclosure accounting for disclosures made pursuant to subsection (b) of the Act would reveal a source who furnished information to the Government in confidence.

(2) From subsection (c)(4) to the extent that the system is exempt from subsection (d).

(3) From subsection (d) because access to records would reveal the names and other information pertaining to prisoners, including sensitive security information such as the identities and locations of confidential sources, *e.g.*, informants and protected witnesses; and disclose access codes, data entry codes and message routing symbols used in law enforcement communications systems to schedule and effect prisoner movements. Thus, such a compromise of law enforcement communications systems would subject law enforcement personnel and other prisoners to harassment and possible danger, and present a serious threat to law enforcement activities. To permit amendment of the records would interfere with ongoing criminal law enforcement and impose an impossible administrative burden by requiring that information affecting the prisoner's security classification be continuously reinvestigated when contested by the prisoner, or by anyone on his behalf.

(4) From subsections (e) (1) and (5) because the security classification of prisoners is based upon information collected during official criminal investigations; and, in the interest of ensuring safe and secure prisoner movements it may be necessary to retain information the relevance, necessity, accuracy, timeliness, and completeness of which cannot be readily established, but which may subsequently prove useful in establishing patterns of criminal activity or avoidance, and thus be essential to assigning an appropriate security classification to the prisoner. The restrictions of subsection (e) (1) and (5) would impede the information collection responsibilities of the USMS, and the lack of all available information could result in death or serious injury to USMS and other law enforcement personnel, prisoners in custody, and members of the public.

(5) From subsection (e)(2) because the requirement to collect information from the subject individual would impede the information collection responsibilities of the USMS in that the USMS is often dependent upon sources other than the subject individual for verification of information pertaining to security risks posed by the individual prisoner.

(6) From subsection (g) to the extent that the system is exempt from subsection (d)

* * * * *

[FR Doc. 92-2070 Filed 1-28-92; 8:45 am]

BILLING CODE 4410-01-M

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 86-7B]

Cable Compulsory License; Definition of Cable System

AGENCY: Copyright Office, Library of Congress.

ACTION: Final regulation.

SUMMARY: The Copyright Office affirms its decision, announced at 56 FR 31580 (1991), that satellite carriers are not cable systems within the meaning of 17 U.S.C. 111 (the Copyright Act of 1976) notwithstanding the decision in *National Broadcasting Company, Inc.* v. *Satellite Broadcast Networks, Inc.*, 940 F.2d 1467 (11th Cir. 1991). The Office also confirms that multipoint distribution service (MDS) and multichannel multipoint distribution service (MMDS) are not cable systems within the meaning of 111. The status of satellite master antenna television facilities (SMATV) is not part of this final regulation and will be addressed separately at a later date.

EFFECTIVE DATE: January 1, 1994.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, U.S. Copyright Office, Library of Congress, Washington, DC 20559; telephone (202) 707-8380.

SUPPLEMENTARY INFORMATION:

I. Background

Today's announcement marks another step in the Copyright Office's rulemaking proceeding regarding the definition of a cable system under the cable compulsory licensing mechanism in 17 U.S.C. 111, (the Copyright Act of 1976.) On October 15, 1986, the Office opened this proceeding with a Notice of Inquiry (51 FR 36705) inviting public comment on whether satellite master antenna television (SMATV) and multichannel multipoint distribution service (MMDS) operations qualify as cable systems under section 111(f) of the Copyright Act. The Office received numerous comments and reply comments and reopened the comment period from August 3, 1987 until September 2, 1987 (52 FR 28731) so that the public might respond to four comments received by the Office after the closing of the initial comment and reply period.

On May 19, 1988, the Copyright Office again reopened this proceeding (53 FR 17962) to broaden the scope of the inquiry to include issues relating to the

eligibility of satellite carriers to operate under the section 111 compulsory license. The Office also sought comments as to whether satellite carriers may qualify for the passive carrier exemption of section 111(a) with respect to certain transmissions and also qualify as a cable system with respect to other transmissions. The Office received fifteen additional comments regarding satellite carriers.

On July 11, 1991, the Copyright Office issued a Notice of Proposed Rulemaking (NPRM) in this proceeding (56 FR 31580).

II. Notice of Proposed Rulemaking (NPRM)

The NPRM represented the Copyright Office's thorough consideration of the public comments and its findings and preliminary findings with respect to SMATV, MMDS, and satellite carrier eligibility for the cable compulsory license. The Office interpreted the terms and purpose of the section 111 license and proposed new regulations to govern the conditions under which SMATV systems would qualify for the cable license. The Office, however, made a preliminary finding that MMDS systems do not qualify for the cable license and announced a policy decision that satellite carriers were not eligible for the license.

The comments received in response to the 1986 and 1988 Notices of Inquiry played a significant role in fleshing out the issues concerning the eligibility of SMATV's, MMDS's and satellite carriers' eligibility for compulsory licensing. The Copyright Office has the administrative task of interpreting the terms of the statute. See *Cablevision Systems Development Co.* v. *Motion Picture Association of America. Inc.*, 836 F.2d 599, 609–10 (DC Cir.), cert. denied, 487 U.S. 1235 (1988).

With respect to satellite carriers, the Office concluded that they did not satisfy the conditions of the definition of a cable system found in section 111(f) and therefore did not qualify for compulsory licensing. Starting with the premise that the cable compulsory license should be construed according to its terms, and should not be given a wide scale interpretation which could, or will, encompass any and all new forms of retransmission technology, the Office applied the literal terms of the section 111(f) definition to the operations of satellite carriers. 56 FR 31590 (1991). The Office found that satellite carriers did not meet the definitional requirements because, among other reasons, they provide a national retransmission service rather than the localized, community based service contemplated by the Copyright Act. The concept of localism is evidenced by "provisions of the license which discuss such items as the 'local service' area of a primary transmitter and other language sensitive to locality." *Id.* at 31590–91. The Office did not reach the question of whether satellite carriers made use of "other communications channels," as described in 111(f), since they were "national retransmission service(s) and, as such, do not have any one facility located in a state which both receives and retransmits signals or programming." *Id.* The Copyright Office's conclusion was affirmed by "an extensive examination of the legislative history of the compulsory license (which) fails to reveal any evidence suggesting that Congress intended the compulsory license to extend to such types of retransmission service." *Id.*

After providing a refund mechanism for satellite carriers who had made royalty filings with the Copyright Office claiming compulsory licensing, the NPRM turned to the issue of MMDS eligibility under section 111(f). The Office once again began its analysis with a consideration of the definitional requirements of section 111(f) and found that while MMDS and MDS operations meet most of the requirements, "such facilities (are) wanting regarding the requirement that retransmission of signals be accomplished via wires, cables, or other communications channels." *Id.* at 31592. Unlike its conclusion with respect to satellite carriers, however, the NPRM stated that the conclusion with respect to MMDS facilities was preliminary only. *Id.* at 31593.

In preliminarily deciding that MDS and MMDS facilities did not meet the requirements of a cable system as envisioned by section 111, the Office drew upon "(t)he legislative history to section 111 (which) makes it clear that there is a significant 'interplay between copyright and the communications law elements' of section 111, requiring the Office to consider the qualifications of MDS and MMDS as cable systems with an eye towards how those systems were treated as a matter of communications policy at the time of passage of the Copyright Act." *Id.* at 31592 (citation omitted). In determining how these systems were regulated in 1976 and thereafter, the Office studied the FCC Report and Order in Docket No. 89–35, Definition of a Cable Television System, in which the FCC interpreted the statutory term "cable system" as it appeared in the Cable Communications Policy Act of 1984.

The Office was not as concerned with how the FCC interpreted the 1984 Cable Act definition, since the Cable Act and Copyright Act definitions are not identical, as it was with the Commission's discussion of how it regulated cable systems in 1976. *Id.* at 31591 ("(T)he FCC's discussion and conclusions are still of significant value, since entities regulated as cable systems by the FCC are presumptively cable systems under the Copyright Act's definition, which generally encompasses the FCC's concept of cable system in 1976.") The NPRM therefore provided a lengthy discussion of the FCC Cable Report, see *id.* at 31591–31592, where the Commission held, *inter alia*, that those systems that did not make use of closed transmission paths, such as MDS and MMDS, were not considered cable systems.

The Copyright Office preliminarily concluded that MDS and MMDS facilities did not meet the section 111(f) cable definition because they do not make secondary transmissions via "wires, cables, or other communications channels." The Office interpreted this phrase to require retransmission by closed transmission paths primarily, which excluded MDS' and MMDS' wireless retransmission. The NPRM stated that this restricted reading comported with the Copyright Office position that Congress did not intend to extend compulsory licensing to every video retransmission service, and with the congressional understanding of cable systems in 1976:

> When Congress passed the Copyright Act in 1976, its understanding of the regulation of the cable industry was naturally based on FCC policy and precedent. The FCC's 1966 definition of a cable system, in effect while the Copyright Act was passed, defined a cable system as "redistribut(ing) * * * signals by wire or cable. * * *" While the reference to "by wire or cable" was dropped by the FCC in 1977, the Commission specifically stated that the change was not to be "interpreted to include such non-cable television broadcast station services as Multipoint Distribution Systems. * * *" (citation omitted). Regulation of cable systems from a communications standpoint, therefore, was limited to traditional, wire-based, closed path transmission services. It is therefore reasonable to conclude that the copyright compulsory license was adopted to apply to those same types of services then regulated by the FCC as cable systems. A broad reading of the phrase "other communications channels" in section 111(f) to include systems, such as MDS and MMDS, which were not regulated by the FCC as cable systems would be contrary to the express congressional purpose of adopting a compulsory license for the cable industry.

Id. at 31593.

The Copyright Office's preliminary conclusion regarding MDS and MMDS

was bolstered by two specific elements. First, the 1984 Cable Act's definition of a cable system as consisting of "a set of closed transmission paths" reflected Congress's understanding of years of FCC regulation in the cable area and what was generally known and regulated as a cable system. *Id.* While neither FCC precedent nor the definition of a cable system appearing in the Cable Act was binding on the Office's interpretation of section 111(f), this background reflected that "Congress did not act within a vacuum when it drafted section 111, but rather adopted a compulsory licensing scheme for an industry which was already defined and regulated by the FCC." *Id.*

Second, the very specific and direct tie-in between the compulsory license and the FCC's rules and regulations governing the cable industry belied MDS' and MMDS' eligibility. For example, the concept of a distant signal equivalent, crucial to the computation of royalties and operation of the license, was fixed by the rules of the FCC in effect on the date of enactment of the Copyright Act. The statute's heavy reliance on FCC regulation, which applied only to the cable industry and not MDS or MMDS operations, "unmistakably reflects [the] interplay between copyright and communications policies." *Id.* Congress was providing a copyright licensing scheme for an industry already defined and regulated by the FCC—an industry which did not include the operations of MDS or MMDS. The Copyright Office therefore proposed a refund mechanism for MDS and MMDS operators who had made royalty filings with the Office on the assumption that they qualified for compulsory licensing. *Id.*

The NPRM concluded with a discussion of the eligibility of SMATV systems and a preliminary finding that some SMATV's did meet the requirements of section 111(f). *Id.* at 31593–31594. The NPRM proposed a series of amendments to the Copyright Office regulations to include some SMATV's within the definition of a cable system and provided specific royalty and filing requirements for those operators. These issues will be addressed later in a separate document.

The Copyright Office invited public comment on the NPRM. Initial comments were due September 9, 1991, and reply comments were due October 9, 1991.

III. National Broadcasting Company, Inc. v. Satellite Broadcast Networks, Inc.

Subsequent to the publication of the NPRM, the Eleventh Circuit issued its opinion in *National Broadcasting Company, Inc.* v. *Satellite Broadcast Networks, Inc.*, 940 F.2d 1467 (11th Cir. 1991) (hereinafter referred to as "*SBN*"), reversing the decision of the District Court in *Pacific & Southern Co., Inc.* v. *Satellite Broadcast Networks, Inc.*, 694 F. Supp. 1565 (N.D. Ga. 1988). The District Court, which considered whether satellite carriers serving home dish owners qualified for section 111 compulsory licensing, held that satellite carriers were not cable systems within the section 111(f) definition because their receiving and retransmitting facilities were not located in the same state.

The Copyright Office addresses the Eleventh Circuit decision because it cited the District Court opinion favorably in the NPRM. At the outset, the Copyright Office notes that, while it has carefully analyzed the *SBN* decision, the Office is not bound by the decision of the Eleventh Circuit, just as it was not bound by the decision of the District Court. See 56 FR at 31590. As the Court of Appeals for the District of Columbia Circuit pointed out in *Cablevision Systems Development Co.* v. *Motion Picture Association of America, Inc.*, 836 F.2d 599, 610 (DC Cir.), *cert. denied*, 487 U.S. 1235 (1988), the Copyright Office, through its rulemaking authority in 17 U.S.C. 702, is given the express authority to interpret the provisions of section 111 relating to the operation of the cable compulsory licensing system.

The *SBN* case involved a satellite carrier that collected the network affiliate broadcast signals of NBC in Georgia, CBS in New Jersey, and ABC in Illinois, and made those signals available to home satellite dish owners across the country on a subscriber basis. SBN claimed that it was entitled to retransmit those signals in accordance with section 111, although such carriage is now covered by the terms of section 119, the Satellite Home Viewer Act of 1988. As noted above, the District Court held that SBN did not qualify for compulsory licensing because it did not meet all of the definitional requirements of section 111(f); specifically it found that SBN failed to meet the "located in any State requirement" because its retransmission facilities were not located in the same state as its receiving facilities.

The Eleventh Circuit disagreed with this analysis, stating that it was "unpersuaded that 'located in any State' means located entirely within a single state." *SBN*, 940 F.2d at 1470. Instead, the Court focused on the definition of a secondary transmission in section 111(f), which provides that a nonsimultaneous broadcast is not a secondary transmission if made by a cable system located partly in Alaska and partly in some other state. This language, according to the Court, "suggests that Congress understood it would be possible for a cable system to exist 'in part' within Alaska and 'in part' elsewhere." *Id.*

The *SBN* court concluded that "there is no good reason why a satellite broadcasting company such as SBN should not be a cable system." *Id.* Noting that SBN could have delivered its signal to cable operators across the country without incurring copyright liability as a passive carrier, "SBN has simply eliminated the middleman." *Id.* at 1471. Furthermore, "to conclude that SBN cannot be a cable system because of its geographic reach would be to prevent those in sparsely populated areas from receiving the quality television reception technology can provide." *Id.* In the interest of widespread dissemination of signals, the court summarized "(i)n short, there is no good reason to read 'cable system' narrowly to deny SBN its license, and to do so will do an injustice to those who live in rural areas. SBN is a cable system." *Id.*

The *SBN* court addressed two other aspects of the definition of a cable system: Whether the carriage of the broadcast signals was "permissible under the rules, regulations, or authorizations" of the FCC, and whether secondary transmissions by satellite carriers are made by "wires, cables or other communications channels." As to permissibility of carriage, the court held that "the rebroadcast was permissible because no rule or regulation forbade it," noting that the FCC had expressly stated it would not consider regulation of satellite carriers until the courts had resolved the copyright infringement issue. *Id.* And in a footnote, the Court expressed in dicta that it thought that satellite retransmission services were made through "other communications channels" in satisfaction of the statute. *Id.* at 1469 n. 3. The court stated that "(t)he legislative history shows that in considering the Copyrights (sic) Act, Congress understood that the development of satellites promised a new channel for communicating in the future," and that "both the Second and Eighth Circuits have concluded that transmission by 'wires, cables or other communications channels' includes satellite broadcasts." *Id.* (citing *Hubbard Broadcasting* v. *Southern Satellite*, 777 F.2d 393 (8th Cir. 1985), *cert. denied*, 479 U.S. 1005 (1986) and *Eastern Microwave, Inc.* v. *Doubleday Sports, Inc.*, 691 F.2d

125 (2d Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983)).

Finally, in another footnote, the court noted the issuance of the NPRM and the Copyright Office's decision that satellite carriers did not satisfy the definitional requirements of a cable system. The court dwelled on the possible retroactive application of the Office's policy decisions announced in the NPRM, noting that "(i)f this recent promulgation applied retroactively to this case, it might be entitled to deferential review under *Chevron*," but concluded that the "language of the notice does not require that it apply retroactively." *Id.* at 1469 n. 4. The court considered the Office's position on satellite carriers as expressed in the NPRM, and concluded:

> In any event, we have considered the views of the Copyright Office on the language and legislative history of section 111, but we find those views unpersuasive. We of course express no opinion on the new rule's validity as applied prospectively.

Id. at 1470 n. 4.

IV. Discussion of Comments

The Copyright Office received a large number of comments responding to the positions expressed in the NPRM. Although the majority of comments came from MMDS operators and their affiliates, the Office also heard from satellite carriers, broadcasters, the FCC, copyright owners, the cable television industry, and members of Congress. A summary of the major issues brought out in the comments follows.

A. MMDS Operations

The question of the eligibility of MMDS operations for compulsory licensing drew the lion's share of comments. The majority of commentators favored inclusion of MMDS and MDS within the definition of a cable system. However, several parties did object to inclusion of MMDS services.

Commentators arguing for inclusion of MDS and MMDS operations within the section 111 definition of a cable system took issue with the tentative decision announced in the NPRM on several grounds: statutory construction, legislative intent, judicial interpretation, and public policy. They argued that the Copyright Office should confine its analysis to a plain reading of the statutory language contained in section 111(f)'s definition of a cable system, and that the legislative history suggests the compulsory license is broad enough to encompass new video retransmission services such as MMDS. Further, judicial interpretations of section 111 and the Copyright Act mandate that a flexible approach be taken to its provisions to embrace new forms of technology, and public policy requires that the MMDS industry be fostered to provide competition and widespread dissemination of video programming.

One of the principal arguments advanced by the pro-MMDS commentators involves the rules of statutory construction. They argue that the preliminary decision announced in the NPRM violates the plain meaning of the definition of a cable system appearing in section 111(f), and requires immediate reversal by the Office. The 111(f) definition has five requirements: (1) Facilities located in a state, territory, trust territory or possession, that (2) in whole or in part receives television broadcast signal licensed by the FCC, and (3) make secondary transmissions of those signal, by (4) wires, cables or other communications channels, to (5) subscribing members of the public who pay for such service. MMDS operators argued they satisfy all of these definitional requirements, including retransmission by "wires, cables or other communications channels," and therefore the Office inquiry must end there. MMDS operators, it is argued, do make use of wires and cables in their operations, as well as "other communications channels," thereby satisfying all the requirements. Technivision, Inc. comments at 6. They assert that the Copyright Office erred in looking to legislative history and other outside sources when the statutory language was clear: "(E)vident legislative intent is required to override clear statutory language, not to enforce it." Turner Broadcasting Inc. comments at 4, citing to *American Tobacco Co.* v. *Patterson*, 456 U.S. 63 (1982).

MMDS commentators also argued that MMDS operations satisfy the plain meaning of section 111(c)(1), which permits compulsory licensing for only broadcast signals whose carriage "is permissible under the rules, regulations, or authorizations of the Federal Communications Commission." Although the NPRM did not discuss the meaning of the phrase "permissible under FCC rules," several commentators argue that the requirement is satisfied in the case of MMDS because there are no FCC rules prohibiting carriage. See, e.g., Technivision, Inc., comments at 10. The FCC confirms that it has never expressly restricted the carriage of broadcast signals by "wireless" cable systems, and notes that its regulations permit an ITFS licensee (most MMDS operations consist of channel capacity licensed in whole or in part from ITFS licensees) to "transmit material other than the ITFS subject matter" i.e., broadcast signals. Federal Communications Commission, comments at 7 (citing 47 CFR 74.931(e)).

Several commentators argued the Copyright Office has relied incorrectly on legislative history in interpreting the definitional phrase "or other communications channels." The Office is charged with, in effect, substituting the word "and" for the word "or," requiring cable systems to use cables, wires and other communications channels.[1] See Turner Broadcasting System, Inc., comments at 4; Senators DeConcini, Metzenbaum, Inouye, Leahy, Simon, comments at 2; Representatives Boucher, Moorhead, comments at 1. Congress did not intend such a requirement, according to these commentators, and the Office's interpretation is contrary to standard rules of statutory construction. Turner Broadcasting Systems, Inc., comments at 4 (citing *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Rather, Congress' deliberate use of the word "or" demonstrates, they say, that Congress did not intend to confine the definition to those systems which use wires and cables, but rather reflected a "technology neutral" approach to encompass new forms of video delivery. Wireless Cable Association, Inc., comments at 15–18; Ad Hoc Committee of Wireless Cable System Operators, comments at 5–6.

A number of commentators contend that the NPRM erroneously interpreted the legislative history of section 111 and the Copyright Act, and improperly relied on communications law history and the Cable Act of 1984. They say the Office's approach of defining cable systems on the basis of technological distinctions unnecessarily confines the compulsory license's operation, and limits the future applicability of the cable license.

Certain commentators argue that the only relevant legislative history of significance relates to the definition of cable system. They read the legislative history to suggest that the language "or other communications channels" is broad enough to encompass the operations of MMDS because (1) the Congress was aware of the existence and potential of wireless systems, and (2) the legislative history shows that a flexible approach should be taken *vis-a-vis* new technologies. To demonstrate Congress' awareness of wireless-based operations in the context of the definition of a cable system, they cite

[1] In fact the Office has not interpreted this phrase as though "and" replaced "or." Such a reading would require qualifying wired systems to use "other communications channels" in addition to wire. The Office instead has interpreted the phrase in the context of the whole of section 111.

Barbara Ringer, Register of Copyrights, in testimony during hearings on the Copyright Act:

> First, as to the scope of the provision: it deals with all kinds of secondary transmissions, which usually means picking up electrical energy signals, broadcast signals, off the air and retransmitting them simultaneously by one means or the other—usually cable but sometimes other communication channels, like microwave and apparently laser beam transmissions that are on the drawing boards if not in actual operation.

Hearings on H.R. 2223 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 1820 (1975)(part 3). Congress was therefore aware that wireless operations would likely soon be providing secondary transmissions, and the phrase "or other communications channels" was likely inserted to cover that eventuality. Cross Country Telecommunications, Inc., comments at 6.

Further, the comments supporting MMDS eligibility for the section 111 compulsory license argue there is nothing in the legislative history to suggest that Congress desired a technology-based limit on the compulsory license. Rather, they say the history shows that Congress desired the definitional provisions of the Copyright Act to be interpreted flexibly, so that it would not have continually to amend the statute as new technologies emerged. Turner Broadcasting Systems, Inc., comments at 10 (citing H.R. Rep. No. 1476, 94th Cong., 2d Sess. 51 (1976).

The NPRM's reliance on communications policy and the 1984 Cable Act were also erroneous, according to these commentators. First, they contend that, consideration of FCC regulations and its definition of a cable system in 1976 ignores Congress's actions. In fact, they say, comparing FCC regulations in effect in 1976 with the language of section 111 demonstrates Congress's desire to make the copyright definition broader. Turner Broadcast Systems, Inc., comments at 7–8. The FCC definition, found at 47 CFR 74.1101(a)(1977), defines a cable system as only consisting of "wires and cables" as opposed to "wires, cables and other communications channels." If Congress had desired to limit the copyright definition of a cable system to those systems regulated as such by the FCC, it is argued, Congress simply could have adopted the FCC definition. The fact that it included the much broader "or other communications channels" language reflects an intention to embrace a wider range of retransmission services than those regulated as cable systems by the FCC. *Id*, comments at 9.

Second, the NPRM is said to have relied incorrectly upon the 1984 Cable Act and its definition of a cable system as including only closed transmission path services. The Cable Act, which originated from the Senate Commerce and House Energy and Commerce Committees, and not the Senate and House Judiciary Committees, was enacted for communications policy and not copyright reasons. The Cable Act was designed to regulate services subject to local franchising authorities, which excludes MMDS operations. It is perfectly consistent that MMDS should be considered a cable system for copyright purposes, but not for Cable Act purposes. Wireless Cable Association, Inc., comments at 21. The purpose of the copyright system is to allow the public to benefit by the wider dissemination of works carried on television broadcast signals," it is argued, whereas the Cable Act addressed relationships between municipal governments and wired cable systems. Id. (citing *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 709–711 (1984)). The Cable Act, therefore, and its requirement that cable systems consist of closed transmission paths, has no application to the compulsory license.

Several commentators contend that the position expressed in the NPRM cannot withstand judicial scrutiny. They argue that the Copyright Office is bound by the Eleventh Circuit's interpretation of section 111 in *National Broadcasting Company, Inc.* v. *Satellite Broadcast Networks, Inc.*, 940 F.2d 1467 (11th Cir. 1991) and its footnote regarding the meaning of "other communications channels." See e.g., Wireless Cable Association, comments at 11. "For (a governmental agency) to predicate an order on its disagreement with (a) court's interpretation of a statute is for it to operate outside the law." *Allegheny General Hospital* v. *NLRB*, 608 F.2d 965, 970 (3d Cir. 1979). Of particular note is footnote 3 of the *SBN* decision where the Court thought that transmission via satellite was through "other communications channels" within the meaning of section 111(f). If satellite transmissions are within the reach of "other communications channels," then certainly the terrestrial operations of MMDS satisfy the requirement, according to these commentators.[2]

[2] One commentator even argued that failure to include wireless cable within the definition of a cable system, when the courts have recognized satellite carriers' eligibility, would amount to an unconstitutional violation of due process. See Wireless Cable Association, Inc., comments at 13.

It is argued that other judicial decisions require a finding of compulsory license eligibility for MMDS because of their interpretation of other provisions of section 111 and their conclusions about the thrust and purpose of compulsory licensing. In *Hubbard Broadcasting* v. *Southern Satellite*, 777 F.2d 393 (8th Cir. 1985), *cert. denied*, 479 U.S. 1005 (1986), and *Eastern Microwave, Inc.* v. *Doubleday Sports, Inc.*, 691 F.2d 125 (2d Cir. 1982), cert. denied, 459 U.S. 1226 (1983), it was held that the passive carrier exemption of section 111(a)(3) applied to satellite carriers who delivered broadcast programming to cable headends without any intermediary performance to the public. Section 111(a)(3), which insulates passive carriers from copyright liability, applies solely to systems which provide secondary transmissions via "wires, cables or other communications channels," the same phrase used in section 111(f). According to pro-MMDS commentators, the use of the same phrase in two different parts of the same section of the Copyright Act creates the presumption that Congress intended both phrases to have the same meaning. Wireless Cable Association, Inc., comments at 17. Since more than one court has found that satellite carriers meet all the definitional requirements of the section 111(a)(3) passive carrier exemption, including transmission via "other communications channels," it is argued that the same reasoning must apply to section 111(f).

According to these commentators, not only have the courts established that wireless video providers meet the definition of transmission via "other communications channels, contrary to the assertions in the NPRM, but they also support the position that the license must be construed in such a way as to provide for the greatest dissemination of works. The purpose of the copyright system is to "allow the public to benefit by the wider dissemination of works carried on television broadcast signals." *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 709–711 (1984). Further, "(w)hen technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose"—the promotion of "broad public availability of literature, music and other arts." *Sony Corporation* v. *Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984). These commentators assert that section 111 should, therefore, be interpreted in a technologically neutral manner to assure that the greatest amount of copyrighted broadcast programming is made available to the public.

Finally, the critics of the NPRM argue that public policy requires a finding of compulsory license eligibility. They note that without the license, MMDS operators will be unable to clear copyrights in the broadcast programming which they retransmit, putting them at a severe disadvantage to their competitors, the wired cable industry. The FCC emphasized that the Copyright Office's interpretation of the copyright definition of a cable system would have significant implications for the nation's communications policy. Inclusion of MMDS in the copyright compulsory license would foster competition in the marketplace, assure the widest dissemination of information in line with the goals of the Communications Act, and result in significant public benefits from the equal treatment of MMDS and cable operators. Chief, Mass Media Bureau, Federal Communications Commission, comments at 3–4. The FCC also felt that "the threat of expansion of coverage of the compulsory license provisions through an 'open-ended' interpretation of the law's coverage appears limited." since the license does not apply to broadcasters and satellite carriers are covered by the provisions of the Satellite Home Viewer Act. Id., comments at 6. "The compulsory license will remain available only to traditional cable systems and other highly localized nonbroadcast, non-common carrier media of limited availability." *Id.*, comments at 7.

Several other commentators supported the tentative conclusions expressed in the NPRM and opposed inclusion of MMDS within the compulsory licensing scheme. The Motion Picture Association of America, Inc. ("MPAA"), which originally supported inclusion of MMDS in 1986 when this proceeding commenced, now opposes inclusion because of certain recent developments with respect to reinstatement of the syndicated exclusivity rules. The new syndex rules do not apply to MMDS, because the FCC does not regulate them as cable systems, and "this * * * gives MMDS operators a major advantage over cable operators, at the expense of copyright owners." MPAA, comments at 3. Because broadcasters could not enforce exclusivity against MMDS operators, they will be unable to enter into exclusivity arrangements with copyright owners, reducing copyright owners' income stream. Further, cable systems are subject to title III and title VI regulation under the Communication Act of 1934, which includes significant structural and content related limitations; MMDS operators are subject to title II regulation which lacks such limitations. *Id.*, reply comments at 7. "(A)ny statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry." *Id.*, comments at 5 (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976)). According to the MPAA, the delicate balance struck in 1976 would be destroyed if MMDS operators were included in the section 111 compulsory licensing scheme.[3]

The Professional Sports Leagues ("Sports") also argued against inclusion of MMDS, emphasizing that the question of a compulsory licensing scheme for wireless cable is for Congressional resolution. Echoing the MPAA's position that MMDS operations are not regulated as cable systems, Sports argue that the language of section 111(f) is limiting, not encompassing. In contrast, the term "transmit," found in section 101 of the Copyright Act, is very broad and includes "all conceivable forms and combinations of wired or wireless communications media." Professional Sports Leagues, comments at 10. "Had Congress intended to extend compulsory licensing to every facility which retransmits broadcast signals, it would have defined a 'cable system' as a facility which simply makes 'secondary transmissions.'" *Id.*, comments at 11. The requirement that a facility making secondary transmissions must do so via "wires, cables or other communications channels" demonstrates Congress's intent to limit the compulsory license to traditional wired cable systems.

Finally, Fox, Inc. ("Fox") favors the preliminary position announced in the NPRM. Fox agrees with the Office's position that the compulsory license, as a derogation of the property rights of copyright owners, must be narrowly construed. Fox, Inc., comments at 2 (citing *Duchess Music Corp.* v. *Stern*, 458 F.2d 1305 (9th Cir. 1972)). Fox also posits that the phrase "or other communications channels," so much the focus of this proceeding, "is just as consistently, if not more consistently, interpreted as a reference to non-wire elements within a traditional cable system using no wire or cable transmission capacity whatsoever." *Id.*, comments at 4.

B. Satellite Carriers

The Copyright Office received a handful of comments, mostly from satellite carrier interests, regarding the announced ineligibility of satellite carriers for section 111 compulsory licensing. Those commentators favoring satellite carrier inclusion centered their arguments essentially around two points: The *SBN* decision and the argument that section 111 is a technology neutral, universal compulsory license.

Comments from satellite carrier interests stressed that the *SBN* decision should be dispositive of the issue of satellite carrier eligibility for section 111 licensing, and requires immediate reversal of the position announced in the NPRM. See, e.g., Hughes Communications Galaxy, Inc., reply comments; Prime Time 24, comments. The Eleventh Circuit rejected the district court's holding with respect to a satellite carrier not being located in a single State, and rejected the reasoning of the NPRM: "(W)e have considered the views of the Copyright Office on the language and legislative history of section 111, but we find those views unpersuasive." *SBN*, 940 F.2d at 1470, n. 4. As the MMDS commentators argued, these commentators argue that the Copyright Office interpretation of section 111 cannot stand in the face of judicial authority.

The *SBN* decision is controlling regarding the requirement that a cable system be located in "any State," according to Hughes Communications Galaxy Inc. ("Hughes"). They charge that the NPRM, in basing its decision on the finding that satellite carriers were not located in a single state, ignored that carriers have significant ground contact. Satellite carriers collect signals in a state, and they retransmit those signals to subscribers located in states, thereby satisfying the definitional requirement. Hughes Communications Galaxy, Inc., reply comments at 5–6. Hughes also notes that its carriage of signals is permissible under the rules of the FCC, in accordance with section 111(c)(1), because there are no FCC rules which forbid it. *Id.*, reply comments at 6.

Satellite carrier interests also argue that the *SBN* decision further proves that section 111 must be interpreted in a technologically neutral manner. They say it does not make sense to hinge the operation of the license on technological distinctions, when those distinctions between different types of video

[3] The MPAA also argues that those, like the FCC, who believe that choice and diversity in communications services are fostered by extension of the compulsory license, run headlong into the FCC's pronouncement in its 1989 report on the compulsory license, Gen. Docket No. 87–25, 4 FCC Rcd 6711 (1989), that compulsory licensing is inimical to First Amendment principles. MPAA, reply comments at 9, n.10.

providers are blurring and rapidly changing. "It is fully consistent with the balance and structure of the Copyright Act to recognize section 111 as a 'universal' compulsory license," which, "by its very nature, (is) technology neutral." Satellite Broadcasting & Communications Association of America, comments at 8, 10. The license should therefore apply to DBS and all types of video retransmission services. Hughes Communications Galaxy, Inc., reply comments at 2.

In opposition to the above commentators, the Network Affiliated Stations Initiative ("Network") supports the decision of the NPRM and argues that the Copyright Office is not bound by the *SBN* case. Network points out that the NPRM also concluded that satellite carriers are not located in *any* state, rather than solely the district court's opinion that they must be located within a single state, a position not addressed by the Eleventh Circuit. Network Affiliated Stations Initiative, reply comments at 3. Further, Network argues that the terms of section 111, when considered as a whole, make it obvious that the license is directed to localized transmission services. Satellite carriers have no headends, cannot operate in contiguous communities, and do not relate to the concept of the distant signal equivalent, which makes reference to the local service area wherein the cable system is located. The Copyright Office should, therefore, not fashion what would essentially be a new license for satellite carriers. *Id.*, reply comments at 5.

V. Policy Decision

As announced in the NPRM, the Copyright Office reached a preliminary decision with respect to MMDS operators' eligibility for section 111 compulsory licensing, and a final decision with respect to the eligibility of satellite carriers. Since the publication of the NPRM, the Eleventh Circuit announced its decision in the *SBN* case, and satellite carrier commentators urged a reconsideration and reversal of the Office's position with respect to the eligibility of satellite carriers for section 111 licensing. The Office has therefore reconsidered the position announced in the NPRM, and issues today a final decision that satellite carriers are not eligible for the cable compulsory license. SMATV facilities are not a part of this policy decision, and shall be addressed in a final rulemaking at a future date. The Copyright Office does reach today a final decision with respect to MMDS facilities, discussed fully below.

A. Satellite Carriers

Shortly after publication of the NPRM, the Eleventh Circuit announced its decision in *National Broadcasting Company, Inc.* v. *Satellite Broadcast Networks, Inc.*, 940 F.2d 1467 (11th Cir. 1991), reversing the district court and holding that SBN, a satellite carrier which provided broadcast signals to home dish owners, was a cable system under 17 U.S.C. 111. (See *supra*, for full discussion of the case). Because the *SBN* decision is at odds with the interpretation of section 111 with respect to satellite carriers announced in the NPRM, the Office analyzes the case and the arguments offered by the commentators who urged a reconsideration of the Office's position.

As noted in the discussion of the comments, the principal argument surrounding the *SBN* decision is that its interpretation of section 111 and conclusion with respect to satellite carriers is binding on the Copyright Office, requiring a reversal of the decision announced in the NPRM. The Copyright Office cannot accept this argument. First, the Eleventh Circuit was not reviewing an agency action in passing on one specific satellite carrier's circumstances and eligibility for compulsory licensing. The Copyright Act makes it plain that the Copyright Office is vested with authority to interpret provisions of the Act, 17 U.S.C. 702, and the Court of Appeals for the District of Columbia Circuit has specifically endorsed the Office's authority to interpret the terms of section 111. See *Cablevision Systems Development Corporation* v. *Motion Picture Association of America, Inc.*, 836 F.2d 599 (D.C. Cir.), *cert. denied*, 487 U.S. 1235 (1988). The Office was not a party to the case, and the Court unequivocably explained that it was not passing on the validity of the position expressed in the NPRM. See *National Broadcasting Company, Inc.*, 940 F.2d 1467, 1470 n. 4 (11th Cir. 1991) ("We of course express no opinion on the new rule's validity as applied prospectively.").

The *SBN* decision, although not binding on the Copyright Office, has been analyzed for its persuasive value. The Office, however, affirms the position announced in the NPRM for the following reasons.

The decision of the Eleventh Circuit rests on its disagreement with the district court's interpretation of the phrase "a facility located in any State" appearing in the definition of a cable system in section 111(f). The district court read the requirement to mean that a cable system must be located entirely within a single state, and that SBN's inability to meet the requirement meant that it was not a cable system. The Eleventh Circuit was "unpersuaded that 'located in any State' means located entirely within a single state," thereby reversing the district court's ruling. *SBN*, 940 F.2d at 1470. As the Copyright Office noted in the NPRM, however, the facilities of a satellite carrier, specifically the facilities which make the secondary transmission, are not located in any state, let alone the same state. 56 FR at 31590. This is a critical requirement in the definition which is evident from a plain reading: a facility located in any State which (1) receives broadcast signals, and (2) makes secondary transmissions of those signals. While satellite carriers arguably receive signals in one or more states (in the case of SBN, it placed receiving dishes in Illinois, Georgia, and New Jersey), the secondary transmissions are not likewise made in any state, but rather from geostationary orbit above the earth. Therefore, the Office respectfully does not agree that satellite carriers satisfy all of the definitional requirements of a cable system.

The Eleventh Circuit also failed to address the fact that section 111 is clearly directed at localized transmission services. The second part of the section 111(f) definition of a cable system refers to "headends" and "contiguous communities," two concepts which do not have any application to a nationwide retransmission service such as satellite carriers. Further, section 111(f) defines a "distant signal equivalent" with reference to television stations "within whose local service area the cable system is located(.)" Satellite carriers may argue that they have subscribers located in the service area of a primary transmitter, but they cannot argue that their "cable system" is located in that same area as required by the definition. The Eleventh Circuit also did not address the fact that FCC signal carriage regulations, particularly they must carry rules embodied in section 111 which form the critical distinction of local vs. distant signals, have no application whatsoever to satellite carriers. In sum, all the evidence points to the conclusion that Congress intended the compulsory license to apply to localized retransmission services regulated by the FCC as cable systems. The Eleventh Circuit's failure to address these telling points undermines the persuasive value of the opinion.

The *SBN* case also contains some other observations about the definitional requirements of section 111, including whether satellite carriers

retransmit via "other communications channels" and whether their carriage of signals is permissible under the rules and regulations of the FCC. In a footnote the Court stated:

> Section 111(f) goes on to require that the secondary transmission be made through "wires, cables, or other communications channels." A question arises whether a transmission via satellite is one through "other communications channels." We think so. The legislative history shows that in considering the Copyrights [sic] Act, Congress understood that the development of satellites promised a new channel for communicating in the future. See H.R. Rep. No. 94–1476, 94th Cong., 2d Sess. 47 * * * (1976), * * * Moreover, in interpreting another provision of § 111, both the Second and the Eighth Circuits have concluded that transmission by "wires, cables or other communications channels," includes satellite broadcasts. See *Hubbard Broadcasting* v. *Southern Satellite*, 777 F.2d 393, 401–02 (8th Cir. 1985), *cert. denied*, 479 U.S. 1005 * * * (1986); *Eastern Microwave, Inc.* v. *Doubleday Sports, Inc.*, 691 F.2d 125, 131 (2d Cir. 1982), *cert. denied*, 459 U.S. 1226 * * * (1983).

SBN 940 F.2d at 1469, n. 3. Since the appellate court held that the district court erred in limiting the definition of a cable system to facilities located entirely within a single state, footnote 3 is merely dictum. However, in any event, the Copyright Office respectfully disagrees with the court's conclusion and its analysis of the House Report and the *Southern Satellite* and *Eastern Microwave* cases.

The Copyright Office does not agree with the court's conclusion that the Copyright Act's legislative history demonstrates that Congress intended satellite carriers to be covered by the cable compulsory license. The court cites a portion of the House Report that indicates why a general revision of the copyright law was necessary, and provides a history of developments after passage of the 1909 Copyright Act. The only reference to a "satellite" appears in the following passage.

> Since that time (1909) significant changes in technology have affected the operation of the copyright law. Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their development. During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices, *communications satellites*, and laser technology promises even greater changes in the near future. The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 47 (1976) (emphasis added). The Copyright Office concludes that this passage does not support an interpretation that Congress intended the cable license to apply to satellite carriers. At best, this passage is a recognition by Congress that "communications satellites" (not satellite carriers) existed and might have an impact on the reproduction and dissemination of copyrighted works, but the Copyright Office is unwilling to stretch this passage to support a conclusion that satellite carriers are cable systems. As stated in the NPRM, 56 FR 31580, 31590, the Office has always maintained that compulsory licenses are to be construed narrowly, and using the above passage from the House Report to embrace satellite carriers within the license would flout that principle.

The Copyright Office also respectfully disagrees with the *SBN* court's analysis of the *Southern Satellite* and *Eastern Microwave* decisions. Both cases involved interpretation and application of section 111(a)(3), better known as the passive carrier exemption. Section 111(a)(3) provides:

> The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—* * * (3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of other, * * *

17 U.S.C. 111(a)(3). Neither *Southern Satellite* nor *Eastern Microwave* interpreted the phrase "wires, cables or other communications channels" in the context of section 111(f), nor did either court conclude that the phrases had identical meanings in both sections of the statute. This is not surprising, considering that section 111(a)(3) is explicitly describing what is not a cable system, and not subject to copyright liability or compulsory licensing. See the analyses of section 111(a) by then Register of Copyrights Barbara Ringer at the last hearings held on the copyright revision bill, explaining that "commercial cable systems are not exempted" by section 111(a). Hearings (on H.R. 2223) Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 94th Cong., 1st Sess. 1820 (1975) (part 3).

The phrase "wires, cables, or other communications channels" was first used in the 1966 bill, H.R. 4347, 89th Congress, 2d Session, which was reported favorably by the House Judiciary Committee. The phrase was not then part of the definition of cable system, however; it appeared in the common or passive carrier exemption, which is now section 111(a)(3). The text is virtually identical except for the omission of the adjective "common" before the word "carrier," and the addition of the proviso. The 1966 House Report accompanying the bill starkly states that this provision would in no case apply to community antenna systems, as cable systems were called at the time, since such systems "necessarily select the primary transmissions to retransmit, and control the recipients of the secondary transmission * * *" H.R. Rep. No. 2237, 89th Cong., 2d Sess. 82 (1966).

It is incongruous to argue that authority which supports a finding that satellite carriers are not cable systems under section 111(a)(3) also supports a finding that they are cable systems under section 111(f). *Southern Satellite* and *Eastern Microwave*, therefore, are not authority for the proposition that the phrase "other communications channels" in section 111(f) includes satellite carriers.

The *SBN* court concluded that carriage of broadcast signals was permissible under the rules of the FCC in accordance with section 111(c)(1) because no FCC regulations forbid it. *SBN*, 940 F.2d at 1471. This position is corroborated by the comments of the FCC submitted in this proceeding. Federal Communications Commission, comments at 7. The Copyright Office expressly stated in the NPRM that it was not ruling on satellite carriers' sufficiency under section 111(c)(1), and it does not do so now. 56 FR at 31,590 ("(I)t is not necessary to rule on whether the retransmissions of satellite carriers are permissible under the rules and regulations of the FCC"). The Office therefore neither endorses nor disputes the *SBN* Court's conclusion that carriage of broadcast signals by satellite carriers is permissible under FCC rules.

Finally, the *SBN* court held that public policy reasons required an extension of the compulsory license to include satellite carriers, stating "there is no good reason to read 'cable system' narrowly to deny *SBN* its license, and to do so will do an injustice to those who live in rural areas." *SBN*, 940 F.2d at 1471. The court was concerned that if satellite carriers like *SBN* did not have access to a compulsory licensing

scheme, they would be unable to continue functioning, thereby denying "those in sparsely populated areas from receiving the quality television reception technology can provide." *Id.* The Copyright Office is not imbued with authority to expand the compulsory license according to public policy objectives. That matter is for the Congress. Rather, the Office is charged with the duty to interpret the statute in accordance with Congress' intentions and framework and, where Congress is silent, to provide reasonable and permissible interpretations of the statute. See *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Satellite carriers are not cable systems under section 111 because they simply do not satisfy the definitional requirements, and do not fit within the constraints Congress has placed on the cable compulsory license.

In support of this conclusion, the Copyright Office also finds there are other reasons, not addressed or discussed in the *SBN* case. Consideration of section 111 as a whole, and indeed the second part of the definition of a cable system in section 111(f), demonstrates that Congress intended the compulsory license to apply to localized retransmission services, and not nationwide retransmission services such as satellite carriers.

Examination of the overall operation of section 111 proves that the compulsory license applies only to localized retransmission services regulated as cable systems by the FCC. For example, the second part of the section 111(f) definition of a cable system refers to cable systems operating in "contiguous communities and from a single headend." Neither concept has any application for satellite carrier operations. Further, section 111(f) defines a "distant signal equivalent" with reference to broadcast television stations "within whose local service area the cable system is located." While it may be that satellite carriers have subscribers located within the service area of a broadcast station, it is obvious that the satellite carrier as a "cable system," is not so located, which is required by the definition.

Furthermore, it is apparent that the operation of section 111 is hinged on the FCC rules regulating the cable industry. The whole concept of distant versus local signals, which forms the foundation of the royalty scheme, is tied to the concept of the must carry rules and the "rules, regulations and authorizations of the Federal Communications Commission in effect on April 15, 1976." 17 U.S.C. 111(f). Satellite carriers were not, and are not, regulated by the FCC as cable systems, and the whole concept of must carry and the 1976 FCC rules have no application to them whatsoever. Nothing in the statute or its legislative history suggests that Congress intended section 111 to apply to nationwide retransmission services such as satellite carriers, or would explain how if Congress had intended the result advanced by satellite carrier commentators, the FCC rules regulating localized wired cable systems would apply to satellite operations.

In summary, the Copyright Office has reconsidered its decision announced in the NPRM with respect to satellite carriers, and reaches a final conclusion today that they are not cable systems within the meaning of section 111 and thus do not qualify for the cable compulsory license.

Refunds

As discussed in the NPRM, 56 FR at 31591, satellite carriers who have made filings with the Copyright Office claiming the section 111 license may request a refund. The Office reaffirms the NPRM refund statement, and notifies satellite carriers that refunds of monies submitted may be obtained by contacting the Licensing Division. Refunds will only be made on a requested basis, and requests must be received by the Office no later than March 1, 1994. Requests for refund should be sent to the Licensing Division, Copyright Office, Library of Congress, Washington, D.C. 20557.

B. MMDS Operations

(1) Eligibility Under Section 111

Unlike its conclusion with respect to satellite carriers, the Copyright Office made only a preliminary finding regarding the eligibility of MMDS operations for section 111 compulsory licensing and requested public comment. The Office has carefully considered and analyzed the comments, reviewed its position expressed in the NPRM, and reexamined the language and legislative history of section 111. The Office now reaches its final decision that MMDS facilities are not cable systems within the meaning of section 111, and therefore are not eligible for compulsory licensing.

The question of MMDS' eligibility for compulsory licensing created a vigorous debate as the commenting parties expressed what in their view was Congress's vision and intention in 1976. As noted in the discussion of the comments, the debate proceeded along four lines of analysis: Statutory construction, legislative history, judicial interpretation, and public policy. Although the first two are of ultimate primacy, the Copyright Office believes that its decision that MMDS facilities are not cable systems is not only supportable, but required under all four lines of inquiry.

Throughout this proceeding, the commentators supporting MMDS' eligibility for the compulsory license have criticized the Office's analytical approach, charging that it has violated the canons of statutory construction. They argue that the Office has ignored the plain meaning of the definition of a cable system appearing in section 111(f) and has construed its terms far too narrowly so as to constrict the license to unnecessary technological distinctions. See part IV, Discussion of the Comments, *supra.* They charge that the Office has also ignored the plain meaning of the phrase "other communications channels" appearing in section 111(f), and attached unwarranted technical requirements to its meaning. MMDS operations do make secondary transmissions via "other communications channels," they say, and the Office inquiry should have properly concluded with that finding.

Contrary to the assertions of these commentators, the Copyright Office believes it has followed the rules of statutory construction. The proper application of those rules affirms our conclusion that MMDS facilities are not cable systems. Much has been made of the phrase "other communications channels," and the pro-MMDS commentators have argued that the Office's interpretation of the statute is limited to the language of the definition of a cable system in section 111(f). If MMDS can be fit into the meaning of "other communications channels," then the matter is resolved and MMDS operators are cable systems. This view of section 111, however, ignores a cardinal rule of statutory construction: a statutory provision must be interpreted as a whole. "(E)ach part of a section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed." 2A Sutherland, *Stat. Const.* 46.05 (5th ed. 1992). Does inclusion of MMDS make sense with the terms and operation of section 111 as a whole? A plain reading of section 111 as a whole confirms the plain meaning of "other communications channels." If inclusion of MMDS conflicts with other provisions of section

111, or causes language in the statute to become superfluous or inoperative, then clearly the "plain meaning" of "other communications channels" cannot be said to include the operations of MMDS.

The other tenet of statutory construction for which the Office has been criticized is in construing the compulsory license narrowly. The Copyright Office has followed the principle of narrow interpretation of the compulsory license since inception of the Copyright Act in 1976, see *Compulsory License for Cable Systems*, 49 FR 14944, 14950 (1984), and this approach is fully consistent with the provisions of the Act, and the rules of statutory construction. See 73 Am. Jur. 2d 313 (1991) (stating that "statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption.") Section 106 is a broad grant of exclusive rights to the owner of a copyrighted work, and the limitations to those rights are spelled out in the statute with specificity and precision. See 17 U.S.C. 107–115, 119; see also, 1976 House Report at 61 ("The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow."), adopting the recommendation of the Staff of House Committee on the Judiciary, 89th Cong., 1st Sess., Copyright Law Revision part 6, 1965 Supplementary Report of the Register at 14. (Comm. Print 1965). ("We believe that the author's rights should be stated in the statute in broad terms, and that the specific limitations on them should not go any further than is shown to be necessary in the public interest.")

Congress's treatment of the public performance right, which is the right impacted by secondary transmissions, confirms this principle of the Copyright Act. The Copyright Act of 1909 exempted nonprofit public performance of nondramatic music and literary works. The 1976 Copyright Act modifies this exemption. Not only are the key terms "perform" ("by means of any device or process"), "publicly" ("to transmit * * * by means by any device or process"), and "transmit" ("to communicate by any device or process") defined broadly, see 1976 House Report at 62–65, but the exceptions and limitations on the public performance right are specific and narrowly drawn. As one example, the general nonprofit exemption of the 1909 Act became a series of narrower exemptions of limitations in sections 110, 111, 116, and 118. The provision that most closely approximates the 1909 Act's nonprofit exemption, 17 U.S.C. 110(4), is hedged with qualifying language: it does not apply to transmissions to the public; there must be no purpose of direct or indirect commercial advantage; there must be no fee or other compensation to the performers, promoters, or organizers; there can be no direct or indirect admission charge unless the proceeds are used exclusively for educational, religious, or charitable purposes, and in those cases the author has the right to object in writing to the public performance.

As the owners of exclusive rights in a work, copyright holders possess a property grant which entitles them to negotiate and bargain for use of the work. This property right is limited only in well articulated exceptions appearing in the statute. The cable compulsory license is one of those exceptions, and the Copyright Office will not dilute the property right of copyright holders beyond what is expressed in the statutory exception.

In applying the principles of statutory construction and embracing a view that section 111 should be construed narrowly,[4] the Copyright Office has also examined the legislative history. Several commentators argued that it is improper for the Office to consult legislative history since, in their opinion, the language contained in the definition of a cable system is evident on its face and Congressional intent is therefore proved. The Copyright Office rejects this position, since the precise meaning of "other communications channels" is far from obvious. The Office also does not believe that failure to examine the legislative history of the Copyright Act when the meaning is not evident on its face would be consistent with its statutory obligation to interpret the Act. The true purpose of statutory interpretation is to determine and understand how Congress intended the law to operate, and a crucial element to achieving that understanding is examining the circumstances surrounding its passage, and what was said regarding its provisions. Consequently, the Copyright Office carefully examined the legislative history in order to answer the ultimate question: Did Congress intend the cable compulsory license to apply to non-wire secondary transmission services such as MMDS?

The third and fourth interpretory principles—judicial interpretation and public policy—played lesser to nonexistent roles. As noted *supra*, the Copyright Office is not technically bound by judicial decisions concerning interpretation of section 111 (unless, of course, the decision is a review of an Office rule or interpretation under the APA), but looks to those cases for guidance and helpful insight. The Office has already discussed that it did not find the decision in *SBN* persuasive with respect to satellite carriers' eligibility for compulsory licensing, and the reasoning expressed in the case is not helpful to the issue of MMDS. The series of cases dealing with the passive carrier exemption were also not enlightening on the question of what is a cable system, and therefore have limited application. As discussed, *supra*, general public policy issues are for Congress to resolve,[5] and the question of whether it is sound policy to create a compulsory license for MMDS operations is for future legislation. The statutory language and legislative history therefore form the basis for today's policy decision.

The Copyright Office begins its analysis with an examination of the requirements of a cable system in section 111(f), and then expands its consideration to the whole of section 111 to determine if MMDS inclusion is consistent with the operation of the compulsory licensing scheme. As discussed *supra*, a cable system is defined as: (1) A facility located in any State, Territory, Trust Territory or

[4] Congressional support for a narrow interpretation of section 111 can be found in the numerous references to FCC regulations on a certain date. Congress chose not to allow the cable license to expand by changes in FCC regulatory policy. Since low power stations were not "local" signals by application of the FCC's 1976 must-carry rules, Congress amended the definition of "local service area" in 1986 to create a statutory standard for determining when the signal of a low power station qualifies as a local signal.

[5] The Copyright Office must respectfully disagree with the comments of the Chief of the FCC's Mass Media Bureau, who urged that public policy considerations favor interpretation of the cable compulsory license to cover MMDS. We do not agree that once extended to MMDS the "license would remain available only to traditional cable systems and other highly localized nonbroadcast, noncommon carrier media of limited availability." FCC comments at 7. Many of the arguments now made by MMDS would be made by direct broadcasting services, by satellite carriers, by the telephone companies, and future unknown services. Since the 1976 Congress did not consider the public policy implications of extending a compulsory license to these non-cable services, the Copyright Office should not assert the authority to interpret the Copyright Act in this way. Unlike the FCC, which has recommended elimination of the cable compulsory license, Report in Gen. Docket 87–25, 4 FCC Rcd 6711 (1989), the Copyright Office in this proceeding takes no position on the legislative policy issues of eliminating or extending the cable compulsory license by amendment of the Copyright Act.

Possession, that (2) receives the signals of FCC licensed broadcast stations, and (3) makes secondary transmission of those signals, (4) by "wires, cables or other communications channels," to (5) subscribing members of the public who pay for such service. 17 U.S.C. 111(f). MMDS operators ostensibly satisfy requirements 1 through 3 and 5 in that they are some type of facility, located in a State, which receives television broadcast signals and charges subscribers for their receipt. It is also apparent that MMDS operators do make secondary transmissions, but the question remains whether they do so by "wires, cables or other communications channels" within the contemplation of the statute, and can satisfy the other relevant definitions and conditions of the cable compulsory license.

The House Report to the 1976 Copyright Act discusses the section 111(f) definition of a cable system, and states:

> The definition of a "cable system" establishes that it is a facility that in whole or in part receives signals of one or more television broadcast stations licensed by the FCC and makes secondary transmissions of such signals to subscribing members of the public who pay for such service. *A closed circuit wire system that only originates programs and does not carry television broadcast signals would not come within the definition.*

H.R. Rep. No. 1476 94th Cong., 2d Sess. 99 (1976) (emphasis added). The Copyright Office reads the highlighted passage as contemplating a cable system to be a "closed circuit wire system" that carries broadcast signals, since the language makes it clear that a closed circuit wire system which did not carry broadcast signals would not be a cable system within the meaning of section 111. This reading is confirmed by an earlier passage in the House Report which describes a typical cable system: "A typical system consists of a central antenna which receives and amplifies television signals *and a network of cables* through which the signals are transmitted to the receiving sets of individual subscribers." *Id.* at 88 (emphasis added). The House Report's use of the terms "closed circuit wire system" and "network of cables" suggests that the phrase "other communications channels" appearing in the statutory definition was not intended to include open transmission path services such as MMDS.

The idea of a closed circuit wire system is further supported through consideration of that history behind enactment of section 111. The problems presented by cable television during the general revision of the copyright law are well documented. The effort to work out the final compromise embodied in section 111 delayed passage of the Copyright Act for almost 10 years. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976). Numerous private and governmental meetings were held by or with the interested parties in an effort to work out an agreement. At that time, there was a very clear picture of who and what the cable industry was and how it was regulated. The two watershed cable copyright cases, which prompted Congress to impose copyright liability on cable systems and led to the creation of section 111, *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Telepromter Corp.* v. *CBS, Inc.*, 415 U.S. 394 (1974), involved traditional wired, closed transmission path cable systems. Indeed, throughout the series of congressional hearings involving cable television there was constant reference to "wire television," and the terms "cable television" and "wire television" were used interchangeably. See, e.g., Copyright Law Revision, Hearings Before Subcomm. 3 of the House Committee on the Judiciary, 89th Cong. 1st Sess. 1342 (1966) (statement of Frederick Ford, FCC Commissioner). It is therefore apparent that Congress had a firm understanding of what a cable system was: a wired, closed transmission path service that carried broadcast signals. This is not surprising since throughout the debate period from the late 1960's through the early 1970's, wired cable television was the only kind of cable television that there was. See, *infra*, discussion regarding the emergence of non-wire multichannel video transmission services.

Congress's understanding of the cable industry and what it sought to regulate is confirmed by the manner in which it structured the compulsory license around the system of FCC regulation of cable. The 1976 House Report plainly states that section 111 creates a significant "interplay" between copyright and communications regulation:

> [A]ny statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry. While the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC's rules or which might be characterized as affecting "communications policy", the Committee has been cognizant of the interplay between the copyright and the communications elements of the legislation.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976). The recognized "interplay" and reliance on FCC regulation is embodied directly in the statute. The "rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976," 17 U.S.C. 111(f) are the key to determining local versus distant status of broadcast signals, and are a crucial factor in computing copyright royalties. Further, the license only covers those broadcast signals whose carriage by a cable system is "permissible under the rules, regulations, or authorizations of the Federal Communications Commission," 17 U.S.C. 111(c)(1), invoking a whole body of FCC regulations governing wired closed transmission path systems and their permitted and nonpermitted signal carriage. In short, copyright liability and royalty compensation are entirely predicated on a system of regulation imposed on the wired cable television industry by the FCC in 1976. MMDS systems have never been regulated by the FCC as cable systems; consequently, it is difficult to imagine how Congress could have ever intended the compulsory license to extend to operations like MMDS when it hinged the very principle and function of the license on FCC regulation of the industry.

The only piece of legislative history offered by commentators supporting inclusion of MMDS within the concept of a cable system was a statement at the 1975 hearings on the revision bill. In summarizing the operation of section 111, Register of Copyrights Barbara Ringer stated:

> First, as to the scope of the provision: it deals with all kinds of secondary transmissions, which usually means picking up electrical energy signals, broadcast signals, off the air and retransmitting them simultaneously by one means or the other—usually cable but sometimes other communications channels, like microwave and apparent laser beam transmissions that are on the drawing boards if not in actual operation.

Hearings on H.R. 2223 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 1820 (1976). Pro-MMDS commentators argue that this passage amounts to a recognition by the Congress that other types of non-wired transmission services existed or were contemplated in the near future, and that the section 111 definition of a cable system would be broad enough to encompass those new systems. This argument is faulty for several reasons.

First, the argument fails to place Ringer's quote in proper context. As discussed earlier, the ten plus years of legislative process demonstrates that Congress had an understanding of cable systems as wired, closed transmission path services regulated by the FCC. It is therefore unlikely that Congress would abruptly change this perception and desire to include all types of new retransmission services, not regulated by the FCC, without noting the change in either the statute or the legislative history. The phrase "other communications channels" was not new to the 1976 revision bill, and in fact had appeared in bills as far back as 1966. See, H.R. Rep. No. 2237, 89th Cong., 2d Sess. 7 (1966). Ringer's passage does not offer a description of "other communications channels," because she was describing section 111 overall and not discussing the definition of a cable system. It is clear that section 111 as a whole deals with various kinds of secondary transmissions, subjecting some secondary transmissions to full liability in paragraph (b) and exempting others in paragraph (a). Only cable system secondary transmissions, however, are eligible for the compulsory license of paragraphs (c), (d), and (e). Moreover, Ringer was simply referring to the obvious fact that microwave transmissions were used by traditional wired cable systems, and she observed that wired systems might use laser beams in the future. Cable operators used microwave to distribute distant broadcast signals and, in some cases, retransmit signals from one headend to another.[6]

Second, the argument that the Ringer passage supports the position that Congress recognized new types of non-wired retransmission services and sought to include them within the compulsory licensing scheme directly conflicts with another provision of section 111. Section 111(b) imposes liability on those who make secondary transmissions of copyrighted works where the primary transmission is not made to the public at large but is controlled and limited to reception by certain members of the public. The House Report gives examples of such services: "Examples of transmissions not intended for the general public are background music services such as MUZAK, closed circuit broadcasts to theatres, *pay television (STV)* or pay cable." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 92 (1976) (emphasis added). Thus, "closed circuit wire systems" which are not subject to compulsory licensing because they do not carry broadcast signals, see *id.* at 99 (definition of a cable system), along with pay cable and subscription television are clearly subject to full copyright liability. The pro-MMDS commentators fully described how, in its initial incarnation as MDS, MMDS was a pay television (STV) service:

> At the time the Copyright Act ("Act") was promulgated, channels known as MDS–1 and MDS–2 were the only channels authorized for commercial cable-type service. These frequencies were used in most major markets for the *distribution of a single channel pay TV service* and were in use at the time of passage of the Act.

Technivision, Inc., comments at 4 (emphasis added). Congress was therefore very much aware of MDS in 1976,[7] and specifically chose to subject it to full copyright liability through section 111(b). There is nothing in the Copyright Act or its legislative history even suggesting that Congress contemplated that one day MDS might become something other than STV, and that at that time it should receive the benefits of section 111. To create such a presumption reads far too much into the statute, and violates the principle that compulsory licenses should be construed narrowly.

Finally, it cannot be denied that Congress intended the compulsory license to be tied to a cable industry which was highly regulated by the FCC. See *supra*. The FCC's definition of a cable system, in effect while the Copyright Act was passed, defined a cable system as "redistribut(ing) * * * signals by wire or cable * * *."[8] While the reference to "by wire or cable" was dropped by the FCC in 1977, the Commission specifically stated that the change was not to be "interpreted to include such non-cable television broadcast station services as Multipoint Distribution Systems * * *." First Report and Order in Docket 20561, 63 FCC 2d 956, 966 (1977). Regulation of cable systems from a communications standpoint, therefore, was limited to traditional, wire-based, closed path transmission services. Congress chose to freeze several key definitions to the FCC rules in effect on April 15, 1976 or on the date of enactment (October 19, 1976). The whole structure of the cable compulsory license and the amount of royalties payable depends on the 1976 FCC regulations. This highly complicated body of rules, which was critical to the balancing of copyright and cable user interests, did not and does not apply to MMDS facilities.[9] As the Motion Picture Association of America, Inc. correctly points out, including a video provider in the compulsory license which is not subject to FCC regulation would ruin the critical balance established in 1976. Motion Picture Association of America, Inc., comments at 5. For example, the syndicated exclusivity rules, very much a part of cable regulation in 1976 and now recently reinstituted in a different form by the FCC, do not apply to MMDS operators, thereby allowing them to import as much distant signal programming as desired, notwithstanding the exclusive contracts entered into by broadcast stations. It is therefore counter-intuitive to assert that Congress intended a technology neutral compulsory license in 1976 applicable to

[6] Pro-MMDS commentators assert that they, like wired systems, make use of cables and wires in addition to microwave in the distribution of broadcast signals. This argument ignores the fundamental nature of wired systems in contrast to non-wired distribution services: Traditional wired systems use a network of cables as the primary method of retransmitting the broadcast signals; wireless systems like MMDS may use wire in part of their operations (*e.g.*, to effect the reception of an electronic signal in the subscribers' television set) but the primary method of retransmitting the signals is through the broadcast spectrum by wireless means.

[7] MDS, which was authorized in 1974, subsequently became MMDS in 1983 when the FCC reallocated eight of the ITFS channels for commercial use, and made them available for video distribution. 94 FCC 2d 1203 (1983).

[8] The FCC, notwithstanding its use of the phrase "by wire or cable," certainly understood that microwave was used by traditional cable systems to retransmit distant signals. In fact, the FCC first indirectly regulated the cable industry by regulating issuance of microwave licenses to those who serviced the cable systems. In 1962, the FCC initially refused to grant a microwave license, but in 1965 it issued rules governing microwave carriers serving the cable industry.

[9] Pro-MMDS commentators argue that the Copyright Office in its cable regulations provides that entities not regulated as "cable systems" by the FCC may nevertheless satisfy the Copyright Act's definition and qualify for the compulsory license. The Copyright Office, however, has never interpreted its regulation affirmatively to allow wireless services, which have always been excluded by the FCC as an entire industry from regulation as a cable system, to qualify for the compulsory license. The Copyright Office regulation at 37 CFR 201.17(b)(2) has been interpreted and applied by the Office to mean that a wired system qualifies under the Copyright Act's definition even if the wired system is not regulated by the FCC as a cable system "because of the number or nature of its subscribers or the nature of its secondary transmissions." FCC regulations have sometimes excluded wired systems with fewer than 1000 or 3000 subscribers. The Copyright Office regulations also provide that "an 'individual' cable system is each cable system recognized as a distinct entity under the rules, regulations, and practices of the Federal Communications Commission." Therefore, the cable system must be recognized as such under the rules of the FCC even if the FCC elects not to subject the system to certain rules applied to other wired cable systems. *Id.*

all types and forms of video delivery systems, regulated or unregulated, against a legislative and historical backdrop of a dominant industry distributing signals to its subscribers by wired closed transmission paths, which was highly regulated by the FCC.

In summary, the Copyright Office formally concludes that MDS and MMDS operations do not satisfy the definition of a cable system appearing in section 111, and therefore do no qualify for cable compulsory licensing.

(2) Refunds

The Copyright Office has had a practice of accepting and will continue to accept statements of account and royalty payments from MMDS operators without pronouncing whether MMDS facilities qualified for compulsory licensing. The Office has also received a number of filings from MMDS operators without knowledge of them as such, since the Statement of Account do not require such identification. Given the Office's final decision, effective January 1, 1994, that MDS and MMDS facilities are not cable systems and do not qualify for section 111 compulsory licensing, refunds of monies submitted may be obtained by contacting the Licensing Division of the Copyright Office. Refunds will only be made on a requested basis, and requests must be made in writing no later than March 1, 1994. Refund requests should be sent to Licensing Division, Copyright Office, Library of Congress, Washington, DC 20557.

* * * * *

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position that this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress, which is part of the legislative branch. Neither the Library of Congress nor the Copyright Office is an "agency" within the meaning of the Administrative Procedure Act of June 11, 1946, as amended (title 5, U.S. Code, subchapter II and chapter 7). The Regulatory Flexibility Act consequently does not apply to the Copyright Office since the Act affects only those entitles of the Federal Government that are agencies as defined in the Administrative Procedure Act.[10]

[10] The Copyright Office was not subject to the Administrative Procedure Act before 1978, and it is now subject to it only in areas specified by section 701(d) of the Copyright Act (*i.e.*, "all actions taken by the Register of Copyrights under this title (17)," except with respect to the making of copies of copyright deposits) (17 U.S.C. 706(b)). The Copyright Act does not make the Office an "agency" as defined in the Administrative Procedure Act. For example, personnel actions taken by the Office are not subject to APA–FOIA requirements.

List of Subjects in 37 CFR Part 201

Cable systems; Cable compulsory license.

Final Regulation

In consideration of the foregoing, part 201 of 37 CFR chapter II is amended in the manner set forth below.

PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 is revised to read as follows:

Authority: Sec. 702, 90 Stat. 2541, 17 U.S.C. 702; 201.7 is also issued under 17 U.S.C. 408, 409, and 410; 201.16 is also issued under 17 U.S.C. 116; 201.17 is also issued under 17 U.S.C. 111.

2. Section 201.17 is revised by adding paragraph (k) to read as follows:

§ 201.17 Statements of Account covering compulsory licenses for secondary transmissions by cable systems.

* * * * *

(k) *Satellite carriers and MMDS not eligible.* Satellite carriers, satellite resale carriers, multipoint distribution services, and multichannel multipoint distribution services are not eligible for the cable compulsory license based upon an interpretation of the whole of section 111 of title 17 of the United States Code. At its election, any such entity who paid copyright royalties into the Copyright Office in an attempt to comply with 17 U.S.C. 111 may obtain a refund of the royalties paid by submitting a written request no later than March 1, 1994, addressed to the Licensing Division, Copyright Office, Library of Congress, Washington, DC 20557.

Ralph Oman,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress

[FR Doc. 92–1858 Filed 1–28–92; 8:45 am]

BILLING CODE 1410–08–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 180 and 186

[PP 9F3743 and FAP 1H5614/R1137; FRL–4008–2]

RIN 2070–AB78

Pesticide Tolerances and Food Additive Regulation for Clethodim

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: These regulations establish tolerances with an expiration date for the residues of the herbicide clethodim ((E)-(±)-2-[1-[[(3-chloro-2-propenyl)oxy]imino]propyl]-5-[2-(ethylthio)propyl]-3-hydroxy-2-cyclohexen-1-one) in or on the following raw agricultural commodities (RACs): soybeans at 10 parts per million (ppm); cottonseed at 1 ppm; meat, fat, and meat byproducts of cattle, goats, hogs, horses, poultry, and sheep at 0.2 ppm; milk at 0.05 ppm; eggs at 0.2 ppm; also, the following food additive regulation for the feed additive commodities soybean soapstock at 15 ppm and cottonseed meal at 2 ppm. These regulations were requested by Valent U.S.A. Corp. and establish maximum permissible levels for residues of the herbicide in or on these RACs and the feed commodities. The tolerances expire on January 31, 1994.

EFFECTIVE DATE: These regulations become effective on January 29, 1992.

ADDRESSES: Written objections, identified by the document control number, [PP 9F3743 and FAP 1H5614/R1137], may be submitted to: Hearing Clerk (A-110), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: By mail: Joanne I. Miller, Product Manager (PM) 23, Registration Division (H7505C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 237, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-305-7830.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of May 19, 1989 (54 FR 21664), EPA issued a notice announcing that Valent U.S.A. Corp., 1333 North California Blvd., Walnut Creek, CA, had submitted pesticide petition 9F3743 to EPA under section 408 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 346a), proposing to amend 40 CFR part 180 by establishing tolerances for residues of the herbicide clethodim and its metabolites containing the 2-cyclohexen-1-one moiety in or on soybeans at 10 ppm; cottonseed at 5 ppm; meat, fat, and meat byproducts of cattle, goats, hogs, horses, poultry, and sheep at 0.2 ppm; milk at 0.05 ppm; and eggs at 0.5 ppm.

On September 5, 1990, Valent subsequently submitted a revision to PP 9F3743 to amend the proposed tolerances on cottonseed from 5 ppm to 1 ppm and eggs from 0.5 ppm to 0.2 ppm.

On September 9, 1991, Valent submitted a feed additve petition (FAP

1H5614) to EPA under section 409 of the Federal Food, Drug, and Cosmetic Act (FFDCA) (21 U.S.C. 348), proposing to amend 40 CFR part 186 by establishing a regulation to permit the residues of the herbicide clethodim and its metabolites containing the 2-cyclohexen-1-one moiety on the feed commodities soybean soapstock at 15 ppm and cottonseed meal at 2 ppm. In the Federal Register of September 18, 1991 (56 FR 47210), EPA issued a notice of a feed additive petition (FAP 1H5614) proposing to amend 40 CFR part 186 by establishing a regulation to permit the residues of the herbicide clethodim and its metabolites containing the 2-cyclohexen-1-one moiety in or on soybean soapstock at 15.0 ppm and cottonseed meal at 2 ppm.

There were no comments or requests for referral to an advisory committee received in response to the notices of filing.

The data submitted in the petition and other relevant material have been evaluated. The toxicology data described below were considered in support of these tolerances and food additive regulations.

1. Several acute toxicology studies placing the technical-grade herbicide in Toxicity Category III.

2. A 2-year rat chronic toxicity/carcinogenicity study found the compound to be noncarcinogenic to rats under the conditions of the study. The systemic no- observed-effect level (NOEL) was 500 ppm (approximately 19 mg/kg/day), and the systemic lowest-observed-effect level (LOEL) was 2,500 ppm (approximately 100 mg/kg/day) based on the observed body weight gain, the increases in liver weights, and the presence of centrilobular hepatic hypertrophy.

3. An 18-month mouse carcinogenicity study which showed the compound to be noncarcinogenic to mice under the conditions of the study. The systemic NOEL was 200 ppm (8 mg/kg/day), and the systemic LOEL was 1,000 ppm (50 mg/kg/day) based on treatment-related effects on survival, red cell mass, absolute and relative liver weights, and microscopic findings in liver and lung.

4. A 1-year feeding study in dogs with a systemic NOEL of 1 mg/kg/day in both sexes and an LOEL of 75 mg/kg/day based on increased absolute and relative liver weights, and alteration and clinical chemistry.

5. A developmental toxicity study in rats with a developmental and maternal NOEL and LOEL of 100 and 350 mg/kg/day, respectively. The NOEL and LOEL for developmental toxicity were based on reductions in fetal body weight and increases in skeletal anomalies.

6. A developmental toxicity study in rabbits with a maternal toxicity NOEL and LOEL of 25 and 100 mg/kg/day, respectively. Maternal toxicity was manifested as clinical signs of toxicity and reduced weight gain and food consumption during treatment. Developmental toxicity was not observed, and therefore the developmental toxicity NOEL was 300 mg/kg/day (HDT).

7. A two-generation reproduction study in the rat with a parental toxicity NOEL and LOEL of 500 and 2,500 ppm (51 and 283 mg/kg/day), respectively, based on reductions in body weight in males, and decreased food consumption in both generations. The NOEL for reproductive toxicity was 2,500 ppm (263 mg/kg/day, HDT).

8. A mutagenicity test with *Salmonella* Ames assay showed nonmutagenicity in three strains. Clethodim imine sulfone was negative for reverse gene mutation in *Salmonella* and *E. coli* exposed up to 10,000 ug/plate with or without activation. Clethodim was negative for chromosomal damage in bone marrow cells of rats treated orally up to toxic doses (1,500 mg/kg).

The dietary risk exposure analysis used a RfD of 0.01 mg/kg body weight (bw)/day based on a NOEL of 1.0 mg/kg/bw/day and a safety factor of 100. Using anticipated residues and 100 percent crop treated, the results for the overall U.S. population were 0.000211 mg/kg/bw/day, representing 2.1 percent of the RfD and 15.8 percent of the RfD for nonnursing infants. There are no other published tolerances for this chemical. The pesticide is useful for the purpose of this rule. The Agency does not believe that these tolerances and food additive regulations pose significant risks.

A common moiety analytical method for tolerance enforcement (gas chromatography with a flame photometric detector in the sulfur mode) was satisfactorily tested and is available. This method, however, cannot distinguish between clethodim and sethoxydim, a closely related herbicide with tolerances established under 40 CFR 180.412. A compound-specific confirmatory method (HPLC with a UV detector) that can distinguish between derivatives of clethodim and sethoxydim was tested in the Agency laboratory. Considerable revisions were made by the laboratory in order to obtain satisfactory analytical results. EPA's revisions to the method will be made available for enforcement purposes. The revised specific method has been returned to Valent to be rewritten and subsequently validated by an independent laboratory. Subsequent validation is generally required prior to EPA validation of the method, but in this case EPA has already validated the method. Nevertheless, an independent validation is deemed useful to confirm that the revisions made by EPA are adequately explained. These tolerances and food additive regulations are being established with an expiration date to assure timely submission of the rewritten method and subsequent validation.

The nature of the residue is adequately understood, and a common moiety analytical method (gas chromatograph with a flame photometric detector in the sulfur mode) and a compound-specific confirmatory method are available for enforcement purposes. Prior to publication in the Pesticide Analytical Manual, Vol. II, both methods are available in the interim to anyone interested in pesticide enforcement. They can be requested from: Calvin Furlow, Public Response and Program Resources Branch, Field Operations Division (H7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Crystal Mall #2, Rm. 1128, 1921 Jefferson Davis Hwy., Arlington, VA 22202, (703)-305-5232.

There are currently no actions pending against the registration of this chemical. Based on the above information, the Agency concludes that the tolerances will protect the public health. Therefore, the tolerances and food additive regulation are established as set forth below.

Any person adversely affected by these regulations may, within 30 days after publication of this document in the Federal Register, file written objections with the Hearing Clerk, at the address given above. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must include a statement of the factual issue(s) on which a hearing is requested and the requestor's contentions on each such issue. A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issue(s) in the manner sought by the

requestor would be adequate to justify the action requested.

The Office of Management and Budget has exempted these rules from the requirements of section 3 of Executive Order 12291.

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 Parts 180

Administrative practice and procedure, Agricultural commodities, Feed additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: January 23, 1992.

Douglas D. Campt,

Director, Office of Pesticide Programs.

Therefore, chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 180—[AMENDED]

1. In part 180:

a. The authority citation for part 180 is revised to read as follows:

Authority: 21 U.S.C. 346a and 371.

b. By adding new § 180.458, to read as follows:

§ 180.458 Clethodim ((E)-(±)-2-[1-[[(3-chloro-2-propenyl)oxy]imino]propyl]-5-[2-(ethylthio)propyl]-3-hydroxy-2-cyclohexen-1-one); tolerances for residues.

Interim tolerances that expire on January 31, 1994 are established for the combined residues of the herbicide clethodim ((E)-(±)-2-[1-[[(3-chloro-2-propenyl)oxy]imino]propyl]-5-[2-(ethylthio)propyl]-3-hydroxy-2-cyclohexen-1-one) and its metabolites containing the 2-cyclohexen-1-one moiety in or on the following raw agricultural commodities.

Commodity	Parts per million
Cattle, fat	0.2
Cattle, meat	0.2
Cattle, mbyp	0.2
Cottonseed	1.0
Eggs	0.2
Goats, fat	0.2
Goats, meat	0.2
Goats, mbyp	0.2
Hogs, fat	0.2
Hogs, meat	0.2
Hogs, mbyp	0.2
Horses, fat	0.2
Horses, meat	0.2
Horses, mbyp	0.2
Milk	0.05
Poultry, fat	0.2
Poultry, meat	0.2
Poultry, mbyp	0.2
Sheep, fat	0.2
Sheep, meat	0.2
Sheep, mbyp	0.2
Soybeans	10.0

PART 186—[AMENDED]

2. In part 186:

a. The authority citation for part 186 continues to read as follows:

Authority: 21 U.S.C. 348.

b. By adding new § 186.1075, to read as follows:

§ 186.1075 Clethodim ((E)-(±)-2-[1-[[(3-chloro-2-propenyl)oxy]imino]propyl]-5-[2-(ethylthio)propyl]-3-hydroxy-2-cyclohexen-1-one); tolerances for residues.

Interim tolerances that expire on January 31, 1994 are established for residues of the herbicide clethodim ((E)-(±)-2-[1-[[(3-chloro-2-propenyl)oxy]imino]propyl]-5-[2-(ethylthio)-propyl]-3-hydroxy-2-cyclohexen-1-one) and its metabolites containing the 2-cyclohexen-1-one moiety in or on the following feeds.

Feed	Parts per million
Cottonseed meal	2.0
Soybean soapstock	15.0

[FR Doc. 92-2165 Filed 1-28-92; 8:45 am]

BILLING CODE 6560-50-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General

42 CFR Parts 1001, 1002, 1003, 1004, 1005, 1006 and 1007

RIN 0991-AA47

Health Care Programs: Fraud and Abuse; Amendments to OIG Exclusion and CMP Authorities Resulting From Public Law 100-93

AGENCY: Office of Inspector General, HHS.

ACTION: Final rule.

SUMMARY: This final rule implements the OIG sanction and civil money penalty provisions established through section 2 and other conforming amendments in the Medicare and Medicaid Patient and Program Protection Act of 1987, along with certain additional provisions contained in the Consolidated Omnibus Budget Reconciliation Act of 1985, the Omnibus Budget Reconciliation Act (OBRA) of 1987, the Medicare Catastrophic Coverage Act of 1988, OBRA of 1989, and OBRA of 1990. Specifically, these regulations are designed to protect program beneficiaries from unfit health care practitioners, and otherwise to improve the anti-fraud provisions of the Department's health care programs under titles V, XVIII, XIX and XX of the Social Security Act.

EFFECTIVE DATE: These regulations are effective on January 29, 1992.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Statutory Background

The Medicare and Medicaid Patient and Program Protection Act (MMPPPA) of 1987, Public Law 100-93, enacted on August 18, 1987 and effective on September 1, 1987, recodified and expanded the Secretary's authority to exclude various individuals and entities from receiving payment for services that would otherwise be reimbursable under Medicare (title 18), Medicaid (title 19), the Maternal and Child Health Block Grant Program (title 5) and the Social Services Block Grant (title 20). In addition, new civil money penalty (CMP) authorities, and technical amendments to existing CMP provisions, were established under MMPPPA.

MMPPPA both consolidated many of the Secretary's pre-existing exclusion authorities into section 1128 of the Social Security Act, and added significant new grounds for exclusion under those authorities. The Secretary's authority under this section of the Act has been delegated to the Department's Office of Inspector General (OIG). (53 FR 12999, April 20, 1988).

A. Expanded Exclusion Authorities

MMPPPA gives the OIG added authority to control who may obtain payment for services furnished to program beneficiaries. Section 1128 of the Act provides for both mandatory and permissive exclusions. The mandatory exclusions (section 1128(a) of

the Act) require that an individual or entity that has been convicted of certain types of crimes be excluded, and that the exclusion be for a period of not less than five years. Under authorities set forth in section 1128(b) of the Act, the OIG has the discretion to determine whether, and for how long, to impose the permissive exclusions.

MMPPPA establishes two categories of permissive exclusions: (1) Derivative exclusions, i.e., ones involving the authority to exclude an individual or entity from Medicare and the State health care programs based on an action previously taken by a court, licensing board or other agency; and (2) non-derivative exclusions, based on determinations of misconduct that originate with the OIG. For derivative exclusions, the OIG would not be required to re-establish the factual or legal basis for such underlying sanction; for non-derivative exclusions, the OIG would be required, if the case is appealed to an administrative law judge (ALJ), to make a prima facie showing that the improper behavior did occur.

B. State Health Care Programs: Exclusions and Waivers

The Act provides for exclusion not only from the Medicare program, but also from State health care programs, including those programs covered under titles V, XIX, and XX of the Act. The statute makes clear that, in most cases, an individual or entity excluded from Medicare is to be excluded from all of these programs, and the exclusion is to be for the same period of time. The OIG is to consider requests for a waiver from exclusion from one or more of the State health care programs in limited situations.

II. Provisions of the Proposed Regulations

Proposed regulations intended to implement section 2 of MMPPPA and certain conforming amendments found elsewhere in that statute were published in the **Federal Register** on April 2, 1990 (55 FR 12205) for public comment and consideration. Certain relevant provisions contained in the Consolidated Omnibus Budget Reconciliation Act of 1985, Public Law 99–272, and the Medicare Catastrophic Coverage Act of 1988, Public Law 100–360, were also contained in that proposed rulemaking. Set forth below is a brief summary of that rulemaking and the proposed revisions to 42 CFR chapter V.

Part 1001

The basic structure of the proposed regulations in this part set forth for each type of exclusion the basis or activity that would justify the exclusion, and the considerations the OIG would use in determining the period of exclusion.

The proposed regulations set forth mandatory exclusions for any individual or entity that was convicted of (1) a criminal offense related to the delivery of an item or service under Medicare or a State health care program, or (2) patient abuse or neglect. In accordance with the statute, there is to be a minimum 5 year exclusion. The regulations proposed that the exclusion could be for a longer period if aggravating circumstances existed with respect to the individual or entity.

The proposed regulations also addressed two categories of permissive exclusions to be set forth in part 1001. The first category—derivative exclusions—was designed to address exclusions based on an action previously taken by a court, licensing board or other agency. These include convictions for certain types of fraud, theft, embezzlement, breach of fiduciary responsibility, financial misconduct, obstruction of investigations and certain types of offenses related to controlled substances. While Congress did not set a mandatory minimum period for these types of exclusions, we proposed that exclusions derived from such prior convictions be for a period of 5 years, with some flexibility to decrease or increase the period.

The second category of permissive exclusions—non-derivative exclusions—is to be based on OIG-initiated determinations of misconduct. Several of these non-derivative exclusions were essentially recodifications of the existing regulations, while others reflected the newly enacted authorities. With respect to the non-derivative exclusions, the proposed regulations were designed to:

- Permit the exclusion of those individuals and entities who provide unnecessary or substandard care not only to Medicare and State health care program beneficiaries, but to any person. We proposed to use a 5-year exclusion period as a benchmark for these exclusions. Similarly, the regulations proposed a 5-year exclusion period for health maintenance organizations and similar entities subject to exclusion for failure to provide medically necessary items and services where such failure has adversely affected, or has a substantial likelihood of adversely affecting, program beneficiaries.
- Expand the bases for exclusion to include any act that is described in sections 1128A or 1128B of the Social Security Act. No benchmark was set in the proposed regulations for the exclusion period; a list of factors that the OIG would consider in setting the length of an exclusion was included.
- Provide for the exclusion of entities when they are owned or controlled by individuals who have been convicted, excluded or have had CMPs or assessments imposed against them. The rulemaking proposed that an entity excluded under this provision be excluded for a period corresponding to the exclusion period established for the individual whose relationship with the entity was the basis for the exclusion.
- Address new exclusion authorities relating to the failure to provide information to the Department or its agents. Exclusions were set forth for failure to grant immediate access upon reasonable requests to certain agency representatives. In the context of this provision, we proposed to define "immediate access" and "reasonable request" to ensure access on the spot in certain defined circumstances. Exclusions were also proposed where individuals or entities failed to provide immediate access to investigators or agents of the OIG or the State Medicaid Fraud Control Units (MFCUs) in conjunction with the investigators' or agents' review of documents related to the control of fraud and abuse in the Department's programs. Except in unusual situations, we proposed 24 hours to be a sufficient period to gain access to the information.
- Provide for the exclusion of a hospital that has failed to comply substantially with a corrective action plan that has been required under section 1886(f)(2)(B) of the Act. The rulemaking proposed that exclusions would be based on the Health Care Financing Administration's (HCFA's) determination that the hospital substantially failed to comply with such corrective action.
- Provide exclusions based on a determination by the Public Health Service (PHS) that an individual failed to pay back covered obligations and loans.

Part 1002

Since the new requirements of Public Law 100–93 are being incorporated into part 1001 (which would require State health care programs, including Medicaid, to exclude those whom the OIG has excluded under Medicare), the proposed new part 1002 was designed to set forth provisions pertaining only to State agency-initiated exclusions. The rulemaking proposed certain minimal requirements on State agencies when they undertake such exclusions—

requirements that are substantially consistent with OIG procedures and ensure adequate due process.

Part 1003

The proposed revisions to part 1003, addressing CMPs, were designed to implement the statutory changes affecting section 1128A of the Act, and incorporate a number of statutory revisions made as a result of Public Laws 100–203, 100–360 and 100–485.

Parts 1004 and 1005

Revisions to part 1004 were proposed consistent with the proposed establishment of the new part 1005. Through the revising and recodification of existing regulations, a new part 1005 was proposed to address various OIG hearing procedures. Specifically, proposed part 1005 was designed to govern ALJ hearings and subsequent appeals to the Secretary for all OIG sanction cases.

Part 1006

A new part 1006 was proposed to address the implementation of the OIG's testimonial subpoena authority for investigations of cases under the CMP law.

Part 1007

Regulations addressing State MFCUs, previously set forth in part 1002, subpart C, were proposed to be recodified into a new part 1007.

In response to the proposed rulemaking, we received a total of 61 timely-filed public comments from various provider groups, medical facilities, professional and business organizations and associations, medical societies, State and local government entities, private practitioners and concerned citizens. The comments included both general concerns regarding the impact of these regulations, and specific comments on those areas about which we requested public input. A summary of the comments received and our responses to those comments follows.

III. General Comments on the Proposed Rule

A. Definition of "Furnished"

In the proposed rule, we invited comments on whether the definition of the term "furnished" set forth in § 1001.2 should be revised to explicitly encompass health care manufacturers and other entities who do not receive payments for items or services directly from Medicare or State health care programs, but rather supply items or services to providers, practitioners or suppliers who *do* receive payments from these programs. We explained that if the term "furnished" is defined narrowly, it may inappropriately limit the effect of an exclusion from Medicare and State health care programs.

We received numerous comments on this issue—some supporting and some challenging our authority to revise the definition of "furnished." While we believe that the statute permits us to include entities that "furnish" items covered by the Medicare program but do not receive program payment directly, we have decided not to provide for this in regulations. Because the effect of exclusion is denial of payment for items or services furnished by an excluded individual or entity, it would be difficult to administer exclusions against entities which the Secretary does not directly reimburse. Thus, for the present time, to the extent that manufacturers, suppliers and distributors do not receive payment directly from the Medicare and State health care programs for the items they supply, these regulations will not affect them.

This clarification is in no way intended to limit our exclusion authority under section 1128(b)(8) of the Act. When this statutory provision is applicable, we can assure that no payment is made for items or services furnished by sanctioned persons whether or not they directly receive payments from Medicare and State health care programs, since we can exclude the entities they manage or control which *do* receive such payments.

In this final rule, we are retaining the definition of "furnished" currently found in § 1001.2 of the regulations with one modification, and placing the definition in § 1001.2 under General Definitions. We have deleted the parenthetical statement in the existing definition which we believe is unnecessary in light of the changes made in section 1862(e) of the Act and reflected in § 1001.1901 of these regulations. These provisions, which explicitly incorporate the concept that payment may not be made for items and services provided under the direction of or by prescription of an excluded individual, render the parenthetical statement redundant.

B. Constitutionality of Administrative Exclusions Based on Criminal Convictions

Comment: Several comments expressed concern that exclusions imposed by the Federal Government based upon prior Federal or State criminal convictions may constitute a second "punishment" for a single offense in violation of the double jeopardy clause of the Fifth Amendment of the Constitution.

Response: Exclusions based upon criminal convictions do not constitute an impermissible second punishment under the double jeopardy clause. Exclusions are civil sanctions, not criminal. Only in rare cases will a civil sanction imposed after a criminal sanction violate the double jeopardy clause, and even in those rare cases, only where the sanction may not fairly be characterized as remedial, but only as a deterrent or retribution (see *United States* v. *Halper*, 109 S.Ct. 1892, 1902 (1989)). Thus, under *Halper*, whether a civil sanction constitutes punishment depends in large part upon the goal served by the sanction—if the second civil sanction can be said to serve a remedial purpose, its imposition does not violate the double jeopardy clause (*Halper*, 109 S.Ct. at 1902).

The primary purpose of an exclusionary sanction is remedial, not punitive. When the OIG imposes an exclusion under section 1128 of the Act, it is simply carrying out Congress' intent to protect the Medicare and Medicaid programs from individuals or entities who have already been tried and convicted of a criminal offense (see *Dewayne Franzen* v. *The Inspector General*, Departmental Appeals Board (DAB) decision, Docket No. 90–37 (June 13, 1990), page 11). Further, Congress has made clear that the Department's exclusionary authority was expanded by MMPPPA in 1987 to provide HHS with sufficient authority to better protect the integrity of the Medicare and Medicaid programs and program beneficiaries from providers who have pled guilty to criminal charges. (see Report of Committee on Energy and Commerce, reprinted in 1986 U.S. Cong. and Ad. News, pg. 3665; and 133 Cong. Rec. S 10537 (daily ed. July 23, 1987)). Thus, exclusions serve a remedial purpose and therefore do not constitute a second punishment under *Halper*.

Consistent with the above, courts have held that exclusions do not amount to a second punishment under *Halper*, since "the Inspector General's goals are clearly remedial and include protecting beneficiaries, maintaining program integrity, fostering public confidence in the program, etc." (see *Greene* v. *Sullivan*, No. CIV–3–89–758 (E.D. Tenn. Feb. 8, 1990), page 3; *Matter of David Cooper, R.Ph.*, ALJ Decision, Docket No. C–51 (July 24, 1990); *Matter of Joyce Faye Hughey)*, ALJ Decision, Docket No. C–201 (August 9, 1990)). In a number of these cases, exclusions have been compared to professional license revocations for criminal convictions, "which have the function of protecting the public" (see *DeWayne Franzen* v.

The Inspector General, Id. at page 11; *Greene* v. *Sullivan, Id.* at 3). Further, it has been held that remedial sanctions that involve the revocation of a privilege voluntarily granted are civil in nature and do not invoke the double jeopardy clause (see *Helvering* v. *Mitchell,* 303 U.S. 399 (1938)). Thus, Medicare and Medicaid exclusions do not amount to "punishment" for purposes of the double jeopardy clause.

Further, even assuming, that exclusions were penal in nature, the double jeopardy clause would not be implicated where the Federal government imposes an exclusion based upon a *State* conviction. Under the "dual sovereignty doctrine," double jeopardy does not attach to a subsequent Federal prosecution based on facts which led to a State conviction (see *United States* v. *Anthony,* 727 F. Supp. 792 (E.D.N.Y. 1989); *Abbate* v. *United States,* 359 U.S. 187 (1959); *Chapman* v. *United States Department of Health and Human Services,* 821 F.2d 523 (10th Cir. 1987); and *United States* v. *Lanza,* 260 U.S. 377, 382 (1922)). Under this doctrine, States are considered to be a "separate sovereign" from the Federal government, because a State's power to prosecute is derived from its own inherent sovereignty, and not from the powers of the Federal government (see *United States* v. *Wheeler,* 435 U.S. 313, 320 (1978)). Thus, under the dual sovereignty doctrine, exclusions based upon prior State convictions do not violate the double jeopardy clause. In light of the foregoing, we do not agree with the comments on the question of the constitutionality of our exclusion authorities.

IV. Specific Comments on the Proposed Regulations

A. Part 1001, Subpart A—Definitions

1. Professionally Recognized Standards of Health Care

Comment: A few commenters expressed the view that the proposed definition of "professionally recognized standards of health care" inadequately defines the term, that is, it does not (i) adopt traditional malpractice standards, (ii) define "peer," and (iii) take into account differences of opinion among physicians regarding practice standards. Some commenters also felt that the definition should specifically recognize and make allowances for variations in regional or local community standards of care, that is, different standards for rural and urban areas.

Response: We recognize that the proposed definition of "professionally recognized standards of health care" does not provide a litmus test which can be easily applied in every case. It would be very difficult to formulate a wholly objective standard in the area of medical practice, where a certain amount of subjectivity in judgment is inevitable. The OIG relies upon the Utilization and Quality Control Peer Review Organizations (PROs) and the Medicare carriers to determine on a case-by-case basis whether the quality of items or services provided has failed to meet professionally recognized standards of health care. (PROs are also required to take interventions other than sanctions for confirmed quality problems.) We do not feel that it is necessary to define the term "peer," but would note that the dictionary defines a peer as one's "equal," and our assessment of who qualifies as a "professional peer" would be consistent with that definition and with the view expressed by Congress in enacting the PRO statute that licensed physicians "practicing in the area" are peers (see House Conf. Rpt. 97–760).

Note: HCFA published a final rule on February 27, 1984 (49 FR 7202) which defined a PRO area to be a State.

With respect to the request that the regulations specifically provide for variations in standards for individual localities and service areas, we have decided not to modify the definition. However, while the definition will continue to provide that the standards will be state or national ones, that does not mean that those health care facilities with minimal technical capability and expertise will be evaluated as if they were high-tech facilities. The quality of the care provided will be assessed in light of all of the surrounding circumstances, including the capabilities of the facility. For example, in a facility with limited technical equipment or expertise, we would assess whether a patient who required more sophisticated treatment than was available at that facility should have been transferred to another facility, and whether professionally recognized standards were met in determining whether transfer was appropriate and that appropriate care was rendered to facilitate the transfer.

Comment: One commenter pointed out that the definition of "professionally recognized standards of health care" is too narrowly drafted and should be modified to encompass "professional peers of the individual and entity." This commenter also raised a number of related questions about the interpretations and use of this definition in evaluating the quality of care provided by nursing homes where, according to the commenter, the standards governing the industry are primarily regulatory, not peer-based. The commenter asked, for example, whether this definition meant to encompass citations for "substandard care" issued against nursing homes under State and Federal survey and certification guidelines. The commenter states that citations by regulatory agencies which require corrective actions on the part of nursing homes are extremely common and do not normally result in exclusion. The commenter further suggested that nursing homes could be deterred from seeking voluntary accreditation from the Joint Commission for Accreditation of Healthcare Organizations (JCAHO) if failure on the part of an accredited nursing home to meet any of JCAHO's standards, which differ in some respects from state and federal regulatory standards, could be taken as failure to meet "professionally recognized" standards.

Response: We agree that the definition should be modified to include the word "entity," and we have amended the regulations accordingly. With respect to the commenter's concerns about the application of this definition to nursing homes and the potential liability of nursing homes under § 1001.701 of these regulations, the following explanation may be helpful. The Inspector General has the legal authority to exclude all kinds of health care providers, including nursing homes, if they fail to furnish items or services which meet "professionally recognized standards of health care." However, in the case of nursing homes, we anticipate that problems related to quality of care would ordinarily be investigated by HCFA which could, if necessary, take action under its authority to terminate provider agreements. We would expect that the vast majority of citations against nursing homes for violations of quality of care would be handled by the State survey and certification agencies or by HCFA, and the Inspector General would not normally be involved. When the OIG chooses to investigate quality of care problems in a nursing home, hospital, laboratory, or other entity, however, it first needs to determine whether the entity has failed to comply with professionally recognized standards of health care. In making such a determination, the OIG would look to Federal and State statutory and regulatory standards and to those standards established by voluntary accrediting organizations such as JCAHO. (The OIG would look to these standards to determine whether the

entity in question was accredited by such an organization.) Previous citations against the entity for violation of any of these established standards, if serious and substantial, could be evidence that the entity has violated professionally recognized standards of health care. However, consistent with our practice in developing cases under section 1128(b)(6)(B) of the Act, the OIG would normally not propose an exclusion based on an isolated instance, but would look for a pattern of poor quality care which might be evidenced by a series of citations by standard-setting agencies and monitoring organizations. The OIG's exclusion authority under section 1128(b)(6)(B) of the Act is a permissive authority, and before the Inspector General decides to exercise it, the OIG would do an independent evaluation of the care provided by the entity rather than rely solely on prior citations. (For further discussion of OIG's practice in such cases, see comment and response section in section IV.C.2. of this preamble regarding § 1001.701.)

Comment: One commenter objected to what it termed a "conclusive presumption" set forth in this definition, that is, when the Food and Drug Administration (FDA), PHS or HCFA have declared a treatment modality not to be safe and effective, those who employ it will be deemed not to meet professionally recognized standards of health care. The commenter suggested that this might unfairly restrict practitioners from using a treatment modality which has been declared not safe and effective for one purpose, even though the practitioner might want to use it for a different purpose about which FDA, PHS and HCFA have taken no position.

Response: We disagree with the comment and have retained this portion of the definition intact. If a practitioner can show that none of the specified agencies found the treatment modality in question to be unsafe or ineffective for the purpose for which the practitioner used it, the usage of the treatment modality would not cause the practitioner to be deemed to have violated professionally recognized standards of health care.

2. Convicted

Comment: Several commenters questioned the use of the word "dismissed" in paragraph (a)(2) of the definition of "convicted" as an unwarranted diversion from the statutory definition, and because dismissal of charges typically occurs either before judgment or upon acquittal, not subsequent to a conviction. These commenters also objected to defining a judgment as a conviction when a post-trial motion is pending, since the motion could result in the overturning of the judgment.

Response: We agree that the term "dismissed" was not the appropriate term, and have changed the regulatory language to "otherwise removed" to clarify that this is meant to apply only to actions that are equivalent in effect to expungement, but called something different. With respect to applying the definition even when a post-trial motion is pending, we disagree with the comment. Just as Congress did not intend to tie our hands postponing exclusions while appeals are pending, we are similarly not constrained to delay exclusions while post-trial motions are pending. Any post-trial motion which is resolved quickly will, as a practical matter, be resolved prior to any exclusion, since there is some lag time before the OIG is made aware of convictions and can take action to impose an exclusion. If the post-trial motion is not able to be resolved quickly, then the exclusion will be imposed, but the individual or entity will be retroactively reinstated if the motion results in the conviction being vacated or reversed. (See § 1001.3005 of these regulations for further discussion.)

3. Entity

Comment: Several commenters requested that we add a definition of the term "entity" to the regulations that would limit the scope of the term to the "actual offender" who holds the provider number, and would specifically exclude from the definition a parent corporation when one of its subsidiary facilities (such as a laboratory, nursing home, or dialysis center) is excluded.

Response: We have decided not to define "entity" in these regulations. In our view, the OIG has the discretion to exclude any offender, and the corporate structure of an entity or group of entities will be one factor to consider when determining who or what the offender is. Depending upon the nature of the offense and the scope of involvement by various parties, the OIG could elect to exclude the parent corporation, the subsidiary, or both. Even if the offense itself was committed by just one of the facilities owned by a parent corporation, if the parent corporation was convicted of the offense along with its subsidiary, and if it was aware of the practices of its subsidiary, or encouraged them, the OIG might elect to exclude both the parent and the subsidiary. However, absent some evidence of involvement or knowledge on the parent of the parent corporation, the OIG would normally exclude only the offending facility rather than an entire chain of facilities. (See discussion of § 1001.1001 below in section IV.C.2. of this preamble.) Of course, with respect to all of the OIG's derivative exclusion authorities (§§ 1001.101, 1001.201, 1001.301, 1001.401, 1001.501, 1001.601, 1001.1401, and 1001.1501), the OIG has authority to exclude *only* those entities against whom action has previously been taken by a court, licensing board, or other agency.

4. Sole Community Physician

Comment: Some commenters suggested that the proposed definition was unnecessarily limited to designated health manpower shortage areas, and failed to address the specific need for access by Medicare and Medicaid beneficiaries to providers and practitioners who will accept such beneficiaries.

Response: We agree with these comments. Accordingly, we have revised the definition to eliminate the health manpower shortage area limitation, and to ensure that even if other physicians or providers in the community provide the same services as an excluded physician or provider, if the excluded party is the only one practicing in a recognized service area who participates in either Medicare or Medicaid, that individual will meet the terms of the definition and be eligible for waiver on those grounds.

For purposes of both this definition and the definition of "sole source of essential specialized services in the community," the OIG will look at the services offered by providers and physicians in a recognized service area to determine whether other individuals or entities are providing the same services. The OIG will consider any relevant information regarding the scope of the service area, which in some cases may be comprised of an entire town and in other cases may only consist of a small community within a much larger city. In determining what constitutes the service area, the OIG will give a great weight to objective measures where available, such as a breakdown by zip code area of patients served or a demonstration of geographic boundaries that self-define a service area. Where the service area is in dispute, the OIG will also seek advice from the State health agency in making its final determination.

5. Criminal Offense Related to the Delivery of an Item or Service

Comment: One commenter requested that we define by regulation the phrase

"criminal offense related to the delivery of an item or service" as used in § 1001.101 of these regulations. The commenter expressed the view that the phrase, which serves as the basis for mandatory exclusions, is too ambiguous, particularly in light of the mandatory 5-year exclusion.

Response: We have decided not to define this term. This term has served as the basis for exclusions from Medicare and Medicaid for many years and the absence of a definition of the term has not posed any serious problems. The OIG assesses each conviction on a case-by-case basis to determine whether it falls within the ambit of the statutory language—that is, whether it is related to the delivery of an item or service under one of the programs—and each of those determinations is quite fact-specific. We believe that it will continue to be more effective to make these determinations on a case-by-case basis than to attempt to define the phrase further.

B. Part 1001, Subpart B—Mandatory Exclusions

Comment: Some commenters believe that mandatory minimum five-year exclusions may violate the Eighth Amendment bar against cruel and unusual punishment because they may be disproportionate to the underlying crimes committed.

Response: We do not agree. Exclusions, whether mandatory or permissive, do not invoke the Eighth Amendment prohibition against "excessive bail, excessive fines, and cruel and unusual punishment." As discussed earlier in this preamble, it is well-established that exclusions are remedial sanctions that serve a remedial purpose. The Eighth Amendment applies only to criminal punishments and not to civil sanctions (see *Ingraham* v. *Wright*, 430 U.S. 651 (1977); *Bell* v. *Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979); *Stamp* v. *Commissioner of Internal Revenue*. 579 F.Supp. 168, 171 (N.D. Ill. 1984); *Popow* v. *City of Margate*, 476 F.Supp. 1237 (1979)). Further, at least one court has held that civil sanctions disqualifying individuals from receiving certain benefits based on prior convictions do not violate the Eighth Amendment, even when they apply automatically to all offenders without regard to the circumstances of the offense (see *Blout* v. *Smith*, 440 F.Supp. 528 (M.D. Pa. 1977)). Finally, in enacting section 1128(a) of the Act, Congress has required the OIG to exclude individuals or entities convicted of certain offenses for at least five years, and § 1001.101 merely implements that provision. For all of the foregoing reasons, the OIG is not accepting this comment.

Comment: One commenter expressed concern that the language of § 1001.101 gives the OIG independent authority to review criminal convictions to determine whether such convictions resulted in patient abuse or neglect. This commenter believes that a body such as a licensing board or a peer review organization, rather than the OIG, should conduct a medical-type review to determine whether a conviction entailed patient abuse or neglect.

Response: Section 1001.101 simply parrots the language of section 1128(a)(2) of the Act. As is evidenced by its legislative history, Congress intended for section 1128(a)(2) to give the Secretary the authority to protect Medicare and the State health care program beneficiaries from individuals or entities that have already been tried and convicted of offenses "which the *Secretary* concludes entailed or resulted in neglect or abuse of other patients * * * ." (emphasis added) (see S. Rep. No. 100–109, 100th cong., 1st Sess. 6). Thus, whether or not an individual or entity has been convicted of a criminal offense "relating to neglect or abuse of patients in connection with the delivery of a health care item or service" is a legal determination to be made by the Secretary based on the facts underlying the conviction. Further, the offense that is the basis for the exclusion need not be couched in terms of patient abuse or neglect. For example, an individual convicted of embezzling a nursing home's funds may be excluded if the OIG determines that the offense resulted in the abuse or neglect of patients, i.e., that as a result of the offense, the facility was underfinanced to the point that the residents could not be properly cared for. Further, it is clear from the language of the statute and its legislative history that the OIG may exclude an individual convicted of an offense related to patient abuse or neglect irrespective of whether the individual intended to harm patients.

Comment: Several commenters were confused as to what offenses are included in the phrase "criminal offenses related to the neglect or abuse of a patient" within the meaning of § 1001.101, and requested that we define the phrase or give examples. These commenters said their confusion was compounded by additional language in § 1001.101 requiring an exclusion where a conviction "entailed, or resulted in, neglect or abuse of patients."

Response: Section 1128(a)(2) of the Act authorizes the Secretary to exclude "any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service." Section 1001.101 states that an offense "related to the neglect or abuse of patients" includes "any offense that the OIG concludes entailed, or resulted in, neglect or abuse of patients." This language is the same language used by Congress in the legislative history of section 1128(a)(2) of the Act. We have chosen to put this language in the regulation because we believe it makes it clear that it is in the OIG's discretion to determine whether a conviction is related to patient abuse or neglect, as discussed above. We also believe that Congress used this language in the legislative history to expand upon the types of offenses it meant to include in enacting section 1128(a)(2).

We have chosen not to define which offenses "relate to" or "entail or result in" neglect or abuse of patients. Since a determination as to whether an offense related to patient abuse or neglect is fact-intensive, we feel it is most appropriate for the OIG to exercise its authority to make such determinations on a case-by-case basis.

C. Part 1001, Subpart C—Permissive Exclusions

1. General Comments

Comment: Commenters indicated that the regulations should include a list of factors that the OIG will use in determining whether to impose a permissive exclusion.

Response: Our experience has shown that situations which could result in the imposition of a permissive exclusion are extremely varied and must be evaluated on a case-by-case basis. Some of these factors include controlled substance abuse history, criminal history, and prior experience with the programs. However, the statute vests the Secretary with complete discretion, and does not require us to set forth the precise criteria which will be used in determining whether to impose a permissive exclusion.

Comment: Several commenters stated that, prior to imposing a permissive exclusion, the OIG should have to prove that allowing continued program participation would harm beneficiaries.

Response: The purpose of these permissive authorities is to protect Federal and State health care programs and their beneficiaries. The OIG always considers whether continued participation presents a risk to the programs or their beneficiaries in deciding whether an exclusion is

warranted. However, this determination is within the OIG's discretion. Further, it is not necessary for the OIG to prove that allowing continued program participation would harm beneficiaries since that is not the only basis for the imposition of an exclusion.

Comment: A number of commenters stated that §§ 1001.201, 1001.301, 1001.401, 1001.701 and 1001.801 should not include a 5-year "benchmark" length for an exclusion. In contrast to the mandatory exclusions, where Congress expressly set forth a minimum 5-year term, Congress did not set a minimum exclusion length for the permissive authorities. The commenters argued that Congress indicated that these kinds of offenses should not be treated as harshly as the mandatories since Congress did not require the Secretary to exclude providers in these circumstances.

Response: Upon careful consideration of the comments and further research, we have decided that a 3-year benchmark for permissive exclusions is more appropriate than the proposed 5-year benchmark. A 3-year benchmark is consistent with the period established by regulation for government-wide debarments and suspensions from nonprocurement contracts, grants and the like, including those debarments and suspensions imposed by HHS (see 45 CFR 76.320). (It is also consistent with longstanding regulations governing the period of debarments in the government procurement context (see 48 CFR 9.406–4)).

Periods of debarment and suspension from HHS programs under 45 CFR 76.320 are determined much the way exclusion periods for permissive exclusions will be determined under these final regulations. Section 76.320 provides the "[d]ebarment shall be for a period commensurate with the seriousness of the cause(s). Generally, a debarment should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed * * *." Similarly, the 3-year benchmark concept established in these exclusion regulations requires the Secretary to evaluate the seriousness of the violation upon which the exclusion is based by considering whether there are mitigating or aggravating circumstances which should serve to shorten or lengthen the exclusion period and permitting the Secretary to adjust the period accordingly. In practice, this means that no permissive exclusion period will exceed 3 years unless aggravating circumstances exist to justify a longer exclusion period.

Both the 3-year benchmark and the process for adjusting it are consistent with the methods already in use by the Department for determining debarment and suspension periods, and we believe that it is reasonable for our regulations to take the same approach. We have, therefore, modified these regulations accordingly.

Comment: Some commenters expressed the opinion that the OIG will never use these authorities to exclude a hospital, thus making the regulations applicable only to certain types of providers.

Response: A hospital can and will be excluded if the circumstances warrant that exclusion. However, the OIG must consider all the circumstances in determining whether an exclusion is appropriate in any case, including cases involving hospitals. Certain factors, such as access of program beneficiaries to services, may weigh against imposing an exclusion on hospitals but may be less significant in evaluating possible exclusions of other types of providers.

Comment: A number of commenters indicated that exclusions which relate to Medicare billing violations should be withdrawn because Medicare billing rules are so complex.

Response: It is the obligation of anyone doing business with the Medicare program to understand relevant Medicare rules of reimbursement. However, these authorities are permissive, and OIG does not intend to impose exclusions in cases involving isolated, legitimate confusion with the Medicare rules.

2. Permissive Exclusions

• *Section 1001.201*

Section 1001.201 implements the OIG's authority to exclude an individual or entity convicted of, among other things, a criminal offense in connection with the delivery of any health care item or service. We have clarified that this authority allows the OIG to exclude a person who was convicted of an offense involving the performance of management or administrative services relating to the delivery of such items or services.

Comment: Commenters indicated that the regulations should state that the OIG may exclude anyone who enters a pre-trial diversion program, regardless of whether there was an admission of guilt.

Response: The statute permits the imposition of an exclusion on any individual or entity that has been "convicted." Section 1128(i) of the Act contains a broad definition of "convicted," and we are bound by this definition. (See discussion regarding § 1001.102 in section IV.C.1. of this preamble.) "Pre-trial diversion" is defined differently in different States. If a "pre-trial diversion program" satisfies the statutory definition of "convicted", then a party who enters into a pre-trial diversion program may be excluded.

• *Section 1001.301*

No comments specific to this provision were received.

• *Section 1001.401*

This section permits the OIG to exclude anyone who has been convicted of a criminal offense relating to a controlled substance. We have modified this regulation to clarify that the operative definition of the term "controlled substance" will be the definition that applies to the law that forms the basis for the conviction. For example, if an individual is convicted of a Federal offense, the operative definition would be the definition of a controlled substance under Federal law. If the individual was convicted, for example, of a criminal offense under New York State law, the determination of whether the conviction related to a controlled substance will be determined by whether the substance is defined as controlled under the New York criminal code.

Comment: Some commenters stated that the regulations should be expanded to permit the OIG to exclude someone for illegal possession of a controlled substance.

Response: Section 1128(b)(3) of the Act sets forth the types of convictions relating to controlled substances that may serve as the grounds for an exclusion. Since section 1128(b)(3) of the Act does not state that the OIG may exclude someone based on a conviction for possession, expanding the regulation as suggested is beyond the scope of our statutory authority.

• *Sections 1001.501 and 1001.601*

These regulations implement sections 1128 (b)(4) and (b)(5) of the Act. Both of these authorities permit exclusion of an individual or entity on the basis of the actions of another agency, e.g.; where a State medical society revoked a practitioner's license, or where a provider was suspended from a State health care program. We consider these agencies to be "derivative agencies," since we derive the right to impose an exclusion from their actions. We have modified § 1001.501 to provide that exclusions may be imposed for periods of time shorter than the period for which the license was lost and to allow for early reinstatement, in cases where another State, fully apprised of the circumstances surrounding the loss of

the license, grants the practitioner a new license or takes no significant adverse action as to a current license. We have also revised § 1001.501 to state that loss of a license includes the loss of the right to apply for or renew a license, as provided in section 6411(d) of the Omnibus Budget Reconciliation Act of 1989. We have modified § 1001.601 to provide that exclusions will be for a period of 3 years unless specified aggravating or mitigating factors form a basis for lengthening or shortening that period. We have also clarified § 1001.601 to state that the OIG will normally not consider a request for reinstatement until the period of exclusion imposed by the OIG has expired. Once the OIG has reinstated the party, the Federal or State health care program that originally imposed the sanction will be free to reinstate the party.

Comment: Commenters stated that the regulations provide that the OIG may impose an exclusion for a longer length of time than the penalty imposed by the derivative agency. One commenter argued that it is inappropriate to allow for an exclusion to be longer than that imposed by the original sanctioning body, especially since a provider cannot collaterally attack the basis for the first action.

Response: We anticipate that in the vast majority of cases, the length of the exclusion imposed by the OIG will parallel the length of time imposed by the original sanctioning body. However, there may be circumstances where the OIG finds that the derivative body did not adequately consider the potential harm that the individual's or entity's actions could have on Medicare or the State health care programs. In those cases, the OIG must have the discretion to extend an exclusion so as to adequately protect the programs and their beneficiaries. Section 1128(c) of the Act, which governs the length of exclusions, does not restrict exclusions imposed under sections 1128 (b)(4) or (b)(5) to the length imposed by the derivative body.

Comment: Several commenters stated that §§ 1001.501 and 1001.601 should provide that someone who suffers a license revocation, exclusion, or other action covered by these provisions will automatically be excluded from Medicare and the State health care program.

Response. In contrast to the mandatory exclusions, Congress vested the Secretary with the discretion and the responsibility to determine whether it is appropriate, based on the particular circumstances, to exclude the sanctioned individual or entity from Medicare and the State health care programs. To treat these exclusions as automatic, i.e., as mandatory exclusions, would be inconsistent with that authority.

Comment: A number of commenters indicated that § 1001.501 should allow for an exclusion where restrictions are imposed that curtail use but do not result in the license being lost entirely, such as prohibiting a physician from performing surgery except under supervision.

Response: Section 1128(b)(4) of the Act specifies that someone may be excluded because a license has been suspended, revoked, surrendered or otherwise lost. We do not have the statutory authority to expand this regulation as suggested by this comment.

Comment: Commenters pointed out that it is not necessary to provide for an exclusion where someone has surrendered his or her license since the individual or entity would automatically be precluded from rendering services.

Response: An individual or entity may lose a license in one State, but that alone would not preclude that individual or entity from rendering services in another State, if licensed there. An exclusion from Medicare or Medicaid, for example, would have nationwide applicability, so that individual or entity could not receive payment from Medicare or Medicaid for rendering services to any program beneficiary, regardless of where that beneficiary is located.

Comment: One commenter stated that an individual or entity that surrenders a license should not have to go through the procedures of requesting reinstatement if and when the license is regained.

Response: In granting the Secretary the authority to exclude based on surrender of a license, Congress recognized that licenses are often surrendered because of serious underlying problems. Surrender does not mean that the basis for the loss of the license is any less serious than if the license was revoked. Consequently, we do not believe that cases of surrender should be treated any differently than other cases where a license was lost.

Comment: Several commenters indicated that in cases of surrender, the regulations exceed congressional intent by allowing for exclusion where someone surrenders a license for a minor infraction while not allowing the practitioner to challenge the reasonableness of the disciplinary action. Congressional intent shows that the critical factor in determining whether to exclude someone is not merely surrender, but whether the practitioner intended to evade scrutiny by surrender. These commenters felt that the regulations should set forth the factors that will be used to determine whether exclusion in surrender cases is appropriate.

Response: These regulations consistent with the statute, do not permit exclusion in all cases of surrender, but only in those cases where surrender occurs while a disciplinary proceeding concerning professional competence, professional performance or financial integrity is pending. Thus, exclusions will not be imposed in cases where licenses are surrendered for violations which do not fall in these categories. To the extent a ministerial violation arguably fall within these categories—for example, one could argue that failure to pay annual dues relates to financial integrity—the OIG will exercise its discretion as to whether an exclusion is appropriate. We decline to include a list of factors to be considered in determining whether to impose an exclusion in licensure cases as this will vary depending on the unique circumstances of a particular case.

Comment: One commenter stated that exclusions should not be imposed in cases where a license is lost until the practitioner has the opportunity for judicial review of the underlying action which caused the loss of license

Response: We disagree. The regulations are consistent with statutory authority. Often, judicial review occurs a substantial period of time after the original action. Since an independent body has made a determination regarding this practitioner, we believe it is preferable to give controlling weight to the derivative body's conclusions and exclude the practitioner, to protect the program and beneficiaries, consistent with the purposes of the exclusion authorities.

Comment: According to some comments received, the definition of "or otherwise sanctioned" that was included in the preamble to the proposed regulations should be incorporated in § 1001.601.

Response: We agree and have included a definition of this term in the regulations to explain that it includes any actions that limits the ability of a person to participate in the program at issue. We have also clarified that this includes situations where an individual or entity voluntarily withdraws from program participation solely to avoid a formal sanction, for example, by agreeing to withdraw in order to avoid prosecution or exclusion

Comment: Commenters stated that the OIG should not exclude an individual or entity under § 1001.601 when the original sanctioning agency did not itself exclude the individual or entity. These commenters indicated that the regulations wrongly assume that the basis of the derivative sanction was serious when in reality a provider may choose not to contest a minor sanction simply to avoid further confrontation.

Response: We have clarified the scope of § 1001.601 by incorporating in the regulations a definition for the term "or otherwise sanctioned" to cover all actions that limit the ability of a person to participate in the program. This definition will ensure that OIG exclusions will be based only on prior sanctions that were significant in nature.

Comment: A number of individuals indicated that the terms "professional competence," "professional performance" and "financial integrity" are too vague. Commenters questioned whether these terms would include, for example, a deficiency in a facility's conditions of participation.

Response: We decline to further define these terms, and believe that whether someone's professional competence, professional performance or financial integrity are implicated must be determined based on all the circumstances. However, the fact that this authority can only be used in cases where someone's program participation has been curtailed militates against the concern that someone would be excluded for insignificant violations. In addition, this authority is permissive, and the OIG can and will exercise its discretion in determining whether a particular violation warrants the severe penalty of exclusion.

Comment: Commenters felt that the OIG should consult with a sanctioning agency before imposing an exclusion, rather than providing notice after the fact.

Response: By its delegated statutory authority, the OIG has full discretion to decide whether to impose a permissive exclusion, and need not consult with third parties including the original sanctioning bodies. However, we would note that in specific cases, the OIG may decide to contact the original sanctioning body to obtain relevant information or guidance in deciding whether to impose an exclusion.

● *Section 1001.701*

Comment: Several commenters pointed out that the proposed regulatory language in § 1001.701(a)(1) did not comport with the statutory language which specifies that the point of reference is "such individual's or entity's usual charges or costs."

Response: We agree with these concerns, and have amended the regulatory provision accordingly.

Comment: A number of commenters suggested that the exception in § 1001.701(b)(2), permitting the furnishing of items or services in excess of the needs of individuals under certain circumstances when such items or services were ordered by a physician, is too narrow and should be expanded to include those situations where the item or service was ordered by a health care professional other than a physician, such as a nurse practitioner or a clinical psychologist.

Response: We agree, and have amended the regulation to include a physician or other authorized individual.

Comment: One commenter pointed out that although current regulations specify the sources of information that the OIG will look to in making a determination that items or services provided were in excess of the needs of individuals or of a quality that fails to meet professionally recognized standards of health care (§ 1001.101(b)), the proposed rule did not include such a provision. This commenter suggested that the final regulations should contain a similar list of information sources.

Response: We agree. This provision was inadvertently omitted from both §§ 1001.701 and 1001.801 of the proposed regulations. We have added provisions specifying sources of information to both sections in this final rule.

Comment: A number of commenters asked that we define the phrase "substantially in excess of the patient's needs," and one commenter suggested that we adopt a definition from the Home Health Agency manual. Along the same line, some commenters suggested that we amend the regulations to state that liability under this section requires a pattern of abuse, or a showing of repetitive violations. One commenter expressed the view that § 1001.701(a)(2) should never be a basis for exclusion since no standards exist for determining whether care is substandard or unnecessary.

Response: Section 1001.701(a)(2) implements section 1128(b)(6)(B) of the Act, which is a recodification of an authority which the Department has had for many years (section 1862(d)(1)(C) of the Act). We have initiated a number of cases under this authority and can therefore speak from some experience. In our opinion, it is unnecessary to define the phrase "substantially in excess of the patient's needs" or to limit by regulations the OIG's discretion to initiate cases that are not based on a pattern of violations. Before we initiate a case under this authority, the Inspector General makes a determination of liability based on all of the facts available. This determination is always made on the basis of expert medical opinion, usually that of medical reviewers from the Medicare carrier or from the local PRO, and followed up by a review by one of our own medical officers. In fact, cases under this section almost always originate with Medicare carriers or other medical sources who refer the case to the OIG. Thus, on a case-by-case basis, we are in a position to determine whether the care provided was substantially in excess of the needs of the patient.

As evidenced by the legislative history to this section, Congress did not intend that the OIG automatically exclude an individual or entity where the violation was "an isolated or inadvertent instance," but to seek corrective action in such cases. Consistent with this intent, we would rarely propose an exclusion for an isolated and inadvertent instance.

However, if only one or two life-threatening violations were brought to our attention and we determined that imposition of an exclusion under § 1001.701 was the most appropriate remedy, we believe that it is consistent with the intent of the statute for the OIG to retain the discretion under these regulations to initiate an exclusion action, even absent a full-fledged pattern of abuse.

Comment: A number of commenters sought specific clarification of the scope of § 1001.701(a)(2). Their concern related to whether entities such as nursing homes and home health agencies would violate this section if they provided an increased level of services to a patient at the specific request of the patient and at the patient's own expense, e.g., private duty nurses, extra home health services not reimbursable by Medicare, or private rooms.

Response: Section 1001.701(a)(1) is not intended to subject to liability those who furnish an increased level of care to a patient who has been informed that such care is not medically necessary and that neither Medicare nor a State health care program will reimburse such services, but who chooses to purchase such services at his or her own expense. For purposes of determining liability under this provision, such services would not be viewed as "substantially in excess of the patient's needs."

Comment: Some commenters requested clarification of the breadth of the exception set forth § 1001.701(c)(2). Specifically, they expressed concern

about liability of laboratories and of suppliers for items or services that are provided and later determined to be unnecessary or excessive.

Response: In general, the exception in paragraph (c)(2) of this section will protect such laboratories and suppliers from liability. However, we are aware that some suppliers have conspired with physicians to obtain certificates of necessity for items or services in order to defraud the Medicare program. If, as in that sort of situation, a supplier was in a position to know that the items or services were not necessary, § 1001.701(c)(2) would provide no protection from liability. With respect to laboratories, although the exception would normally protect a laboratory from being subject to exclusion for providing unnecessary tests ordered by a physician or other authorized individual, we want to make clear that this does not mean that the laboratory is entitled to be paid by Medicare or State health care programs for such tests. Notwithstanding the paragraph (b)(2) exception, payments made to laboratories for services later deemed to be unnecessary may constitute overpayments under HCFA regulations.

Comment: In the preamble to the proposed rule, we requested comments on whether to define by regulations the terms "substantially in excess" and "usual costs or charges" which are used in § 1001.701(a). That provision authorizes the exclusion of individuals and entities that submit, or cause to be submitted, bills or requests for payment containing charges or costs that are "substantially in excess of" the "usual charges or costs" for such items or services.

We received a number of comments in response to our request, many from the clinical laboratory industry. While most commenters agreed that definitions would be helpful, none were able to suggest feasible ones. One commenter suggested that any definition should take account of the fact that it costs laboratories more to deal with Medicare than to deal with physicians, and should permit Medicare to be charged more. Another commenter suggested that we consider such factors as the geographic area in which the provider operates (cost of overhead) and whether there is a scarcity of practitioners in the area in determining whether to permit higher charges. One commenter felt that the OIG should have to prove intent to overbill Medicare in order to show liability under this provision. Two commenters noted that third-party payors other than Medicare normally allow the highest costs for laboratory services, and suggested that the appropriate comparison in charges is between Medicare and other third-party payors, not between Medicare and physicians. One commenter objected to the application of this provision to laboratories at all.

Response: Upon review of all the comments and further consideration of this issue, we have decided not to define the terms "substantially in excess" and "usual charges or costs" at this time. We recognize that it would be helpful to the public to have some additional guidance on what standards the OIG intends to apply in cases brought under § 1001.701(a)(1). However, in light of the many different factors and variables that may exist in the wide variety of cases which could be investigated under this provision, we have determined that it is not feasible to define the terms by regulation. Instead, the OIG will continue to evaluate the billing patterns of individuals and entities, including clinical laboratories, on a case-by-case basis.

- *Section 1001.801*

Comment: According to some commenters, it was unclear what would be considered a "substantial" failure to provide medically necessary items or services. These commenters indicated that health maintenance organizations (HMOs) should not be sanctioned for denials because an enrollee did not seek required prior approval or where the HMO denies coverage for services provided by a non-plan provider where the HMO determines the services did not meet "emergency" standards, or where medical judgment to not provide the services is made in accordance with the HMO's standard operating policies. A commenter questioned whether this would apply if there was a delay in providing routine services.

Response: In determining whether an exclusion should be imposed, legitimate reasons for denying services will be considered. However, HMOs may use "procedures" as a pretext justification, and it is the OIG's responsibility to evaluate all circumstances to determine whether the HMO properly or improperly failed to provide medically necessary items or services.

Comment: Some commenters believed that the OIG lacks the expertise to determine whether there is a substantial failure to provide medically necessary items or services, and stated that the OIG's decision should be based on medical review by the carrier or the PRO. The comments indicated that the OIG should defer to HCFA and the States, which are primarily responsible for regulation of HMOs, in determining whether an exclusion is appropriate.

Response: We have included in the final regulations the sources on which the OIG's decision to exclude under this authority will be based. These are PROs, State or local licensing or certification authorities, fiscal agents or contractors, private insurance companies, State or local professional societies or other sources deemed appropriate by the OIG. Although the OIG may consider the views of HCFA or a State, or any other entity, the OIG has the delegated authority to impose an exclusion under these circumstances and it is the OIG that must ultimately evaluate the facts to determine if an exclusion is appropriate.

Comment: One commenter asked whether an HMO could be excluded if an independent contractor failed to provide medically necessary services.

Response: Section 1128(b)(6)(C) of the Social Security Act provides that an HMO can be excluded under these circumstances. As a practical matter, we intend to use this authority only where the HMO had sufficient responsibility for this act, e.g., if problems concerning a physician's professional competence had been brought to the attention of the HMO, but it failed to take any appropriate action. Since the HMOs are selecting the service providers, and beneficiaries place their trust in the HMO's ability to select qualified providers, the HMOs must and should take responsibility for their selection. This provision will help assure that this occurs.

Comment: A commenter pointed out that these regulations should state that an exclusion may occur for failure to provide medically necessary services to any persons regardless of whether those persons are covered by Medicare or Medicaid.

Response: Section 1128(b)(6)(C) of the Act provides that this exclusion only applies to a failure to provide medically necessary items or services to individuals who are covered under a Medicaid plan, or a waiver under the Medicaid program under section 1915(b)(1) of the Act, or to individuals covered under a risk-sharing contract under section 1876 of the Act. Thus, it would be beyond our statutory authority to expand this regulation as suggested.

- *Section 1001.901*

Comment: Commenters believed that the statute does not authorize an exclusion where a CMP is not imposed or where a CMP proceeding is not commenced.

Response: Imposition of a CMP is not a predicate to imposing an exclusion under this authority; rather, exclusion is an alternative remedy, to be used instead of or in conjunction with a CMP or criminal proceeding depending on the circumstances. The legislative history to section 1128(b)(7) of the Act states that "[t]he Secretary could exercise this authority to exclude an individual or entity without the necessity of imposing a civil money penalty or obtaining a criminal penalty or obtaining a criminal conviction." (House Report No. 100–85, 100th Cong., 1st sess., 9.)

Comment: Some commenters indicated that if someone successfully defended against imposition of a CMP, those same defenses should apply to bar the imposition of an exclusion.

Response: We agree. If a respondent successfully defends against imposition of a CMP, we would not then impose an exclusion under § 1001.901 based on the conduct at issue in the CMP case.

Comment: One commenter felt that a CMP, rather than an exclusion, should be imposed for a first offense, since a CMP gives the programs a chance to see if corrective action will be taken.

Response: We reject this comment since the OIG has the right and responsibility to exercise its discretion in all cases, including first offenses, to determine whether an exclusion is appropriate.

- *Section 1001.951*

Comment: One commenter urged that the Inspector General recommend that the exemption under section 1128B of the Act for payments to employees be revoked because outsiders cannot compete for the services employees of referring physicians provide.

Response: This issue was addressed at length in the preamble to the OIG "safe harbor" regulations. (See 56 FR 35952, July 29, 1991.)

Comment: One commenter questioned whether violations of the anti-kickback statute would depend on the kind of health care provider involved in the remuneration scheme.

Response: By its term, section 1128B of the Act applies to "whoever" engages in a kickback. The term "whoever" means any individual or entity, regardless of the kind of items or services they provide.

Comment: One commenter proposed that consideration of "[a]ny other facts bearing on the nature and seriousness of the individual's or entity's misconduct" for purposes of determining the period of exclusion was too vague to be evenly applied and, therefore, should be deleted throughout the regulations.

Response: The purpose of such a "catch-all" provision is to afford the decisionmaker some leeway to consider certain highly relevant facts which relate to that particular exclusion. Exactly what these facts might be, other than the fact that they must relate to the "nature and seriousness" of the excluded party's conduct, depends entirely on the particular circumstances of the case. We believe that justice is best served if such leeway is afforded the decisionmaker.

Comment: One commenter suggested that the financial condition of the excluded party should be considered when determining the length of exclusion under §§ 1001.901 and 1001.951.

Response: As we stated in the proposed rule, financial condition is relevant only to the *amount* of a penalty or assessment and not to the *length* of an exclusion. For further discussion, see section IV.D. of this preamble.

Comment: One commenter inquired as to the reason why the aggravating and mitigating factors present in other exclusion authorities were not incorporated in this authority.

Response: Generally, aggravating and mitigating factors are applied to situations where there is either a benchmark period of exclusion or some other specific period of time that would otherwise set the exclusion period. Here, as with § 1001.901, there are no such periods so that it is appropriate to look only at factors that would help determine an appropriate period of exclusion given the particular facts of each case.

Comment: Many commenters objected to § 1001.951(a)(2)(i) which provides that any individual or entity that has offered, paid, solicited or received remuneration as described in section 1128B(b) of the Act is subject to exclusion so long as *one* of the purposes of such remuneration is unlawful under the statute—the so-called "one-purpose" rule. That is, liability could not be avoided by the fact that there may also have been some additional, lawful purpose for the remuneration. Some commenters also asserted that the one-purpose rule is unfairly broad because it would include activities that are nonabusive or beneficial to the Medicare program.

Response: The focus of the inquiry is whether an individual or entity has deliberately and intentionally paid or received remuneration to induce the referral of program-related business. We believe it, if the OIG has demonstrated this conduct, the statute does not require the OIG to further prove that the illegal purpose was the primary factor motivating the conduct. We believe that this broad interpretation of the statute is supported by the courts (see *United States* v. *Greber*, 760 F.2d 68 (3d Cir.) *cert. denied*, 474 U.S. 988 (1985); *United States* v. *Bay State Ambulance and Hospital Rental Service, Inc.*, 874 F. 2d 20 (1st Cir. 1989); and *United States* v. *Kats*, 871 f.2d 105 (9th Cir. 1989)).

With respect to conduct that may technically constitute a violation but that should nevertheless be protected, Congress, in recognition of the broad reach of the anti-kickback statute, provided for the development of "safe harbors." These regulations describe various business and payment practices that, although they violate the anti-kickback statute, will not be treated as criminal offenses under section 1128B(b) of the Act and will not serve as a basis for a program exclusion under section 1128(b)(7) of the Act. (See section 14 of Public Law 100–93.) For further discussion on the reach of the anti-kickback statute, we recommend that individuals refer to the "safe harbor" regulations (56 FR 35952, July 29, 1991).

Comment: One commenter recommended that we include in § 1001.951 a provision that proof that a lawful purpose existed for an otherwise unlawful kickback could provide a basis for decreasing the length of exclusion.

Response: Although we suggested in the preamble of the proposed rule that there are circumstances where a lawful purpose for the remuneration may lead to a reduction in the proposed period of exclusion, in most cases we believe that it would not and should not. Consequently, we believe that such arguments are best considered under § 1001.951(b)(iv) which provides for consideration of "[a]ny other facts bearing on the nature and seriousness of the individual's or entity's misconduct."

- *Section 1001.1001*

This section permits the exclusion of entities that are owned or controlled by an individual who has been criminally convicted, has had CMPs imposed on him or her, or who has been excluded from Medicare or a State health care program.

Comment: One commenter suggested that this provision violates the due process requirements because there is no rational relationship between the acts of the individual and the entity. One commenter expressed concern that an entity could be excluded when it did not even know that an individual was sanctioned. Another commenter stated that the entity should have an opportunity to cure the problem prior to exclusion, and one commenter

questioned whether an entity could do this based on §§ 1001.3002(c) (1) and (2), which provide that an entity will be reinstated when it shows that it has terminated its relationship with the sanctioned individual. Another commenter argued that if the individual has not been excluded from Medicare or the State health care programs, that the entity should not be excluded either.

Response: In accordance with section 1128(b)(8) of the Act, the Secretary is authorized to exclude any entity in which a person with an ownership or controlling interest, or an officer, director, agent or managing employee, has been sanctioned for certain program-related offenses. The regulations merely implement the OIG's authority in accordance with section 1128(b)(8). The purpose of this provision is to ensure that the programs do not indirectly reimburse excluded individuals through payments to entities that they control or own or with which they have any significant relationship. Further, section 1128(b)(8) of the Act should encourage entities to scrutinize the background of individuals with whom they plan to embark on a significant relationship before they hire the individual or grant him or her a controlling interest. Thus, excluding an employer who has a significant relationship with any individual who has been sanctioned for program-related offenses is rationally related to the goal of protecting the Medicare and Medicaid programs.

Moreover, in these cases, the OIG will always issue a letter prior to imposing the exclusion that notifies an entity of the OIG's intention to exclude it because of its relationship with a sanctioned individual. This letter states that the entity may supply the OIG with any mitigating information. Thus, the entity is always given an opportunity to cure the situation, such as by terminating its relationship with the sanctioned individual, and notifying the OIG of that fact before the OIG makes a final decision as to whether to exclude the entity.

If an entity, after receiving the OIG's notice of intent to exclude under § 1001.2001, can prove that it has terminated or modified its relationship with the sanctioned individual in accordance with the conditions of §§ 1001.1001(c) (1) or (2), that individual would not be excluded by the OIG. Similarly, the OIG will reinstate an entity as soon as it determines that the sanctioned individual no longer has the proscribed relationship with the entity (§§ 1001.3001(c) (1) and (2)). Thus, it would be extremely unlikely that the OIG would exclude an entity which, when notified of its problematic relationship with a sanctioned individual, promptly severed it.

Comment: Commenters expressed concern about how the term "entity" would apply to a corporation with many subsidiaries. In a case where one subsidiary had a relationship with a sanctioned individual, commenters questioned whether only the subsidiary would be excluded, or whether all parent and related corporations could be excluded. Commenters argued that this broad interpretation would simply lead to unnecessary restructuring of entire organizations to insulate the entire entity. Commenters further recommended that the exclusion be limited to the corporate site involved, or that the OIG should have to prove that the entire entity actively encouraged or knowingly tolerated the offending behavior.

Response: The statute contemplates excluding an entity that has a substantial relationship with a sanctioned individual. While it may often be possible to target only one offending subsidiary or site for exclusion, we believe that there are situations where an entire corporate entity may be found to have a substantial relationship with one individual who deals primarily with one of its subsidiaries. In deciding whether to exclude an entire corporate network or one isolated subsidiary, we intend to evaluate the nature and extent of the relationship and determine what parties were actually at fault for engaging in a relationship with a sanctioned individual, as well as which entities the sanctioned individual actually controls. The OIG will always consider whether the interests of the programs and their beneficiaries are furthered by excluding an entire corporate network.

Comment: The statute and regulations provide for the exclusion of an entity whose agent is a sanctioned individual. Commenters expressed concern as to whether "agent" includes even low-level employees or independent contractors and argued that, to trigger an exclusion, the "agent" should have a substantial relationship with the entity.

Response: We agree that the term "agent" is vague and therefore have included in the final regulations a definition of "agent" essentially modeled after a definition set forth in HCFA regulations (42 CFR 455.100) which implement section 1126 of the Act, which is referenced in section 1128(b)(8)(A)(ii) of the Act. We are defining "agent" as anyone who has the express or implied authority to obligate or act on behalf of an entity. We intend for this to apply to agency relationships where the agent has, or is able to have, a significant role in the entity. For example, this definition includes a situation where an excluded individual transferred control of an entity to his or her spouse, but still, in fact, acts on behalf of the entity or exercises some control over the entity. In such a case, the excluded individual would be an agent because he or she would have, at a minimum, the implied authority to act on behalf of the entity. Of course, it is not necessary to prove that someone is an agent if that person falls into another category of enumerated relationships. Thus, in the example cited above, if a State has community property laws, it may be possible to exclude the entity because the excluded spouse still has a legal ownership interest in the business, regardless of whether that spouse meets the definition of "agent."

Comment: Some commenters stated that this provision is overly broad and should be restricted to only those cases where the sanctioned individual exercises control over the day-to-day operations of the entity.

Response: We disagree with this comment. The regulations are a proper interpretation of statutory authority, and the legislative history establishes that Congress thought ownership alone, or one of the other relationships alone, was enough of a substantial relationship to warrant exclusion. (House Report 100–85, *supra* at 10.)

Comment: One commenter expressed concern that an entity could be excluded because of its relationship with an individual who had to pay a minimal monetary penalty, and suggested that the regulations set forth a minimum penalty that would have to have been imposed before the entity could be excluded.

Response: We take into account the amount of the penalty in determining whether an exclusion is appropriate. However, we believe the most important factor to consider in determining whether to exclude an entity because of its relationship with a sanctioned individual is the circumstances surrounding, rather than merely the amount of, the penalty.

Comment: One commenter questioned whether prohibitions on the various ownership or control relationships set forth in proposed paragraphs (a)(1)(iii)(A)–(F) of § 1001.1001 apply only to individuals who were excluded, or to all sanctioned individuals who were criminally convicted or subject to a CMP, as defined in proposed §§ 1001.1001(a)(1) (i) through (iii).

Response: We have revised the final regulations to make it clear that entities may be excluded for having any of the specified relationships with any sanctioned individual as defined in §§ 1001.1001(a)(1) (i) through (iii). We are also adding the word "ownership" to the first factor in this list of relationships. That term was inadvertently omitted from the proposed regulations and is consistent with section 1124(a)(3) of the Act.

Comment: One commenter questioned our definition of "indirect ownership interest." The commenter stated that since the proposed regulations provide that indirect ownership interest includes an ownership interest through any other entities, use of the term "includes" suggests that the term "indirect ownership interest" covers other relationships that are not specified in the regulations. In addition, the commenter questioned the example given in the proposed regulation that stated that an individual has a 10 percent ownership interest in the entity at issue if he or she has a 20 percent ownership interest in a corporation that wholly owns a subsidiary that is a 50 percent owner of the entity in issue. The commenter argued that the indirect owner may have no control over the actions of the target entity, and stated that it is unclear how ownership would be calculated in a situation which is more complex.

Response: We have modified the final regulations to replace the word "includes" with "means." The example used in the proposed rule was merely illustrative to show that an entity may be excluded if a sanctioned individual has even an indirect ownership relationship, which is consistent with the statute. We recognize that complex situations will require an analysis of the extent of the ownership interest, but this must be determined on a case-by-case basis.

• *Sections 1001.1101 and 1001.1201*

These provisions implement sections 1128(b) (9), (10) and (11) of the Act which permit the exclusion of an individual or entity that fails to disclose certain information, including payment information.

Comment: One commenter argued that exclusions should be imposed only after the subject individual or entity has an opportunity for a hearing before an ALJ.

Response: We do not believe that due process requires a hearing before an ALJ before an exclusion under these regulations is imposed, for the reasons discussed in section IV.F.1. of this preamble. However, § 1001.2001 provides that, prior to exclusion, an individual will receive notice of intent to exclude describing the payment or other information that was not disclosed as requested by the Department, and gives the individual 30 days to comply with the request before the exclusion is implemented. In this way, exclusions will not be imposed for inadvertent failures to comply with statutory or regulatory disclosure requirements, since the subject individual or entity will have an opportunity to cure the problem prior to imposition of exclusion.

Comment: One commenter contended that the regulations give no criteria as to what constitutes a failure to provide information, and that there is no requirement that the request for the information be reasonable, relevant, or that specific information requested be identified. The commenter argued that these regulations violate constitutional rights, and that the regulations should state that the exclusion is applicable only if there is some probable cause or reasonable basis for the disclosure through the OIG's subpoena power.

Response: These regulations provide for exclusion where information is not provided which is already required by statute or regulation, or information which is necessary to determine appropriate program reimbursement. The successful operation of the programs is based, in large part, on the government having access to information. As noted above, an individual will have 30 days to respond before an exclusion is imposed.

Comment: Several commenters expressed concern that an individual or entity would be excluded for declining to provide the information for legitimate reasons, such as the physician-patient privilege.

Response: Much of the information required to be provided in §§ 1001.1101 and 1001.1201 relates to ownership interests or significant business transactions which will not implicate patient records. Moreover, to the extent that patient records are sought, the Federal government's interest in such records supercedes State confidentiality privileges, as discussed later in this preamble. With respect to § 1001.1201, the information being requested is limited to that necessary to determine whether payments should be made and the amount thereof, information that is fundamental to the proper administration of the programs. However, as stated above, an individual will have 30 days to comply prior to imposition of an exclusion (§ 1001.2001(a)). If an individual or entity believes it is unable to provide the requested information, whether on the basis of privilege or other reason, it should notify the OIG of that fact during this 30 day period, and the OIG will consider this information in determining whether an exclusion is appropriate.

Comment: One commenter expressed concern that excluding an individual in accordance with § 1001.1101 for giving a government representative incorrect information is an extraordinary punishment when the individual was unaware that the information was incorrect. Another commenter suggested that the regulations should include a statement made in the preamble to the proposed regulations that the OIG does not intend to take action based on isolated or unintentional failures unless such failures have a significant impact on the program or beneficiaries.

Response: As stated in the preamble to the proposed regulations, the proper administration of the programs depends upon the Department having access to information that is required by statute. However, the OIG does not expect to take action based on isolated or unintentional failures to supply information unless such failures have a significant impact on the programs or their beneficiaries. We believe it is unnecessary to include a statement in the regulations as to the circumstances when the exclusion would be imposed, because it is within the OIG's discretion to determine what failures will have a significant impact on the program or beneficiaries, and when an exclusion is appropriate.

• *Section 1001.1301*

This authority permits the exclusion of individuals or entities who fail, when a proper request has been made, to grant immediate access to the Secretary, State survey agency or other entity for the purpose of conducting surveys and other reviews, or who fail to grant immediate access to the OIG or State MFCUs for the purpose of reviewing documents to determine if a statutory or regulatory violation has occurred.

Comment: Commenters contended that the searches authorized by the regulations are unconstitutional. They argued that warrants should be required, and that the regulations should require that the OIG and MFCUs have probable cause to believe that there is a violation of statutory or regulatory requirements, rather than "information to suggest" a violation.

Response: This Department can request through appropriate channels that a search warrant be obtained. In granting survey agencies, the OIG and MFCUs the authority to gain immediate access to documents or to an institution

by threatening exclusion, Congress plainly intended to grant these entities broader and additional authority that is not subject to the restrictions suggested in the comments. Administrative warrantless searches have been upheld by the Supreme Court (see *New York* v. *Burger*, 482 U.S. 691 (1987); *United States* v. *Biswell*, 406 U.S. 311 (1972)). In *Burger*, the Court set forth the three criteria that must be met in order for such searches to be constitutional: (1) There must be a substantial government interest that informs the regulatory scheme in accordance with the inspection made; (2) the warrantless searches must be necessary to further that scheme; and (3) the statutory scheme must provide an adequate substitute for a warrant. To meet this third criterion, the statutory scheme must be sufficiently comprehensive and defined so that the subject cannot help but know that his or her property will be subject to periodic inspections undertaken for specific purposes, and the statutory scheme must limit the discretion of the government inspectors in terms of time, place and scope. We believe each of these criteria is met through the statute and implementing regulations that are published today.

First, the government interest in the administration of its health care programs is obvious. The government must be able to protect the health and welfare of the beneficiaries of its programs, and must be able to assure that government payments are lawful and appropriate. Quality of care is critical to every program beneficiary, and proper government reimbursement is essential given the escalation of health care costs in our nation and the need for the proper distribution of limited public funds.

Second, warrantless searches are necessary to further the statutory schemes of Medicare and State health care programs. With regard to searches by survey facilities, it is critical that the programs have the ability to evaluate conditions of these facilities to be certain that appropriate care is given. With regard to searches by the OIG and MFCUs, these searches are limited to review of documents necessary to determine if good care is being provided and if government payments are proper. In all of these situations, the process of getting a warrant might alert health care providers of the investigation, and thwart the investigation's goals.

Third, the statutory schemes of Medicare, Medicaid and other programs covered by these regulations are sufficiently comprehensive such that providers can reasonably expect administrative searches, and the restrictions on the discretion of those seeking immediate access in terms of time, place and scope are also reasonable. With regard to searches by survey agencies, all facilities subject to such searches have, by their participation, consented to such surveys, and should reasonably be aware that surveys are part of the statutory scheme. We agree that it is reasonable to limit the scope of a survey to ordinary business hours, but facilities such as hospitals and nursing facilities are open, and are caring for beneficiaries, 24 hours a day, and therefore, must be subject to searches at any time. For example, it may be necessary to conduct a survey in the middle of the night to determine if nighttime staffing is truly adequate.

The places of such inspections are also specified. Inspections may only be made of entities that represent themselves to be specific types of institutions—such as a hospital, home health agency or laboratory—and the types of institutions subject to inspection are clearly delineated in the regulations. Finally, the scope of such searches are also defined, that is, the inspectors may examine the premises and documents that are necessary to allow a survey agency to determine whether that facility meets statutory standards that are specified in the regulations.

With regard to searches by the OIG or MFCUs, by regulation the scope of the searches are narrowly tailored in that they are limited to searches for documents. Everyone who participates in the government health care programs is, or should be, aware by the nature of the detailed statutory and regulatory schemes governing such programs, and the fact that they are entering into a business arrangement with the government, that the government can and must review records relating to their participation in the health care programs. In some cases, this will involve review of records for patients not covered by government programs, but those who participate are aware of the need for government review of the provider's quality of care. Further, the regulatory scheme imposes proper limitations. The regulations provide that the request must be made during reasonable business hours. The searches are limited in place, since they only involve review of records rather than inspections of premises, and they are limited in scope as only involving searches which are necessary for the OIG or MFCUs to fulfill their statutory and regulatory functions.

Requiring access in cases where the OIG or a MFCU has reason to suggest there is a statutory or regulatory violation is a proper implementation of the statute. As the legislative history states, Congress intended that requests for immediate access by the OIG MFCUs "only apply to situations where there is information to suggest that the individual or entity has violated statutory or regulatory requirements under titles V, XI, XVIII, XIX or XX." (House Report 100–85, *supra* at 10.) Moreover, searches where there are "reasonable grounds" to believe a violation of law has occurred have been upheld where they meet reasonable legislative or administrative standards, as is the case here (see *Griffin* v. *Wisconsin*, 483 U.S. 868 (1986)).

Comment: A number of commenters believed that the regulations should state that individuals or entities will not be excluded under § 1001.1301 due to clerical errors in failing to provide information.

Response: Whether exclusion is appropriate will depend on the circumstances surrounding the failure to provide information, and there may be differing views on whether a failure to provide information was truly inadvertent. We decline to include the limitation suggested by the comments in the regulations, but, as a practical matter, the OIG does not intend to use this authority in cases where the failure to provide information was inadvertent. Moreover, a provider can avoid this problem by simply giving the information that was erroneously not provided to the requesting agency at the time the request for immediate access is made.

Comment: Commenters pointed out that any request for immediate access should be based on information that suggests a serious violation of sections 1128A or 1128B of the Act.

Response: Section 1128(b)(12) of the Act does not limit this authority to use only in cases of suspected violations of sections 1128A or 1128B.

Comment: One commenter questioned the Secretary's authority to authorize searches by MFCUs.

Response: The commenter is mistaken. Section 1128(b)(12)(D) of the Act specifically authorizes immediate access to MFCUs. However, by regulation we are requiring that written requests for documents made by MFCUs be signed by the IG or his or her designee.

Comment: Commenters felt that MFCUs should be given immediate access in the same way State survey agencies are.

Response: State survey agencies are not only reviewing documents, but need access to a facility to determine current conditions. Although there is always a risk that documents will be destroyed or altered, the regulations provide that in cases where the MFCU has reason to believe that such destruction or alteration will occur, the MFCU can have on the spot access. Otherwise, we believe it is reasonable to allow providers some period of time to compile and review records. Of course, if it is later determined that a provider altered or destroyed records, the provider may be subject to sanctions, for example, for obstruction of an investigation.

Comment: Commenters stated that while the regulations require access to determine if laboratories meet the requirements of sections 1861(s) (12) and (13) of the Act, these sections do not relate to laboratories.

Response: We have corrected these statutory references in the final regulations.

Comment: According to several commenters, when requesting immediate access, the OIG should provide the individual or entity with a written statement of the subject's rights, and obligations, and this statement should include the definitions of "reasonable request" and "immediate access."

Response: We agree, and have incorporated this in the final regulations. This statement, which will be in the form of a letter requesting immediate access, will set forth the nature of the request such as the documents sought, the authority for it, and will also serve as the notice of intent to exclude and opportunity to response (in lieu of any such notice and opportunity under § 1001.2001), explaining the potential exclusion sanction and the length of the potential exclusion.

Comment: A number of commenters indicated that the regulations should set forth the OIG's statutory functions that can be the basis for a request for immediate access.

Response: The OIG's authority is derived from 5 U.S.C. App. 3. We do not believe it is necessary to include this in the regulations, but the authority for the request for immediate access will be included in the letter requesting access.

Comment: Commenters pointed out that a party should be allowed to know what information the OIG or a MFCU has that leads the OIG or the MFCU to believe the party has violated a statutory and regulatory requirement at the time access is requested, rather than having this information told only to an ALJ at an exclusion hearing.

Response: In advising a party of the documents requested, the statutory authority for the request, and the name of the official authorizing the request, a party has enough protections by which to verify the legitimacy of the request. A party has no right to know the nature of the underlying investigation. It is not appropriate for the OIG or a MFCU to reveal sources of information or the nature of the investigation, since a party is obligated to comply regardless of the nature of the investigation, and since providing such knowledge could impede the investigation.

Comment: In requests for immediate access by survey agencies under §§ 1001.1301(a)(1) (i) and (ii), some commenters believed that it is unclear whether access to documents or to the physical premises is permitted. Where access to the physical plant is sought, commenters felt that the regulations should provide for access that will not unduly interfere with patient privacy and treatment.

Response: Survey agencies have the right to review both the physical plant and documents. Congress intended for this provisions to grant survey agencies the ability to determine the extent of compliance with relevant requirements; both the physical plant and documents are important sources of information. Survey agencies need the flexibility to be able to conduct surprise surveys, but it is expected that any interference with patient privacy or treatment would be only that which is necessary to enable the survey agencies to fulfill their statutory functions.

Comment: Several commenters stated that the regulations provide that a party will not be considered to have failed to provide immediate access if, in response to a request by the OIG or a MFCU, a party can provide a compelling reason why documents cannot be produced. According to the comments received, this exception should also be included in the regulations applicable to requests for access by survey agencies under §§ 1001.1301(a)(1) (i) and (ii).

Response: We agree and have modified the final regulations accordingly.

Comment: One commenter indicated that the regulations should require that the request be made to a person with authority.

Response: We intend to make the request to someone in control. With respect to requests for documents, the request will be addressed to the custodian of records. With respect to requests for access by survey agencies, the request will be made to the owner, administrator or other person functioning in that capacity, or his or her delegatee.

Comment: Numerous commenters criticized the definition of "failure to grant immediate access" in the context of requests by the OIG or MFCUs. Many commenters argued that a 24 hour period is too short and would not give the subject enough time to verify that the request is genuine or to determine whether it had custody of the requested documents. Commenters suggested that the time for compliance should be tolled while the subject is verifying the legitimacy of the request. Further, some commenters felt that providing 24 hours was too long a period of time and that the information should be required on the spot in all situations.

Response: We believe that 24 hours is enough time for subjects to verify the legitimacy of the request. We believe that problems with identifying the appropriate person to be called will be alleviated because this information will be included in the statement of rights that will be provided to the subject. The subject can compile the documents while verifying the legitimacy of the request at the same time. Moreover, the regulations do not require that any copies be made, but only that the records be made available. Finally, subjects will not be excluded if they can provide a compelling reason why the request cannot be satisfied.

Comment: Commenters believed that it is not clear how the OIG can determine that there are exigent circumstances, i.e., risk of destruction, that justify on the spot access in the absence of probable cause. Commenters argued that exigency must be determined from an objective perspective. Exigent circumstances could always be deemed to occur in a case involving fraud.

Response: We do not intend to use this authority in every case, but we must have an ability to obtain documents immediately if there is a legitimate concern that the documents will be altered. We believe this will be resolved by looking at the circumstances surrounding a case. For example, if a subject has been extremely recalcitrant in providing information, or if the OIG had previously been provided with information from this subject that included altered documents, that would be reason to believe that this act may occur again. We have revised the regulations to clarify that exigent circumstances apply where the OIG or the MFCU reasonably believes that the documents will be altered or destroyed.

Comment: Some commenters argued that the regulations exceeded statutory

authority in providing for an exclusion longer than the length of time access was denied up to 90 days. One commenter suggested that the exclusion should last at least one year from the date access was denied.

Response: Section 1128(c)(3)(C) of the Act expressly limits the length of the exclusion for an individual, but does not impose any limitation on the length of the exclusion for an entity. The regulations, in setting an upper limit for individuals but not for entities, properly implement the statute. Moreover, we believe that the circumstances surrounding the failure to provide information can so vary that it would be inappropriate to set forth a minimum length of exclusion period.

Comment: Some commenters felt that the proposed regulations did not sufficiently protect individual privacy rights or the confidentiality of medical records. Some commenters felt that only the records of program beneficiaries should be made available to the government. One commenter believed that the final rule should affirmatively state that patients do not waive their privacy rights by participating in a government health care program.

Response: We disagree with these comments. All health care providers, as a condition of their participation in the Medicare and Medicaid programs, are obligated to furnish to the government any records or other confidential information necessary to determine appropriate reimbursement (see, for example, sections 1815(a) and 1833(e) of the Act). Thus, under Federal law, the government's interests in ensuring the integrity of its health care programs supercedes patients' privacy rights under certain conditions. As part of the mandate to investigate fraud and abuse in the Medicare and State health care programs (5 U.S.C. App. 3, 6(a)(2)), the Inspector General may need to review health care providers' medical records in order to determine whether there has been a violation of one or more authorities implemented under these regulations. In deciding whether to seek access to confidential information during the course of an investigation, the IG attempts, on a case by case basis, to strike a fair balance between the privacy rights of patients and the Federal interest in obtaining and safeguarding evidence. Whenever confidential information is material to an investigation, the IG's policy is to assess whether the Federal interest in the information outweighs the privacy concerns of individuals involved. For example, if there is evidence that a psychiatrist sought Medicaid reimbursement for individual therapy sessions when he or she actually provided group therapy (which is reimbursed at a lesser rate), obtaining access to the psychiatrist's appointment book may be essential to determine whether the psychiatrist committed fraud.

The IG's approach fully accords with established legal precedent in this area. When the government seeks confidential records in order to enforce a statutory scheme enacted to protect the public health or safety, the public interest prevails over individual claims of privacy (see *United States* v. *Westinghouse Electric Corporation*, 638 F. 2d 570 (3d Cir. 1970)). In particular, there is a compelling public interest in investigating fraud committed against government health care programs, and privacy protections afforded under State law must succumb to that interest (see *St. Lukes Regional Medical Center, Inc.* v. *United States*, 717 F. Supp. 665, 666 (N.D. Iowa 1989)). We believe that these regulations allow for lawful and appropriate disclosure of confidential information that is material to Medicare and Medicaid fraud investigations. They are not intended to protect unnecessary invasions of privacy.

• *Section 1001.1401*

This provision permits the exclusion of hospitals that fail to comply substantially with corrective action plans required by HCFA in accordance with section 1886(f)(2)(B) of the Act, which are imposed to correct practices that circumvent the prospective payment system.

Comment: One commenter questioned that part of the preamble to the proposed regulations that stated that issues relating to the underlying inappropriate admissions or practice patterns may not be contested in an exclusion hearing. The commenter was concerned that there be an appeals mechanism for the underlying issues.

Response: The OIG has the authority to exclude a hospital that has failed to comply substantially with a corrective action plan under section 1886(f)(2) of the Act. Section 1886(f)(2) provides that the provisions of sections 1128(c)–(g) apply to determinations made under section 1886(f)(2). Sections 1128(c)–(g) set forth procedures relating to implementation of exclusions, including rights to appeal. A provider will, therefore, have the rights to appeal provided for in sections 1128(c)–(g) to appeal the merits of the determination that it has failed to comply substantially with a corrective action plan.

• *Section 1001.1501*

This provision permits the exclusion of individuals who default on health education loans or scholarship obligations.

Comment: Commenters stated that there is little relationship between failure to pay one's scholarship obligations and the right to participate in Medicare. Moreover, these commenters indicated that this section seems extremely unfair to an entity, which could be excluded under § 1001.1001 based on the actions of a single individual who failed to pay student loans.

Response: A physician reaps financial benefits from participating in Medicare and Medicaid. There is plainly a connection between requiring a physician who is benefitting from government programs to meet his or her financial obligations to the government, by repayment of loans. These regulations are a proper interpretation of statutory authority (section 1128(b)(14) of the Act). An entity will always have an opportunity to terminate its relationship with a sanctioned individual before an exclusion will be imposed.

Comment: Section 1128(b)(14)(B) of the Act requires that the Secretary take into account access of beneficiaries to physician services in determining whether to impose an exclusion, and this should be included in the regulations.

Response: We agree, and have changed the final rule accordingly. We have also included in the regulations the other limitation set forth in section 1128(b)(14)(A), which mandates that the Secretary may not exclude a physician who is the sole community physician or the sole source of essential specialized services in a community if a State requests that the physician not be excluded.

Comment: Some commenters stated that although the regulation provides that the OIG must determine that the PHS has taken all reasonable administrative steps to obtain payment of the loans or other obligations before imposing an exclusion, it fails to state what steps are reasonable.

Response: The Secretary is expected to use alternative administrative tools whenever feasible. Whether it is feasible or reasonable to use alternative administrative means will depend on the circumstances surrounding a particular case.

We are, however, clarifying § 1003.1501(a)(2) to indicate that whenever PHS has complied with the

Medicare offset provisions of section 1892 of the Act, the OIG will find that "all reasonable steps" have been taken and that no other administrative steps are necessary. The basis for this policy is that, in enacting an almost identical exclusion authority in section 1892(a)(3)(B) shortly after it enacted the exclusion authority in section 1128(b)(14), Congress effectively defined the term "all reasonable steps" as used in section 1128(b)(14). Since section 1892 makes clear that no more is required of the Secretary prior to excluding a defaulter than to offer an offset agreement, we believe that it would be illogical to interpret section 1128(b)(14) as requiring more, especially in light of the fact that section 1892 is (1) the more recently enacted statute and (2) an even stricter statute in that it makes exclusions mandatory and not permissive.

• *Section 1001.1601*

This provision permits the exclusion of physicians who violate the limitations on physician charges under Medicare. For services furnished during the period January 1, 1987 to December 31, 1990, the issue is whether the physician billed in excess of the maximum allowable charge determined in accordance with section 1842(j)(1)(c) of the Act. Since January 1, 1991, the issue is whether the physician billed in excess of the limiting charge determined in accordance with section 1848(g)(2) of the Act. Based on comments and our review of this section, we have deleted the limitation that was erroneously included in the proposed regulations which stated that an exclusion under this authority is limited to the Medicare program. As stated in the preamble to the proposed regulations, Public Law 100–360 extended this exclusion to all programs.

Comment: According to several comments received, beneficiary access to alternative services should be considered in determining whether to impose an exclusion, rather than only being a factor in determining the length of the exclusion.

Response: We agree and have modified the final rule accordingly. This authority implements section 1842(j) of the Act, and paragraph (j)(3)(B) of that section of the law mandates that the Secretary take into account access of beneficiaries to physicians' services in determining whether to impose an exclusion. We have also included in the final regulations the requirement, set forth in section 1842(j)(3)(A) of the Act, that the Secretary may not exclude a physician if that physician is a sole community physician or the sole source of essential specialized services in a community.

Comment: Section 1842(j)(1)(B) of the Act provides that an exclusion may only be imposed in cases where a physician knowingly and willfully bills on a repeated basis in excess of the maximum allowable charge. One commenter felt that the regulations should include the qualification that the exclusion may only be imposed if the act occurred repeatedly.

Response: We agree and have modified this provision accordingly.

Comment: Some commenters indicated that the regulations should set forth a minimum monetary level justifying the imposition of an exclusion.

Response: The decision of whether to exclude someone is not based solely on monetary consequences to the program. The requirement that the excessive billing be made on a repeated basis before an exclusion will be imposed counters any concern that an exclusion will be imposed for a single or de minimis violation.

Comment: Commenters pointed out that the final regulations would clearly define the term "knowingly and willfully" as used in § 1001.1601 of the regulations.

Response: We intend for these terms to be interpreted according to their accepted legal meaning in Federal law.

Comment: Some commenters questioned why section 1842(j)(1)(B)(ii) of the Act contains a sunset provision on this authority, but that the regulations does not.

Response: We have modified these regulations to clarify that an exclusion under section 1842(j)(1)(B) of the Act only applies to services furnished between the period January 1, 1987 and December 31, 1990.

Comment: A number of commenters felt that physicians excluded under this authority should have a hearing prior to imposition of the exclusion, since safety of beneficiaries is not a concern.

Response: Because a CMP may also be imposed for conduct sanctionable under § 1001.1601, and because prior hearings are available for all CMP authorities, we are providing for a hearing prior to an exclusion under this section. This issue is discussed more fully in section IV.F.1. of this preamble.

• *Section 1001.170*

This provision permits the exclusion of physicians who bill for services of assistants at surgery during cataract operations.

Comment: Commenters specifically pointed out that, although not cited in the proposed rule, section 1842(k) of the Act requires the Secretary to take into account access of beneficiaries to physicians' services in determining whether to impose an exclusion.

Response: We agree and have modified the final regulations accordingly. We have also included in the regulations the statutory mandate that the OIG may not exclude a physician who is the sole community physician or the sole source of essential specialized services in the community (section 1842(j)(3) of the Act).

Comment: One commenter argued that a physician should have a hearing before an ALJ prior to imposition of the exclusion.

Response: We agree and have modified the final regulations accordingly.

Comment: One commenter stated that exclusion for providing an assistant at cataract surgery is too severe a penalty, and stated that the PRO prior approval program is adequate.

Response: Congress determined that exclusion is an appropriate remedy for this conduct. The OIG will exercise its discretion to impose exclusions only in those cases where it is the appropriate remedy.

D. Part 1001, Subparts B and C—Aggravating and Mitigating Circumstances

Comment: Commenters stated that an ALJ should be free to consider any factors whatsoever in determining whether the length of an exclusion should be reduced, and that the mitigating factors included in the regulations should be examples rather than an exhaustive list.

Response: The legislative history directs the Secretary to consider any mitigating circumstances in setting the period of exclusion. The Secretary has the authority to determine what circumstances are mitigating. Moreover, these factors only relate to the length of the exclusion. The OIG considers many factors in deciding whether to impose an exclusion in the first place.

Comment: Some commenters felt that the regulations should give specific guidance as to how aggravating and mitigating factors will be weighted.

Response: We do not intend for the aggravating and mitigating factors to have specific values; rather, these factors must be evaluated based on the circumstances of a particular case. For example, in one case many aggravating factors may exist, but the subject's cooperation with the OIG may be so significant that it is appropriate to give that one mitigating factor more weight than all of the aggravating. Similarly, many mitigating factors may exist in a

case, but the acts could have had such a significant physical impact on program beneficiaries that the existence of that one aggravating factor must be given more weight than all of the mitigating. The weight accorded to each mitigating and aggravating factor cannot be established according to a rigid formula, but must be determined in the context of the particular case at issue.

Comment: Several commenters expressed concern that certain provisions, such as § 1001,102, provide that it will be an aggravating factor if the acts underlying the exclusion had an impact on programs or individuals, while other sections, such as § 1001.201, provide that only if the acts had a significant adverse impact will the impact be considered aggravating. Commenters believed that this factor should be consistently stated in the regulations. In addition, commenters indicated that the mitigating factor in § 1001.701, stating that it will be mitigating if the violations had no adverse impact on individuals or the programs, should be changed to make it mitigating if the violations had no significant adverse impact.

Response: An aggravating factor is one that does not automatically exist in every case, but when it does exist, justifies a longer period of exclusion. Every case resulting in an exclusion will involve circumstances that had an impact on the program or beneficiaries. To be an aggravating factor, we agree that the impact must be more than minimal, that is, it must have been significant, and we have modified the regulations accordingly. With regard to the mitigating factor set forth in § 1001.701, we have deleted that factor since, on review, we do not think this mitigating factor would ever apply; we believe that there will be no case where there is absolutely no adverse impact on individuals or the programs. We believe that the issue of the extent of the harm caused by a violation under § 1001.701 is addressed by the fact that it will be considered mitigating if there were few violations and they occurred over a short period of time.

Comment: Sections 1001.102, 1001,201, and 1001.301 provide that it will be considered mitigating if someone had a mental, emotional or physical condition, before or during commission of the offense, that reduced the individual's culpability. A commenter questioned whether it would be mitigating if such a condition developed after commission of the offense.

Response: This factor was intended to take into account the factors that might reduce the offender's culpability in committing the offense, and development of a condition after the commission of the offense would not be relevant. We have also clarified that such a condition will only be considered if the court reached the conclusion that such a factor existed which reduced the offender's culpability; the mere appearance of such an allegation in the pre-sentencing report would not be enough. Moreover, this factor will not be considered as mitigating if there is an ongoing problem that has not been resolved, such that the program and their beneficiaries continue to be at risk.

Comment: Sections 1001.102, 1001.201, 1001.301, and 1001.401 state that an individual's or entity's cooperation is a mitigating factor if the cooperation resulted in others being convicted or excluded from Medicare or a State health care program. Commenters contended that cooperation itself should be considered mitigating, regardless of whether another individual or entity was sanctioned.

Response: As a practical matter, we generally consider cooperation in determining whether to impose a permissive exclusion at all. We believe, however, that only significant cooperation should be considered mitigating, and the imposition of a sanction as a result of cooperation establishes that the cooperation was significant. We believe the significance of cooperation is more properly evaluated by those in a position to utilize the information, rather than by an ALJ. We have, however, modified the regulations to provide that cooperation shall be a mitigating factor if it led to imposition of a CMP, in addition to whether it led to a conviction or exclusion.

Comment: Commenters stated that some aggravating factors, such as that the acts resulted in loss of $1,500 or more, were committed over a period of 1 or more years, and had a significant impact on the programs or individuals, will likely exist in every case, and thus serve no purpose but to allow the OIG to routinely increase the length of the exclusion. Similarly, commenters indicated that certain mitigating factors, such as an individual or entity being convicted of three or fewer misdemeanors, and the loss to the government or other individuals or entities being less than $1,500 (§§ 1001.102 and 1001.201), will never exist. These individuals felt that the existence of 3 or fewer misdemeanors should be mitigating by itself.

Response: We disagree with these comments. Our experience has shown that none of the aggravating factors included in these final regulations are present in every case. Moreover, we believe the amount of the loss relates to the degree of risk to the programs, and we believe $1,500 is a reasonable benchmark for distinguishing between significant and less significant risk.

Comment: Proposed §§ 1001.102 and 1001.201 provided that it will be considered aggravating if the total loss exceeds $1,500, and stated that the total amount of financial loss would be considered, including any amounts resulting from similar acts not adjudicated. Commenters stated that this factor should not be used since the excluded party has not been given an opportunity to contest these acts.

Response: Acts that have not been adjudicated are not considered in determining whether an exclusion must or should be imposed. Other acts are considered only in determining the length of the exclusion. We are aware of numerous cases where there is evidence that an individual or entity committed many similar acts but, as a condition for entering into a plea agreement, only pled guilty to one charge. It is part of the OIG's responsibility to review all factors surrounding a case to determine the reasonable length of an exclusion. The approach we have taken is not unlike sentencing in the criminal context, where a judge may consider many different acts of the defendant in setting the appropriate sentence, not just the ones that form the basis for the conviction. We have also modified this factor so that, although $1,500 will be the benchmark of significant loss to the government, no specific monetary figure is included for impact to program beneficiaries or other individuals, since, to those persons, a loss much less than $1,500 may be significant. We have also deleted "financial" from § 1001.201(b)(2)(iii) since the financial impact is dealt with in paragraph (b)(2)(i) of that section.

Comment: Some commenters questioned whether the mitigating factor relating to the loss to the programs being less than $1,500 could apply if someone pleads guilty to one offense which is less than $1,500, where there is evidence that the individual committed offenses that total greater than $1,500.

Response: We are not concerned about the applicability of this factor to plea bargains, because the factor states that it requires the consideration of not only the acts that resulted in the conviction, but also similar acts.

Comment: Proposed §§ 1001.201 through 1001.801 provided that it will be a mitigating factor if alternative sources of the type of health care items or services furnished by the excluded individual or entity are not available. A

number of commenters believe that the regulations should be modified to state that it will be mitigating if alternative sources are not reasonably available.

Response: We believe this is implicit in the regulations. The purpose of this mitigating factor is to protect program beneficiaries, and if services are not reasonably available to them then, as a practical matter, they are not available. Of course, in evaluating the factor, we will look to whether there are service providers who accept Medicare and Medicaid patients, rather than merely whether services are available generally.

Comment: Several commenters pointed out that the unavailability of alternative sources of the type of health care items or services furnished by the entity will never be a mitigating factor for HMOs sanctioned under § 1001.801 if non-plan providers are considered alternative.

Response: An exclusion is remedial and is designed to protect the program and its beneficiaries. It is not in the interests of the beneficiaries to include in the program an HMO that substantially fails to provide necessary services. Thus, if another entity can provide these services, the medical needs of the beneficiaries are met and there is no need to keep the HMO in the program. There may be circumstances, however, where unique services will only be provided by physicians who are part of the HMO, and this factor will, in those situations, apply.

Comment: Commenters stated that the regulations should be consistent in identifying the parties on whom the impact of the action will be evaluated for purposes of determining the existence of aggravating and mitigating factors. For example, proposed § 1001.102 provided that it would be aggravating if there was an adverse impact on individuals, and § 1001.201 provided that it would be aggravating if there was a significant adverse impact on individuals or the program. One commenter stated that these regulations should be consistent, and that considering effect on anyone besides program beneficiaries is overly broad.

Response: We have modified the regulations to provide that under all of these provisions we will evaluate the impact on the programs, program beneficiaries and other individuals. It is reasonable to consider the impact conduct had on any and all persons in determining whether program beneficiaries are at risk.

Comment: According to the concerns of some commenters, a prior sanction record should serve as an aggravating factor only if there was a pattern of wrongdoing with respect to Medicare or a State health care program.

Response: We believe that a prior sanction record is an aggravating factor because it shows an unwillingness to comply with the law.

Comment: A number of commenters indicated that the absence of a prior record of convictions or other sanctions should be a mitigating factor.

Response: We disagree. We do not believe anyone deserves special credit (in the form of a reduced period of exclusion) for doing what is expected, that is, obeying the law.

Comment: Proposed §§ 1001.501 and 1001.601 provided that it would be aggravating if the period of license loss or exclusion from participation set by the derivative agency does not take into account the impact that the sanctioned party's conduct had or could have had on Federal or State health care programs. One commenter believed that this factor is too speculative.

Response: It is the OIG's responsibility to assess all circumstances that relate to the risk of future participation in the health care programs.

Comment: Proposed §§ 1001.501 and 1001.601 provided that mitigating factors would only be considered if aggravating factors justify lengthening the exclusion beyond the time imposed by the derivative agencies. Some commenters felt that the regulations should allow for consideration of mitigating circumstances even in the absence of aggravating circumstances.

Response: These exclusions rely on the determination of another agency that has had the opportunity to fully evaluate a situation. In most cases, we will accept the derivative agency's length of exclusion as controlling for Medicare purposes, and we do not believe it is appropriate to focus on issues that have already been considered in that other forum. In cases where we exercise our independent discretion to extend the length of the exclusion, it is then appropriate to allow new information to be considered both in favor of lengthening and reducing the period of exclusion.

Comment: According to some commenters' concerns, an individual's financial condition is relevant and should be considered mitigating in determining the length of the exclusion imposed under §§ 1001.901 or 1001.951.

Response: CMPs and exclusions serve different functions. In setting a CMP, the purpose is to make an individual or entity pay for bad conduct both to compensate the government and deter future similar conduct. In cases where the OIG imposes a CMP only, the OIG has determined that the program is not at risk by allowing the sanctioned party to continue to participate, and it is not in the interest of the program and their beneficiaries to make the penalties so extreme that they are either uncollectible or act to prevent the sanctioned party from being able to afford to continue participating in the programs. If it is determined that someone should be excluded from the programs because continued participation puts the program at risk, the fact that the exclusion may affect his or her financial condition is not our concern; our concern is in protecting the programs.

E. Part 1001, Subpart D—Waivers and Effect of Exclusion

1. Waiver of Exclusions

Comment: One commenter stated that in addition to waiving State health care program exclusions on behalf of individuals or entities excluded from participation in Medicare, the OIG should permit State licensure authorities to waive imposition of sanctions.

Response: Nothing in these regulations requires States to take particular licensing or disciplinary action against excluded providers. When the OIG excludes an individual or entity from participation in Medicare, it is obligated by statute to notify State licensing agencies of the exclusion, and to request that appropriate investigations be made and sanctions invoked in accordance with applicable State law and policy (section 1128(e) of the Act). These regulations implement that statutory provision, but do not require State licensing agencies to take any specific action against excluded providers (§ 1001.2005). Thus, State licensing agencies may refrain from sanctioning individuals or entities excluded from Medicare so long as the law and policy within a particular State authorizes the waiver of licensure or disciplinary sanctions.

Comment: A few commenters requested that we broaden the circumstances under § 1001.1801(b) by which a request to waive a permissive exclusion may be granted to State health care programs. The proposed regulation limited waiver requests in the case of permissive exclusions to the same conditions that waiver requests are statutorily authorized in the case of mandatory exclusions; that is, where the excluded party is the sole community physician or the sole source of essential specialized services in a community. One commenter stated that these conditions for considering waiver

requests would not ensure community access to long term care services, such as nursing home placement, because the existence of other sources of long term care may not reflect the actual availability of beds. Another commenter felt that the criteria for assessing waiver requests should be expanded to include consideration of whether an exclusion would compromise beneficiary access to needed services. A third commenter suggested that the OIG should agree to consider a waiver request whenever a State health care program can demonstrate that waiver would be in the public interest.

Response: We have considered the above comments, and we agree that the conditions for OIG consideration of State health program waiver requests under proposed § 1001.1801 may not protect beneficiary or other program needs in some instances. For example, when a cardiologist is excluded from the State health care programs, while there may be several other physicians in the community that provide cardiology services, it may be that none of these physicians participate in Medicaid. In this type of situation, imposing a Medicaid exclusion would deprive Medicaid beneficiaries of needed services, although the excluded party was not a sole community physician or sole source of essential specialized services.

In order to provide the OIG with greater flexibility to protect program interests when the imposition of an exclusion would threaten such interests, we are amending this provision in two ways. First, as discussed earlier in this preamble, we are modifying the definition of "sole community physician" by removing the language restricting this definition to providers practicing in health manpower shortage areas under 42 CFR part 5. Second, we are adding a new paragraph (c) to § 1001.1801, to allow the OIG, at its discretion, to waive imposition of a permissive exclusion when such waiver would be in the public interest.

Comment: One commenter stated that the language in § 1001.1801(d) should be changed to clarify that waiver would apply only with respect to those programs for which waiver is specifically requested. For example, if a State agency requests waiver from the Medicaid program, waiver should be granted for that program alone, and not for the Maternal and Child Health Care program (title V) or the Block Grants program to States (title XX).

Response: We agree with this comment, and have modified the proposed § 1001.1801(d), codified now as paragraph (e) in these final regulations, to clarify that if a waiver request is made with respect to certain State health care programs, it will only apply to those State programs. However, under § 1001.1801(g) of this final rule, if in the course of considering a waiver request with respect to one or more State health care programs, the OIG determines that imposition of a Medicare exclusion will deprive Medicare beneficiaries of access to needed services, the OIG may waive the Medicare exclusion in conjunction with granting the State program waiver request.

2. Scope and Effect of Exclusion

In the proposed rule, we requested comments on a number of possible approaches to implementing Executive Orders 12549 and 12689, which provide that debarments, suspensions, and other exclusion actions taken by any Federal agency will have government-wide effect. The language that was proposed would have expanded the scope of these exclusions to all Federal nonprocurement health programs.

Comment: There were only two commenters on the issue of the government-wide effect of the regulations. One agreed with the expanded scope and the other expressed the opinion that there was no legal authority for giving government-wide effect to these sanction authorities which relate only to Medicare and State health programs. Neither commenter specifically discussed the alternate approaches set forth in the preamble to the proposed rule, one of which was to provide, by regulation, that the exclusions will apply to all Federal nonprocurement programs.

Response: We have decided to adopt this latter approach. With respect to our legal authority for this provision, we have concluded, in consultation with the Department of Justice, that Executive Order 12549 requires us to give government-wide effect to all exclusions imposed under these regulations. However, since the scope of this Executive Order is limited to Federal nonprocurement programs and activities, it does not authorize us to extend the government-wide effect of our exclusions to procurement programs and activities.

We have also concluded that to limit the scope of the government-wide effect to nonprocurement health programs is not authorized by the Executive Order, nor does it comport with the intent of the order. Such an interpretation would have anomalous results. For example, under such a limited interpretation, an individual who was convicted of Medicare fraud, and thus excluded from participation in Medicare and State health care programs, would still be eligible to run a Head Start Program or receive a grant from the Department of Housing and Urban Development to build low-income housing, notwithstanding his or her history of defrauding the government. This is exactly the sort of result that the Executive Order was designed to prevent.

We recognize that in some situations the government-wide effect of a Medicare exclusion may pose an undue hardship and may be unnecessary to project the integrity of government programs. For example, if an exclusion from Medicare is based on a license revocation by a State licensure board, and the sole basis for the revocation is the incompetence of the physician or other health care professional, it might be unfair to bar that individual from participating in Federal programs unrelated to the practice of medicine. Any unfairness in a specific case may be remedied, however, since paragraph 2(c) of the Executive Order authorizes an agency head to grant an exception permitting an excluded party to participate in a particular transaction.

Comment: Some commenters felt that the proposed regulations unfairly penalized institutional providers who employ excluded individuals or entities. For example, one commoner objected to the provisions of proposed § 1001.1001, authorizing the exclusion of entities owned or controlled in whole or in part by individuals sanctioned under section 1128 or 1128A of the Act. Another commenter felt that proposed regulation § 1001.1901(b), prohibiting Medicare and State health care program reimbursement for items or services furnished by, at the medical direction of, or on the prescription of an excluded physician, unfairly penalized institutional providers who employ excluded physicians in accordance with contracts that cannot be terminated upon notice of the exclusion. The commenter stated that the risk of legal action by excluded providers or by their patients if ordered items or services were not furnished would make the providers feel constrained to provide such items or services. The commenter also believed that § 1001.1901(b) discriminated against institutional providers by denying payment to these facilities for items or services ordered by excluded providers, but not denying payment to provider-based physicians who perform services in conjunction with or related to those performed by excluded physicians, e.g., an

anesthesiologist working with an excluded surgeon.

Response: Both proposed §§ 1001.1001 and 1001.1901(b) were based on statutory mandate (sections 1128(b)(8) and 1862(e)(1)(B) of the Act). To the extent that these provisions impose sanctions against, or deny reimbursement to, institutional providers that employ excluded individuals, the Department has simply implemented what Congress required. Moreover, with respect to the comments that § 1001.1901(b) unfairly penalizes institutional providers, we believe that providers can structure their contracts with physician employees so as to protect themselves from having to continue an employment relationship once they become aware that a physician has been excluded. Because, under § 1001.1901, any person furnishing items or services ordered or prescribed by an excluded physician must know or have reasons to know of the physician's exclusion, the provision justly avoids penalizing facilities that employ excluded physicians unknowingly. Under § 1001.2006(a)(1), the Department would give notice of a physician's exclusion to any provider known to be employing the physician.

With respect to the comment that failure to provide services ordered by excluded physicians might entail legal risk, we point out that § 1001.1901 does not prohibit providers from continuing to provide services for legal or any other reasons. The provision, which tracks the statutory language of section 1863(e)(1)(B) of the Act, denies payment for services furnished at the medical direction or on the prescription of an excluded physician. The provision reflects the intent of Congress and the Secretary that the government not pay—directly or indirectly—for the services of untrustworthy individuals or entities with whom the Department has determined it should cease doing business.

Finally, with respect to the comment that § 1001.1901(b) discriminates against institutional providers in contrast to other hospital based physicians, we disagree. Other hospital based physicians who perform services ordered by an excluded physician (such as a radiologist who does X-rays at the request of an excluded cardiologist) will be reimbursed for their own services, not those of the excluded physician. By contrast, institutional providers that bill for items or services furnished by or at the medical direction or on the prescription of an excluded physician, seek reimbursement for items or services used or performed by, or at the direction of, the excluded physician.

Furthermore, institutional providers control and influence the excluded physician's ability to continue serving program beneficiaries in ways that other individual physicians simply cannot. Individual physicians influence the referral of services in particular cases; however, institutional providers are in a position to determine whether an excluded physician can continue treating beneficiaries at all. Therefore, because their control over the ability of excluded physicians to treat beneficiaries is far greater, we believe it is reasonable to deny payment to institutional providers who seek reimbursement for items or services furnished by excluded providers.

Comment: A few commenters were concerned that both the proposed regulatory provisions governing the effect of exclusions and exceptions to the nonpayment of claims for services of excluded parties were unclear. For example, one commenter pointed out that the proposed rule should have expressly stated that an excluded individual or entity does not automatically become eligible to participate in Medicare or State health care programs once the exclusion period ends. Other commenters were confused about the exception specified under proposed § 1001.1901(d)(1)—now being codified as § 1001.1901(c)(1) in these final regulations—for payment of the first claims of part B enrollees who are without notice of an exclusion. These commenters were concerned that excluded practitioners could, under this provision, avoid the impact of an exclusion by continuing to furnish services to program beneficiaries, and having those beneficiaries then submit claims to Medicare for reimbursement.

Response: We agree that these regulations should clarify that excluded individuals or entities must be reinstated into Medicare or the State health care programs in order to begin participating in these programs after a period of exclusion has lapsed. Therefore, we are amending § 1001.1901(b) to clarify that the effect of an exclusion lasts unless and until an individual is reinstated in accordance with the procedures set forth under part 1001, subpart F.

With respect to the payment of enrollees' first claims for services furnished by excluded providers, it should be noted that under section 1848(g)(4) of the Act, physicians and suppliers are required to complete and submit all claims forms for services provided to beneficiaries on or after September 1, 1990.

We are adding a new paragraph (b)(3) to § 1001.1901 to clarify that an excluded individual or entity who submits or causes the submission of claims for items or services furnished during the exclusion period is liable under the CMP law and criminal law. The Secretary's intent in paying the first claim of beneficiaries under § 1001.1901(c)(1) is not to legitimize excluded parties causing their patients to submit claims during the exclusion period (see *The Inspector General* v. *Berney R. Keszler, M.D., P.A.*, Docket No. C-167 (Departmental Appeals Board/Civil Remedies Division) (November 1, 1990), at 28)). Rather, the intent is that beneficiaries not be forced to pay for services provided by someone whom the beneficiaries did not know was excluded. Hence, we will pay the first claim, and then notify the beneficiaries of the excluded status of the individual or entity and that further claims for items or services furnished by such individual or entity will not be paid.

F. Part 1001, Subpart E—Notice and Appeals

1. Statutory Authority and Constitutional Issues

Comment: Several commenters expressed concern that the proposed rule did not afford constitutionally adequate due process to individuals and entities who are excluded from participation in Medicare and the State health care programs. These commenters stated that, because the inability to participate in government health care programs can be professionally and financially devastating, it would violate due process to exclude an individual or entity from program participation without a prior opportunity to contest the exclusion. Some commenters felt that parties excluded for *any* reason authorized under MMPPPA should be permitted to request a hearing prior to imposition of the exclusion. Other commenters believed that the OIG should provide for such a hearing prior to imposing any of the non-derivative exclusions, or any exclusions necessary to safeguard the health or safety of program beneficiaries.

Response: In accordance with section 1128(f)(2) of the Act, we provided for a prior hearing in the case of exclusions imposed under section 1128(b)(7) for violations of the CMP law (§ 1001.901) and for kickbacks and other illegal activities under section 1128B of the Act (§ 1001.951), unless the health and safety

of individuals receiving services warranted otherwise. We have also provided for a prior hearing in the case of exclusions imposed for violations of Medicare physician charge limitations under § 1001.1601, and exclusions imposed for fraudulent billing for services of an assistant during cataract surgery under § 1001.1701. We have done this because the conduct involved in these two exclusion authorities subjects an individual or entity to a CMP in addition to, or in lieu of, the exclusion authority authorized here, and the CMP may only be imposed after an ALJ hearing. We believe that fundamental fairness, as well as economy of resources, make a single unified proceeding the appropriate mechanism for imposing sanctions under §§ 1001.1601 and 1001.1701.

However, we do not believe that prior hearings would be appropriate for any other exclusion authorities implemented in these regulations, and have therefore provided for post-exclusion hearings for all exclusion authorities except §§ 1001.901, 1001.951, 1001.1601 and 1001.1701. As we stated in the preamble to the proposed regulations, case law makes clear that due process does not require a hearing prior to the imposition of an exclusion from Medicare or State health care programs (see *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Ram* v. *Heckler*, 792 F.2d 444 (4th Cir. 1986)). When an agency exercises discretionary authority, due process is satisfied so long as the affected party is given "notice and an opportunity to respond * * * (t)he opportunity to present reasons, either in person or in writing, why proposed action should not be taken" (see *Cleveland Bd. of Education* v. *Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 1495 (1985)). This final rule reflects this constitutional principle. Under § 1001.2001, we have provided for notice and an opportunity to respond, in writing, as well as in person for certain exclusion authorities, in cases in which the OIG's exercise of authority to exclude individuals or entities is not mandated by law. Thus, § 1001.2001(a) provides for issuance of a "notice of intent to exclude" granting 30 days to provide "documentary evidence and written argument in response" prior to imposition of (1) a permissive exclusion (except those imposed under §§ 1001.1301 through 1001.1501 for reasons stated below) and (2) a mandatory exclusion imposed for more than the minimum 5 year period required by law. With respect to exclusions imposed under §§ 1001.701 and 1001.801 for submitting excessive claims or for furnishing unnecessary items or services, as these cases typically involve complicated issues, we have maintained proposed § 1001.2001(b), allowing for the opportunity to present oral as well as written evidence.

With respect to the exclusion authorities implemented in §§ 1001.1301 through 1001.1501, we have determined that the procedures provided in § 1001.2001(a) for notice and opportunity to respond should not apply. Sections 1001.1401 and 1001.1501 each involve exclusions based on conduct determined to violate statutes regulated by other divisions of the Department. Under § 1001.1401, the OIG may exclude any hospital that HCFA determines has substantially failed to comply with a corrective action required by HCFA under section 1886(f)(2)(B) of the Act. Under § 1001.1501, the OIG may exclude individuals whom PHS determines are in default on health education scholarship or loan obligations. The exclusion remains in effect until PHS notifies the OIG that the default was cured. Because the OIG would impose sanctions under §§ 1001.1401 and 1001.1501 only after HCFA or PHS determined such action to be appropriate, providing excluded parties an opportunity to respond to the OIG would not be meaningful. Thus, we have not included §§ 1001.1401 and 1001.1501 within the ambit of exclusion authorities covered under § 1001.2001(a).

We also do not provide for issuance of a notice of intent to exclude and the opportunity to respond under § 1001.2001(a), in the case of exclusions imposed under § 1001.1301. These exclusions allow the OIG to exclude any individual or entity that fails to grant immediate access upon reasonable request under (1) §§ 1001.1301(a)(1) (i) and (ii) to survey agencies or other entities attempting to inspect health care facilities in accordance with Medicare and Medicaid statutory requirements, and (2) §§ 1001.1301(a)(1) (iii) and (iv), to Federal or State investigators seeking to review the individual's or entity's records to determine whether fraud has been committed under a Federal or State health care program. Under proposed §§ 1001.1301(a)(1) (iii) and (iv), we granted individuals and entities from whom immediate access to documents is requested the opportunity to "provide a compelling reason" why such records cannot be produced. In the final rule, we also apply this provision in the case of facilities from whom immediate access is requested in order to conduct surveys or reviews under §§ 1001.1301(a)(1) (i) and (ii). Thus, these facilities will also have opportunity to explain to OIG officials why immediate access should be denied, and therefore do not need additional opportunity to respond under § 1001.2001 (see § 1001.1301(a)(2)).

Proposed § 1001.2001(a) did not apply to mandatory exclusions imposed for a period exceeding 5 years. However, the OIG's authority under section 1128(a) of the Act to exclude a party for more than 5 years is discretionary, much like the OIG's permissive exclusion authorities under section 1128(b) of the Act. For that reason, we have modified § 1001.2001(a) to extend its application to mandatory exclusions imposed for periods exceeding 5 years. Consistent with our longstanding practice, for mandatory exclusions imposed for not more than five years, § 1001.2002(a) provides for issuance of a written notice 20 days prior to the effective date of the exclusion.

2. Notice of Intent to Exclude

Comment: We received a number of comments regarding the provision governing notice of intent to exclude under § 1001.2001. Some commenters felt that the notice of intent to exclude under § 1001.2001(a) should be by certified mail, and that the notice should be deemed received on the return receipt date, rather than a presumed date of 5 days after the date on the notice. One commenter requested that we set forth standards in these regulations for how the OIG would evaluate documentary evidence and written argument in response to a notice of intent to exclude, and when a hearing would be granted.

Response: When the OIG receives information in response to a notice of intent to exclude, it evaluates the information supplied in order to determine whether, in light of exigent or mitigating circumstances surrounding the conduct authorizing the exclusion, justice requires permitting the individual or entity to remain a participating Medicare provider. We have modified the language in § 1001.2001 to clarify that, in making these determinations, we will consider any evidence concerning whether the exclusion is warranted and any related issues, such as argument pertaining to the proper length of exclusion. The OIG's determinations in each case depend on the unique information supplied, and we cannot reduce that process to a uniform set of standards.

With respect to the OIG's policy on granting requests for a hearing under § 1001.2001(b), whenever a hearing request is made in conjunction with the submission of documentary evidence and written argument, the request is always granted.

With respect to the comments that we send these notices by certified mail, the OIG currently sends by certified mail all notices relating to the imposition of exclusions, including notices of intent to exclude under § 1001.2001, notices of exclusion under § 1001.2002, and notices of proposals to exclude under § 1001.2003. However, it is not administratively feasible for the OIG to await the return of certified mail receipt forms before proceeding to impose exclusions. We believe that a presumption that notices are received within 5 days after the date on the notice is both reasonable and legally sound. The courts customarily use presumptions of this nature so that parties may consider particular documents sent in the course of litigation to have been received by a date certain. In fact, the Federal Rules of Civil Procedure (FRCP) provide parties with only 3 extra days of time, not 5, when notice is by mail (see FRCP, section 6(e)). For these reasons, we are retaining in the final rule the presumption that notice is received within 5 days of the date on the notice.

3. Notice of Exclusion

Comment: One commenter objected to the fact that, under these regulations, individuals or entities excluded for 5 years under a mandatory exclusion authority are notified of the exclusion only 20 days prior to its effect, and do not have the opportunity to present evidence in their defense prior to the imposition of the exclusion. This commenter suggested that even in situations when the OIG believed it was statutorily obligated to impose an exclusion under section 1128(a) of the Act, there could be a mistake of identity or some other reason why imposing an exclusion would be improper.

Response: Under this rule, no exclusion takes effect immediately upon notice to the provider. Under § 1001.2002, mandatorily excluded individuals or entities are always notified by the OIG 20 days prior to the effective date of the sanction. This period of 20 days provides ample time for rectifying any mistakes of identity or similar errors before the exclusion takes effect. Furthermore, if the OIG were to implement an exclusion in error, the excluded party would be reinstated retroactively.

4. Notice of Proposal to Exclude

Comment: A few commenters expressed concern about the OIG's responsibility under § 1001.2003(c) to determine whether a threat to the health and safety of Medicare or State health care program beneficiaries warranted imposition of an exclusion prior to the completion an ALJ hearing. One commenter felt that the ALJ, not the OIG, should make this determination. Another commenter felt that the requirement under § 1001.2003(a)(5) that petitioners notify the OIG of any reasons why the health and safety of individuals do not warrant a pre-hearing exclusion unfairly shifted the burden of proof on this issue to the health care provider.

Response: We disagree that § 1001.2003(a)(5) shifts the burden of proof. It merely requires providers to supply relevant information and any defenses to assist the OIG in determining whether an exclusion should be imposed prior to a full ALJ hearing. We also disagree with the comment that an ALJ, rather than the OIG, should make this determination. The Department has a responsibility to protect the integrity of its programs and to ensure that program dollars are not being paid to health care providers who pose a danger to the health or safety of program beneficiaries. In order to carry out that responsibility, the Department must be able to sever its relationships with such providers immediately. Under §§ 1001.2001 and 1001.2003, the OIG would already have solicited and received relevant medical and other information regarding a provider it determined posed a danger to the programs. Therefore, the OIG, rather than an ALJ, is in the best position to evaluate all material evidence in a prompt manner.

5. Notice to Third Parties Regarding Exclusion

Comment: We received a number of comments on the regulatory provisions governing notice to third parties of exclusions. Several commenters stated that, in light of the probable damaging effect of an exclusion on the professional reputation of health care providers, the OIG should not notify third parties of exclusions under §§ 1001.2004 through 1001.2006 until all avenues of appellate review were exhausted. One commenter felt that OIG should be required under § 1001.2006 to notify the National Practitioner Data Bank of exclusions imposed under these authorities, so that this information would be available to all government and private agencies networked to this health care sanctions data collection organization.

Response: The OIG has an agreement with the National Practitioner Data Bank to provide it with notices of all exclusions. With respect to the comment that we should forego notification of exclusions to third parties until exclusions imposed by ALJs are upheld on appeal, we believe this would contravene legislative intent. Under section1128(e)(1) of the Act, prompt notification of these parties is required. It should be noted that under § 1001.3003(a)(3), prompt notification of reinstatement will be made to those agencies and organizations originally informed about the exclusion. We have modified the language in this provision to clarify that notification will be to the extent applicable; that is, it will be made to all entities originally notified about the exclusion that are still in business or, with respect to government contractors, still operating as a contractor for a government health care program.

6. Appeal of Exclusions

Comment: A few commenters felt that the "preponderance of the evidence" standard set forth in § 1001.2007(c) was improper given the potential harm exclusions cause providers' professional careers. One commenter was especially concerned about the use of this standard in cases involving exclusions imposed under § 1001.951 for conduct violating the criminal anti-kickback statute. One commenter stated that the standard was inconsistent with legislative intent.

Response: The preponderance of the evidence standard is the traditional standard of proof in administrative hearings, and, as such, ought to be applied in these administrative proceedings (see *Delikosta* v. *Califano*, 478 F. Supp. 640, 643 n. 4 (S.D.N.Y. 1979)).

Moreover, as we pointed out in the proposed regulations, the legislative history of MMPPPA reflects Congress' intent that the preponderance of the evidence standard be applied in kickback exclusion appeals (see H.R. Rep. No. 85, Part 1 at 10 (1987); H.R. Rep. Part 2, No. 85 at 9 (1987); S. Rep. No. 109, at 10 (1987)).

Comment: Several commenters felt that § 1001.2007(a) improperly limited the issues upon which parties could appeal an exclusion before an ALJ. Section 1001.2007 limits the issues on appeal to whether (1) the statutory basis for imposing the exclusion exists and (2) the length of the sanction is unreasonable. One commenter felt that if OIG failed to meet its notice requirements under part 1001, subpart E, this should be a basis for appeal of the exclusion. Another party felt that providers convicted of program related convictions in States affording fewer due process protections than those granted under Federal law should be

able to attack the underlying conviction at their hearing to contest the exclusion.

Response: We have deliberately limited the issues that may be appealed under § 1001.2007, in keeping with the authority under section 1128 of the Act delegated to the OIG. Under section 1128(a), Congress mandated that the Secretary exclude individuals and entities convicted by States of program related crimes, or of crimes involving patient abuse. The OIG, to whom this authority has been delegated, is statutorily obligated to implement exclusions whenever such convictions have occurred. The due process afforded by States in convicting their citizens is not a factor we are authorized to consider.

In section 1128(b) of the Act, Congress authorized the Secretary to impose exclusions at its discretion under the various circumstances described in that section. As the Secretary's delegatee under section 1128, the OIG has been vested with that discretionary authority. Because the decision whether to exclude an individual or entity under section 1128(b) is the OIG's alone, the ALJ does not have authority to review the exercise of discretion by the OIG to exclude someone under section 1128(b), or to determine the scope or effect of the exclusion. In addition, the OIG's decision to exclude may not be appealed under § 1001.2007.

The OIG's broad discretion is also reflected in the language of § 1001.2007(a)(2), restricting the ALJ's authority to review the length of an exclusion imposed by the OIG. Under that section, the ALJ's authority is limited to reviewing whether the length is unreasonable. So long as the amount of time chosen by the OIG is within a reasonable range, based on demonstrated criteria, the ALJ has no authority to change it under this rule. We believe that the deference § 1001.2007(a)(2) grants to the OIG is appropriate, given the OIG's vast experience in implementing exclusions under these authorities.

With respect to the comment that failure to provide adequate notice should be a basis for appeal of an exclusion, we disagree. At most, it could be the basis for recalculating the effective date of the exclusion. Moreover, under these regulations, all excluded individuals and entities are notified at least 20 days before the effect of an exclusion. To date, no individuals or entities have ever been excluded without proper notice. In the unlikely event that an individual or entity was excluded without proper notice, the OIG, if informed of the error, will take the steps necessary to ensure protection of the excluded party's opportunity to be heard, and appeal rights.

G. Part 1001, Subpart F—Reinstatement Into the Programs

Comment: Various commenters believed that the reinstatement procedures set forth in the proposed regulations are unconstitutional. Some of these commenters felt that the provision authorizing the OIG to deny reinstatement without the possibility of review is a denial of due process in violation of the Fifth Amendment. Others felt that the provisions authorizing the OIG to consider evidence of conduct occurring before the date of the exclusion violates an individual's First Amendment right to privacy.

Response: The provisions of the proposed regulations setting forth the reinstatement procedures merely implement the authority given to the Department by Congress. Section 1128(g) of the Act specifically provides that termination of an exclusion is not automatic, and grants the Secretary the authority to promulgate regulations setting forth the procedures for applying to the Department for reinstatement.

Further, the legislative history to MMPPPA makes it clear that the Secretary has the discretion to grant or deny a request for reinstatement, and provides that the decision is not subject to administrative or judicial review:

> The Committee bill maintains current law by providing that the decision of whether or not to grant an applicant's request for reinstatement is vested by law in the Secretary's discretion and thus is not subject to judicial review. (House Report 100–85, *supra* at 13.)

Concerning the OIG's consideration of an excluded individual's conduct prior to the date of the notice of exclusion, section 1128(g) of the Act states that:

> the Secretary may terminate the exclusion if the Secretary determines, on the basis of the conduct of the applicant which occurred after the date of the notice of exclusion or *which was unknown to the Secretary at the time of the exclusion* * * * (emphasis added)

Thus, consistent with the statute and its legislative history, the OIG is authorized to consider conduct of the individual or entity occurring prior to the date of the notice of exclusion, provided the OIG was not aware of such conduct at the time of the exclusion, as provided in § 1001.3002 of the proposed regulations.

Under section 1128(g), the decision whether to reinstate individuals excluded from the Medicare and State health care programs is vested by law in the Secretary's discretion and is not subject to judicial review. Prior to the passage of MMPPPA, reinstatement decisions were not subject to administrative or judicial review. When it enacted MMPPPA, Congress indicated that it did not expect the Department to change current legal procedures for reinstatement (see H.R. Rep. No. 85, Part 1, at 13, H.R. Rep. No. 85, Part 2, at 13). Thus, we believe that Congress, in section 1128(g) of the Act, did not intend to provide for administrative or judicial review for reinstatement decisions. Under section 1128(g), the Department is authorized to determine whether a previously excluded individual or entity can now be trusted to do business with the Government honestly and fairly. Because of its vast experience administering sanctions against health care providers, the OIG is in a better position than the ALJs to make these determinations. We have added paragraph (f) to § 1001.3002 to clarify that ALJs are not authorized to reinstate excluded individuals or entities under these regulations.

Comment: One commenter expressed concern about the provision in § 1001.3004(b) that subsequent requests for reinstatement following an initial denial will not be considered for one year. This commenter felt that there may be instances when a year is not sufficient time for the OIG to determine whether the criteria governing reinstatement under § 1001.3002(a) have been met.

Response: We agree that a year may be insufficient for purposes of assessing whether the conduct for which the provider was excluded is likely to recur, or whether the provider meets the other criteria set forth under § 1001.3002(b). For example, a physician excluded under section 1128(b)(4) of the Act for reasons bearing upon his or her professional competence may have moved to a different jurisdiction to begin practicing again just prior to his or her initial request for reinstatement. In that case, if the OIG were required to consider a new request within a year following the denial of the initial request, that might be insufficient for purposes of determining whether the provider had remained incompetent or was deserving of reinstatement. For that reason, we are modifying § 1001.3004(b) to state that after a denial of reinstatement, a subsequent request will not be considered for at least one year.

H. Part 1002—State-Initiated Exclusions From Medicaid

Comment: One commenter was concerned that the regulations violate the Social Security Act and the Fifth

amendment right to due process, because they invite States to add punishments beyond those authorized by Federal law.

Response: This comment appears to refer to § 1002.2(b), which simply states that nothing in the regulations limit a State's own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law. State agencies may prosecute and sanction providers on their own initiative when State law authorizes them to do so. Nothing in section 1128(d) of the Act or its legislative history indicates that the Federal statutory provisions governing the length of exclusions were intended to supplant State law provisions governing exclusions from State health care programs. In fact, section 1128(d)(3)(B)(ii) provides that "a State health care program may provide for a period of exclusion which is longer than the period of exclusion under title XVIII (Medicare)."

Comment: Several commenters expressed their opposition to §§ 1002.210, 1002.212, and 1002.213 through 1002.215 of the proposed regulations. These provisions set forth procedural safeguards to be followed by the States when excluding an individual. The commenters believed that a Federal agency should not promulgate regulations that require a State to carry out administrative tasks that are not specifically set out in the underlying statute.

Response: In accordance with section 1902(p)(1) of the Act, State Medicaid agencies have the authority to initiate exclusions of individuals or entities who could be excluded from Medicare by the Federal government under sections 1128, 1128A or 1866(b)(2) of the Act. The Department is authorized to require State agencies to develop mechanisms for implementing and terminating exclusions imposed under these authorities. Under section 1902(a)(39) of the Act, which sets forth the requirements for State Medicaid plans, the State programs are obligated to "provide that the State agency shall exclude any specified individual or entity from participation * * * when required to do so pursuant to section 1128 or section 1128A." In addition, section 1902(a)(4) of the Act states that plans must provide "such methods of administration * * * as are found by the Secretary to be necessary for the proper and efficient operation of the plan." These provisions clarify, by statute, that we may require States to adopt certain administrative procedures when they impose exclusions at the direction of the Secretary under the Secretary's exclusion or CMP authorities.

Furthermore, when an individual or entity has been excluded, suspended, or otherwise sanctioned by a State Medicaid agency, the OIG is authorized to exclude that individual or entity from Medicare and all State health care programs in accordance with section 1128(b)(5) of the Act, that is, to "piggyback" onto the State-initiated exclusion an additional nationwide exclusion from Medicare and *all* State health care programs. Thus, the OIG's exclusion is based upon a State agency's determination that a provider is unfit to participate in their State Medicaid program. In making that determination, the agency must afford the provider certain minimum due process safeguards before effectuating the exclusion, such as notifying the provider of the proposed exclusion and the basis therefore, and giving the provider a chance to respond to the allegations against them either in person or in writing. We received comments from one State agency stating that many or most States already have due process safeguards built into their exclusion process. However, as discussed above, because the administrative procedures followed in State-initiated exclusions may impact upon the OIG's authority to initiate exclusions under section 1128(b)(5), we believe it is important to insure that *all* States have minimum due process safeguards in effect when initiating exclusions from State Medicaid programs. We believe the administrative procedures set forth in the regulations provide such safeguards. In fact, they are based on the OIG's own procedures for initiating exclusions. Finally, in addition to the reasons set forth above, we believe the fact that Medicaid is a joint State and Federally-funded program supports the OIG's authority to set forth in regulations administrative procedures to be followed in State-initiated exclusions. Accordingly, we are not adopting the comments on this issue.

Comment: In accordance with § 1002.230(a) of the proposed regulations, the State Medicaid agency is required to notify the OIG "whenever a State or local court has convicted an individual who is receiving reimbursement under Medicaid of a criminal offense related to participation in the delivery of health care items or services of the Medicaid program." One MFCU pointed out that they routinely notify the OIG when they obtain State convictions. The comment from the MFCU stated that in order to avoid having both the MFCU and the State agency report to the OIG on the same convictions, proposed § 1002.230 should be revised to add the following language at the end of the last sentence in paragraph (a): "* * * except when the State MFCU has so notified the OIG."

Response: We have adopted the MFCU's comment, and have revised § 1002.230(a) accordingly.

Comment: One commenter stated that the different definitions of the term "exclusion" in §§ 1002.203(b) and 1002.211 is confusing because it implies that an exclusion under subpart B—Mandatory Exclusions—is different than an exclusion under subpart C—Permissive Exclusions. This commenter suggested putting a general definition of "exclusion" in § 1001.2, Definitions.

Response: The definition of the term "exclusion" set forth in § 1002.203(b) pertains to subpart B of the regulations, which implements section 7 of Public Law 100–93 governing mandatory exclusions by State agencies. Section 7 of Public Law 100–93 provides that in order for a State to receive payments for medical assistance under section 1903(a) of the Act, with respect to payments the State makes to a HMO or to an entity furnishing services under a waiver approved under section 1915(b)(1), the State must exclude from participation such an entity if it could be excluded under section 1128(b)(8) of the Act, or if it had a substantial contractual relationship with an individual or entity that could be excluded under section 1128(b)(8). For the narrow purpose of implementing an exclusion under section 7 of Public Law 100–93, § 1002.203 points out that an exclusion includes the refusal to enter into or renew a participation agreement, or the termination of such an agreement, with the excluded entity. In part 1002, subpart B is entirely separate from subpart C, which pertains to permissive exclusions. Section 1002.211 defines the term "exclusion" for purposes of subpart C. In contrast to § 1002.203(b) of subpart B, in which the definition of "exclusion" focuses on a contract agreement between a State and an HMO or an entity furnishing services under a waiver by way of contract, § 1002.211 is broader in that it applies to all individual and entities, and focuses on the withhold of payments rather than the status of an agreement. Since the two different definitions are unique to the subparts in which they are set forth, we have chosen not to adopt the commenter's recommendation to consolidate them under one definitional section.

Comment: One commenter suggested changing § 1002.2(b) to read: "Nothing

contained in this part should be construed to limit a State's own authority to exclude an individual or entity from Medicaid for cause for any period authorized by State law."

Response: We are not adopting this comment. Section 1002.2(b) as it is written simply provides that nothing contained in part 1002 implementing the Federal statute limits the State's authority under State law to exclude an individual or entity. It is up to the various courts and legislative bodies to interpret how the individual States may apply the authority given to them under State law, not the OIG. Further, it would be inappropriate for the OIG to define on behalf of State agencies the terms of their agreements with health care providers.

Comment: One commenter expressed concern that the term "agent" as used in § 1002.3(c) is very broad and may allow Medicaid agencies to unfairly exclude certain providers.

Response: The final regulations include a definition of the term "agent" modeled after the definition set forth in the HCFA regulations (42 CFR 455.100), implementing sections 1124(a)(3) and 1126 of the Act and which ties into the OIG's exclusionary authority under section 1128(b)(8) of the Act. Section 1002.3(c) parallels section 1128(b)(8) of the Act, giving State agencies the same authority as the Federal government to exclude an entity controlled by a sanctioned individual. The final regulations define "agent" as anyone who has the express or implied authority to obligate or act on behalf of an entity. As discussed above, we intend for this definition to mainly cover agency relationships where the agent has, or is able to have, a significant role in the entity.

I. Part 1003—Civil Money Penalties and Exclusions

1. General Comments

Comment: Several commenters expressed concern about the application of § 1003.114, which relates to the applicability of the doctrine of collateral estoppel to CMP proceedings. One commenter believed that there cannot be a "final determination" for purposes of collateral estoppel until a party has exhausted all of his or her available appeal rights. Another commenter felt that the collateral estoppel doctrine should only apply when the prior proceeding was a judicial or administrative proceeding with sufficient safeguards to protect against bias or error. A third commenter stated that the regulations should require that the issue decided in the prior proceeding must be identical to the one at issue in order for collateral estoppel to apply.

Response: Section 1003.114 sets forth the basic doctrine of collateral estoppel. In order to safeguard the due process rights of respondents in CMP proceedings, we intend to apply § 1003.114 in full accordance with recognized legal standards. However, we do not feel this is the appropriate forum to address discrete legal issues relating to the application of the collateral estoppel doctrine. Rather, we believe that the legal issues raised by the commenters may be best addressed on a case-by-case basis as they arise, so that the ALJs can objectively dispose of them in accordance with the governing law and the facts of each case. Thus, we have chosen not to revise § 1003.114 as the commenters had requested.

Comment: One commenter felt that § 1003.109(a)(5) should be expanded to include the right to request an extension of time to respond to the OIG's notice of proposed determination beyond the 60 days set forth in that provision.

Response: In § 1005.2 of this final rule, we have provided a 60-day period in which a petitioner or respondent in any exclusion or CMP proceeding may request a hearing. This is a change from the rules that previously applied to CMP cases. Under § 1003.109 of the prior regulations, respondents were entitled to only 30 days in which to request a hearing, but also in which they could request an extension of that 30-day period for "good cause." In practice, the OIG never granted an extension of more than 30 additional days. Thus, the maximum period in which to respond never exceeded 60 days.

We have decided to simplify the process for all concerned by entitling all respondents to 60 days in which to request a hearing. We are thereby doubling the usual period of time previously available to respondents, while eliminating the labor involved in generating "good cause" requests and responding to them. Section 1003.109(a)(5) of this rule now merely requires the notice of proposed determination for CMP cases to include the 60-day timeframe set forth in § 1005.2. Therefore, no change in this section is appropriate.

Comment: We received comments to the effect that the OIG should not be limited to considering the mitigating factors set forth in §§ 1003.106 (b)(1) and (b)(2), but rather, the OIG and the ALJ should be able to consider any factors that may be mitigating.

Response: In accordance with § 1003.106(a)(5), in determining the amount of any CMP or assessment, the Department must take into account "such other matters as justice may require." This catch-all phrase already allows the OIG and the ALJ to consider any other mitigating factors that may exist.

Comment: Some commenters expressed confusion regarding the effect of the Supreme Court's decision in *United States* v. *Halper* on the scope of damages that the Inspector General may recover in CMP cases.

Response: The courts have recognized that civil penalty statutes entitle the government to recover full compensation for its damages, and that ordinarily, application of a statutory "fixed penalty plus double damages" provision does no more than make the government whole (*United States* v. *Halper*, 109 S.Ct. 1892, 1900, 1902 (1989); *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 152–154, 76 S.Ct. 219, 222 (1956)). This is due, in part, to the fact that the government's losses involve more than merely the amount disbursed on account of false or improper Medicare or Medicaid claims (*Mayers* v. *United States Department of Health and Human Services*, 806 F. 2d 995, 999 (11th Cir. 1986)). In CMP cases, the government's damages typically include, in addition to actual improper payments made, (1) costs of detection, investigation and prosecution of fraud, (2) diversion of scarce resources from the direct provision of health services, and (3) loss of public confidence in the integrity of Medicare or State health care programs, and in the government's ability to properly manage them (*The Inspector General* v. *Harold Chapman and Autumn Manor, Inc.*, No. C–5 (1985), *aff'd, Chapman* v. *Department of Health and Human Services*, 821 F. 2d 523, 528 (10th Cir. 1987); *Mayers, supra* at 999).

We have modified the guidelines under §§ 1003.106 (c) and (d) for determining appropriate monetary sanctions in order to codify existing case law governing the process of determining penalties and assessments under the CMP law. We have clarified that the United States or any State government is entitled to full compensation for any damages and costs arising from CMP violations. We have specifically identified the costs of investigation, prosecution and administrative review as amounts to be taken into account in determining appropriate monetary sanctions. Finally, we have converted the guidelines under § 1003.106 to binding rules, except to the extent that their application in a particular case could result in an amount that exceeds constitutional limitations. This final modification reflects the intent of the original

regulations that the latitude inherent in the non-binding guidelines is meant only to "provide for the exceptional case" (48 FR 38827, August 26, 1983).

Under this approach, the ALJ must compute the amount of the penalty and assessment in accordance with the guidelines set forth in § 1003.106, and then make a determination as to whether that amount exceeds constitutional limits. Should the ALJ determine that the prescribed amount is excessive and violative of the constitution, the ALJ would be required to explain the reasons for that conclusion. The ALJ would then be authorized to reduce the amount, but only to the point where the amount was no longer constitutionally impermissible. Both the determination that the amount computed under the regulations was constitutionally infirm and the amount of the required reduction would be subject to administrative and judicial review.

Comment: With regard to § 1003.102 of the proposed regulations, one commenter wished to know under what circumstances a person "should have known" that a claim was false or fraudulent, or not provided as claimed.

Response: Congress has indicated that the "should know" standard of knowledge under section 1128A of the Act places upon Medicare and Medicaid providers the duty to ascertain the truth and accuracy of claims submitted by them:

> Providers who bill the Medicare, Medicaid and MCH programs have an affirmative duty to ensure that the claims for payment which they submit, or which are submitted on their behalf by billing clerks or other employees, are true and accurate representations of the items or services actually provided. (H. Rep. No. 100–391, 100 Cong., 2d Sess., pp. 533–535 (1987))

Thus, under the "should know" standard of liability, the duty to ascertain the truth and accuracy of a claim exists at all times. Further, the "should have known" standard has been interpreted as subsuming reckless disregard for the consequences of a person's acts, as well as negligence in preparing and submitting or in directing the preparing and submitting of claims (see *Mayers* v. *U.S. Department of Health and Human Services*, 806 F.2d 995 (11th cir. 1986), *cert. denied*, 484 U.S. 822 (1987); *The Inspector General* v. *Edward J. Petrus, Jr., M.D., and the Eye Center of Austin*, Docket No. C–147 (Oct. 10, 1990), pg. 42)).

Further guidance as to the meaning of "should have known" can be found in the *Restatement of Torts (2d)* at section 12 (1965):

> The words "should know" are used throughout the Restatement * * * to denote the fact that a person of reasonable prudence and intelligence or of the superior intelligence of the actor would ascertain the fact in question in the performance of this duty to another, or would govern his conduct upon the assumption that such fact exists. (See *In the Case of the Inspector General* v. *Corazon C. Hobbs, M.D.*, Decision of ALJ Charles E. Stratton, Docket No. C–55 (December 5, 1989), pg. 27, citing the restatement.)

Whether a health care provider or practitioner "should have known" that an item or service has not been provided as claimed or that a claim is false or fraudulent is fact intensive, and will therefore be determined on a case-by-case basis.

2. Other Crimes, Wrongs, or Acts as an Aggravating Circumstance

As mentioned in the preamble to the proposed regulations, we solicited comments on whether it would be appropriate to include a provision in the regulations stating that proof of "other crimes, wrongs, or acts" is an aggravating circumstance in OIG sanction cases.

Comment: We received one comment objecting to the inclusion of such a provision. The commenter believed that the mere existence of a prior wrongful act should not serve as an aggravating factor if that act were unrelated to the Medicare or Medicaid program.

Response: We have decided to add into the final regulations a new § 1003.106(b)(4), "Other Wrongful Conduct." This provision makes it an aggravating factor if the OIG proves that a respondent engaged in wrongful conduct, other than the conduct at issue, relating to government programs or in connection with the delivery of a health care item or service. Although the OIG anticipates that the wrongful conduct raised for purposes of this provision will be Medicare and Medicaid-related, there may be wrongful conduct that is unrelated to Medicare and Medicaid that is considered to be aggravating, such as where a respondent has proved himself or herself to be untrustworthy in dealing with other government programs. The OIG may present evidence of "other wrongful conduct" as an aggravating factor even if such conduct was not specifically mentioned in the notice of proposed determination initiating the CMP proceeding.

In accordance with § 1003.106(b)(4), "other wrongful conduct" includes but is not limited to, evidence that the conduct for which the OIG is seeking civil sanctions is part of a larger pattern or scheme of the same or similar wrongful conduct. For example, the OIG has evidence to show that an individual submitted 200 false claims. The OIG only initiates an CMP action based on 100 of those claims because the statute of limitations has run on the 100 claims remaining. In accordance with § 1003.106(b)(4), the OIG may present evidence of the remaining claims as an aggravating factor.

Finally, it is important to note that the absence of "other wrongful conduct" is not a mitigating factor.

3. Effect of Regulations on Other CMP Provisions

Comment: Several commenters expressed concern that § 1003.102 does not incorporate the provisions of section 1128A(b) of the Act, which prohibits incentives to physicians in order to reduce or limit services to Medicare or Medicaid patients. The commenters believed that the regulations fail to provide substantive guidance or place procedural restrictions on the Department's implementation of section 1128A(b) of the Act, effective on April 1, 1991.

Response: With respect to the procedural guidelines for the implementation of section 1128A(b) of the Act, the OIG currently intends for the administrative procedures set forth at part 1003 of these regulations to govern proceedings initiated for alleged violations of section 1128A(b). In fact, the OIG currently intends for the administrative procedures set forth at part 1003 to govern all proceedings initiated under the CMP authorities contained in the Social Security Act, even those not specifically mentioned in the regulations, e.g., section 1867 of the Act. We acknowledge that the various CMP authorities set forth in the Act and the sanctions that accompany them may vary from those specifically described in the regulations in such a way that certain procedures set forth at part 1003 do not make sense when they are applied to them. Where that is the case, the regulations will be used as a framework for the proceedings, and will govern to the extent they are applicable.

Whenever the OIG initiates a CMP proceeding, it will notify each respondent that the procedural regulations set forth at part 1003 will govern. It is well-established that if a party is notified of the standards and procedures that will be applied in a particular case, an agency can bring an action against that party even in the absence of regulations (see *Patchogue Nursing Center* v. *Bowen*, 797 F.2d 1137, 1143 (2d Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987); *Central Arkansas Auction Sale, Inc.* v. *Bergland*, 570 F.2d 724, 727 (8th Cir. 1977), *cert. denied*, 436 U.S. 957

(1978)). With respect to the implementation of the substantive provisions of section 1128A(b) of the Act, the Department is currently working on separate regulations. However, it is not necessary for such regulations to be in place before the OIG may exercise its authority under that provision once it takes effect on April 1, 1991. An agency may exercise its statutory functions even in the absence of specific implementing regulations (see *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947); *Abbott-Northwestern Hospital, Inc.* v. *Schweiker*, 698 F.2d 336 (8th Cir. 1983)). Thus, once the OIG gives such notice regarding section 1128A(b) of the Act, there is legal support for using the administrative procedures set forth at part 1003 to implement CMP authorities not specifically mentioned in the regulations.

J. Part 1005—Appeals of Exclusions and CMPs

General Comments

Comment: We received a number of comments concerning the authority of ALJs. One commenter suggested that we amend § 1005.2 to permit ALJs to dismiss requests for hearing that fail to meet the requirements of paragraph (d). This commenter pointed out that if no factual or legal basis for a hearing was identified by the requesting party, the ALJ should dismiss the request for hearing. Another commenter objected to the provision under § 1005.4(c) that the ALJ may not enjoin an act of the Secretary. Finally, one commenter suggested that ALJs should be able to render directed verdicts in these cases.

Response: With respect to the comment that ALJs should be able to dismiss requests for hearing if there is no factual or legal dispute, we agree, and have revised § 1005.2(e) accordingly. It should also be noted that under § 1005.4(b)(12) an ALJ may dismiss a case, in whole or in part, by summary judgment, where there is no disputed issue of material fact. With respect to the objection to § 1005.4(c), we note that the ALJ's own authority in these proceedings is derived from the Secretary by delegation (sections 1128A(f) and 205(b) of the Act). Since the ALJ's authority to hear cases comes from the Secretary, the ALJ cannot overrule acts of the Secretary which may have an impact on these cases. The full scope of the ALJ's limited authorities in these proceedings is contained in § 1005.2.

We have also clarified under §§ 1005.4(c) (5) and (7) that ALJs may not review the OIG's exercise of discretion to impose a penalty, assessment or exclusion under these authorities. It should also be noted that in a case where the ALJ upholds the OIG's exclusion determination, the ALJ is not authorized under these regulations to modify the date of commencement of the exclusion identified in the OIG's notice of exclusion.

We have also provided in § 1005.4(c)(6) that in any case where an ALJ finds that an individual or entity has committed an act described in section 1128(b) of the Act, the ALJ is not authorized to reduce to zero the exclusion period proposed by the Inspector General. In other words, when the ALJ finds a violation, he or she must remedy it with some period of exclusion. We believe that this requirement is consistent with congressional intent in enacting section 1128 which explicitly provides for exclusion as the appropriate remedy for the commission of any of the acts specified in the statute. Thus, in every case where the Inspector General has exercised his or her discretion to impose an exclusion, and where the ALJ concurs that violation did occur, some period of exclusion is necessary to remedy the violation.

Although circumstances such as the absence of proof of harm to beneficiaries or the programs may mitigate the length of exclusion, they do not eliminate the need for some remedial period of exclusion. Inherent in the structure and far-reaching effect of section 1128 is the notion that any violation compromises the integrity of the programs and thereby places the programs and its beneficiaries at risk.

We do not agree with the comment that ALJs should be authorized to impose directed verdicts in these cases. If a directed verdict is rendered prior to the presentation of both parties' cases, the record will be incomplete in the event that the initial decision were subsequently reversed on appeal. We have encountered this situation in the past, and the only remedy in such a case is a new trial. Thus, it can be less efficient in the long run, and can delay and frustrate justice, to authorize directed verdicts in these proceedings.

Comment: One commenter suggested that these regulations should require a pre-hearing conference before the ALJ to attempt settlement of the case.

Response: We agree that ALJs should encourage parties to settle their cases prior to hearing. We are therefore adding a provision to § 1005.6 to clarify that ALJs should investigate the possibility of settlement during pre-hearing conferences.

Comment: Several commenters were concerned that the type of discovery provided for under § 1005.7 was too limited. One conmenter suggested that the Administrative Procedure Act (APA) mandates broader discovery rights in exclusion appeals under these authorities. Some commenters felt that the prohibition against discovery other than documentary requests was unfair, particularly in light of the OIG's testimonial subpoena authority under part 1006. One commenter felt it was inappropriate to place the burden of showing that discovery should be allowed on the party *seeking* discovery, rather than having the other party show cause why discovery should not be conducted.

Some commenters felt that this provision left unanswered important questions regarding discovery procedure. One commenter wanted to know if data stored in computers could be discoverable. Another commenter was concerned over whether the OIG, in response to a discovery request, was required to seek or obtain material in the possession of other branches or divisions of the agency.

Response: Generally, discovery is not required to be made available in administrative proceedings. Under the APA, agencies are free to decide the extent of discovery to which parties to administrative proceedings will be entitled (see *Pacific Gas & Electric Co.* v. *FERC*, 746 F. 2d 1383, 1387 (9th Cir. 1984); *National Labor Relations Board* v. *Valley Mold Co.*, 530 F. 2d 693, 695 (6th Cir. 1976); *Frilette* v. *Kimverlin*, 508 F. 2d 205, 208 (3d Cir. 1974); *Silverman* v. *Commodity Futures Trading Commission*, 549 F. 2d 28 (7th Cir. 1977)).

With respect to exclusion and CMP proceedings, we have determined that discovery should be limited to documentary exchanges in order to avoid the time-consuming discovery fights that commonly beset civil litigation. Since discovery is to be as limited as possible, we believe it is appropriate to place the burden of showing why it is needed on the party seeking discovery under § 1005.7(c)(3). Further, we have clarified in § 1005.7(a) that discovery requests may only be made from one party to "another party." Therefore, the OIG may only be requested to produce documents in the possession of the OIG, as a party to the proceeding under § 1005.2(b), and not documents potentially in the possession of other branches or divisions of the Department, such as HCFA.

We have also inserted a provision that protects against the disclosure of interview reports or statements obtained

by any party of persons who will not be called as witnesses, and analyses and summaries prepared in conjunction with the investigation or litigation of the case (§ 1005.7(d)). This protection extends to respondents as well as the government, and thus is broader than the provision included in the proposed rule that would have protected only "internal government documents."

While limited discovery is necessary to ensure timely and efficient disposition of these proceedings, it does not operate unfairly against petitioners and respondents. In exclusion and CMP cases, it is usually the petitioner and respondent, rather than the OIG, who possess the vast bulk of discoverable evidence. With respect to the comment that the OIG is favored because it can subpoena witnesses under part 1006, it should be clarified that the investigative subpoena provisions under part 1006 apply only to CMP investigations. That is, the subpoena is not available to the OIG once litigation has begun. The authority enables the OIG to obtain evidence from otherwise uncooperative witnesses during the course of investigations. It is not a litigation discovery provision.

In response to the comment concerning the discoverability of computer data we have added a provision to § 1005.7(c) dealing with information stored in computers. Although that section prohibits "the creation of a document," we have added language indicating that where requested data is stored in a computer, a party has the right to request that the information be provided in a form that can be used by the requesting party, i.e., a "hard copy" or print out of the data, or a computerized version of the data, such as a computer disk. It is anticipated that the parties will cooperate with one another by providing information in a format that is useful to the other party.

2. Exchange of Witness Lists, Statements and Exhibits

Comment: A few commenters felt that we should clarify the procedures under § 1005.8(b) with respect to evidence that was not exchanged at least 15 days prior to the hearing as required by § 1005.8(a).

Response: The 15-day rule set forth in § 1005.8(a) requires opposing parties to disclose the documents that will be presented at the hearing and, in addition, information concerning witnesses who will testify. One purpose of the rule is to provide parties the opportunity to subpoena any individuals for whom the opposing party has submitted statements in lieu of live testimony. Thus, the right to cross-examination of witnesses under § 1005.16(d) extends only to individuals subpoenaed to testify, and does not include declarants or interviewees. However, the chief purpose of the provision is to grant both parties adequate time to prepare to contest the other side's case. This purpose is defeated if one party fails to comply with the exchange provisions of § 1005.8(a). Therefore, if a party objects to the admission of evidence not disclosed in compliance with § 1005.8(a), the ALJ normally should not admit the evidence.

However, in extraordinary situations, a party may be unable to disclose evidence at least 15 days prior to the hearing. For example, a relevant document may have been created only 5 days before the hearing. Under such circumstances, the ALJ may admit evidence not exchanged in accordance with § 1005.8(a), unless its admission would substantially prejudice the objecting party. If admission of evidence not disclosed in compliance with § 1005.8(a) would cause substantial prejudice, the ALJ may do one of two things. The ALJ may exclude the evidence and go forward with the hearing, or the ALJ may, at his or her discretion, recess the hearing to allow the objecting party the opportunity to prepare and respond to the evidence.

Thus, under § 1005.8(b), the ALJ should only consider the issue of prejudice once a determination has been made that there were extraordinary grounds for the failure to comply with § 1005.8(a). If no such grounds exist, the evidence should always be excluded and the hearing should go forward.

With respect to § 1005.8(c), we believe that, prior to the hearing, ALJs should resolve objections to the authenticity of documents exchanged in accordance with § 1005.8(a). In presenting their cases, parties should be able to rely on the authenticity of documents provided to opposing counsel, unless a specific objection has been made before hand. We have modified § 1005.8(c) accordingly.

3. Witnesses

Comment: One commenter objected to the admission of statements in lieu of live testimony unless both sides consented to admission of the statement. This commenter felt it was unfair for petitioners and respondents to bear the burden of subpoenaing witnesses to contradict any such statements submitted by the OIG.

Response: We disagree. Written statements in lieu of live testimony have always been admissible in CMP proceedings, and have served a valuable purpose in cases where live witnesses were unavailable. For example, the statement of a now deceased Medicare beneficiary describing his or her knowledge of a physician's conduct could be relevant and material in a CMP case against that physician. Since both parties have the right to submit statements in lieu of testimony, each party bears the burden of subpoenaing witnesses whose statements are proposed as exhibits by the opposing party. The courts have held such statements admissible in administrative proceedings, despite their heresay character and absent any cross-examination of the witness who gave the statement (see *Richardson* v. *Perales*, 402 U.S. 389, 91 S.Ct. 1420 (1971)).

4. Burden of Proof

Comment: One commenter stated that the burden of proof for exclusions based on kickbacks should be the same as for CMP cases.

Response: We agree, and have revised § 1001.15 to provide that the burden of going forward and the burden of persuasion are the same for exclusions initiated under § l001.951 as for CMP cases initiated under part 1003.

Comment: Many commenters asserted that the APA requires that the burden of persuasion always rests with the government in exclusion cases.

Response: These commenters are mistaken as a matter of law. As we discussed in some detail in the preamble to the proposed rule, the APA requires the government—in this case, the OIG—to have the burden of going forward with evidence sufficient to make a *prima facie* case to support an exclusion; it does not require the OIG to bear the burden of persuasion in such cases.

Comment: Many commenters asserted that it is fundamentally unfair for the government not to bear the burden of persuasion in exclusion cases.

Response: As discussed above, with respect to kickback and CMP exclusions we have placed the burden of persuasion on the government because Congress intended "special due process protections" to accompany such exclusions (see Senate Report 100–109, *supra*, at 12–13). We have also decided to place the burden of proof on the government for PRO exclusions under part 1004 of this regulation.

With respect to all of the OIG's other exclusion authorities, however, we have decided not to specify by regulation which party bears the burden of going forward or which party bears the burden of persuasion. Instead, we have opted to continue to rely on the ALJs to allocate

the burden of proof as they deem appropriate.

Comment: Several commenters argued that it would be unfair to allow a party to raise new facts during its case-in-chief when the opposing party had no adequate notice and opportunity to respond.

Response: To ensure that no party is unfairly prejudiced by items or information raised at the hearing which were not set forth in the original notice letter, we have revised § 1005.15(f) to clarify that admission of such new evidence at a hearing is subject to the restrictions set forth in §§ 1005.8 and 1005.17.

5. Evidence

Comment: One commenter felt that the ALJ should not be given discretion in § 1005.17(b) to decide whether to apply any rules of evidence. The commenter felt that inconsistent application of the evidentiary rules would frustrate the ability of parties to prepare for hearing, and could result in arbitrary determinations by ALJs.

Response: The discretion we have provided in § 1005.17(b) is not unbridled. We expect the ALJs to continue their current practice of admitting evidence that may be barred by the rules of evidence, such as hearsay, if a determination is made that the evidence is reliable. However, if an ALJ believes that proffered evidence inadmissible under the rules of evidence is wholly unreliable, the ALJ should exclude the evidence.

Comment: In the proposed regulations, we solicited comments as to whether we should recognize and include Rule 404(b) of the Federal Rules of Evidence in the hearing procedures under part 1005. Rule 404(b) allows for the introduction of evidence of other crimes, wrongs or acts under certain circumstances, such as to prove knowledge, lack of mistake, or existence of a scheme. We also solicited comments on whether the rules should clarify that proof of "other crimes, wrongs or acts" is an aggravating circumstance in OIG sanction cases. Two-thirds of the comments we received supported the inclusion of Rule 404(b) in these regulations. On the other hand, one commenter said that such a rule would be unfair to petitioners and respondents because of the difficulty of challenging the accuracy of prior wrongful acts given the limited discovery available under this part.

Response: We agree with the majority of commenters that evidence of prior bad acts, including prior false claims, admitted for the purposes listed in Federal Rule of Evidence 404(b) is relevant and material and should be admitted. Such evidence should be considered proof of aggravating circumstances affecting the amount of damages awarded in CMP cases. Because the evidence provides proof of aggravating circumstances, and does not demonstrate facts relevant to the actual counts at issue, the evidence should be admitted even if the acts occurred prior to the statute of limitations period applicable to the claims at issue. Because evidence of aggravating circumstances bears only upon the amount of damages that should be imposed, and not a party's liability, evidence of prior bad acts should be admissible even if the prior bad acts were not mentioned in the IG's letter of notice to the petitioner or respondent. We have added a new paragraph (g) to § 1005.17 in accordance with these views.

We do not agree that discovery of the relevant facts concerning prior wrongful acts will be hampered by the limited discovery available under this part. Petitioners and respondents can seek any and all documents the OIG would use as exhibits to prove prior acts, such as plea agreements or judgments of conviction. Furthermore, at least 15 days prior to the hearing the petitioner or respondent is entitled to a list of any and all witnesses who might testify about the party's prior bad acts (§ 1005.8).

6. Initial Decision

Comment: A few commenters pointed out that, although parties are afforded 30 days within which to appeal the initial decision of an ALJ under § 1005.21(a), under proposed § 1005.20(d), the initial decision is not binding until 60 days after it is issued. This situation creates a gap of 30 days within which the ALJ decision will not be binding even if neither party decides to appeal it.

Response: We agree that the ALJ decisions should take effect immediately upon termination of the period within which the parties may appeal, when neither party appeals the decision. Therefore, we are modifying § 1002.20(d) to make initial decisions binding 30 days after they are issued by an ALJ, unless the decisions are timely appealed.

7. Appeal to the Secretary and Stay of Initial Decision

Comment: One commenter was concerned that the standards for internal agency review of ALJ decisions set forth in § 1005.21(h), and the authority of the Secretary to decline review of ALJ decisions under § 1005.21(g), violate due process.

Response: Under the APA, the Department is not required to provide for internal agency review of ALJ decisions imposing or upholding CMP or exclusion sanctions (5 U.S.C. 557). Moreover, a Federal agency may either adopt or reject the decision of an ALJ, and if it is fully satisfied with the ALJ's findings, it need not render a separate opinion (see *Starrett* v. *Special Counsel*, 792 F. 2d 1246, 1252 (4th Cir. 1986); *Braswell Motor Freight Lines, Inc.* v. *United States*, 275 F. Supp. 98, 103 (D.C. Tex. 1967) *aff'd* 389 U.S. 569, 88 S.Ct. 692 (1968); *Younger Bros., Inc.* v. *United States*, 238 F. Supp. 859, 860–61 (D.C. Tex. 1965)). Despite the fact that there is no legal requirement for internal agency review of ALJ decisions, we have chosen to provide such review in order to improve the administration and consistency of Department decisions imposing or implementing sanctions under the authorities set forth in Public Law 100–93. We have limited internal agency review to whether the decision is supported by substantial evidence, in the parallel manner that Congress, under sections 1128(f) and 205(g) of the Act, limited judicial review of agency decisions. We believe that this review process will eliminate erroneous sanctions decisions by the Department while, at the same time, granting appropriate deference to the credibility and other factual determinations of the ALJ.

Comment: A few commenters felt that the final rule should contain a provision stating when decisions by the DAB become final and binding on the parties.

Response: We agree that some clarification as to when agency action becomes final is needed, particularly in light of the provisions governing requests for stay of CMP decisions under § 1005.22. Accordingly, we are making several modifications to the proposed rules. First, we are revising § 1005.21(j) to clarify that a ruling by the DAB, including a decision to decline review of an ALJ's decision, becomes final and binding on the parties 60 days after the date on which the DAB serves the parties with a copy of the Secretary's decision.

This 60-day rule regarding finality reflects the Secretary's fundamental position that imposition of sanctions in CMP cases not be affected by the pendency of any appeals (see preamble to 1983 CMP regulations at 48 FR 38836, August 26, 1983). The procedure set forth in proposed § 1005.22 for filing with the ALJ a request for stay of a final CMP decision would appear to conflict with the Secretary's position that final

agency action in CMP cases is binding on the parties.

Accordingly, we have restricted the provision for stay pending judicial review in CMP cases. Under § 1005.22(b), following the DAB's decision, a respondent may seek a stay of any penalty or assessment imposed, but there is no authority providing for the stay of an exclusion. Furthermore, a stay of a penalty or assessment pending judicial review will only be granted if the respondent posts a bond or provides other adequate security.

Comment: One commenter objected to the fact that the provision for stay in § 1005.22 applies only to CMP cases and not to exclusion cases.

Response: The language and history of sections 1128(c) and 1128(f) of the Act indicate that Congress intended exclusions to take effect upon reasonable notice to the affected individual, and prior to the exhaustion of administrative and judicial remedies. In fact, section 1128(f) of the Act states that any individual or entity "that is excluded," that is, against whom the exclusion has already been made effective, is entitled to a hearing. Even in the exception carved out by Congress for exclusions under section 1128(b)(7), for which the statute affords extra due process protections, Congress still provided that such exclusions would become effective after an ALJ hearing (see Senate Report 100–109, *supra*, at 12–13). Clearly, Congress intended that exclusions would be imposed and effective pending appeals beyond the ALJ hearing.

K. Part 1006—Investigational Inquiries

Comment: One commenter was concerned about the provision in § 1006.4(g)(3)(iv), allowing the OIG to propose revisions to the transcript of a witness' testimonial interview. The commenter suggested that the testimony of an independent witness should not be susceptible to government revisions.

Response: By this provision, we meant to indicate that the OIG could propose corrections to the record transcribing the interview with the witness, if the record was incorrect. We did not mean to suggest that the OIG could propose substantive changes to the witness' testimony. We are revising the language of § 1006.4(g)(3)(iv) to clarify our intent.

Comment: One commenter felt that the targets of CMP investigations should be permitted to review the transcripts of investigative interviews of witnesses obtained under part 1006.

Response: We disagree. Targets of investigations have no legal right to review witness interview transcripts during the investigative phase of a case. These interviews are taken for investigative purposes prior to any litigation, often in order to determine whether there is *prima facie* evidence to pursue a CMP action. If the OIG subsequently determines that litigation is warranted, the transcript would become available in discovery. Furthermore, under § 1005.8, if the OIG planned to introduce the transcript into evidence at the hearing, it would provide a copy to the respondent at least 15 days prior to the hearing.

V. Technical Revisions

A. Subpoenas Directed at OIG Officials

Respondents or petitioners have occasionally sought the presence at a hearing of senior OIG officials. Requiring such individuals to appear and testify is extremely burdensome and detrimental to the proper functioning of the OIG. These officials could not perform their professional duties if they were forced to appear whenever any individual charged with a violation of an exclusion or CMP authority requested it. For that reason, under § 1005.9(c) of these regulations, we have provided that the OIG may comply with a subpoena to an OIG official by designating any OIG representative to appear and testify.

There is ample support in case law for this public policy. For example, courts have refused to allow parties to depose or subpoena the testimony of high level agency officials regarding administrative decisions committed to their discretion (see *Cornejo* v. *Landon*, 524 F. Supp. 118, 122 (E.D. Ill. 1981); *Simplex Time Recorder Co.* v. *Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985); *U.S.* v. *Morgan*, 313 U.S. 409, 421–22 (1940)). Agency officials cannot be compelled to provide information orally in an administrative proceeding unless the information "is not available from depositions of * * * other persons * * * or * * * through interrogatories or other discovery methods" (see *Cornejo* v. *Landon*, 524 F. Supp. at 122). The purpose of that rule is "to relieve agency decision-makers from the burdensomeness of discovery, allowing them to spend their valuable time on the performance of official functions and to protect them from inquiries into the mental processes of agency decisionmaking." *Id.*

B. Substitution of the Term "Exclusion" for "Suspension"

The term "suspension" has been changed to the term "exclusion" in part 1003 in the interests of uniformity and in order to clear up any confusion caused by the fact that both Congress and the Department have used the terms interchangeably. "Suspension" was the term Congress used in section 1128(a) of the Act prior to the passage of MMPPPA when it referred to the Secretary's authority or obligation to bar a provider from participation in government health care programs. In 1987, MMPPPA changed the term in the law to "exclusion." It is clear from the legislative history that changing the language did not change the meaning or effect of the Secretary's authority. In fact, in House and Senate Reports preceding the passage of MMPPPA, Congress used the term "exclusion" to refer to the Department's sanctioning authority although section 1128A did not contain the term at that time (see H.R. Rep. No. 85, 100th Cong. 1st Sess. 5 (1987)). Moreover, the Department's regulations make it clear that the effect of a suspension and the effect of an exclusion are identical (compare § 1001.115, Effect of Exclusion, and § 1001.126, Effect of Suspension). Under both regulations, payment will not be made to health care providers (including practitioners) for items or services furnished on or after the effective date of the sanction. Further, the same exceptions to the payment prohibition apply in both cases. (Compare §§ 1001.115 (b) and (c), and §§ 1001.126 (d) and (e).)

C. Definition of "Claim" Under Part 1003

We are revising § 1003.102(b) to reflect a 1987 technical statutory amendment to the definition of "claim" in the CMP law (section 1128A(i)(2) of the Act). Prior to 1987, the definition of "claim" in the CMP law was limited to applications for payment submitted by a provider of services to Medicare or a State health care program. Effective December 22, 1987, section 4118(e)(10)(B) of Pub.L. 100–203, as added by Public Law 100–360, section 411(k)(10)(D), substituted a new definition of "claim" that does not require submission by a health care provider to a health care program. Section 1128A(i)(2) of the Act now defines "claim" as simply "an application for payments for items and services under titles V, XVIII, XIX or XX of this Act."

Under this former definition of "claim," an assessment "of not more than twice the amount claimed," as provided for in section 1128A(a), could not be imposed for CMP violations that did not involve the submission of a claim by a health care provider to a health care program. Therefore, the current CMP regulations did not authorize imposition of an assessment for CMP violations that might not

involve a provider submitting a claim to a health care program (i.e., the violation of an assignment agreement under section 1842(b)(3)(B)(ii) of the Act). However, the definition of "claim" under section 1128A(i)(2) permits imposition of an assessment for CMP violations whenever an application for payment is made, even if it is not submitted by a provider to a health care program. Accordingly, we have modified § 1003.102(b) to clarify that an assessment may be imposed, as authorized, for CMP violations that are not based on the submission of a claim by a provider of services to a health care program.

D. Inclusion of the Omnibus Budget Reconciliation Act of 1990 Provisions Relating to PROS

We are also incorporating into part 1004 of these regulations conforming changes consistent with the new statutory authority set forth in section 4205 of Public Law 101–508, the Omnibus Budget Reconciliation Act of 1990. The amendment requires PROs, if appropriate, to offer a corrective action plan to practitioners prior to making a finding under section 1156 of the Act; and requires the Secretary to consider in determining whether a practitioner is willing and able to comply with his or her obligations, whether the practitioner entered into and successfully completed a corrective action plan prior to the PRO's submission of its recommendation and report to the Secretary.

Please note that these revisions to part 1004 are meant only to conform these regulations to new statutory changes resulting from OBRA 1990, and are not meant to be a comprehensive rewrite of this part. A more complete and comprehensive rewrite of the part 1004 regulations is currently under development within the OIG. We hope to issue those revised regulations through a separate notice of proposed rulemaking sometime in the near future.

VI. Regulatory Impact Analysis

Executive Order 12291 requires us to prepare and publish a final regulatory impact analysis for any regulation that meets one of the Executive Order criteria for a "major rule," that is, that which would be 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, individuals, industries, Federal, State, or local government agencies or geographic areas; 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. In addition, we generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (5 U.S.C. 601–612), unless the Secretary certifies that a final regulation would not have a significant economic impact on a substantial number of small entities.

We have determined that these final regulations are not classified as a "major rule" under Executive Order 12291 as these regulations are not likely to meet the criteria for having a significant economic impact. As indicated throughout this preamble, the final provisions in this rulemaking are intended to provide new authorities to the OIG to exclude an individual or entity from Medicare and State health care programs, and to levy CMPs and assessments, if they are engaged in a prohibited activity or practice proscribed by statute. These provisions serve to clarify departmental policy with respect to the imposition of exclusions, CMPs and assessments upon individuals and entities who violate the statute. We believe that the great majority of providers and practitioners do not engage in such prohibited activities and practices discussed in these regulations, and that the aggregate economic impact of these provisions should, in effect, be minimal, affecting only those who have engaged in prohibited behavior in violation of statutory intent. As such, this final rule should have no direct effect on the economy or on Federal or State expenditures.

For these reasons, we have determined that no regulatory impact analysis is required. In addition, while some penalties and assessments the Department could impose as a result of these regulations might have an impact on small entities, we do not anticipate that a substantial number of these small entities will be significantly affected by this rulemaking. Therefore, since we have determined, and the Secretary certifies, that this final rule would not have a significant economic impact on a number of small business entities, we have not prepared a regulatory flexibility analysis.

List of Subjects

42 CFR Part 1001

Administrative practice and procedure, Fraud, Health facilities, Health professions, Medicaid, Medicare.

42 CFR Part 1002

Fraud, Grant programs—health, Health facilities, Health professions, Medicaid, Reporting and recordkeeping requirements.

42 CFR Part 1003

Administrative practice and procedure, Fraud, Grant programs—health, Health facilities, Health professions, Maternal and child health, Medicaid, Medicare, Penalties.

42 CFR Part 1004

Administrative practice and procedure, Health facilities, Health professions, Medicare, Peer Review Organizations, Penalties, Reporting and recordkeeping requirements.

42 CFR Part 1005

Administrative practice and procedure, Fraud, Penalties.

42 CFR Part 1006

Administrative practice and procedure, Fraud, Investigations, Penalties.

42 CFR Part 1007

Administrative practice and procedure, Fraud, Medicaid, Reporting and recordkeeping requirements.

TITLE 42—PUBLIC HEALTH

CHAPTER V—OFFICE OF INSPECTOR GENERAL—HEALTH CARE, DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Chapter V is amended as set forth below:

PART 1000—INTRODUCTION; GENERAL DEFINITIONS

A. Part 1000 is amended as follows:

1. The authority citation for part 1000 is revised to read as follows:

Authority: 42 U.S.C. 1320 and 1395hh.

2. In subpart B, the introductory text of § 1000.10 is republished and § 1000.10 is amended by adding new definitions for the terms *beneficiary* and *furnished* to read as follows:

§ 1000.10 General definitions.

In this chapter, unless the context indicates otherwise—

* * * * *

Beneficiary means any individual eligible to have benefits paid to him or her, or on his or her behalf, under Medicare or any State health care program.

* * * * *

Furnished refers to items and services provided directly by, or under the direct supervision of, or ordered by, a practitioner or other individual, or ordered or prescribed by a physician, (either as an employee or in his or her

own capacity), a provider, or other supplier of services.

§ 1000.20 [Amended]

3. Section 1000.20 is amended by removing the existing definition for the term *beneficiary*.

B. Part 1001 is revised to read as follows:

PART 1001—PROGRAM INTEGRITY—MEDICARE AND STATE HEALTH CARE PROGRAMS

Subpart A—General Provisions

Sec.
1001.1 Scope and purpose.
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Authority: 42 U.S.C. 1302, 1320a–7, 1320a–7b, 1395u(j), 1395u(k), 1395y(d), 1395y(e), 1395cc(b)(2) (D), (E) and (F), and 1395hh, and section 14 of Public Law 100–93 (101 Stat. 697).

Subpart A—General Provisions

§ 1001.1 Scope and purpose.

The regulations in this part specify certain bases upon which individuals and entities may, or in some cases must, be excluded from participation in the Medicare and certain State health care programs. They also state the effect of exclusion, the factors that will be considered in determining the length of any exclusion, the provisions governing notices of exclusions, and the process by which an excluded individual or entity may seek reinstatement into the programs.

§ 1001.2 Definitions.

Controlled substance means a drug or other substance, or immediate precursor:

(a) Included in schedules I, II, III, IV or V of part B of subchapter I in 21 U.S.C. chapter 13, or

(b) That is deemed a controlled substance by the law of any State.

Convicted means that—

(a) A judgment of conviction has been entered against an individual or entity by a Federal, State or local court, regardless of whether:

(1) There is a post-trial motion or an appeal pending, or

(2) The judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed;

(b) A Federal, State or local court has made a finding of guilt against an individual or entity;

(c) A Federal, State or local court has accepted a plea of guilty or *nolo contendere* by an individual or entity; or

(d) An individual or entity has entered into participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld.

Exclusion means that items and services furnished by a specified individual or entity will not be reimbursed under Medicare or the State health care programs.

HHS means Department of Health and Human Services.

OIG means Office of Inspector General of the Department of Health and Human Services.

PRO means Utilization and Quality Control Peer Review Organization as created by the Tax Equity and Fiscal Responsibility Act of 1982 (42 U.S.C. 1320c–3).

Professionally recognized standards of health care are Statewide or national standards of care, whether in writing or not, that professional peers of the individual or entity whose provision of care is an issue, recognize as applying to those peers practicing or providing care within a State. Where the Food and Drug Administration (FDA), the Health Care Financing Administration (HCFA) or the Public Health Service (PHS) has declared a treatment modality not to be safe and effective, practitioners who employ such a treatment modality will be deemed not to meet professionally recognized standards of health care. This definition shall not be construed to mean that all other treatments meet professionally recognized standards.

Sole community physician means a physician who is the only physician who provides primary care services to Federal or State health care program beneficiaries within a defined service area.

Sole source of essential specialized services in the community means that an individual or entity—

(a) Is the only practitioner, supplier or provider furnishing specialized services in an area designated by the Public Health Service as a health manpower shortage area for that medical specialty, as listed in 42 CFR part 5, Appendices B–F;

(b) Is a sole community hospital, as defined in § 412.92 of this title; or

(c) Is the only source for specialized services in a defined service area where services by a non-specialist could not be substituted for the source without jeopardizing the health or safety of beneficiaries.

State health care program means:

(a) A State plan approved under title XIX of the Act (Medicaid),

(b) Any program receiving funds under title V of the Act or from an allotment to a State under such title (Maternal and Child Health Services Block Grant program), or

(c) Any program receiving funds under title XX of the Act or from any allotment to a State under such title (Block Grants to States for Social Services).

State Medicaid Fraud Control Unit means a unit certified by the Secretary

as meeting the criteria of 42 U.S.C. 1396b(q) and § 1002.305 of this chapter.

Subpart B—Mandatory Exclusions

§ 1001.101 Basis for liability.

The OIG will exclude any individual or entity that—

(a) Has been convicted of a criminal offense related to the delivery of an item or service under Medicare or a State health care program, including the performance of management or administrative services relating to the delivery of items or services under any such program, or

(b) Has been convicted, under Federal or State law, of a criminal offense related to the neglect or abuse of a patient, in connection with the delivery of a health care item or service, including any offense that the OIG concludes entailed, or resulted in, neglect or abuse of patients. The conviction need not relate to a patient who is a program beneficiary.

§ 1001.102 Length of exclusion.

(a) No exclusion imposed in accordance with § 1001.101 will be for less than 5 years.

(b) Any of the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion—

(1) The acts resulting in the conviction, or similar acts, resulted in financial loss to Medicare and the State health care programs of $1,500 or more. (The entire amount of financial loss to such programs will be considered, including any amounts resulting from similar acts not adjudicated, regardless of whether full or partial restitution has been made to the programs);

(2) The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more;

(3) The acts that resulted in the conviction, or similar acts, had a significant adverse physical, mental or financial impact on one or more program beneficiaries or other individuals;

(4) The sentence imposed by the court included incarceration;

(5) The convicted individual or entity has a prior criminal, civil or administrative sanction record; or

(6) The individual or entity has at any time been overpaid a total of $1,500 or more by Medicare or State health care programs as a result of improper billings.

(c) Only if any of the aggravating factors set forth in paragraph (b) of this section justifies an exclusion longer than 5 years, may mitigating factors be considered as a basis for reducing the period of exclusion to no less than 5 years. Only the following factors may be considered mitigating—

(1) The individual or entity was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss to Medicare and the State health care programs due to the acts that resulted in the conviction, and similar acts, is less than $1,500;

(2) The record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional or physical condition before or during the commission of the offense that reduced the individual's culpability; or

(3) The individual's or entity's cooperation with Federal or State officials resulted in—

(i) Others being convicted or excluded from Medicare or any of the State health care programs, or

(ii) The imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter.

Subpart C—Permissive Exclusions

§ 1001.201 Conviction relating to program or health care fraud.

(a) *Circumstance for exclusion.* The OIG may exclude an individual or entity convicted under Federal or State law of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct—

(1) In connection with the delivery of any health care item or service, including the performance of management or administrative services relating to the delivery of such items or services, or

(2) With respect to any act or omission in a program operated by, or financed in whole or in part by, any Federal, State or local government agency.

(b) *Length of exclusion.* (1) An exclusion imposed in accordance with this section will be for a period of 3 years, unless aggravating or mitigating factors listed in paragraphs (b)(2) and (b)(3) of this section form a basis for lengthening or shortening that period.

(2) Any of the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion—

(i) The acts resulting in the conviction, or similar acts, resulted in financial loss of $1,500 or more to a government program or to one or more other entities, or had a significant financial impact on program beneficiaries or other individuals. (The total amount of financial loss will be considered, including any amounts resulting from similar acts not adjudicated, regardless of whether full or partial restitution has been made.);

(ii) The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more;

(iii) The acts that resulted in the conviction, or similar acts, had a significant adverse physical or mental impact on one or more program beneficiaries or other individuals;

(iv) The sentence imposed by the court included incarceration; or

(v) The convicted individual or entity has a prior criminal, civil or administrative sanction record.

(3) Only the following factors may be considered as mitigating and a basis for reducing the period of exclusion—

(i) The individual or entity was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss to a government program or to other individuals or entities due to the acts that resulted in the conviction and similar acts is less than $1,500;

(ii) The record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional or physical condition, before or during the commission of the offense, that reduced the individual's culpability;

(iii) The individual's or entity's cooperation with Federal or State officials resulted in—

(A) Others being convicted or excluded from Medicare or any of the State health care programs, or

(B) The imposition of a civil money penalty against others; or

(iv) Alternative sources of the type of health care items or services furnished by the individual or entity are not available.

§ 1001.301 Conviction relating to obstruction of an investigation.

(a) *Circumstance for exclusion.* The OIG may exclude an individual or entity convicted under Federal or State law of interference with, or obstruction of, any investigation into a criminal offense described in §§ 1001.101 or 1001.201.

(b) *Length of exclusion.* (1) An exclusion imposed in accordance with this section will be for a period of 3 years, unless aggravating or mitigating factors listed in paragraphs (b)(2) and (b)(3) of this section form the basis for lengthening or shortening that period.

(2) Any of the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion—

(i) The interference with, or obstruction of, the criminal investigation caused the expenditure of significant additional time or resources;

(ii) The interference or obstruction had a significant adverse mental, physical or financial impact on program beneficiaries or other individuals or on the Medicare or State health care programs;

(iii) The interference or obstruction also affected a civil or administrative investigation;

(iv) The sentence imposed by the court included incarceration; or

(v) The convicted individual or entity has a prior criminal, civil or administrative sanction record.

(3) Only the following factors may be considered as mitigating and a basis for reducing the period of exclusion—

(i) The record of the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional or physical condition, before or during the commission of the offense, that reduced the individual's culpability;

(ii) The individual's or entity's cooperation with Federal or State officials resulted in—

(A) Others being convicted or excluded from Medicare or any of the State health care programs, or

(B) The imposition of a civil money penalty against others; or

(iii) Alternative sources of the type of health care items or services furnished by the individual or entity are not available.

§ 1001.401 Conviction relating to controlled substances.

(a) *Circumstance for exclusion.* The OIG may exclude an individual or entity convicted under Federal or State law of a criminal offense relating to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance, as defined under Federal or State law.

(b) For purposes of this section, the definition of *controlled substance* will be the definition that applies to the law forming the basis for the conviction.

(c) *Length of exclusion.* (1) An exclusion imposed in accordance with this section will be for a period of 3 years, unless aggravating or mitigating factors listed in paragraphs (b)(2) and (b)(3) of this section form a basis for lengthening or shortening that period.

(2) Any of the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion—

(i) The acts that resulted in the conviction or similar acts were committed over a period of one year or more;

(ii) The acts that resulted in the conviction or similar acts had a significant adverse physical, mental or financial impact on program beneficiaries or other individuals or the Medicare or State health care programs;

(iii) The sentence imposed by the court included incarceration; or

(iv) The convicted individual or entity has a prior criminal, civil or administrative sanction record.

(3) Only the following factors may be considered as mitigating and a basis for shortening the period of exclusion—

(i) The individual's or entity's cooperation with Federal or State officials resulted in—

(A) Others being convicted or excluded from Medicare or any of the State health care programs, or

(B) The imposition of a civil money penalty against others; or

(ii) Alternative sources of the type of health care items or services furnished by the individual or entity are not available.

§ 1001.501 License revocation or suspension.

(a) *Circumstance for exclusion.* The OIG may exclude an individual or entity that has—

(1) Had a license to provide health care revoked or suspended by any State licensing authority, or has otherwise lost such a license (including the right to apply for or renew such a license), for reasons bearing on the individual's or entity's professional competence, professional performance or financial integrity; or

(2) Has surrendered such a license while a formal disciplinary proceeding concerning the individual's or entity's professional competence, professional performance or financial integrity was pending before a State licensing authority.

(b) *Length of exclusion.* (1) Except as provided in paragraph (c) of this section, an exclusion imposed in accordance with this section will never be for a period of time less than the period during which an individual's or entity's license is revoked, suspended or otherwise not in effect as a result of, or in connection with, a State licensing agency action.

(2) Any of the following factors may be considered aggravating and a basis for lengthening the period of exclusion—

(i) The acts that resulted in the revocation, suspension or loss of the individual's or entity's license to provide health care had or could have had a significant adverse physical, emotional or financial impact on one or more program beneficiaries or other individuals;

(ii) The individual or entity has a prior criminal, civil or administrative sanction record; or

(iii) The acts (or similar acts) had or could have had a significant adverse impact on the financial integrity of the programs.

(3) Only if any of the aggravating factors listed in paragraph (b)(2) of this section justifies a longer exclusion may mitigating factors be considered as a basis for reducing the period of exclusion to a period not less than that set forth in paragraph (b)(1) of this section. Only the following factors may be considered mitigating—

(i) The individual's or entity's cooperation with a State licensing authority resulted in the sanctioning of other individuals or entities; or

(ii) Alternative sources of the type of health care items or services furnished by the individual or entity are not available.

(4) When an individual or entity has been excluded under this section, the OIG will consider a request for reinstatement in accordance with § 1001.3001 if the individual or entity obtains a valid license in the State where the license was originally revoked, suspended, surrendered or otherwise lost.

(c) *Exceptions.* (1) *Length of exclusion.* If, prior to the notice of exclusion by the OIG, the licensing authority of a State (other than the one in which the individual's or entity's license had been revoked, suspended, surrendered or otherwise lost), being fully apprised of all of the circumstances surrounding the prior action by the licensing board of the first State, grants the individual or entity a license or takes no significant adverse action as to a currently held license, an exclusion imposed in accordance with this section may be for a period of time less than that prescribed by paragraph (b)(1) of this section.

(2) *Consideration of early reinstatement.* If an individual or entity that has been excluded in accordance with this section fully and accurately discloses the circumstances surrounding this action to a licensing authority of a different State, and that State grants the individual or entity a new license or takes no significant adverse action as to a currently held license, the OIG will consider a request for early reinstatement.

§ 1001.601 Exclusion or suspension under a Federal or State health care program.

(a) *Circumstance for exclusion.* (1) The OIG may exclude an individual or entity suspended or excluded from participation, or otherwise sanctioned, under—

(i) Any Federal program involving the provision of health care, or

(ii) A State health care program, for reasons bearing on the individual's or entity's professional competence, professional performance or financial integrity.

(2) The term "or otherwise sanctioned" in paragraph (a)(1) of this section is intended to cover all actions that limit the ability of a person to participate in the program at issue regardless of what such an action is called, and includes situations where an individual or entity voluntarily withdraws from a program to avoid a formal sanction.

(b) *Length of exclusion.* (1) An exclusion imposed in accordance with this section will be for a period of 3 years, unless aggravating or mitigating factors set forth in paragraphs (b)(2) and (b)(3) of this section form the basis for lengthening or shortening that period.

(2) Any of the following factors may be considered aggravating and a basis for lengthening the period of exclusion—

(i) The acts that resulted in the exclusion, suspension or other sanction under the Federal or State health care program had, or could have had, a significant adverse impact on Federal or State health care programs or the beneficiaries of those programs or other individuals;

(ii) The period of exclusion, suspension or other sanction imposed under the Federal or State health care program is greater than 3 years; or

(iii) The individual or entity has a prior criminal, civil or administrative record.

(3) Only the following factors may be considered mitigating and a basis for shortening the period of exclusion—

(i) The period of exclusion, suspension or other sanction imposed under the Federal or State health care program is less than 3 years;

(ii) The individual's or entity's cooperation with Federal or State officials resulted in the sanctioning of other individuals or entities; or

(iii) Alternative sources of the types of health care items or services furnished by the individual or entity are not available.

(4) The OIG will normally not consider a request for reinstatement in accordance with § 1001.3001 until the period of exclusion imposed by the OIG has expired.

§ 1001.701 Excessive claims or furnishing of unnecessary or substandard items and services.

(a) Circumstance for exclusion. The OIG may exclude an individual or entity that has—

(1) Submitted, or caused to be submitted, bills or requests for payments under Medicare or any of the State health care programs containing charges or costs for items or services furnished that are substantially in excess of such individual's or entity's usual charges or costs for such items or services; or

(2) Furnished, or caused to be furnished, to patients (whether or not covered by Medicare or any of the State health care programs) any items or services substantially in excess of the patient's needs, or of a quality that fails to meet professionally recognized standards of health care.

(b) The OIG's determination under paragraph (a)(2) of this section—that the items or services furnished were excessive or of unacceptable quality—will be made on the basis of information, including sanction reports, from the following sources:

(1) The PRO for the area served by the individual or entity;

(2) State or local licensing or certification authorities;

(3) Fiscal agents or contractors, or private insurance companies;

(4) State or local professional societies; or

(5) Any other sources deemed appropriate by the OIG.

(c) Exceptions. An individual or entity will not be excluded for—

(1) Submitting, or causing to be submitted, bills or requests for payment that contain charges or costs substantially in excess of usual charges or costs when such charges or costs are due to unusual circumstances or medical complications requiring additional time, effort, expense or other good cause; or

(2) Furnishing, or causing to be furnished, items or services in excess of the needs of patients, when the items or services were ordered by a physician or other authorized individual, and the individual or entity furnishing the items or services was not in a position to determine medical necessity or to refuse to comply with the order of the physician or other authorized individual.

(d) Length of exclusion. (1) An exclusion imposed in accordance with this section will be for a period of 3 years, unless aggravating or mitigating factors listed in paragraphs (d)(2) and (d)(3) of this section form a basis for lengthening or shortening the period.

(2) Any of the following factors may be considered aggravating and a basis for lengthening the period of exclusion—

(i) The violations were serious in nature, and occurred over a period of one year or more;

(ii) The violations had a significant adverse physical, mental or financial impact on program beneficiaries or other individuals;

(iii) The individual or entity has a prior criminal, civil or administrative sanction record; or

(iv) The violation resulted in financial loss to Medicare or the State health care programs of $1,500 or more.

(3) Only the following factors may be considered mitigating and a basis for reducing the period of exclusion—

(i) There were few violations and they occurred over a short period of time; or

(ii) Alternative sources of the type of health care items or services furnished by the individual or entity are not available.

§ 1001.801 Failure of HMOs and CMPs to furnish medically necessary items and services.

(a) Circumstances for exclusion. The OIG may exclude an entity—

(1) That is a—

(i) Health maintenance organization (HMO), as defined in section 1903(m) of the Act, providing items or services under a State Medicaid Plan;

(ii) Primary care case management system providing services, in accordance with a waiver approved under section 1915(b)(1) of the Act; or

(iii) HMO or competitive medical plan providing items or services in accordance with a risk-sharing contract under section 1876 of the Act;

(2) That has failed substantially to provide medically necessary items and services that are required under a plan, waiver or contract described in paragraph (a)(1) of this section to be provided to individuals covered by such plan, waiver or contract; and

(3) Where such failure has adversely affected or has a substantial likelihood of adversely affecting covered individuals.

(b) The OIG's determination under paragraph (a)(2) of this section—that the medically necessary items and services required under law or contract were not provided—will be made on the basis of information, including sanction reports, from the following sources:

(1) The PRO or other quality assurance organization under contract with a State Medicaid plan for the area served by the HMO or competitive medical plan;

(2) State or local licensing or certification authorities;

(3) Fiscal agents or contractors, or private insurance companies;

(4) State or local professional societies;

(5) HCFA's HMO compliance office; or

(6) Any other sources deemed appropriate by the OIG.

(c) Length of exclusion. (1) An exclusion imposed in accordance with this section will be for a period of 3 years, unless aggravating or mitigating factors listed in paragraphs (c)(2) and (c)(3) of this section form a basis for lengthening or shortening the period.

(2) Any of the following factors may be considered aggravating and a basis for lengthening the period of exclusion—

(i) The entity failed to provide a large number or a variety of items or services;

(ii) The failures occurred over a lengthy period of time;

(iii) The entity's failure to provide a necessary item or service had or could have had a serious adverse effect; or

(iv) The entity has a criminal, civil or administrative sanction record.

(3) Only the following factors may be considered as mitigating and a basis for reducing the period of exclusion—

(i) There were few violations and they occurred over a short period of time; or

(ii) Alternative sources of the type of health care items or services furnished by the entity are not available.

(iii) The entity took corrective action upon learning of impermissible activities by an employee or contractor.

§ 1001.901 False or improper claims.

(a) *Circumstance for exclusion.* The OIG may exclude any individual or entity that it determines has committed an act described in section 1128A of the Act. The imposition of a civil money penalty or assessment is not a prerequisite for an exclusion under this section.

(b) *Length of exclusion.* In determining the length of an exclusion imposed in accordance with this section, the OIG will consider the following factors—

(1) The nature and circumstances surrounding the actions that are the basis for liability, including the period of time over which the acts occurred, the number of acts, whether there is evidence of a pattern and the amount claimed;

(2) The degree of culpability;

(3) The individual's or entity's prior criminal, civil or administrative sanction record (The lack of any prior record is to be considered neutral); and

(4) Other matters as justice may require.

§ 1001.951 Fraud and kickbacks and other prohibited activities.

(a) *Circumstance for exclusion.* (1) Except as provided for in paragraph (a)(2)(ii) of this section, the OIG may exclude any individual or entity that it determines has committed an act described in section 1128B(b) of the Act.

(2) With respect to acts described in section 1128B of the Act, the OIG—

(i) May exclude any individual or entity that it determines has knowingly and willfully solicited, received, offered or paid any remuneration in the manner and for the purposes described therein, irrespective of whether the individual or entity may be able to prove that the remuneration was also intended for some other purpose; and

(ii) Will not exclude any individual or entity if that individual or entity can prove that the remuneration that is the subject of the exclusion is exempted from serving as the basis for an exclusion.

(b) *Length of exclusion.* (1) The following factors will be considered in determining the length of exclusion in accordance with this section—

(i) The nature and circumstances of the acts and other similar acts;

(ii) The nature and extent of any adverse physical, mental, financial or other impact the conduct had on program beneficiaries or other individuals or the Medicare or State health programs;

(iii) The excluded individual's or entity's prior criminal, civil or administrative sanction record (The lack of any prior record is to be considered neutral); and

(iv) Any other facts bearing on the nature and seriousness of the individual's or entity's misconduct.

(2) It will be considered a mitigating factor if—

(i) The individual had a documented mental, emotional, or physical condition before or during the commission of the prohibited act(s) that reduced the individual's culpability for the acts in question;

(ii) The individual's or entity's cooperation with Federal or State officials resulted in the—

(A) Sanctioning of other individuals or entities, or

(B) Imposition of a civil money penalty against others; or

(iii) Alternative sources of the type of health care items or services provided by the individual or entity are not available.

§ 1001.952 Exceptions.

The following payment practices shall not be treated as a criminal offense under section 1128B of the Act and shall not serve as the basis for an exclusion:

(a) *Investment Interests.* As used in section 1128B of the Act, "remuneration" does not include any payment that is a return on an investment interest, such as a dividend or interest income, made to an investor as long as all of the applicable standards are met within one of the following two categories of entities:

(1) If, within the previous fiscal year or previous 12 month period, the entity possesses more than $50,000,000 in undepreciated net tangible assets (based on the net acquisition cost of purchasing such assets from an unrelated entity) related to the furnishing of items and services, all of the following five applicable standards must be met—

(i) With respect to an investment interest that is an equity security, the equity security must be registered with the Securities and Exchange Commission under 15 U.S.C. 781 (b) or (g).

(ii) The investment interest of an investor in a position to make or influence referrals to, furnish items or services to, or otherwise generate business for the entity must be obtained on terms equally available to the public through trading on a registered national securities exchange, such as the New York Stock Exchange or the American Stock Exchange, or on the National Association of Securities Dealers Automated Quotation System.

(iii) The entity or any investor must not market or furnish the entity's items or services (or those of another entity as part of a cross referral agreement) to passive investors differently than to non-investors.

(iv) The entity must not loan funds to or guarantee a loan for an investor who is in a position to make or influence referrals to, furnish items or services to, or otherwise generate business for the entity if the investor uses any part of such loan to obtain the investment interest.

(v) The amount of payment to an investor in return for the investment interest must be directly proportional to the amount of the capital investment of that investor.

(2) If the entity possesses investment interests that are held by either active or passive investors, all of the following eight applicable standards must be met—

(i) No more than 40 percent of the value of the investment interests of each class of investments may be held in the previous fiscal year or previous 12 month period by investors who are in a position to make or influence referrals to, furnish items or services to, or otherwise generate business for the entity.

(ii) The terms on which an investment interest is offered to a passive investor,

if any, who is in a position to make or influence referrals to, furnish items or services to, or otherwise generate business for the entity must be no different from the terms offered to other passive investors.

(iii) The terms on which an investment interest is offered to an investor who is in a position to make or influence referrals to, furnish items or services to, or otherwise generate business for the entity must not be related to the previous or expected volume of referrals, items or services furnished, or the amount of business otherwise generated from that investor to the entity.

(iv) There is no requirement that a passive investor, if any, make referrals to, be in a position to make or influence referrals to, furnish items or services to, or otherwise generate business for the entity as a condition for remaining as an investor.

(v) The entity or any investor must not market or furnish the entity's items or services (or those of another entity as part of a cross referral agreement) to passive investors differently than to non-investors.

(vi) No more than 40 percent of the gross revenue of the entity in the previous fiscal year or previous 12 month period may come from referrals, items or services furnished, or business otherwise generated from investors.

(vii) The entity must not loan funds to or guarantee a loan for an investor who is in a position to make or influence referrals to, furnish items or services to, or otherwise generate business for the entity if the investor uses any part of such loan to obtain the investment interest.

(viii) The amount of payment to an investor in return for the investment interest must be directly proportional to the amount of the capital investment (including the fair market value of any pre-operational services rendered) of that investor.

For purposes of paragraph (a) of this section, the following terms apply. *Active investor* means an investor either who is responsible for the day-to-day management of the entity and is a bona fide general partner in a partnership under the Uniform Partnership Act or who agrees in writing to undertake liability for the actions of the entity's agents acting within the scope of their agency. *Investment interest* means a security issued by an entity, and may include the following classes of investments: shares in a corporation, interests or units of a partnership, bonds, debentures, notes, or other debt instruments. *Investor* means an individual or entity either who directly holds an investment interest in an entity, or who holds such investment interest indirectly by, including but not limited to, such means as having a family member hold such investment interest or holding a legal or beneficial interest in another entity (such as a trust or holding company) that holds such investment interest. *Passive investor* means an investor who is not an active investor, such as a limited partner in a partnership under the Uniform Partnership Act, a shareholder in a corporation, or a holder of a debt security

(b) *Space Rental.* As used in section 1128B of the Act, "remuneration" does not include any payment made by a lessee to a lessor for the use of premises, as long as all of the following five standards are met—

(1) The lease agreement is set out in writing and signed by the parties.

(2) The lease specifies the premises covered by the lease.

(3) If the lease is intended to provide the lessee with access to the premises for periodic intervals of time, rather than on a full-time basis for the term of the lease, the lease specifies exactly the schedule of such intervals, their precise length, and the exact rent for such intervals.

(4) The term of the lease is for not less than one year.

(5) The aggregate rental charge is set in advance, is consistent with fair market value in arms-length transactions and is not determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties for which payment may be made in whole or in part under Medicare or a State health care program.

For purposes of paragraph (b) of this section, the term *fair market value* means the value of the rental property for general commercial purposes, but shall not be adjusted to reflect the additional value that one party (either the prospective lessee or lessor) would attribute to the property as a result of its proximity or convenience to sources of referrals or business otherwise generated for which payment may be made in whole or in part under Medicare or a State health care program.

(c) *Equipment rental.* As used in section 1128B of the Act, "remuneration" does not include any payment made by a lessee of equipment to the lessor of the equipment for the use of the equipment, as long as all of the following five standards are met—

(1) The lease agreement is set out in writing and signed by the parties.

(2) The lease specifies the equipment covered by the lease.

(3) If the lease is intended to provide the lessee with use of the equipment for periodic intervals of time, rather than on a full-time basis for the term of the lease, the lease specifies exactly the schedule of such intervals, their precise length, and the exact rent for such interval.

(4) The term of the lease is for not less than one year.

(5) The aggregate rental charge is set in advance, is consistent with fair market value in arms-length transactions and is not determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties for which payment may be made in whole or in part under Medicare or a State health care program.

For purposes of paragraph (c) of this section, the term *fair market value* means the value of the equipment when obtained from a manufacturer or professional distributor, but shall not be adjusted to reflect the additional value one party (either the prospective lessee or lessor) would attribute to the equipment as a result of its proximity or convenience to sources of referrals or business otherwise generated for which payment may be made in whole or in part under Medicare or a State health care program.

(d) *Personal services and management contracts.* As used in section 1128B of the Act, "remuneration" does not include any payment made by a principal to an agent as compensation for the services of the agent, as long as all of the following six standards are met—

(1) The agency agreement is set out in writing and signed by the parties.

(2) The agency agreement specifies the services to be provided by the agent.

(3) If the agency agreement is intended to provide for the services of the agent on a periodic, sporadic or part-time basis, rather than on a full-time basis for the term of the agreement, the agreement specifies exactly the schedule of such intervals, their precise length, and the exact charge for such intervals.

(4) The term of the agreement is for not less than one year.

(5) The aggregate compensation paid to the agent over the term of the agreement is set in advance, is consistent with fair market value in arms-length transactions and is not determined in a manner that takes into account the volume or value of any referrals or business otherwise

generated between the parties for which payment may be made in whole or in part under Medicare or a State health care program.

(6) The services performed under the agreement do not involve the counselling or promotion of a business arrangement or other activity that violates any State or Federal law.

For purposes of paragraph (d) of this section, an agent of a principal is any person, other than a bona fide employee of the principal, who has an agreement to perform services for, or on behalf of, the principal.

(e) *Sale of practice.* As used in section 1128B of the Act, "remuneration" does not include any payment made to a practitioner by another practitioner where the former practitioner is selling his or her practice to the latter practitioner, as long as both of the following two standards are met—

(1) The period from the date of the first agreement pertaining to the sale to the completion of the sale is not more than one year.

(2) The practitioner who is selling his or her practice will not be in a professional position to make referrals to, or otherwise generate business for, the purchasing practitioner for which payment may be made in whole or in part under Medicare or a State health care program after one year from the date of the first agreement pertaining to the sale.

(f) *Referral services.* As used in section 1128B of the Act, "remuneration" does not include any payment or exchange of anything of value between an individual or entity ("participant") and another entity serving as a referral service ("referral service"), as long as all of the following four standards are met—

(1) The referral service does not exclude as a participant in the referral service any individual or entity who meets the qualifications for participation.

(2) Any payment the participant makes to the referral service is assessed equally against and collected equally from all participants, and is only based on the cost of operating the referral service, and not on the volume or value of any referrals to or business otherwise generated by the participants for the referral service for which payment may be made in whole or in part under Medicare or a State health care program.

(3) The referral service imposes no requirements on the manner in which the participant provides services to a referred person, except that the referral service may require that the participant charge the person referred at the same rate as it charges other persons not referred by the referral service, or that these services be furnished free of charge or at reduced charge.

(4) The referral service makes the following five disclosures to each person seeking a referral, with each such disclosure maintained by the referral service in a written record certifying such disclosure and signed by either such person seeking a referral or by the individual making the disclosure on behalf of the referral service—

(i) The manner in which it selects the group of participants in the referral service to which it could make a referral;

(ii) Whether the participant has paid a fee to the referral service;

(iii) The manner in which it selects a particular participant from this group for that person;

(iv) The nature of the relationship between the referral service and the group of participants to whom it could make the referral; and

(v) The nature of any restrictions that would exclude such an individual or entity from continuing as a participant.

(g) *Warranties.* As used in section 1128B of the Act, "remuneration" does not include any payment or exchange of anything of value under a warranty provided by a manufacturer or supplier of an item to the buyer (such as a health care provider or beneficiary) of the item, as long as the buyer complies with all of the following standards in paragraphs (g)(1) and (g)(2) of this section and the manufacturer or supplier complies with all of the following standards in paragraphs (g)(3) and (g)(4) of this section—

(1) The buyer must fully and accurately report any price reduction of the item (including a free item), which was obtained as part of the warranty, in the applicable cost reporting mechanism or claim for payment filed with the Department or a State agency.

(2) The buyer must provide, upon request by the Secretary or a State agency, information provided by the manufacturer or supplier as specified in paragraph (g)(3) of this section.

(3) The manufacturer or supplier must comply with either of the following two standards—

(i) The manufacturer or supplier must fully and accurately report the price reduction of the item (including a free item), which was obtained as part of the warranty, on the invoice or statement submitted to the buyer, and inform the buyer of its obligations under paragraphs (a)(1) and (a)(2) of this section.

(ii) Where the amount of the price reduction is not known at the time of sale, the manufacturer or supplier must fully and accurately report the existence of a warranty on the invoice or statement, inform the buyer of its obligations under paragraphs (g)(1) and (g)(2) of this section, and, when the price reduction becomes known, provide the buyer with documentation of the calculation of the price reduction resulting from the warranty.

(4) The manufacturer or supplier must not pay any remuneration to any individual (other than a beneficiary) or entity for any medical, surgical, or hospital expense incurred by a beneficiary other than for the cost of the item itself.

For purposes of paragraph (g) of this section, the term *warranty* means either an agreement made in accordance with the provisions of 15 U.S.C. 2301(6), or a manufacturer's or supplier's agreement to replace another manufacturer's or supplier's defective item (which is covered by an agreement made in accordance with this statutory provision), on terms equal to the agreement that it replaces.

(h) *Discounts.* As used in section 1128B of the Act, "remuneration" does not include a discount, as defined in paragraph (h)(3) of this section, on a good or service received by a buyer, which submits a claim or request for payment for the good or service for which payment may be made in whole or in part under Medicare or a State health care program, from a seller as long as the buyer complies with the applicable standards of paragraph (h)(1) of this section and the seller complies with the applicable standards of paragraph (h)(2) of this section:

(1) With respect to the following three categories of buyers, the buyer must comply with all of the applicable standards within each category—

(i) If the buyer is an entity which reports its costs on a cost report required by the Department or a State agency, it must comply with all of the following four standards—

(A) The discount must be earned based on purchases of that same good or service bought within a single fiscal year of the buyer;

(B) The buyer must claim the benefit of the discount in the fiscal year in which the discount is earned or the following year;

(C) The buyer must fully and accurately report the discount in the applicable cost report; and

(D) The buyer must provide, upon request by the Secretary or a State agency, information provided by the seller as specified in paragraph (h)(2)(ii) of this section.

(ii) If the buyer is an entity which is a health maintenance organization or competitive medical plan acting in accordance with a risk contract under section 1876(g) or 1903(m) of the Act, or under another State health care program, it need not report the discount except as otherwise may be required under the risk contract.

(iii) If the buyer is not an entity described in paragraphs (h)(1)(i) or (h)(1)(ii) of this section, it must comply with all of the following three standards—

(A) The discount must be made at the time of the original sale of the good or service;

(B) Where an item or service is separately claimed for payment with the Department or a State agency, the buyer must fully and accurately report the discount on that item or service; and

(C) The buyer must provide, upon request by the Secretary or a State agency, information provided by the seller as specified in paragraph (h)(2)(ii)(A) of this section.

(2) With respect to either of the following two categories of buyers, the seller must comply with all of the applicable standards within each category—

(i) If the buyer is an entity described in paragraph (h)(1)(ii) of this section, the seller need not report the discount to the buyer for purposes of this provision.

(ii) If the buyer is any other individual or entity, the seller must comply with either of the following two standards—

(A) Where a discount is required to be reported to the Department or a State agency under paragraph (h)(1) of this section, the seller must fully and accurately report such discount on the invoice or statement submitted to the buyer, and inform the buyer of its obligations to report such discount; or

(B) Where the value of the discount is not known at the time of sale, the seller must fully and accurately report the existence of a discount program on the invoice or statement submitted to the buyer, inform the buyer of its obligations under paragraph (h)(1) of this section and, when the value of the discount becomes known, provide the buyer with documentation of the calculation of the discount identifying the specific goods or services purchased to which the discount will be applied.

(3) For purposes of this paragraph, the term *discount* means a reduction in the amount a seller charges a buyer (who buys either directly or through a wholesaler or a group purchasing organization) for a good or service based on an arms length transaction. The term *discount* may include a rebate check, credit or coupon directly redeemable from the seller only to the extent that such reductions in price are attributable to the original good or service that was purchased or furnished. The term *discount* does not include—

(i) Cash payment;

(ii) Furnishing one good or service without charge or at a reduced charge in exchange for any agreement to buy a different good or service;

(iii) A reduction in price applicable to one payor but not to Medicare or a State health care program;

(iv) A reduction in price offered to a beneficiary (such as a routine reduction or waiver of any coinsurance or deductible amount owed by a program beneficiary);

(v) Warranties;

(vi) Services provided in accordance with a personal or management services contract; or

(vii) Other remuneration in cash or in kind not explicitly described in this paragraph.

(i) *Employees.* As used in section 1128B of the Act, "remuneration" does not include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare or a State health care program. For purposes of paragraph (i) of this section, the term *employee* has the same meaning as it does for purposes of 26 U.S.C. 3121(d)(2).

(j) *Group purchasing organizations.* As used in section 1128B of the Act, "remuneration" does not include any payment by a vendor of goods or services to a group purchasing organization (GPO), as part of an agreement to furnish such goods or services to an individual or entity as long as both of the following two standards are met—

(1) The GPO must have a written agreement with each individual or entity, for which items or services are furnished, that provides for either of the following—

(i) The agreement states that participating vendors from which the individual or entity will purchase goods or services will pay a fee to the GPO of 3 percent or less of the purchase price of the goods or services provided by that vendor.

(ii) In the event the fee paid to the GPO is not fixed at 3 percent or less of the purchase price of the goods or services, the agreement specifies the amount (or if not known, the maximum amount) the GPO will be paid by each vendor (where such amount may be a fixed sum or a fixed percentage of the value of purchases made from the vendor by the members of the group under the contract between the vendor and the GPO).

(2) Where the entity which receives the goods or service from the vendor is a health care provider of services, the GPO must disclose in writing to the entity at least annually, and to the Secretary upon request, the amount received from each vendor with respect to purchases made by or on behalf of the entity.

For purposes of paragraph (j) of this section, the term *group purchasing organization* (GPO) means an entity authorized to act as a purchasing agent for a group of individuals or entities who are furnishing services for which payment may be made in whole or in part under Medicare or a State health care program, and who are neither wholly-owned by the GPO nor subsidiaries of a parent corporation that wholly owns the GPO (either directly or through another wholly-owned entity).

(k) *Waiver of beneficiary coinsurance and deductible amounts.* As used in section 1128B of the Act, "remuneration" does not include any reduction or waiver of a Medicare or a State health care program beneficiary's obligation to pay coinsurance or deductible amounts as long as all of the standards are met within either of the following two categories of health care providers:

(1) If the coinsurance or deductible amounts are owed to a hospital for inpatient hospital services for which Medicare pays under the prospective payment system, the hospital must comply with all of the following three standards—

(i) The hospital must not later claim the amount reduced or waived as a bad debt for payment purposes under Medicare or otherwise shift the burden of the reduction or waiver onto Medicare, a State health care program, other payers, or individuals.

(ii) The hospital must offer to reduce or waive the coinsurance or deductible amounts without regard to the reason for admission, the length of stay of the beneficiary, or the diagnostic related group for which the claim for Medicare reimbursement is filed.

(iii) The hospital's offer to reduce or waive the coinsurance or deductible amounts must not be made as part of a price reduction agreement between a hospital and a third-party payor.

(2) If the coinsurance or deductible amounts are owed by an individual who qualifies for subsidized services under a provision of the Public Health Services Act or under titles V or XIX of the Act to a federally qualified health care center or other health care facility under any

Public Health Services Act grant program or under title V of the Act, the health care center or facility may reduce or waive the coinsurance or deductible amounts for items or services for which payment may be made in whole or in part under part B of Medicare or a State health care program.

§ 1001.953 OIG report on compliance with investment interest safe harbor.

Within 180 days of the effective date of this subpart, the OIG will report to the Secretary on the compliance with §§ 1001.952(a)(2)(i) and 1001.952(a)(2)(vi).

§ 1001.1001 Exclusion of entities owned or controlled by a sanctioned person.

(a) *Circumstance for exclusion.* (1) The OIG may exclude an entity if:

(i) A person with a relationship with such entity—

(A) Has been convicted of a criminal offense as described in sections 1128(a) and 1128(b) (1), (2) or (3) of the Act;

(B) Has had civil money penalties or assessments imposed under section 1128A of the Act; or

(C) Has been excluded from participation in Medicare or any of the State health care programs, and

(ii) Such a person—

(A) Has a direct or indirect ownership interest (or any combination thereof) of 5 percent or more in the entity;

(B) Is the owner of a whole or part interest in any mortgage, deed of trust, note or other obligation secured (in whole or in part) by the entity or any of the property or assets thereof, in which whole or part interest is equal to or exceeds 5 percent of the total property and assets of the entity;

(C) Is an officer or director of the entity, if the entity is organized as a corporation;

(D) Is a partner in the entity, if the entity is organized as a partnership;

(E) Is an agent of the entity; or

(F) Is a managing employee, that is, an individual (including a general manager, business manager, administrator or director) who exercises operational or managerial control over the entity or part thereof, or directly or indirectly conducts the day-to-day operations of the entity or part thereof.

(2) For purposes of this section, the term:

Agent means any person who has express or implied authority to obligate or act on behalf of an entity.

Indirect ownership interest includes an ownership interest through any other entities that ultimately have an ownership interest in the entity in issue. (For example, an individual has a 10 percent ownership interest in the entity at issue if he or she has a 20 percent ownership interest in a corporation that wholly owns a subsidiary that is a 50 percent owner of the entity in issue.)

Ownership interest means an interest in:

(i) The capital, the stock or the profits of the entity, or

(ii) Any mortgage, deed, trust or note, or other obligation secured in whole or in part by the property or assets of the entity.

(b) *Length of exclusion.* (1) Except as provided in § 1001.3002(c), exclusions under this section will be for the same period as that of the individual whose relationship with the entity is the basis for this exclusion, if the individual has been or is being excluded.

(2) If the individual was not excluded, the length of the entity's exclusion will be determined by considering the factors that would have been considered if the individual had been excluded.

(3) An entity excluded under this section may apply for reinstatement at any time in accordance with the procedures set forth in § 1001.3001(a)(2).

§ 1001.1101 Failure to disclose certain information.

(a) *Circumstance for exclusion.* The OIG may exclude any entity that did not fully and accurately, or completely, make disclosures as required by section 1124, 1124A or 1126 of the Act, and by part 455, subpart B and part 420, subpart C of this title.

(b) *Length of exclusion.* The following factors will be considered in determining the length of an exclusion under this section—

(1) The number of instances where full and accurate, or complete, disclosure was not made;

(2) The significance of the undisclosed information;

(3) The entity's prior criminal, civil and administrative sanction record (The lack of any prior record is to be considered neutral);

(4) Any other facts that bear on the nature or seriousness of the conduct;

(5) The availability of alternative sources of the type of health care services provided by the entity; and

(6) The extent to which the entity knew that the disclosures made were not full or accurate.

§ 1001.1201 Failure to provide payment information.

(a) *Circumstance for exclusion.* The OIG may exclude any individual or entity that furnishes items or services for which payment may be made under Medicare or any of the State health care programs and that:

(1) Fails to provide such information as is necessary to determine whether such payments are or were due and the amounts thereof, or

(2) Has refused to permit such examination and duplication of its records as may be necessary to verify such information.

(b) *Length of exclusion.* The following factors will be considered in determining the length of an exclusion under this section—

(1) The number of instances where information was not provided;

(2) The circumstances under which such information was not provided;

(3) The amount of the payments at issue;

(4) The individual's or entity's criminal, civil or administrative sanction record (The lack of any prior record is to be considered neutral); and

(5) The availability of alternative sources of the type of health care items or services provided by the individual or entity.

§ 1001.1301 Failure to grant immediate access.

(a) *Circumstance for exclusion.* (1) The OIG may exclude any individual or entity that fails to grant immediate access upon reasonable request to—

(i) The Secretary, a State survey agency or other authorized entity for the purpose of determining, in accordance with section 1864(a) of the Act, whether—

(A) An institution is a hospital or skilled nursing facility;

(B) An agency is a home health agency;

(C) An agency is a hospice program;

(D) A facility is a rural health clinic as defined in section 1861(aa)(2) of the Act, or a comprehensive outpatient rehabilitation facility as defined in section 1861(cc)(2) of the Act;

(E) A laboratory is meeting the requirements of section 1861(s) (15) and (16) of the Act, and section 353(f) of the Public Health Service Act;

(F) A clinic, rehabilitation agency or public health agency is meeting the requirements of section 1861(p)(4) (A) or (B) of the Act;

(G) An ambulatory surgical center is meeting the standards specified under section 1832(a)(2)(F)(i) of the Act;

(H) A portable x-ray unit is meeting the requirements of section 1861(s)(3) of the Act;

(I) A screening mammography service is meeting the requirements of section 1834(c)(3) of the Act;

(J) An end-stage renal disease facility is meeting the requirements of section 1881(b) of the Act;

(K) A physical therapist in independent practice is meeting the requirements of section 1861(p) of the Act;

(L) An occupational therapist in independent practice is meeting the requirements of section 1861(g) of the Act;

(M) An organ procurement organization meets the requirements of section 1138(b) of the Act; or.

(N) A rural primary care hospital meets the requirements of section 1820(i)(2) of the Act;

(ii) The Secretary, a State survey agency or other authorized entity to perform the reviews and surveys required under State plans in accordance with sections 1902(a)(26) (relating to inpatient mental hospital services), 1902(a)(31) (relating to intermediate care facilities for the mentally retarded), 1919(g) (relating to nursing facilities), 1929(i) (relating to providers of home and community care and community care settings), 1902(a)(33) and 1903(g) of the Act;

(iii) The OIG for the purposes of reviewing records, documents and other data necessary to the performance of the Inspector General's statutory functions; or

(iv) A State Medicaid fraud control unit for the purpose of conducting its activities.

(2) For purposes of paragraphs (a)(1)(i) and (a)(1)(ii) of this section, the term—

Failure to grant immediate access means the failure to grant access at the time of a reasonable request or to provide a compelling reason why access may not be granted.

Reasonable request means a written request made by a properly identified agent of the Secretary, of a State survey agency or of another authorized entity, during hours that the facility, agency or institution is open for business.

The request will include a statement of the authority for the request, the rights of the entity in responding to the request, the definition of *reasonable request* and *immediate access,* and the penalties for failure to comply, including when the exclusion will take effect.

(3) For purposes of paragraphs (a)(1)(iii) and (a)(1)(iv) of this section, the term—

Failure to grant immediate access means:

(i) Except where the OIG or State Medicaid fraud control unit reasonably believes that requested documents are about to be altered or destroyed, the failure to produce or make available for inspection and copying requested records upon reasonable request, or to provide a compelling reason why they cannot be produced, within 24 hours of such request;

(ii) Where the OIG or State Medicaid fraud control unit has reason to believe that requested documents are about to be altered or destroyed, the failure to provide access to requested records at the time the request is made.

Reasonable request means a written request for documents, signed by the IG or a delegatee, and made by a properly identified agent of the OIG or a State Medicaid fraud control unit during reasonable business hours, where there is information to suggest that the individual or entity has violated statutory or regulatory requirements under titles V, XI, XVIII, XIX or XX of the Act. The request will include a statement of the authority for the request, the rights of the individual or entity in responding to the request, the definition of *reasonable request* and *immediate access,* and the effective date, length, and scope and effect of the exclusion that would be imposed for failure to comply with the request, and the earliest date that a request for reinstatement would be considered.

(4) Nothing in this section shall in any way limit access otherwise authorized under State or Federal law.

(b) *Length of exclusion.* (1) An exclusion of an individual under this section may be for a period equal to the sum of:

(i) The length of the period during which the immediate access was not granted, and

(ii) An additional period of up to 90 days.

(2) The exclusion of an entity may be for a longer period than the period in which immediate access was not granted based on consideration of the following factors—

(i) The impact of the failure to grant the requested immediate access on Medicare or any of the State health care programs, beneficiaries or the public;

(ii) The circumstances under which such access was refused;

(iii) The impact of the exclusion on Medicare or any of the State health care programs, beneficiaries or the public; and

(iv) The entity's prior criminal, civil or administrative sanction record (the lack of any prior record is to be considered neutral).

(3) For purposes of paragraphs (b)(1) and (b)(2) of this section, the length of the period in which immediate access was not granted will be measured from the time the request is made, or from the time by which access was required to be granted, whichever is later.

(c) The exclusion will be effective as of the date immediate access was not granted.

§ 1001.1401 Violations of PPS corrective action.

(a) *Circumstance for exclusion.* The OIG may exclude any hospital that HCFA determines has failed substantially to comply with a corrective action plan required by HCFA under section 1886(f)(2)(B) of the Act.

(b) *Length of exclusion.* The following factors will be considered in determining the length of exclusion under this section—

(1) The impact of the hospital's failure to comply on Medicare or any of the State health care programs, program beneficiaries or other individuals;

(2) The circumstances under which the failure occurred;

(3) The nature of the failure to comply;

(4) The impact of the exclusion on Medicare or any of the State health care programs, beneficiaries or the public; and

(5) The hospital's prior criminal, civil or administrative sanction record (The lack of any prior record is to be considered neutral).

§ 1001.1501 Default of health education loan or scholarship obligations.

(a) *Circumstance for exclusion.* (1) Except as provided in paragraph (a)(4) of this section, the OIG may exclude any individual that the Public Health Service (PHS) determines is in default on repayments of scholarship obligations or loans in connection with health professions education made or secured in whole or in part by the Secretary.

(2) Before imposing an exclusion in accordance with paragraph (a)(1) of this section, the OIG must determine that PHS has taken all reasonable administrative steps to secure repayment of the loans or obligations. If PHS has offered a Medicare offset arrangement as required by section 1892 of the Act, the OIG will find that all reasonable steps have been taken.

(3) The OIG will take into account access of beneficiaries to physicians' services for which payment may be made under Medicare or State health care programs in determining whether to impose an exclusion.

(4) The OIG will not exclude a physician who is the sole community physician or the sole source of essential specialized services in a community if a State requests that the physician not be excluded.

(b) *Length of exclusion.* The individual will be excluded until such

time as PHS notifies the OIG that the default has been cured or the obligations have been resolved to the PHS's satisfaction. Upon such notice, the OIG will inform the individual of his or her right to request reinstatement.

§ 1001.1601 Violations of the limitations on physician charges.

(a) *Circumstance for exclusion.* (1) The OIG may exclude a physician whom it determines, for any period beginning on or after January 1, 1987—

(i) Is a non-participating physician under section 1842(i) of the Act;

(ii) Furnished services to a beneficiary;

(iii) Knowingly and willfully billed on a repeated basis for such services actual charges in excess of—

(A) The maximum allowable actual charge determined in accordance with section 1842(j)(1)(C) of the Act for the period January 1, 1987 through December 31, 1990, or

(B) The limiting charges determined in accordance with section 1848(g)(2) of the Act for the period beginning January 1, 1991; and

(iv) Is not the sole community physician or sole source of essential specialized services in the community.

(2) The OIG will take into account access of beneficiaries to physicians' services for which Medicare payment may be made in determining whether to impose an exclusion.

(b) *Length of exclusion.* (1) In determining the length of an exclusion in accordance with this section, the OIG will consider the following factors—

(i) The number of services for which the physician billed in excess of the maximum allowable charges;

(ii) The number of beneficiaries for whom services were billed in excess of the maximum allowable charges;

(iii) The amount of the charges that were in excess of the maximum allowable charges;

(iv) The physician's prior criminal, civil or administrative sanction record (the lack of any prior record is to be considered neutral); and

(v) The availability of alternative sources of the type of health care items or services furnished by the physician.

(2) The period of exclusion may not exceed 5 years.

§ 1001.1701 Billing for services of assistant at surgery during cataract operations.

(a) Circumstance for exclusion. The OIG may exclude a physician whom it determines—

(1) Has knowingly and willfully presented or caused to be presented a claim, or billed an individual enrolled under Part B of the Medicare program (or his or her representative) for:

(i) Services of an assistant at surgery during a cataract operation, or

(ii) Charges that include a charge for an assistant at surgery during a cataract operation;

(2) Has not obtained prior approval for the use of such assistant from the appropriate Utilization and Quality Control Peer Review Organization (PRO) or Medicare carrier; and

(3) Is not the sole community physician or sole source of essential specialized services in the community.

(b) The OIG will take into account access of beneficiaries to physicians' services for which Medicare payment may be made in determining whether to impose an exclusion.

(c) Length of exclusion. (1) In determining the length of an exclusion in accordance with this section, the OIG will consider the following factors—

(i) The number of instances for which claims were submitted or beneficiaries were billed for unapproved use of assistants during cataract operations;

(ii) The amount of the claims or bills presented;

(iii) The circumstances under which the claims or bills were made, including whether the services were medically necessary;

(iv) Whether approval for the use of an assistant was requested from the PRO or carrier;

(v) The physician's criminal, civil or administrative sanction record (the lack of any prior record is to be considered neutral); and

(vi) The availability of alternative sources of the type of health care items or services furnished by the physician.

(2) The period of exclusion may not exceed 5 years.

Subpart D—Waivers and Effect of Exclusion

§ 1001.1801 Waivers of exclusions.

(a) The OIG has the authority to grant or deny a request from a State health care program that an exclusion from that program be waived with respect to an individual or entity, except that no waiver may be granted with respect to an exclusion under § 1001.101(b). The request must be in writing and from an individual directly responsible for administering the State health care program.

(b) With respect to exclusions under § 1001.101(a), a request from a State health care program for a waiver of the exclusion will only be considered if the individual or entity is the sole community physician or the sole source of essential specialized services in a community.

(c) With respect to exclusions imposed under subpart C of this part, a request for waiver will only be granted if the OIG determines that imposition of the exclusion would not be in the public interest.

(d) If the basis for the waiver ceases to exist, the waiver will be rescinded, and the individual or entity will be excluded for the period remaining on the exclusion, measured from the time the exclusion would have been imposed if the waiver had not been granted.

(e) In the event a waiver is granted, it is applicable only to the program(s) for which waiver is requested.

(f) The decision to grant, deny or rescind a request for a waiver is not subject to administrative or judicial review.

(g) The Inspector General may waive the exclusion of an individual or entity from participation in the Medicare program in conjunction with granting a waiver requested by a State health care program. If a State program waiver is rescinded, the derivative waiver of the exclusion from Medicare is automatically rescinded.

§ 1001.1901 Scope and effect of exclusion.

(a) *Scope of exclusion.* Exclusions of individuals and entities under this title will be from Medicare, State health care programs, and all other Federal non-procurement programs. The OIG will exclude the individual or entity from the Medicare program and direct each State agency administering a State health care program to exclude the individual or entity for the same period. In the case of an individual or entity not eligible to participate in Medicare, the exclusion will still be effective on the date, and for the period, established by the OIG.

(b) *Effect of exclusion on excluded individuals and entities.* (1) Unless and until an individual or entity is reinstated into the Medicare program in accordance with subpart F of this part, no payment will be made by Medicare or any of the State health care programs for any item or service furnished, on or after the effective date specified in the notice period, by an excluded individual or entity, or at the medical direction or on the prescription of a physician or other authorized individual who is excluded when the person furnishing such item or service knew or had reason to know of the exclusion.

(2) An excluded individual or entity may not take assignment of an enrollee's claim on or after the effective date of exclusion.

(3) An excluded individual or entity that submits, or causes to be submitted, claims for items or services furnished during the exclusion period is subject to civil money penalty liability under section 1128A(a)(1)(D) of the Act, and criminal liability under section 1128B(a)(3) of the Act.

(c) *Exceptions to paragraph (b)(1) of this section.* (1) If an enrollee of Part B of Medicare submits an otherwise payable claim for items or services furnished by an excluded individual or entity, or under the medical direction or on the prescription of an excluded physician or other authorized individual after the effective date of exclusion, HCFA will pay the first claim submitted by the enrollee and immediately notify the enrollee of the exclusion.

(2) HCFA will not pay an enrollee for items or services furnished by an excluded individual or entity, or under the medical direction or on the prescription of an excluded physician or other authorized individual more than 15 days after the date on the notice to the enrollee, or after the effective date of the exclusion, whichever is later.

(3) Unless the Secretary determines that the health and safety of beneficiaries receiving services under Medicare or a State health care program warrants the exclusion taking effect earlier, payment may be made under such program for up to 30 days after the effective date of the exclusion for—

(i) Inpatient institutional services furnished to an individual who was admitted to an excluded institution before the date of the exclusion, and

(ii) Home health services and hospice care furnished to an individual under a plan of care established before the effective date of exclusion.

(4) (i) Notwithstanding the other provisions of this section, payment may be made under Medicare or a State health care program for certain emergency items or services furnished by an excluded individual or entity, or at the medical direction or on the prescription of an excluded physician or other authorized individual during the period of exclusion. To be payable, a claim for such emergency items or services must be accompanied by a sworn statement of the person furnishing the items or services specifying the nature of the emergency and why the items or services could not have been furnished by an individual or entity eligible to furnish or order such items or services.

(ii) Notwithstanding paragraph (c)(4)(i) of this section, no claim for emergency items or services will be payable if such items or services were provided by an excluded individual who, through an employment, contractual or any other arrangement, routinely provides emergency health care items or services.

Subpart E—Notice and Appeals

§ 1001.2001 Notice of intent to exclude.

(a) Except as provided in paragraph (c) of this section, if the OIG proposes to exclude an individual or entity in accordance with subpart C of this part or in accordance with subpart B of this part where the exclusion is for a period exceeding 5 years, it will send written notice of its intent, the basis for the proposed exclusion, and the potential effect of an exclusion. Within 30 days of receipt of notice, which will be deemed to be 5 days after the date on the notice, the individual or entity may submit documentary evidence and written argument concerning whether the exclusion is warranted and any related issues.

(b) If the OIG proposes to exclude an individual or entity in accordance with §§ 1001.701 or 1001.801, the individual or entity may submit, in addition to the information described in paragraph (a) of this section, a written request to present evidence or argument orally to an OIG official.

(c) Exception. If the OIG proposes to exclude an individual or entity under the provisions of §§ 1001.1301, 1001.1401 or 1101.1501, paragraph (a) of this section will not apply.

(d) If an entity has a provider agreement under section 1866 of the Act, and the OIG proposes to terminate that agreement in accordance with section 1866(b)(2)(C) of the Act, the notice provided for in paragraphs (a) and (b) of this section will so state.

§ 1001.2002 Notice of exclusion.

(a) Except as provided in § 1001.2003, if the OIG determines that exclusion is warranted, it will send a written notice of this decision to the affected individual or entity.

(b) The exclusion will be effective 20 days from the date of the notice.

(c) The written notice will state—

(1) The basis for the exclusion;

(2) The length of the exclusion and, where applicable, the factors considered in setting the length;

(3) The effect of the exclusion;

(4) The earliest date on which the OIG will consider a request for reinstatement;

(5) The requirements and procedures for reinstatement; and

(6) The appeal rights available to the excluded individual or entity.

(d) Paragraph (b) of this section does not apply to exclusions imposed in accordance with § 1001.1301.

§ 1001.2003 Notice of proposal to exclude.

(a) Except as provided in paragraph (c) of this section, if the OIG proposes to exclude an individual or entity in accordance with §§ 1001.901, 1001.951, 1001.1601 or 1001.1701, it will send written notice of this decision to the affected individual or entity. The written notice will provide the same information set forth in § 1001.2002(c). If an entity has a provider agreement under section 1866 of the Act, and the OIG also proposes to terminate that agreement in accordance with section 1866(b)(2)(C) of the Act, the notice will so indicate. The exclusion will be effective 60 days after the date of the notice unless, within that period, the individual or entity files a written request for a hearing in accordance with part 1005 of this chapter. Such request must set forth—

(1) The specific issues or statements in the notice with which the individual or entity disagrees;

(2) The basis for that disagreement;

(3) The defenses on which reliance is intended;

(4) Any reasons why the proposed length of exclusion should be modified; and

(5) Reasons why the health or safety of individuals receiving services under Medicare or any of the State health care programs does not warrant the exclusion going into effect prior to the completion of an administrative law judge (ALJ) proceeding in accordance with part 1005 of this chapter.

(b) (1) If the individual or entity does not make a written request for a hearing as provided for in paragraph (a) of this section, the OIG will send a notice of exclusion as described in § 1001.2002.

(2) If the individual or entity makes a timely written request for a hearing and the OIG determines that the health or safety of individuals receiving services under Medicare or any of the State health care programs does not warrant an immediate exclusion, an exclusion will not go into effect unless an ALJ upholds the decision to exclude.

(c) If, prior to issuing a notice of proposal to exclude under paragraph (a) of this section, the OIG determines that the health or safety of individuals receiving services under Medicare or any of the State health care programs warrants the exclusion taking place prior to the completion of an ALJ proceeding in accordance with part 1005 of this chapter, the OIG will proceed under §§ 1001.2001 and 1001.2002.

§ 1001.2004 Notice to State agencies.

HHS will promptly notify each appropriate State agency administering or supervising the administration of each State health care program of:

(a) The facts and circumstances of each exclusion, and

(b) The period for which the State agency is being directed to exclude the individual or entity.

§ 1001.2005 Notice to State licensing agencies.

(a) HHS will promptly notify the appropriate State(s) or local agencies or authorities having responsibility for the licensing or certification of an individual or entity excluded (or directed to be excluded) from participation of the facts and circumstances of the exclusion.

(b) HHS will request that appropriate investigations be made and sanctions invoked in accordance with applicable State law and policy, and will request that the State or local agency or authority keep the Secretary and the OIG fully and currently informed with respect to any actions taken in response to the request.

§ 1001.2006 Notice to others regarding exclusion.

(a) HHS will give notice of the exclusion and the effective date to the public, to beneficiaries (in accordance with § 1001.1901(c)), and, as appropriate, to—

(1) Any entity in which the excluded individual or entity is known to be serving as an employee, administrator, operator, or in which the individual or entity is serving in any other capacity and is receiving payment for providing services (The lack of this notice will not affect HCFA's ability to deny payment for services);

(2) State Medicaid Fraud Control Units;

(3) Utilization and Quality Control Peer Review Organizations;

(4) Hospitals, skilled nursing facilities, home health agencies and health maintenance organizations;

(5) Medical societies and other professional organizations;

(6) Contractors, health care prepayment plans, private insurance companies and other affected agencies and organizations;

(7) The State and Area Agencies on Aging established under title III of the Older Americans Act; and

(8) Other Departmental operating divisions, Federal agencies, and other agencies or organizations, as appropriate.

(b) In the case of an exclusion under § 1001.101 of this chapter, if section 304(a)(5) of the Controlled Substances Act (21 U.S.C. 824(a)(5)) applies, HHS will give notice to the Attorney General of the United States of the facts and circumstances of the exclusion and the length of the exclusion.

§ 1001.2007 Appeal of exclusions.

(a)(1) Except as provided in § 1001.2003, an individual or entity excluded under this Part may file a request for a hearing before an ALJ only on the issues of whether:

(i) The basis for the imposition of the sanction exists, and

(ii) The length of exclusion is unreasonable.

(2) When the OIG imposes an exclusion under subpart B of this part for a period of 5 years, paragraph (a)(1)(ii) of this section will not apply.

(3) The request for a hearing should contain the information set forth in § 1005.2(d) of this chapter.

(b) The excluded individual or entity has 60 days from the receipt of notice of exclusion provided for in § 1001.2002 to file a request for such a hearing.

(c) The standard of proof at a hearing is preponderance of the evidence.

(d) When the exclusion is based on the existence of a conviction, a determination by another government agency or any other prior determination, the basis for the underlying determination is not reviewable and the individual or entity may not collaterally attack the underlying determination, either on substantive or procedural grounds, in this appeal.

(e) The procedures in part 1005 of this chapter will apply to the appeal.

Subpart F—Reinstatement into the Programs

§ 1001.3001 Timing and method of request for reinstatement.

(a) (1) Except as provided in paragraph (a)(2) of this section or in §§ 1001.501(b)(4) and (c) and 1001.601(b)(4), an excluded individual or entity (other than those excluded in accordance with §§ 1001.1001 and 1001.1501) may submit a written request for reinstatement to the OIG only after the date specified in the notice of exclusion.

(2) An entity under § 1001.1001 may apply for reinstatement prior to the date specified in the notice of exclusion by submitting a written request for reinstatement that includes documentation demonstrating that the standards set forth in § 1001.3002(c) have been met.

(3) Upon receipt of a written request, the OIG will require the requestor to furnish specific information and authorization to obtain information from private health insurers, peer review bodies, probation officers, professional associates, investigative agencies and such others as may be necessary to determine whether reinstatement should be granted.

(4) Failure to furnish the required information or authorization will result in the continuation of the exclusion.

(b) If a period of exclusion is reduced on appeal (regardless of whether further appeal is pending), the individual or entity may request reinstatement once the reduced exclusion period expires.

§ 1001.3002 Basis for reinstatement.

(a) The OIG will authorize reinstatement if it determines that—

(1) The period of exclusion has expired;

(2) There are reasonable assurances that the types of actions that formed the basis for the original exclusion have not recurred and will not recur; and

(3) There is no additional basis under sections 1128 (a) or (b) or 1128A of the Act for continuation of the exclusion.

(b) In making the reinstatement determination, the OIG will consider—

(1) Conduct of the individual or entity occurring prior to the date of the notice of exclusion, if not known to the OIG at the time of the exclusion;

(2) Conduct of the individual or entity after the date of the notice of exclusion;

(3) Whether all fines, and all debts due and owing (including overpayments) to any Federal, State or local government that relate to Medicare or any of the State health care programs, have been paid or satisfactory arrangements have been made to fulfill these obligations;

(4) Whether HCFA has determined that the individual or entity complies with, or has made satisfactory arrangements to fulfill, all of the applicable conditions of participation or supplier conditions for coverage under the statutes and regulations; and

(5) For purposes of individuals or entities excluded under part 1004 of this chapter only, the individual's or entity's willingness and ability to provide health care that meets professionally recognized standards.

(c) If the OIG determines that the criteria in paragraphs (a)(2) and (a)(3) of this section have been met, an entity excluded in accordance with § 1001.1001 will be reinstated upon a determination by the OIG that the individual whose conviction, exclusion or civil money penalty was the basis for the entity's exclusion—

(1) Has reduced his or her ownership or control interest in the entity below 5 percent;

(2) Is no longer an officer, director, agent or managing employee of the entity; or

(3) Has been reinstated in accordance with paragraph (a) of this section or § 1001.3005.

(d) Reinstatement will not be effective until OIG grants the request and provides notice under § 1001.3003(a)(1). Reinstatement will be effective as provided in the notice.

(e) A determination with respect to reinstatement is not appealable or reviewable except as provided in § 1001.3004.

(f) An ALJ may not require reinstatement of an individual or entity in accordance with this chapter.

§ 1001.3003 Approval of request for reinstatement.

(a) If the OIG grants a request for reinstatement, the OIG will—

(1) Notify HCFA of the date of the individual's or entity's reinstatement in the Medicare program;

(2) Give written notice to the excluded individual or entity specifying the date when Medicare participation may resume;

(3) Notify State agencies that administer the State health care programs that the individual or entity has been reinstated into the Medicare program; and

(4) To the extent applicable, give notice to those agencies, groups, individuals and others that were originally notified of the exclusion.

(b) If the OIG makes a determination to reinstate an individual or entity under Medicare, the State health care program upon notification from the OIG must automatically reinstate the individual or entity under such program, effective on the date of reinstatement under Medicare, unless—

(1) Reinstatement is not available to such excluded party under State law, or

(2) A longer exclusion period was established in accordance with the State's own authorities and procedures.

§ 1001.3004 Denial of request for reinstatement.

(a) If a request for reinstatement is denied, OIG will give written notice to the requesting individual or entity. Within 30 days of the date on the notice, the excluded individual or entity may submit:

(1) Documentary evidence and written argument against the continued exclusion,

(2) A written request to present written evidence and oral argument to an OIG official, or

(3) Both documentary evidence and a written request.

(b) After evaluating any additional evidence submitted by the excluded individual or entity (or at the end of the 30-day period, if none is submitted), the OIG will send written notice either confirming the denial, and indicating that a subsequent request for reinstatement will not be considered until at least one year after the date of denial, or approving the request consistent with the procedures set forth in § 1001.3003(a).

(c) The decision to deny reinstatement will not be subject to administrative or judicial review.

§ 1001.3005 Reversed or vacated decisions.

(a) An individual or entity will be reinstated into the Medicare program retroactive to the effective date of the exclusion when such exclusion is based on—

(1) A conviction that is reversed or vacated on appeal; or

(2) An action by another agency, such as a State agency or licensing board, that is reversed or vacated on appeal.

(b) If an individual or entity is reinstated in accordance with paragraph (a) of this section, HCFA will make payment for services covered under Medicare that were furnished or performed during the period of exclusion.

(c) The OIG will give notice of a reinstatement under this section in accordance with § 1001.3003(a).

(d) An action taken by OIG under this section will not require any State health care program to reinstate the individual or entity if it has imposed an exclusion under its own authority.

C. Part 1002 is revised to read as follows:

PART 1002—PROGRAM INTEGRITY—STATE-INITIATED EXCLUSIONS FROM MEDICAID

Subpart A—General Provisions

Sec.

1002.1 Scope and purpose.
1002.2 General authority.
1002.3 Disclosure by providers; information on persons convicted of crimes.
1002.100 State plan requirement.

Subpart B—Mandatory Exclusion

1002.203 Mandatory exclusion.

Subpart C—Permissive Exclusions

1002.210 Permissive exclusions; general authority.
1002.211 Effect of exclusion.
1002.212 State agency notifications.
1002.213 Appeals of exclusions.
1002.214 Basis for reinstatement after State agency-initiated exclusion.
1002.215 Action on request for reinstatement.

Subpart D—Notification to OIG of State or Local Convictions of Crimes Against Medicaid

1002.230 Notification of State or local convictions of crimes against Medicaid.

Authority: 42 U.S.C. 1302, 1320a–3, 1320a–5, 1320a–7, 1396(a)(4)(A), 1396(p)(1), 1396a(30), 1396a(39), 1396b(a)(6), 1396b(b)(3), 1396b(i)(2) and 1396b(q).

Subpart A—General Provisions

§ 1002.1 Scope and purpose.

The regulations in this part specify certain bases upon which individuals and entities may, or in some cases must, be excluded from participation in the Medicaid program. These regulations specifically address the authority of State agencies to exclude on their own initiative, regardless of whether the OIG has excluded an individual or entity under part 1001 of this chapter. These regulations also delineate the States' obligation to inform the OIG of certain Medicaid-related convictions.

§ 1002.2 General authority.

(a) In addition to any other authority it may have, a State may exclude an individual or entity from participation in the Medicaid program for any reason for which the Secretary could exclude that individual or entity from participation in the Medicare program under sections 1128, 1128A or 1866(b)(2) of the Social Security Act.

(b) Nothing contained in this part should be construed to limit a State's own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law.

§ 1002.3 Disclosure by providers; information on persons convicted of crimes.

(a) *Information that must be disclosed.* Before the Medicaid agency enters into or renews a provider agreement, or at any time upon written request by the Medicaid agency, the provider must disclose to the Medicaid agency the identity of any person described in § 1001.1001(a)(1) of this chapter.

(b) *Notification to Inspector General.* (1) The Medicaid agency must notify the Inspector General of any disclosures made under paragraph (a) of this section within 20 working days from the date it receives the information.

(2) The agency must also promptly notify the Inspector General of any action it takes on the provider's application for participation in the program.

(c) *Denial or termination of provider participation.* (1) The Medicaid agency may refuse to enter into or renew an

agreement with a provider if any person who has ownership or control interest in the provider, or who is an agent or managing employee of the provider, has been convicted of a criminal offense related to that person's involvement in any program established under Medicare, Medicaid or the title XX Services program.

(2) The Medicaid agency may refuse to enter into, or terminate, a provider agreement if it determines that the provider did not fully and accurately make any disclosure required under paragraph (a) of this section.

§ 1002.100 State plan requirement.

The plan must provide that the requirements of this subpart are met. However, the provisions of these regulations are minimum requirements. The agency may impose broader sanctions if it has the authority to do so under State law.

Subpart B—Mandatory Exclusion

§ 1002.203 Mandatory exclusion.

(a) The State agency, in order to receive Federal financial participation (FFP), must provide that it will exclude from participation any HMO, or entity furnishing services under a Waiver approved under section 1915(b)(1) of the Act, if such organization or entity—

(1) Could be excluded under § 1001.1001 of this chapter, or

(2) Has, directly or indirectly, a substantial contractual relationship with an individual or entity that could be excluded under § 1001.1001 of this chapter.

(b) As used in this section, the term—

Exclude includes the refusal to enter into or renew a participation agreement or the termination of such an agreement.

Substantial contractual relationship is one in which the sanctioned individual described in § 1001.1001 of this chapter has direct or indirect business transactions with the organization or entity that, in any fiscal year, amount to more than $25,000 or 5 percent of the organization's or entity's total operating expenses, whichever is less. Business transactions include, but are not limited to, contracts, agreements, purchase orders, or leases to obtain services, supplies, equipment, space or salaried employment.

Subpart C—Permissive Exclusions

§ 1002.210 Permissive exclusions; general authority.

The State agency must have administrative procedures in place that enable it to exclude an individual or entity for any reason for which the Secretary could exclude such individual or entity under parts 1001 or 1003 of this chapter. The period of such exclusion is at the discretion of the State agency.

§ 1002.211 Effect of exclusion.

(a) *Denial of payment.* Except as provided for in § 1001.1901 (c)(3) and (c)(4)(i) of this chapter, no payment may be made by the State agency for any item or service furnished on or after the effective date specified in the notice by an excluded individual or entity, or at the medical direction or on the prescription of a physician who is excluded when a person furnishing such item or service knew, or had reason to know, of the exclusion.

(b) *Denial of FFP.* FFP is not available where the State agency is required to deny payment under paragraph (a) of this section. FFP will be reinstated at such time as the excluded individual or entity is reinstated in the Medicaid program.

§ 1002.212 State agency notifications.

When the State agency initiates an exclusion under § 1002.210, it must provide to the individual or entity subject to the exclusion notification consistent with that required in subpart E of part 1001 of this chapter, and must notify other State agencies, the State medical licensing board (where applicable), the public, beneficiaries, and others as provided in §§ 1001.2005 and 1001.2006 of this chapter.

§ 1002.213 Appeals of exclusions.

Before imposing an exclusion under § 1002.210, the State agency must give the individual or entity the opportunity to submit documents and written argument against the exclusion. The individual or entity must also be given any additional appeals rights that would otherwise be available under procedures established by the State.

§ 1002.214 Basis for reinstatement after State agency-initiated exclusion.

(a) The provisions of this section and § 1002.215 apply to the reinstatement in the Medicaid program of all individuals or entities excluded in accordance with § 1002.210, if a State affords reinstatement opportunity to those excluded parties.

(b) An individual or entity who has been excluded from Medicaid may be reinstated only by the Medicaid agency that imposed the exclusion.

(c) An individual or entity may submit to the State agency a request for reinstatement at any time after the date specified in the notice of exclusion.

§ 1002.215 Action on request for reinstatement.

(a) The State agency may grant reinstatement only if it is reasonably certain that the types of actions that formed the basis for the original exclusion have not recurred and will not recur. In making this determination, the agency will consider, in addition to any factors set forth in State law—

(1) The conduct of the individual or entity occurring prior to the date of the notice of exclusion, if not known to the agency at the time of the exclusion;

(2) The conduct of the individual or entity after the date of the notice of exclusion; and

(3) Whether all fines, and all debts due and owing (including overpayments) to any Federal, State or local government that relate to Medicare or any of the State health care programs, have been paid, or satisfactory arrangements have been made, that fulfill these obligations.

(b) Notice of action on request for reinstatement. (1) If the State agency approves the request for reinstatement, it must give written notice to the excluded party, and to all others who were informed of the exclusion in accordance with § 1002.212, specifying the date on which Medicaid program participation may resume.

(2) If the State agency does not approve the request for reinstatement, it will notify the excluded party of its decision. Any appeal of a denial of reinstatement will be in accordance with State procedures and need not be subject to administrative or judicial review, unless required by State law.

Subpart D—Notification to OIG of State or Local Convictions of Crimes Against Medicaid

§ 1002.230 Notification of State or local convictions of crimes against Medicaid.

(a) The State agency must notify the OIG whenever a State or local court has convicted an individual who is receiving reimbursement under Medicaid of a criminal offense related to participation in the delivery of health care items or services under the Medicaid program, except where the State Medicaid Fraud Control Unit (MFCU) has so notified the OIG.

(b) If the State agency was involved in the investigation or prosecution of the case, it must send notice within 15 days after the conviction.

(c) If the State agency was not so involved, it must give notice within 15 days after it learns of the conviction.

PART 1003—CIVIL MONEY PENALTIES, ASSESSMENTS AND EXCLUSIONS

D. Part 1003 is amended as follows:

1. The authority citation for part 1003 is revised to read as follows:

Authority: 42 U.S.C. 1302, 1320a–7, 1320a–7a, 1320b–10, 1395u(j), 1395u(k), 11131(c) and 11137(b)(2).

2. The heading for part 1003 is revised to read as set forth above.

3. Section 1003.100 is revised to read as follows:

§ 1003.100 Basis and purpose.

(a) *Basis.* This part implements sections 1128, 1128A, 1140, 1842(j) and 1842(k) of the Social Security Act, and sections 421(c) and 427(b)(2) of Public Law 99–660 (42 U.S.C. 1320a–7, 1320a–7a, 1320b–10, 1395u(j) and 1395u(k), 11131(c) and 11137(b)(2)).

(b) *Purpose.* This part—

(1) Provides for the imposition of civil money penalties and, as applicable, assessments against persons who—

(i) Have submitted certain prohibited claims under the Medicare, Medicaid, or the Maternal and Child Health Services or Social Services Block Grant programs;

(ii) Seek payment in violation of the terms of an assignment agreement or a limitation on charges or payments under the Medicare program, or a requirement not to charge in excess of the amount permitted under the Medicaid program;

(iii) Give false or misleading information that might affect the decision to discharge a Medicare patient from the hospital;

(iv) Fail to report information concerning medical malpractice payments or who improperly disclose, use or permit access to information reported under part B of title IV of Pub.L. 99–660, and regulations specified in 45 CFR part 60; or

(v) Misuse certain Medicare and Social Security program words, letters, symbols and emblems;

(2) Provides for the exclusion of persons from the Medicare or State health care programs against whom a civil money penalty or assessment has been imposed, and the basis for reinstatement of persons who have been excluded; and

(3) Sets forth the appeal rights of persons subject to a penalty, assessment and exclusion.

4. Section 1003.101 is amended by removing the definitions *Agent* and *Suspension;* by revising the definitions *Claims, Program* and *Request for payment;* and by adding the definitions *Exclusion, Social Services Block Grant program* and *State health care program* to read as follows:

§ 1003.101 Definitions.

* * * * *

Claim means an application for payment for an item or service for which payment may be made under the Medicare, Medicaid, Maternal and Child Health Services Block Grant, or Social Services Block Grant programs.

* * * * *

Exclusion means the temporary or permanent barring of a person from participation in the Medicare program or in a State health care program, and that items or services furnished or ordered by such person are not reimbursed under such programs.

* * * * *

Program means the Medicare, Medicaid, Maternal and Child Health Services Block Grant, and Social Services Block Grant programs.

Request for payment means an application submitted by a person to any person for payment for an item or service.

* * * * *

Social Services Block Grant program means the program authorized under title XX of the Social Security Act.

* * * * *

State health care program means a State plan approved under title XIX of the Act, any program receiving funds under title V of the Act or from an allotment to a State under such title, or any program receiving funds under title XX of the Act or from an allotment to a State under such title.

* * * * *

5. Section 1003.102 is revised to read as follows:

§ 1003.102 Basis for civil money penalties and assessments.

(a) The OIG may impose a penalty and assessment against any person whom it determines in accordance with this part has presented, or caused to be presented, a claim which is for—

(1) An item or service that the person knew, or should have known, was not provided as claimed;

(2) An item or service for which the person knew, or should have known, that the claim was false or fraudulent;

(3) An item or service furnished during a period in which the person was excluded from participation in the program to which the claim was made in accordance with a determination made under sections 1128 (42 U.S.C. 1320a–7), 1128A (42 U.S.C. 1320a–7a), 1156 (42 U.S.C. 1320c–5), 1160(b) as in effect on September 2, 1982 (42 U.S.C. 1320c–9(b)),1842(j)(2) (42 U.S.C. 1395u(j), 1862(d) as in effect on August 18, 1987 (42 U.S.C. 1395y(d)), or 1866(b) (42 U.S.C. 1395cc(b)); or

(4) For a physician's service (or an item or service incident to a physician's service) for which the person knew, or should have known, that the individual who furnished (or supervised the furnishing of) the service—

(i) Was not licensed as a physician;

(ii) Was licensed as a physician, but such license had been obtained through a misrepresentation of material fact (including cheating on an examination required for licensing); or

(iii) Represented to the patient at the time the service was furnished that the physician was certified in a medical specialty board when he or she was not so certified.

(b) The OIG may impose a penalty, and where authorized, an assessment against any person (including an insurance company in the case of paragraphs (b)(5) and (b)(6) of this section) whom it determines in accordance with this part—

(1) Has presented or caused to be presented a request for payment in violation of the terms of—

(i) An agreement to accept payments on the basis of an assignment under section 1842(b)(3)(B)(ii) of the Act;

(ii) An agreement with a State agency or other requirement of a State Medicaid plan not to charge a person for an item or service in excess of the amount permitted to be charged;

(iii) An agreement to be a participating physician or supplier under section 1842(h)(1); or

(iv) An agreement in accordance with section 1866(a)(1)(G) of the Act not to charge any person for inpatient hospital services for which payment had been denied or reduced under section 1886(f)(2) of the Act.

(2) Is a non-participating physician under section 1842(j) of the Act and has knowingly and willfully billed individuals enrolled under part B of title XVIII of the Act during the statutory freeze for actual charges in excess of such physician's actual charges for the calendar quarter beginning April 1, 1984;

(3) Is a physician who has knowingly and willfully—

(i) Billed for services as an assistant at surgery during a routine cataract operation, or

(ii) Included in his or her bill the services of an assistant at surgery during a routine cataract operation, and has not received prior approval from the appropriate Peer Review Organization or Medicare carrier for such services based on the existence of a complicating medical condition; or

(4) Has given to any person, in the case of inpatient hospital services subject to the provisions of section 1886 of the Act, information that he or she knew, or should have known, was false or misleading and that could reasonably have been expected to influence the decision when to discharge such person or another person from the hospital.

(5) Fails to report information concerning a payment made under an insurance policy, self-insurance or otherwise, for the benefit of a physician, dentist or other health care practitioner in settlement of, or in satisfaction in whole or in part of, a medical malpractice claim or action or a judgment against such a physician, dentist or other health care practitioner in accordance with section 421 of Pub. L. 99–660 (42 U.S.C. 11131) and as required by regulations at 45 CFR part 60.

(6) Improperly discloses, uses or permits access to information reported in accordance with part B of title IV of Pub. L. 99–660, in violation of section 427 of Pub. L. 99–660 (42 U.S.C. 11137) or regulations at 45 CFR part 60. (The disclosure of information reported in accordance with part B of title IV in response to a subpoena or a discovery request is considered to be an improper disclosure in violation of section 427 of Pub. L. 99–660. However, disclosure or release by an entity of original documents or underlying records from which the reported information is obtained or derived is not considered to be an improper disclosure in violation of section 427 of Pub. L. 99–660.)

(7) Has made use of certain words, letters, symbols or emblems in such a manner that they knew, or should have known, would convey the false impression that an advertisement or other item was authorized, approved or endorsed by the Department, the Social Security Administration (SSA) or HCFA, or that such person or organization has some connection with, or authorization from, the Department, SSA or HCFA. Civil money penalties may be imposed for misuse of—

(i) The words "Social Security," "Social Security Account," "Social Security Administration," "Social Security System," "Medicare," and "Health Care Financing Administration," or any other combination or variation of such words;

(ii) The letters "SSA" or "HCFA," or any other combination or variation of such letters; or

(iii) A symbol or emblem of the Social Security Administration (including the design of, or a reasonable facsimile of the design of, the Social Security card, the check used for payment of benefits under title II, or envelopes or other stationery used by SSA) or of the Health Care Financing Administration, or any combination or variation of such symbols or emblems.

(c) (1) In any case in which it is determined that more than one person was responsible for presenting or causing to be presented a claim as described in paragraph (a) of this section, each such person may be held liable for the penalty prescribed by this part, and an assessment may be imposed against any one such person or jointly and severally against two or more such persons, but the aggregate amount of the assessments collected may not exceed the amount that could be assessed if only one person was responsible.

(2) In any case in which it is determined that more than one person was responsible for presenting, or causing to be presented, a request for payment or for giving false or misleading information as described in paragraph (b) of this section, each such person may be held liable for the penalty prescribed by this part.

(3) In any case in which it is determined that more than one person was responsible for failing to report information that is required to be reported on a medical malpractice payment, or for improperly disclosing, using or permitting access to information, as described in paragraphs (b)(5) and (b)(6) of this section, each such person may be held liable for the penalty prescribed by this part.

(4) Under this section, a principal is liable for penalties and assessments for the actions of his or her agent acting within the scope of the agency.

6. Section 1003.103 is revised to read as follows:

§ 1003.103 Amount of penalty.

(a) Except as provided in paragraphs (b), (c) and (d) of this section, the OIG may impose a penalty of not more than $2,000 for each item or service that is subject to a determination under § 1003.102.

(b) The OIG may impose a penalty of not more than $15,000 for each person with respect to whom a determination was made that false or misleading information was given under § 1003.102(b)(4).

(c) The OIG may impose a penalty of not more than $10,000 for each payment for which there was a failure to report required information in accordance with § 1003.102(b)(5), or for each improper disclosure, use or access to information that is subject to a determination under § 1003.102(b)(6).

(d) (1) The OIG may impose a penalty of not more than $5,000 for each violation resulting from the misuse of Departmental or program words, letters, symbols or emblems relating to printed media, and a penalty of not more than $25,000 in the case of such misuse relating to a broadcast or telecast, that is subject to a determination under § 1003.102(b)(7) of this part. With respect to multiple violations consisting of substantially identical communications or productions, total penalties may not exceed $100,000 per year.

(2) For purposes of this paragraph, a violation is defined as—

(i) In the case of a direct mailing solicitation, each group mailing of an identical, non-personalized, generic letter or solicitation sent at the same time on the same day. Each unique or personalized letter or solicitation, such as with the individual's name and address appearing in the body of the advertisement or on the mailing envelope or covering, will be treated as a separate and single violation;

(ii) In the case of a printed advertisement, each advertisement or solicitation in each publication or issue of a publication in which it appears. Multiple or separate advertisements will be treated as separate violations; and

(iii) In the case of a broadcast or telecast, the airing of a single commercial or solicitation. Each airing will be a separate violation.

7. Section 1003.105 is revised to read as follows:

§ 1003.105 Exclusion from participation in Medicare or a State health care program.

(a) A person subject to a penalty or assessment determined under § 1003.102 may, in addition, be excluded from participation in Medicare for a period of time determined under § 1003.107. The OIG will also direct each appropriate State agency to exclude the person from each State health care program for the same period of time. The OIG may waive an exclusion from a State health care program upon request of the State agency in accordance with the following provisions:

(1) The OIG will consider an application from a State agency for a waiver if the person is—

(i) The sole community physician, or

(ii) The sole source of essential specialized services in a community.

(2) If a waiver is granted, it is applicable only to the State health care program for which the State agency requested the waiver.

(3) If the OIG subsequently obtains information that the basis for a waiver no longer exists, or the State agency submits evidence that the basis for the

waiver no longer exists, the waiver will cease and the person will be excluded from the State health care program for the remainder of the period that such person is excluded from Medicare.

(4) The OIG will notify the State agency whether its request for a waiver has been granted or denied.

(5) The decision to deny a waiver is not subject to administrative or judicial review.

(b) When the Inspector General proposes to exclude a long-term care facility from the Medicare and Medicaid programs, he or she will at the same time he or she notifies the respondent, notify the appropriate State licensing authority, State Office of Aging, the long-term care ombudsman, and the State Medicaid agency of the Inspector General's intention to exclude the facility.

8. Section 1003.106 is revised to read as follows:

§ 1003.106 Determinations regarding the amount of the penalty and assessment.

(a) (1) In determining the amount of any penalty or assessment in §§ 1003.102 (a) and (b)(1) to (b)(4), the Department will take into account—

(i) The nature of the claim, request for payment or information given, and the circumstances under which it was presented or given;

(ii) The degree of culpability of the person submitting the claim or request for payment, or giving the information;

(iii) The history of prior offenses of the person submitting the claim or request for payment, or giving the information;

(iv) The financial condition of the person presenting the claim or request for payment, or giving the information; and

(v) Such other matters as justice may require.

(2) In determining the amount of any penalty in accordance with §§ 1003.102 (b)(5) and (b)(6), the Department will take into account—

(i) The nature and circumstances resulting in the failure to report medical malpractice payments or the improper disclosure of information;

(ii) The degree of culpability of the person in failing to provide timely and complete malpractice payment data or in improperly disclosing, using or permitting access to information;

(iii) The materiality, or significance of omission, of the information to be reported with regard to medical malpractice judgments or settlements, or the materiality of the improper disclosure of, or use of, or access to information;

(iv) Any prior history of the person with respect to violations of these provisions; and

(v) Such other matters as justice may require.

(3) In determining the amount of any penalty in accordance with § 1003.102(b)(7), the OIG will take into account—

(i) The nature and objective of the solicitation or other communication, and the degree to which the communication has the capacity to deceive members of the public;

(ii) The frequency and scope of the violation, and whether a specific segment of the population was targeted;

(iii) The degree to which any misrepresentation or deception may have been mitigated by a clear, prominent and conspicuously-placed disclaimer of association with the Government;

(iv) The prior history of the organization in its willingness or refusal to comply with informal requests to correct violations;

(v) The history of prior offenses of the individual or entity in their misuse of Departmental and program words, letters, symbols and emblems; and

(vi) Such other matters as justice may require.

(b) Determining the amount of the penalty or assessment. In taking into account the factors listed in paragraph (a)(1) of this section, the following circumstances are to be considered—

(1) *Nature and circumstances of the incident.* It should be considered a mitigating circumstance if all the items or services or incidents subject to a determination under § 1003.102 included in the action brought under this part were of the same type and occurred within a short period of time, there were few such items or services or incidents, and the total amount claimed or requested for such items or services was less than $1,000. It should be considered an aggravating circumstance if—

(i) Such items or services or incidents were of several types, occurred over a lengthy period of time;

(ii) There were many such items or services or incidents (or the nature and circumstances indicate a pattern of claims or requests for payment for such items or services or a pattern of incidents);

(iii) The amount claimed or requested for such items or services was substantial; or

(iv) The false or misleading information given resulted in harm to the patient, a premature discharge or a need for additional services or subsequent hospital admission.

(2) *Degree of culpability.* It should be considered a mitigating circumstance if the claim or request for payment for the item or service was the result of an unintentional and unrecognized error in the process respondent followed in presenting claims or requesting payment, and corrective steps were taken promptly after the error was discovered. It should be considered an aggravating circumstance if—

(i) The respondent knew the item or service was not provided as claimed or if the respondent knew that the claim was false or fraudulent;

(ii) The respondent knew that the items or services were furnished during a period that he or she had been excluded from participation and that no payment could be made as specified in § 1003.102(a)(3) or because payment would violate the terms of an assignment or an agreement with a State agency or other agreement or limitation on payment under § 1003.102(b); or

(iii) The respondent knew that the information could reasonably be expected to influence the decision of when to discharge a patient from a hospital.

(3) *Prior offenses.* It should be considered an aggravating circumstance if at any time prior to the incident or presentation of any claim or request for payment which included an item or service subject to a determination under § 1003.102, the respondent was held liable for criminal, civil or administrative sanctions in connection with a program covered by this part or any other public or private program of reimbursement for medical services.

(4) *Other wrongful conduct.* It should be considered an aggravating circumstance if there is proof that a respondent engaged in wrongful conduct, other than the specific conduct upon which liability is based, relating to government programs or in connection with the delivery of a health care item or service. The statute of limitations governing civil money penalty proceedings will not apply to proof of other wrongful conduct as an aggravating circumstance.

(5) *Financial condition.* It should be considered a mitigating circumstance if imposition of the penalty or assessment without reduction will jeopardize the ability of the respondent to continue as a health care provider. In all cases, the resources available to the respondent will be considered when determining the amount of the penalty and assessment.

(6) *Other matters as justice may require.* Other circumstances of an aggravating or mitigating nature should be taken into account if, in the interests

of justice, they require either a reduction of the penalty or assessment or an increase in order to assure the achievement of the purposes of this part.

(c) In determining the amount of the penalty and assessment to be imposed for every item or service or incident subject to a determination under §§ 1003.102(a) and (b)(1) through (b)(4)—

(1) If there are substantial or several mitigating circumstances, the aggregate amount of the penalty and assessment should be set at an amount sufficiently below the maximium permitted by §§ 1003.103(a) and 1003.104, to reflect that fact.

(2) If there are substantial or several aggravating circumstances, the aggregate amount of the penalty and assessment should be set at an amount sufficiently close or at the maximum permitted by §§ 1003.103(a) and 1003.104, to reflect that fact.

(3) Unless there are extraordinary mitigating circumstances, the aggregate amount of the penalty and assessment should never be less than double the approximate amount of damages and costs (as defined in paragraph (d) of this section) sustained by the United States, or any State, as a result of claims or incidents subject to a determination under §§ 1003.102(a) and (b)(1) through (b)(4).

(d) (1) The standards set forth in this section are binding, except to the extent that their application would result in imposition of an amount that would exceed limits imposed by the United States Constitution.

(2) The amount imposed will not be less than the approximate amount required to fully compensate the United States, or any State, for its damages and costs, tangible and intangible, including but not limited to the costs attributable to the investigation, prosecution and administrative review of the case.

(3) Nothing in this section will limit the authority of the Department to settle any issue or case as provided by § 1003.126, or to compromise any penalty and assessment as provided by § 1003.128.

9. Section 1003.107 is revised to read as follows:

§ 1003.107 Determinations regarding exclusion.

(a) In determining whether to exclude a person and the duration of an exclusion, the Department will take into account the factors set forth in § 1003.106. Where there are aggravating circumstances as described in § 1003.106(b), the person should be excluded. In the case of an exclusion based on a determination under § 1003.102(b) (2) or (3), the length of the exclusion may not exceed 5 years.

(b) Nothing in this section will limit the authority of the Department to settle any issue or case as provided by § 1003.126 or to compromise any exclusion as provided by § 1003.128.

10. Section 1003.109 is revised to read as follows:

§ 1003.109 Notice of proposed determination.

(a) If the Inspector General proposes to impose a penalty and assessment, or to exclude a respondent from participation in Medicare or a State health care program in accordance with this part, he or she must serve notice of the action by any manner authorized by Rule 4 of the Federal Rules of Civil Procedure. The notice will include—

(1) Reference to the statutory basis for the penalty, assessment and exclusion;

(2) A description of the claims, requests for payment, or incidents with respect to which the penalty, assessment and exclusion are proposed (except in cases where the Inspector General is relying upon statistical sampling in accordance with § 1003.133 in which case the notice shall describe those claims and requests for payment comprising the sample upon which the Inspector General is relying and will also briefly describe the statistical sampling technique utilized by the Inspector General);

(3) The reason why such claims, requests for payment or incidents subject the respondent to a penalty, assessment and exclusion; the amount of the proposed penalty, assessment and the period of proposed exclusion (where applicable);

(4) Any circumstances described in § 1003.106 which were considered when determining the amount of the proposed penalty and assessment and the period of exclusion;

(5) Instructions for responding to the notice, including—

(i) a specific statement of respondent's right to a hearing, and

(ii) a statement that failure to request a hearing within 60 days permits the imposition of the proposed penalty, assessment and exclusion without right of appeal; and

(6) In the case of a notice sent to a respondent who has an agreement under section 1866 of the Act, the notice will also indicate that the imposition of an exclusion may result in the termination of the provider's agreement in accordance with section 1866(b)(2)(C) of the Act.

(b) Any person upon whom the Inspector General has proposed the imposition of a penalty, assessment or exclusion may appeal such proposed penalty, assessment or exclusion in accordance with § 1005.2 of this chapter. The provisions of part 1005 of this chapter govern such appeals.

§ 1003.110 [Amended]

11. Section 1003.110 is amended by removing the word "suspension" and adding in its place the word "exclusion" the three times it appears; and by revising the citation in the first sentence to read as "§ 1003.109(a)".

§§ 1003.111 through 1003.113 [Removed]

12. Sections 1003.111 Through 1003.113 are removed.

13. Section 1003.114 is revised to read as follows:

§ 1003.114 Collateral estoppel.

(a) Where a final determination that the respondent presented or caused to be presented a claim or request for payment falling within the scope of § 1003.102 has been rendered in any proceeding in which the respondent was a party and had an opportunity to be heard, the respondent shall be bound by such determination in any proceeding under this part.

(b) In a proceeding under this part that—

(1) Is against a person who has been convicted (whether upon a verdict after trial or upon a plea of guilty or nolo contendere) of a Federal crime charging fraud or false statements, and

(2) Involves the same transactions as in the criminal action, the person is estopped from denying the essential elements of the criminal offense.

§§ 1003.115 Through 1003.125 [Removed]

14. Sections 1003.115 through 1003.125 are removed.

15. Section 1003.127 is revised to read as follows:

§ 1003.127 Judicial review.

Section 1128A(e) of the Act authorizes judicial review of a penalty, assessment or exclusion that has become final. Judicial review may be sought by a respondent only with respect to a penalty, assessment or exclusion with respect to which the respondent filed an exception under § 1005.21(c) of this chapter unless the failure or neglect to urge such exception will be excused by the court in accordance with section 1128A(e) of the Act because of extraordinary circumstances.

16. Section 1003.128 is amended by revising paragraphs (a) and (d) to read as follows:

§ 1003.128 Collection of penalty and assessment.

(a) Once a determination by the Secretary has become final, collection of any penalty and assessment will be the responsibility of HCFA, except in the case of the Maternal and Child Health Services Block Grant program, where the collection will be the responsibility of the PHS, and in the case of the Social Services Block Grant program, where the collection will be the responsibility of the Office of Human Development Services.

* * * * *

(d) Matters that were raised or that could have been raised in a hearing before an ALJ or in an appeal under section 1128A(e) of the Act may not be raised as a defense in a civil action by the United States to collect a penalty under this part.

17. Section 1003.129 is revised to read as follows:

§ 1003.129 Notice to other agencies.

Whenever a penalty, assessment or exclusion become final, the following organizations and entities will be notified about such action and the reasons for it—the appropriate State or local medical or professional association; the appropriate Peer Review Organization; as appropriate, the State agency responsible or the administration of each State health care program; the appropriate Medicare carrier or intermediary; the appropriate State or local licensing agency or organization (including the Medicare and Medicaid State survey agencies); and the long-term care ombudsman. In cases involving exclusions, notice will also be given to the public of the exclusion and its effective date.

§§ 1003.130 and 1003.131 [Removed]

18. Sections 1003.130 and 1003.131 are removed.

19. Section 1003.132 is revised to read as follows:

§ 1003.132 Limitations.

No action under this part will be entertained unless commenced, in accordance with § 1003.109(a) of this part, within 6 years from the date on which the claim was presented, the request for payment was made, or the incident occurred.

§ 1003.133 [Amended]

20. Section 1003.133 is amended by revising the citation in the introductory clause of the first sentence of paragraph (a) from "§ 1003.114" to "§ 1005.15 of this chapter".

21. New sections 1003.134 and 1003.135 are added to read as follows:

§ 1003.134 Effect of exclusion.

The effect of an exclusion will be as set forth in § 1001.1901 of this chapter.

§ 1003.135 Reinstatement.

A person who has been excluded in accordance with this part may apply for reinstatement at the end of the period of exclusion. The OIG will consider any request for reinstatement in accordance with the provisions of §§ 1001.3001 through 1001.3004 of this chapter.

PART 1004—IMPOSITION OF SANCTIONS ON HEALTH CARE PRACTITIONERS AND PROVIDERS OF HEALTH CARE SERVICES BY A PEER REVIEW ORGANIZATION

E. Part 1004 is amended to read as follows:

1. The authority citation for part 1004 is revised to read as follows:

Authority: 42 U.S.C. 1302 and 1320c–5.

2. Section 1004.30 is amended by revising paragraph (b) and the introductory text to paragraph (c) to read as follows:

§ 1004.30 Basic responsibilities.

* * * * *

(b) When the PRO identifies situations where the obligations specified in § 1004.10 are violated, it will afford the practitioner or other person reasonable notice and opportunity for discussion and, if appropriate, a suggested method for correcting the situation and a time period for a corrective action in accordance with §§ 1004.40 and 1004.50.

(c) The PRO must submit a report to the OIG after the notice and opportunity provided under paragraph (b) of this section (and corrective action, if appropriate), if the PRO determines that the practitioner or other person has—

* * * * *

3. Section 1004.40 is revised to read as follows:

§ 1004.40 Action on identification of a violation.

(a) When a PRO identifies a violation, it must determine the source and the nature of the violation.

(b) If the PRO determines that the violation is gross and flagrant, it must proceed in accordance with § 1004.50.

(c) If the PRO determines that the violation is a substantial violation in a substantial number of cases, it must send the practitioner or other person a written initial notice of the identification of a violation containing all of the following information:

(1) The obligation involved.

(2) The situation, circumstances or activity that resulted in a violation.

(3) The authority and responsibility of the PRO to report violations of obligations.

(4) A suggested method for correcting the situation and a time period for corrective action, if appropriate.

(5) The sanction that the PRO could recommend to the OIG.

(6) An invitation to submit additional information to or discuss the problem with representatives of the PRO within 20 days of receipt of the notice. The date of receipt is presumed to be 5 days after the date on the notice, unless there is a reasonable showing to the contrary.

(7) A summary of the information used by the PRO in arriving at its determination of a violation of an obligation and a synopsis of its conclusions.

4. Section 1004.50 is amended by revising paragraphs (b) and (c)(1) to read as follows:

§ 1004.50 Action on determination of a violation.

* * * * *

(b) *Contents.* The notice must contain the following information:

(1) The determination of a violation.

(2) The obligation violated.

(3) The basis for the determination.

(4) A suggested method for correcting the situation and a time period for corrective action, if appropriate.

(5) The sanction the PRO will recommend to the OIG.

(6) The right of the practitioner or other person to submit to the PRO within 30 days of receipt of the notice, additional information or a written request for a meeting with the PRO to review and discuss the determination, or both. The date of receipt is presumed to be 5 days after the date on the notice, unless there is a reasonable showing to the contrary.

(7) A copy of the material used by the PRO in arriving at its determination.

(c) *Further review by PRO.* (1) On the basis of additional information received, the PRO shall affirm or modify its determination. If the PRO affirms its determination, it may suggest a method for correcting the situation and a time period for corrective action. If the issue is resolved to the PRO's satisfaction, the PRO shall close the case.

* * * * *

5. Section 1004.60 is amended by adding a new paragraph (c) to read as follows:

§ 1004.60 Final PRO determination of a violation.

* * * * *

(c) Provide notice to the State medical board when it submits a report and

recommendation to the OIG with respect to a physician or other authorized individual whom the board is responsible for licensing.

6. Section 1004.90 is amended by revising paragraph (d)(7) to read as follows:

§ 1004.90 Acknowledgement and review of report.

* * * * *

(d) *Decision of sanction.* * * *

* * * * *

(7) Whether the practitioner or other person is unable or unwilling to comply substantially with the obligations, including whether, prior to the PRO's recommendation, he or she entered into a corrective action plan and, if so, whether he or she successfully completed such corrective action plan.

* * * * *

§ 1004.100 [Amended]

7. Section 1004.100 is amended by removing paragraph (g).

8. Section 1004.110 is revised to read as follows:

§ 1004.110 Effect of an exclusion on Medicare payments and services.

The effect of an exclusion will be as set forth in § 1001.1901 of this chapter.

9. Section 1004.120 is revised to read as follows:

§ 1004.120 Reinstatement after exclusion.

A person who has been excluded in accordance with this part may apply for reinstatement at the end of the period of exclusion. The OIG will consider any request for reinstatement in accordance with the provisions of §§ 1001.3001 through 1001.3005 of this chapter.

10. Section 1004.130 is revised to read as follows:

§ 1004.130 Appeal rights.

(a) *Right to administrative review.* (1) A practitioner or other person dissatisfied with an OIG determination, or an exclusion that results from a determination not being made within 120 days, is entitled to appeal such sanction in accordance with part 1005 of this chapter.

(2) Due to the 120-day statutory requirement specified in § 1004.90(e), the following limitations apply—

(i) The period of time for submitting additional information will not be extended.

(ii) Any material received by the HHS after the 30-day period allowed, will not be considered by the ALJ or the Departmental Appeals Board (DAB).

(3) The OIG's determination continues in effect unless reversed by a hearing.

(b) *Right to judicial review.* Any practitioner or other person dissatisfied with a final decision of the Secretary may file a civil action in accordance with the provisions of section 205(g) of the Act.

F. A new part 1005 is added to read as follows:

PART 1005—APPEALS OF EXCLUSIONS, CIVIL MONEY PENALTIES AND ASSESSMENTS

Sec.

1005.1 Definitions.
1005.2 Hearing before an administrative law judge.
1005.3 Rights of parties.
1005.4 Authority of the ALJ.
1005.5 Ex parte contacts.
1005.6 Prehearing conferences.
1005.7 Discovery.
1005.8 Exchange of witness lists, witness statements and exhibits.
1005.9 Subpoenas for attendance at hearing.
1005.10 Fees.
1005.11 Form, filing and service of papers.
1005.12 Computation of time.
1005.13 Motions.
1005.14 Sanctions.
1005.15 The hearing and burden of proof.
1005.16 Witnesses.
1005.17 Evidence.
1005.18 The record.
1005.19 Post-hearing briefs.
1005.20 Initial decision.
1005.21 Appeal to DAB.
1005.22 Stay of initial decision.
1005.23 Harmless error.

Authority: 42 U.S.C. 405(a), 405(b), 1302, 1320a–7, 1320a–7a and 1320c–5.

§ 1005.1 Definitions.

Civil money penalty cases refer to all proceedings arising under any of the statutory bases for which the OIG has been delegated authority to impose civil money penalties under Medicare or the State health care programs.

DAB refers to the Departmental Appeals Board or its delegatee.

Exclusion cases refer to all proceedings arising under any of the statutory bases for which the OIG has been delegated authority to impose exclusions under Medicare or the State health care programs.

§ 1005.2 Hearing before an administrative law judge.

(a) A party sanctioned under any criteria specified in parts 1001, 1003 and 1004 of this chapter may request a hearing before an ALJ.

(b) In exclusion cases, the parties to the proceeding will consist of the petitioner and the IG. In civil money penalty cases, the parties to the proceeding will consist of the respondent and the IG.

(c) The request for a hearing will be made in writing, signed by the petitioner or respondent or by his or her attorney. The request must be filed within 60 days after the notice, provided in accordance with §§ 1001.2002, 1001.2003 or 1003.109, is received by the petitioner or respondent. For purposes of this section, the date of receipt of the notice letter will be presumed to be 5 days after the date of such notice unless there is a reasonable showing to the contrary.

(d) The request for a hearing will contain a statement as to the specific issues or findings of fact and conclusions of law in the notice letter with which the petitioner or respondent disagrees, and the basis for his or her contention that the specific issues or findings and conclusions were incorrect.

(e) The ALJ will dismiss a hearing request where—

(1) The petitioner's or the respondent's hearing request is not filed in a timely manner;

(2) The petitioner or respondent withdraws his or her request for a hearing;

(3) The petitioner or respondent abandons his or her request for a hearing; or

(4) The petitioner's or respondent's hearing request fails to raise any issue which may properly be addressed in a hearing.

§ 1005.3 Rights of parties.

(a) Except as otherwise limited by this part, all parties may—

(1) Be accompanied, represented and advised by an attorney;

(2) Participate in any conference held by the ALJ;

(3) Conduct discovery of documents as permitted by this part;

(4) Agree to stipulations of fact or law which will be made part of the record;

(5) Present evidence relevant to the issues at the hearing;

(6) Present and cross-examine witnesses;

(7) Present oral arguments at the hearing as permitted by the ALJ; and

(8) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

(b) Fees for any services performed on behalf of a party by an attorney are not subject to the provisions of section 206 of title II of the Act, which authorizes the Secretary to specify or limit these fees.

§ 1005.4 Authority of the ALJ.

(a) The ALJ will conduct a fair and impartial hearing, avoid delay, maintain order and assure that a record of the proceeding is made.

(b) The ALJ has the authority to—

(1) Set and change the date, time and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses at hearings and the production of documents at or in relation to hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of documentary discovery as permitted by this part;

(8) Regulate the course of the hearing and the conduct of representatives, parties, and witnesses;

(9) Examine witnesses;

(10) Receive, rule on, exclude or limit evidence;

(11) Upon motion of a party, take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact; and

(13) Conduct any conference, argument or hearing in person or, upon agreement of the parties, by telephone.

(c) The ALJ does not have the authority to—

(1) Find invalid Federal statutes or regulations or Secretarial delegations of authority;

(2) Enter an order in the nature of a directed verdict;

(3) Compel settlement negotiations;

(4) Enjoin any act of the Secretary;

(5) Review the exercise of discretion by the OIG to exclude an individual or entity under section 1128(b) of the Act, or determine the scope or effect of the exclusion,

(6) Set a period of exclusion at zero, or reduce a period of exclusion to zero, in any case where the ALJ finds that an individual or entity committed an act described in section 1128(b) of the Act, or

(7) Review the exercise of discretion by the OIG to impose a CMP, assessment or exclusion under part 1003 of this chapter.

§ 1005.5 Ex parte contacts.

No party or person (except employees of the ALJ's office) will communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 1005.6 Prehearing conferences.

(a) The ALJ will schedule at least one prehearing conference, and may schedule additional prehearing conferences as appropriate, upon reasonable notice to the parties.

(b) The ALJ may use prehearing conferences to discuss the following—

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact or as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery of documents as permitted by this part;

(9) The time and place for the hearing;

(10) Such other matters as may tend to encourage the fair, just and expeditious disposition of the proceedings; and

(11) Potential settlement of the case.

(c) The ALJ will issue an order containing the matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 1005.7 Discovery.

(a) A party may make a request to another party for production of documents for inspection and copying which are relevant and material to the issues before the ALJ.

(b) For the purpose of this section, the term documents includes information, reports, answers, records, accounts, papers and other data and documentary evidence. Nothing contained in this section will be interpreted to require the creation of a document, except that requested data stored in an electronic data storage system will be produced in a form accessible to the requesting party.

(c) Requests for documents, requests for admissions, written interrogatories, depositions and any forms of discovery, other than those permitted under paragraph (a) of this section, are not authorized.

(d) This section will not be construed to require the disclosure of interview reports or statements obtained by any party, or on behalf of any party, of persons who will not be called as witnesses by that party, or analyses and summaries prepared in conjunction with the investigation or litigation of the case, or any otherwise privileged documents.

(e) (1) Within 10 days of service of a request for production of documents, a party may file a motion for a protective order.

(2) The ALJ may grant a motion for a protective order if he or she finds that the discovery sought—

(i) Is unduly costly or burdensome,

(ii) Will unduly delay the proceeding, or

(iii) Seeks privileged information.

(3) The burden of showing that discovery should be allowed is on the party seeking discovery.

§ 1005.8 Exchange of witness lists, witness statements and exhibits.

(a) At least 15 days before the hearing, the ALJ will order the parties to exchange witness lists, copies of prior written statements of proposed witnesses and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 1005.16.

(b) (1) If at any time a party objects to the proposed admission of evidence not exchanged in accordance with paragraph (a) of this section, the ALJ will determine whether the failure to comply with paragraph (a) of this section should result in the exclusion of such evidence.

(2) Unless the ALJ finds that extraordinary circumstances justified the failure to timely exchange the information listed under paragraph (a) of this section, the ALJ must exclude from the party's case-in-chief:

(i) The testimony of any witness whose name does not appear on the witness list, and

(ii) Any exhibit not provided to the opposing party as specified in paragraph (a) of this section.

(3) If the ALJ finds that extraordinary circumstances existed, the ALJ must then determine whether the admission of such evidence would cause substantial prejudice to the objecting party. If the ALJ finds that there is no substantial prejudice, the evidence may be admitted. If the ALJ finds that there is substantial prejudice, the ALJ may exclude the evidence, or at his or her discretion, may postpone the hearing for such time as is necessary for the objecting party to prepare and respond to the evidence.

(c) Unless another party objects within a reasonable period of time prior to the hearing, documents exchanged in accordance with paragraph (a) of this section will be deemed to be authentic

for the purpose of admissibility at the hearing.

§ 1005.9 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may make a motion requesting the ALJ to issue a subpoena if the appearance and testimony are reasonably necessary for the presentation of a party's case.

(b) A subpoena requiring the attendance of an individual may also require the individual to produce evidence at the hearing in accordance with § 1005.7.

(c) When a subpoena is served by a respondent or petitioner on a particular individual or particular office of the OIG, the OIG may comply by designating any of its representatives to appear and testify.

(d) A party seeking a subpoena will file a written motion not less than 30 days before the date fixed for the hearing, unless otherwise allowed by the ALJ for good cause shown. Such request will:

(1) Specify any evidence to be produced,

(2) Designate the witnesses, and

(3) Describe the address and location with sufficient particularity to permit such witnesses to be found.

(e) The subpoena will specify the time and place at which the witness is to appear and any evidence the witness is to produce.

(f) Within 15 days after the written motion requesting issuance of a subpoena is served, any party may file an opposition or other response.

(g) If the motion requesting issuance of a subpoena is granted, the party seeking the subpoena will serve it by delivery to the individual named, or by certified mail addressed to such individual at his or her last dwelling place or principal place of business.

(h) The individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within 10 days after service.

(i) The exclusive remedy for contumacy by, or refusal to obey a subpoena duly served upon, any person is specified in section 205(e) of the Social Security Act (42 U.S.C. 405(e)).

§ 1005.10 Fees.

The party requesting a subpoena will pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage will accompany the subpoena when served, except that when a subpoena is issued on behalf of the IG, a check for witness fees and mileage need not accompany the subpoena.

§ 1005.11 Form, filing and service of papers.

(a) *Forms.* (1) Unless the ALJ directs the parties to do otherwise, documents filed with the ALJ will include an original and two copies.

(2) Every pleading and paper filed in the proceeding will contain a caption setting forth the title of the action, the case number, and a designation of the paper, such as motion to quash subpoena.

(3) Every pleading and paper will be signed by, and will contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed.

(b) *Service.* A party filing a document with the ALJ or the Secretary will, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document will be made by delivering a copy, or placing a copy of the document in the United States mail, postage prepaid and addressed, or with a private delivery service, to the party's last known address. When a party is represented by an attorney, service will be made upon such attorney in lieu of the party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, will be proof of service.

§ 1005.12 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event or default, and includes the last day of the period unless it is a Saturday, Sunday or legal holiday observed by the Federal Government, in which event it includes the next business day.

(b) When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays observed by the Federal Government will be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional 5 days will be added to the time permitted for any response. This paragraph does not apply to requests for hearing under § 1005.2.

§ 1005.13 Motions.

(a) An application to the ALJ for an order or ruling will be by motion. Motions will state the relief sought, the authority relied upon and the facts alleged, and will be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions will be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 10 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ will make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 1005.14 Sanctions.

(a) The ALJ may sanction a person, including any party or attorney, for failing to comply with an order or procedure, for failing to defend an action or for other misconduct that interferes with the speedy, orderly or fair conduct of the hearing. Such sanctions will reasonably relate to the severity and nature of the failure or misconduct. Such sanction may include—

(1) In the case of refusal to provide or permit discovery under the terms of this part, drawing negative factual inferences or treating such refusal as an admission by deeming the matter, or certain facts, to be established;

(2) Prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense;

(3) Striking pleadings, in whole or in part;

(4) Staying the proceedings;

(5) Dismissal of the action;

(6) Entering a decision by default; and

(7) Refusing to consider any motion or other action that is not filed in a timely manner.

(b) In civil money penalty cases commenced under section 1128A of the Act or under any provision which incorporates section 1128A(c)(4) of the Act, the ALJ may also order the party or attorney who has engaged in any of the acts described in paragraph (a) of this section to pay attorney's fees and other costs caused by the failure or misconduct.

§ 1005.15 The hearing and burden of proof.

(a) The ALJ will conduct a hearing on the record in order to determine whether

the petitioner or respondent should be found liable under this part.

(b) Burden of proof in civil money penalty cases under part 1003, in Peer Review Organization exclusion cases under part 1004, and in exclusion cases under §§ 1001.701, 1001.901 and 1001.951. In civil money penalty cases under part 1003, in Peer Review Organization exclusion cases under part 1004, and in exclusion cases under §§ 1001.701, 1001.901 and 1001.951 of this chapter—

(1) The respondent bears the burden of going forward and the burden of persuasion with respect to affirmative defenses and any mitigating circumstances; and

(2) The IG bears the burden of going forward and the burden of persuasion with respect to all other issues.

(c) Burden of proof in all other exclusion cases. In all exclusion cases except those governed by paragraph (b) of this section, the ALJ will allocate the burden of proof as the ALJ deems appropriate

(d) The burden of persuasion will be judged by a preponderance of the evidence

(e) The hearing will be open to the public unless otherwise ordered by the ALJ for good cause shown.

(f) (1) A hearing under this part is not limited to specific items and information set forth in the notice letter to the petitioner or respondent. Subject to the 15-day requirement under § 1005.8, additional items or information may be introduced by either party during its case-in-chief unless such information or items are—

(i) Privileged;

(ii) Disqualified from consideration due to untimeliness in accordance with § 1004.130(a)(2)(ii); or

(iii) Deemed otherwise inadmissible under § 1005.17.

(2) After both parties have presented their cases, evidence may be admitted on rebuttal even if not previously exchanged in accordance with § 1005.8.

§ 1005.16 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing will be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony (other than expert testimony) may be admitted in the form of a written statement. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner that allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing will be exchanged as provided in § 1005.8.

(c) The ALJ will exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth,

(2) Avoid repetition or needless consumption of time, and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ will permit the parties to conduct such cross-examination of witnesses as may be required for a full and true disclosure of the facts.

(e) The ALJ may order witnesses excluded so that they cannot hear the testimony of other witnesses. This does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated as the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual engaged in assisting the attorney for the IG.

§ 1005.17 Evidence.

(a) The ALJ will determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ will not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, for example, to exclude unreliable evidence.

(c) The ALJ must exclude irrelevant or immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence must be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement made in this action will be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) Evidence of crimes, wrongs or acts other than those at issue in the instant case is admissible in order to show motive, opportunity, intent, knowledge, preparation, identity, lack of mistake, or existence of a scheme. Such evidence is admissible regardless of whether the crimes, wrongs or acts occurred during the statute of limitations period applicable to the acts which constitute the basis for liability in the case, and regardless of whether they were referenced in the IG's notice sent in accordance with §§ 1001.2002, 1001.2003 or 1003.109.

(h) The ALJ will permit the parties to introduce rebuttal witnesses and evidence.

(i) All documents and other evidence offered or taken for the record will be open to examination by all parties, unless otherwise ordered by the ALJ for good cause shown.

(j) The ALJ may not consider evidence regarding the issue of willingness and ability to enter into and successfully complete a corrective action plan when such evidence pertains to matters occurring after the submittal of the case to the Secretary. The determination regarding the appropriateness of any corrective action plan is not reviewable.

§ 1005.18 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Secretary.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by any person, unless otherwise ordered by the ALJ for good cause shown.

(d) For good cause, the ALJ may order appropriate redactions made to the record.

§ 1005.19 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ will fix the time for filing such briefs which are not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 1005.20 Initial decision.

(a) The ALJ will issue an initial decision, based only on the record, which will contain findings of fact and conclusions of law.

(b) The ALJ may affirm, increase or reduce the penalties, assessment or exclusion proposed or imposed by the IG, or reverse the imposition of the exclusion. In exclusion cases where the period of exclusion commenced prior to

the hearing, any period of exclusion imposed by the ALJ will be deemed to commence on the date such exclusion originally went into effect.

(c) The ALJ will issue the initial decision to all parties within 60 days after the time for submission of post-hearing briefs and reply briefs, if permitted, has expired. The decision will be accompanied by a statement describing the right of any party to file a notice of appeal with the DAB and instructions for how to file such appeal. If the ALJ fails to meet the deadline contained in this paragraph, he or she will notify the parties of the reason for the delay and will set a new deadline.

(d) Except as provided in paragraph (e) of this section, unless the initial decision is appealed to the DAB, it will be final and binding on the parties 30 days after the ALJ serves the parties with a copy of the decision. If service is by mail, the date of service will be deemed to be 5 days from the date of mailing.

(e) If an extension of time within which to appeal the initial decision is granted under § 1005.21(a), except as provided in § 1005.22(a), the initial decision will become final and binding on the day following the end of the extension period.

§ 1005.21 Appeal to DAB.

(a) Any party may appeal the initial decision of the ALJ to the DAB by filing a notice of appeal with the DAB within 30 days of the date of service of the initial decision. The DAB may extend the initial 30 day period for a period of time not to exceed 30 days if a party files with the DAB a request for an extension within the initial 30 day period and shows good cause.

(b) If a party files a timely notice of appeal with the DAB, the ALJ will forward the record of the proceeding to the DAB.

(c) A notice of appeal will be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions. Any party may file a brief in opposition to exceptions, which may raise any relevant issue not addressed in the exceptions, within 30 days of receiving the notice of appeal and accompanying brief. The DAB may permit the parties to file reply briefs.

(d) There is no right to appear personally before the DAB, or to appeal to the DAB any interlocutory ruling by the ALJ.

(e) The DAB will not consider any issue not raised in the parties' briefs, nor any issue in the briefs that could have been raised before the ALJ but was not.

(f) If any party demonstrates to the satisfaction of the DAB that additional evidence not presented at such hearing is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at such hearing, the DAB may remand the matter to the ALJ for consideration of such additional evidence.

(g) The DAB may decline to review the case, or may affirm, increase, reduce, reverse or remand any penalty, assessment or exclusion determined by the ALJ.

(h) The standard of review on a disputed issue of fact is whether the initial decision is supported by substantial evidence on the whole record. The standard of review on a disputed issue of law is whether the initial decision is erroneous.

(i) Within 60 days after the time for submission of briefs and reply briefs, if permitted, has expired, the DAB will issue to each party to the appeal a copy of the DAB's decision and a statement describing the right of any petitioner or respondent who is found liable to seek judicial review.

(j) Except with respect to any penalty, assessment or exclusion remanded by the ALJ, the DAB's decision, including a decision to decline review of the initial decision, becomes final and binding 60 days after the date on which the DAB serves the parties with a copy of the decision. If service is by mail, the date of service will be deemed to be 5 days from the date of mailing.

(k) (1) Any petition for judicial review must be filed within 60 days after the DAB serves the parties with a copy of the decision. If service is by mail, the date of service will be deemed to be 5 days from the date of mailing.

(2) In compliance with 28 U.S.C. 2112(a), a copy of any petition for judicial review filed in any U.S. Court of Appeals challenging a final action of the DAB will be sent by certified mail, return receipt requested, to the Associate General Counsel, Inspector General Division, HHS. The petition copy will be time-stamped by the clerk of the court when the original is filed with the court.

(3) If the Associate General Counsel receives two or more petitions within 10 days after the DAB issues its decision, the Associate General Counsel will notify the U.S. Judicial Panel on Multidistrict Litigation of any petitions that were received within the 10-day period.

§ 1005.22 Stay of initial decision.

(a) In a CMP case under section 1128A of the Act, the filing of a respondent's request for review by the DAB will automatically stay the effective date of the ALJ's decision.

(b) (1) After the DAB renders a decision in a CMP case, pending judicial review, the respondent may file a request for stay of the effective date of any penalty or assessment with the ALJ. The request must be accompanied by a copy of the notice of appeal filed with the Federal court. The filing of such a request will automatically act to stay the effective date of the penalty or assessment until such time as the ALJ rules upon the request.

(2) The ALJ may not grant a respondent's request for stay of any penalty or assessment unless the respondent posts a bond or provides other adequate security.

(3) The ALJ will rule upon a respondent's request for stay within 10 days of receipt.

§ 1005.23 Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in any act done or omitted by the ALJ or by any of the parties, including Federal representatives such as Medicare carriers and intermediaries and Peer Review Organizations, is ground for vacating, modifying or otherwise disturbing an otherwise appropriate ruling or order or act, unless refusal to take such action appears to the ALJ or the DAB inconsistent with substantial justice. The ALJ and the DAB at every stage of the proceeding will disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

G. A new Part 1006 is added to read as follows:

PART 1006—INVESTIGATIONAL INQUIRIES

Sec.
1006.1 Scope.
1006.2 Contents of subpoena.
1006.3 Service and fees.
1006.4 Procedures for investigational inquiries.
1006.5 Enforcement of a subpoena.

Authority: 42 U.S.C. 405(d), 405(e), 1302 and 1320a–7a.

§ 1006.1 Scope.

(a) The provisions in this part govern subpoenas issued by the Inspector General, or his or her delegates, in accordance with sections 205(d) and 1128A(j) of the Act, and require the attendance and testimony of witnesses and the production of any other evidence at an investigational inquiry.

(b) Such subpoenas may be issued in investigations under section 1128A of

the Act or under any other section of the Act that incorporates the provisions of section 1128A(j).

(c) Nothing in this part is intended to apply to or limit the authority of the Inspector General, or his or her delegates, to issue subpoenas for the production of documents in accordance with 5 U.S.C. 6(a)(4), App. 3.

§ 1006.2 Contents of subpoena.

A subpoena issued under this part will—

(a) State the name of the individual or entity to whom the subpoena is addressed;

(b) State the statutory authority for the subpoena;

(c) Indicate the date, time and place that the investigational inquiry at which the witness is to testify will take place;

(d) Include a reasonably specific description of any documents or items required to be produced; and

(e) If the subpoena is addressed to an entity, describe with reasonable particularity the subject matter on which testimony is required. In such event, the named entity will designate one or more individuals who will testify on its behalf, and will state as to each individual so designated that individual's name and address and the matters on which he or she will testify. The individual so designated will testify as to matters known or reasonably available to the entity.

§ 1006.3 Service and fees.

(a) A subpoena under this part will be served by—

(1) Delivering a copy to the individual named in the subpoena;

(2) Delivering a copy to the entity named in the subpoena at its last principal place of business; or

(3) Registered or certified mail addressed to such individual or entity at its last known dwelling place or principal place of business.

(b) A verified return by the individual serving the subpoena setting forth the manner of service or, in the case of service by registered or certified mail, the signed return post office receipt, will be proof of service.

(c) Witnesses will be entitled to the same fees and mileage as witnesses in the district courts of the United States (28 U.S.C. 1821 and 1825). Such fees need not be paid at the time the subpoena is served.

§ 1006.4 Procedures for investigational inquiries.

(a) Testimony at investigational inquiries will be taken under oath or affirmation.

(b) Investigational inquiries are non-public investigatory proceedings. Attendance of non-witnesses is within the discretion of the OIG, except that—

(1) A witness is entitled to be accompanied, represented and advised by an attorney; and

(2) Representatives of the OIG and the Office of the General Counsel are entitled to attend and ask questions.

(c) A witness will have an opportunity to clarify his or her answers on the record following the questions by the OIG.

(d) Any claim of privilege must be asserted by the witness on the record.

(e) Objections must be asserted on the record. Errors of any kind that might be corrected if promptly presented will be deemed to be waived unless reasonable objection is made at the investigational inquiry. Except where the objection is on the grounds of privilege, the question will be answered on the record, subject to the objection.

(f) If a witness refuses to answer any question not privileged or to produce requested documents or items, or engages in conduct likely to delay or obstruct the investigational inquiry, the OIG may seek enforcement of the subpoena under § 1006.5.

(g) (1) The proceedings will be recorded and transcribed.

(2) The witness is entitled to a copy of the transcript, upon payment of prescribed costs, except that, for good cause, the witness may be limited to inspection of the official transcript of his or her testimony.

(3) (i) The transcript will be submitted to the witness for signature.

(ii) Where the witness will be provided a copy of the transcript, the transcript will be submitted to the witness for signature. The witness may submit to the OIG written proposed corrections to the transcript, with such corrections attached to the transcript. If the witness does not return a signed copy of the transcript or proposed corrections within 30 days of its being submitted to him or her for signature, the witness will be deemed to have agreed that the transcript is true and accurate.

(iii) Where, as provided in paragraph (g)(2) of this section, the witness is limited to inspecting the transcript, the witness will have the opportunity at the time of inspection to propose corrections to the transcript, with corrections attached to the transcript. The witness will also have the opportunity to sign the transcript. If the witness does not sign the transcript or offer corrections within 30 days of receipt of notice of the opportunity to inspect the transcript, the witness will be deemed to have agreed that the transcript is true and accurate.

(iv) The OIG's proposed corrections the record of transcript will be attached to the transcript.

(h) Testimony and other evidence obtained in an investigational inquiry may be used by the OIG or DHHS in any of its activities, and may be used or offered into evidence in any administrative or judicial proceeding.

§ 1006.5 Enforcement of a subpoena.

A subpoena to appear at an investigational inquiry is enforceable through the District Court of the United States and the district where the subpoenaed person is found, resides or transacts business.

H. A new Part 1007 is added to read as follows:

PART 1007—STATE MEDICAID FRAUD CONTROL UNITS

Sec.

1007.1 Definitions.
1007.3 Scope and purpose.
1007.5 Basic requirement.
1007.7 Organization and location requirements.
1007.9 Relationship to, and agreement with, the Medicaid agency.
1007.11 Duties and responsibilities of the unit.
1007.13 Staffing requirements.
1007.15 Applications, certification and recertification.
1007.17 Annual report.
1007.19 Federal financial participation (FFP).
1007.21 Other applicable HHS regulations.

Authority: 42 U.S.C. 1396b(a)(6), 1396b(b)(3) and 1396b(q).

§ 1007.1 Definitions.

As used in this part, unless otherwise indicated by the context:

Employ or *employee*, as the context requires, means full-time duty intended to last at least a year. It includes an arrangement whereby an individual is on full-time detail or assignment to the unit from another government agency, if the detail or assignment is for a period of at least 1 year and involves supervision by the unit.

Provider means an individual or entity that furnishes items or services for which payment is claimed under Medicaid.

Unit means the State Medicaid fraud control unit.

§ 1007.3 Scope and purpose.

This part implements sections 1903(a)(6), 1903(b)(3), and 1903(q) of the Social Security Act, as amended by the Medicare-Medicaid Anti-Fraud and Abuse Amendments (Pub. L. 95–142). The statute authorizes the Secretary to pay a State 90 percent of the costs of establishing and operating a State

Medicaid fraud control unit, as defined by the statute, for the purpose of eliminating fraud in the State Medicaid program.

§ 1007.5 Basic requirement.

A State Medicaid fraud control unit must be a single identifiable entity of the State government certified by the Secretary as meeting the requirements of §§ 1007.7 through 1007.13 of this part.

§ 1007.7 Organization and location requirements.

Any of the following three alternatives is acceptable:

(a) The unit is located in the office of the State Attorney General or another department of State government which has Statewide authority to prosecute individuals for violations of criminal laws with respect to fraud in the provision or administration of medical assistance under a State plan implementing title XIX of the Act;

(b) If there is no State agency with Statewide authority and capability for criminal fraud prosecutions, the unit has established formal procedures that assure that the unit refers suspected cases of criminal fraud in the State Medicaid program to the appropriate State prosecuting authority or authorities, and provides assistance and coordination to such authority or authorities in the prosecution of such cases; or

(c) The unit has a formal working relationship with the office of the State Attorney General and has formal procedures for referring to the Attorney General suspected criminal violations occurring in the State Medicaid program and for effective coordination of the activities of both entities relating to the detection, investigation and prosecution of those violations. Under this requirement, the office of the State Attorney General must agree to assume responsibility for prosecuting alleged criminal violations referred to it by the unit. However, if the Attorney General finds that another prosecuting authority has the demonstrated capacity, experience and willingness to prosecute an alleged violation, he or she may refer a case to that prosecuting authority, as long as the Attorney General's Office maintains oversight responsibility for the prosecution and for coordination between the unit and the prosecuting authority.

§ 1007.9 Relationship to, and agreement with, the Medicaid agency.

(a) The unit must be separate and distinct from the Medicaid agency.

(b) No official of the Medicaid agency will have authority to review the activities of the unit or to review or overrule the referral of a suspected criminal violation to an appropriate prosecuting authority.

(c) The unit will not receive funds paid under this part either from or through the Medicaid agency.

(d) The unit will enter into an agreement with the Medicaid agency under which the Medicaid agency will agree to comply with all requirements of § 455.21(a)(2) of this title.

§ 1007.11 Duties and responsibilities of the unit.

(a) The unit will conduct a Statewide program for investigating and prosecuting (or referring for prosecution) violations of all applicable State laws pertaining to fraud in the administration of the Medicaid program, the provision of medical assistance, or the activities of providers of medical assistance under the State Medicaid plan.

(b) (1) The unit will also review complaints alleging abuse or neglect of patients in health care facilities receiving payments under the State Medicaid plan and may review complaints of the misappropriation of patient's private funds in such facilities.

(2) If the initial review indicates substantial potential for criminal prosecution, the unit will investigate the complaint or refer it to an appropriate criminal investigative or prosecutive authority.

(3) If the initial review does not indicate a substantial potential for criminal prosecution, the unit will refer the complaint to an appropriate State agency.

(c) If the unit, in carrying out its duties and responsibilities under paragraphs (a) and (b) of this section, discovers that overpayments have been made to a health care facility or other provider of medical assistance under the State Medicaid plan, the unit will either attempt to collect such overpayment or refer the matter to an appropriate State agency for collection.

(d) Where a prosecuting authority other than the unit is to assume responsibility for the prosecution of a case investigated by the unit, the unit will insure that those responsible for the prosecutive decision and the preparation of the case for trial have the fullest possible opportunity to participate in the investigation from its inception and will provide all necessary assistance to the prosecuting authority throughout all resulting prosecutions.

(e) The unit will make available to Federal investigators or prosecutors all information in its possession concerning fraud in the provision or administration of medical assistance under the State plan and will cooperate with such officials in coordinating any Federal and State investigations or prosecutions involving the same suspects or allegations.

(f) The unit will safeguard the privacy rights of all individuals and will provide safeguards to prevent the misuse of information under the unit's control.

§ 1007.13 Staffing requirements.

(a) The unit will employ sufficient professional, administrative, and support staff to carry out its duties and responsibilities in an effective and efficient manner. The staff must include:

(1) One or more attorneys experienced in the investigation or prosecution of civil fraud or criminal cases, who are capable of giving informed advice on applicable law and procedures and providing effective prosecution or liaison with other prosecutors;

(2) One or more experienced auditors capable of supervising the review of financial records and advising or assisting in the investigation of alleged fraud; and

(3) A senior investigator with substantial experience in commercial or financial investigations who is capable of supervising and directing the investigative activities of the unit.

(b) The unit will employ, or have available to it, professional staff who are knowledgeable about the provision of medical assistance under title XIX and about the operation of health care providers.

§ 1007.15 Applications, certification, and recertification.

(a) *Initial application.* In order to receive FFP under this part, the unit must submit to the Secretary, an application approved by the Governor, containing the following information and documentation—

(1) A description of the applicant's organization, structure, and location within State government, and an indication of whether it seeks certification under § 1007.7 (a), (b), or (c);

(2) A statement from the State Attorney General that the applicant has authority to carry out the functions and responsibilities set forth in this part. If the applicant seeks certification under § 1007.7(b), the statement must also specify either that—

(i) There is no State agency with the authority to exercise Statewide prosecuting authority for the violations with which the unit is concerned, or

(ii) Although the State Attorney General may have common law authority for Statewide criminal

prosecutions, he or she has not exercised that authority;

(3) A copy of whatever memorandum of agreement, regulation, or other document sets forth the formal procedures required under § 1007.7(b), or the formal working relationship and procedures required under § 1007.7(c);

(4) A copy of the agreement with the Medicaid agency required under § 1007.9;

(5) A statement of the procedures to be followed in carrying out the functions and responsibilities of this part;

(6) A projection of the caseload and a proposed budget for the 12-month period for which certification is sought; and

(7) Current and projected staffing, including the names, education, and experience of all senior professional staff already employed and job descriptions, with minimum qualifications, for all professional positions.

(b) *Conditions for, and notification of certification.* (1) The Secretary will approve an application only if he or she has specifically approved the applicant's formal procedures under § 1007.7 (b) or (c), if either of those provisions is applicable, and has specifically certified that the applicant meets the requirements of § 1007.7;

(2) The Secretary will promptly notify the applicant whether the application meets the requirements of this part and is approved. If the application is not approved, the applicant may submit an amended application at any time. Approval and certification will be for a period of 1 year.

(c) *Conditions for recertification.* In order to continue receiving payments under this part, a unit must submit a reapplication to the Secretary at least 60 days prior to the expiration of the 12-month certification period. A reapplication must—

(1) Advise the Secretary of any changes in the information or documentation required under paragraphs (a) (1) through (5) of this section;

(2) Provide projected caseload and proposed budget for the recertification period; and

(3) Include or reference the annual report required under § 1007.17.

(d) *Basis for recertification.* (1) The Secretary will consider the unit's reapplication, the reports required under § 1007.17, and any other reviews or information he or she deems necessary or warranted, and will promptly notify the unit whether he or she has approved the reapplication and recertified the unit.

(2) In reviewing the reapplication, the Secretary will give special attention to whether the unit has used its resources effectively in investigating cases of possible fraud, in preparing cases for prosecution, and in prosecuting cases or cooperating with the prosecuting authorities.

(Approved by the Office of Management and Budget under control number 0990–0162)

§ 1007.17 Annual report.

At least 60 days prior to the expiration of the certification period, the unit will submit to the Secretary a report covering the last 12 months (the first 9 months of the certification period for the first annual report), and containing the following information—

(a) The number of investigations initiated and the number completed or closed, categorized by type of provider;

(b) The number of cases prosecuted or referred for prosecution; the number of cases finally resolved and their outcomes; and the number of cases investigated but not prosecuted or referred for prosecution because of insufficient evidence;

(c) The number of complaints received regarding abuse and neglect of patients in health care facilities; the number of such complaints investigated by the unit; and the number referred to other identified State agencies;

(d) The number of recovery actions initiated by the unit; the number of recovery actions referred to another agency; the total amount of overpayments identified by the unit; and the total amount of overpayments actually collected by the unit;

(e) The number of recovery actions initiated by the Medicaid agency under its agreement with the unit, and the total amount of overpayments actually collected by the Medicaid agency under this agreement;

(f) Projections for the succeeding 12 months for items listed in paragraphs (a) through (e) of this section;

(g) The costs incurred by the unit; and

(h) A narrative that evaluates the unit's performance; describes any specific problems it has had in connection with the procedures and agreements required under this part; and discusses any other matters that have impaired its effectiveness.

(Approved by the Office of Management and Budget under control number 0990–0162)

§ 1007.19 Federal financial participation (FFP).

(a) *Rate of FFP.* Subject to the limitation of this section, the Secretary will reimburse each State by an amount equal to 90 percent of the costs incurred by a certified unit which are attributable to carrying out its functions and responsibilities under this part.

(b) *Retroactive certification.* The Secretary may grant certification retroactive to the date on which the unit first met all the requirements of the statute and of this part. For any quarter with respect to which the unit is certified, the Secretary will provide reimbursement for the entire quarter.

(c) *Amount of FFP.* FFP for any quarter will not exceed the higher of $125,000 or one-quarter of 1 percent of the sums expended by the Federal, State, and local governments during the previous quarter in carrying out the State Medicaid program.

(d) *Costs subject to FFP.* (1) FFP is available under this part for the expenditures attributable to the establishment and operation of the unit, including the cost of training personnel employed by the unit. Reimbursement will be limited to costs attributable to the specific responsibilities and functions set forth in this part in connection with the investigation and prosecution of suspected fraudulent activities and the review of complaints of alleged abuse or neglect of patients in health care facilities.

(2) (i) Establishment costs are limited to clearly identifiable costs of personnel that—

(A) Devote full time to the establishment of the unit which does achieve certification; and

(B) Continue as full-time employees after the unit is certified.

(ii) All establishment costs will be deemed made in the first quarter of certification.

(e) *Costs not subject to FFP.* FFP is not available under this part for expenditures attributable to—

(1) The investigation of cases involving program abuse or other failures to comply with applicable laws and regulations, if these cases do not involve substantial allegations or other indications of fraud;

(2) Efforts to identify situations in which a question of fraud may exist, including the screening of claims, analysis of patterns of practice, or routine verification with recipients of whether services billed by providers were actually received;

(3) The routine notification of providers that fraudulent claims may be punished under Federal or State law;

(4) The performance by a person other than a full-time employee of the unit of any management function for the unit, any audit or investigation, any professional legal function, or any criminal, civil or administrative prosecution of suspected providers;

(5) The investigation or prosecution of cases of suspected recipient fraud not

involving suspected conspiracy with a provider; or

(6) Any payment, direct or indirect, from the unit to the Medicaid agency, other than payments for the salaries of employees on detail to the unit.

§ 1007.21 Other applicable HHS regulations.

Except as otherwise provided in this part, the following regulations from 45 CFR subtitle A apply to grants under this part:

Part 16, subpart C—Department Grant Appeals Process—Special Provisions Applicable To Reconsideration of Disallowances [Note that this applies only to disallowance determinations and not to any other determinations, e.g., over certification or recertification];

Part 74—Administration of Grants;

Part 75—Informal Grant Appeals Procedures;

Part 80—Nondiscrimination Under Programs Receiving Federal Assistance Through the Department of Health and Human Services, Effectuation of Title VI of the Civil Rights Act of 1964;

Part 81—Practice and Procedure for Hearings Under 45 CFR Part 80;

Part 84—Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance;

Part 91—Nondiscrimination on the Basis of Age in HHS Programs or Activities Receiving Federal Financial Assistance.

Dated: June 6, 1991.

Richard P. Kusserow,

Inspector General, Department of Health and Human Services.

Approved: October 7, 1991.

Louis W. Sullivan,

Secretary.

[FR Doc. 92-1939 Filed 1-23-92; 11:42 am]

BILLING CODE 4150-04-M

DEPARTMENT OF DEFENSE

48 CFR Parts 232 and 252

Department of Defense Federal Acquisition Regulation Supplement; Fraud Payment Reductions

AGENCY: Department of Defense (DOD).

ACTION: Interim rule with request for comments.

SUMMARY: The Director of Defense Procurement has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to establish policy and procedures for reducing or suspending payments to a contractor when the agency head determines that the contractor's request for advance, partial, or progress payment is based on fraud.

DATES: *Effective Date:* January 15, 1992.

Comment Date: Comments on the interim rule should be submitted in writing at the address shown below on or before February 28, 1992, to be considered in the formulation of the final rule. Please cite DAR Case 90-318 in all correspondence.

ADDRESSES: Interested parties should submit written comments to: Defense Acquisition Regulations Council, ATTN: Mr. Eric Mens, OUSD(A)DP, The Pentagon, Washington, DC 20301-3000. Telefax Number (703) 697-9845.

FOR FURTHER INFORMATION CONTACT: Mr. Eric Mens, (703) 697-7266.

SUPPLEMENTARY INFORMATION:

A. Background

These revisions implement section 836 of the FY 1991 DoD Authorization Act (Public Law 101-510), as amended, which added a subsection (e) to 10 U.S.C. 2307. The statute permits agencies to reduce or suspend payments to a contractor when the agency head determines that the contractor's request for advance, partial, or progress payment is based on fraud.

This DFARS interim rule provides a clause prescription at 232.111-70, establishes agency procedures at a new section 232.173, and establishes a new clause at 252.232-7006, Reduction or Suspension of Contract Payments Upon Finding of Fraud.

B. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense to issue this regulation as an interim rule. Urgent and compelling reasons exist to promulgate this rule before affording the public an opportunity to comment because section 836 of the FY 1991 DoD Authorization Act applies to all contracts awarded on or after May 6, 1991. Therefore, it is essential that guidance be issued as expeditiously as possible.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, applies but the interim rule is not expected to have a significant economic impact on a substantial number of small entities because the rule is not expected to impact 20 percent or more of those small businesses who contract with the Department of Defense. Based on an analysis of data for fiscal year 1990, 4,335 out of a total of 16,689 small businesses (or 20 percent of the total number of small businesses) were awarded contracts with advance or progress payment provisions. A small percentage of these (certainly less than 100 percent) can be expected to submit fraudulent payment requests. The rule will have a significant economic impact on only those small businesses who submit requests for advance, partial, or progress payments which may be based on fraud. Moreover, for those affected entities, the economic impact of the DFARS rule flows directly from 10 U.S.C. 2307(e)(5) which states that the contractor must be afforded an opportunity to "submit matters to the head of the agency" in response to the proposed reduction or suspension of payment (see DFARS 232.173-4(e)). An initial regulatory flexibility analysis has therefore not been performed. Comments from small entities concerning the affected DFARS subpart will be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite 5 U.S.C. 610 (DAR Case 91-610D) in correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) does not apply because the interim rule falls within the exception provided under 5 CFR 1320.3(c), i.e., matters pertaining to the conduct of a federal criminal investigation or prosecution, or during the disposition of a particular criminal matter.

List of Subjects in 48 CFR Parts 232 and 252

Government procurement.

Claudia L. Naugle,

Executive Editor, Defense Acquisition Regulations Council.

Therefore, 48 CFR parts 232 and 252 are amended as follows:

1. The authority citation for 48 CFR parts 232 and 252 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, and Defense FAR Supplement 201.301.

PART 232—CONTRACT FINANCING

2. Sections 232.111 and 232.111-70 are added to read as follows:

232.111 Contract clauses.

232.111-70 Additional clause.

Use the clause at 252.232-7006, Reduction or Suspension of Contract Payments Upon Finding of Fraud, in all solicitations and contracts.

3. Sections 232.173 through 232.173-5 are added to read as follows:

232.173 Reduction or suspension of contract payments upon finding of fraud.

232.173-1 General.

(a) 10 U.S.C. 2307(e)(2) provides for a reduction or suspension of payments to a contractor when the agency head determines there is substantial evidence that the contractor's request for advance, partial, or progress payments is based on fraud.

(b) The agency head may not delegate his or her responsibilities under 10 U.S.C. 2307(e) below level IV of the Executive Schedule. For purposes of this section, the Under Secretary of Defense (Acquisition) is the agency head for the defense agencies.

(c) Authority to reduce or suspend payments under 10 U.S.C. 2307(e) is in addition to other Government rights, remedies, and procedures.

(d) In accordance with 10 U.S.C. 2310(a), agency head determinations and decisions under this section may be made for an individual contract or any group of contracts affected by the fraud.

232.173-2 Definitions.

As used in this section—

(a) *Remedy coordination official* means the person or entity in the agency who coordinates within that agency the administration of criminal, civil, administrative, and contractual remedies resulting from investigations of fraud or corruption related to procurement activities.

(b) *Substantial evidence* means information sufficient to support the reasonable belief that a particular act or omission has occurred.

232.173-3 Responsibilities.

(a) Agencies shall establish appropriate procedures to implement the policies and procedures of this section.

(b) Government personnel shall report suspected fraud related to advance, partial, or progress payments in accordance with agency regulations.

232.173-4 Procedures.

(a) In any case in which an agency's remedy coordination official finds substantial evidence that a contractor's request for advance, partial, or progress payment under a contract awarded by that agency is based on fraud, the remedy coordination official shall recommend that the agency head reduce or suspend payments to the contractor. The remedy coordination official shall submit to the agency head a written report setting forth the remedy coordination official's findings that support each recommendation.

(b) Upon receiving a recommendation from the remedy coordination official under paragraph (a) of this subsection, the agency head shall determine whether substantial evidence exists that the request for payment under a contract is based on fraud.

(c) If the agency head determines that substantial evidence exists, the agency head may reduce or suspend payments to the contractor under the affected contract(s). Such reduction or suspension shall be reasonably commensurate with the anticipated loss to the Government resulting from the fraud.

(d) In determining whether to reduce or suspend payment(s), as a minimum, the agency head shall consider:

(1) A recommendation from investigating officers that disclosure of the allegations of fraud to the contractor may compromise an ongoing investigation;

(2) The anticipated loss to the Government as a result of the fraud;

(3) The contractor's overall financial condition and ability to continue performance if payments are reduced or suspended;

(4) The contractor's essentiality to the national defense;

(5) Assessment of all documentation concerning the alleged fraud, including documentation submitted by the contractor in its response to the notice required by paragraph (e) of this subsection.

(e) Before making a decision to reduce or suspend payments, the agency head shall, in accordance with the agency procedures—

(1) Notify the contractor of the proposed action and the reasons therefor; and

(2) Provide the contractor an opportunity to submit information and argument, within a reasonable time, in response to the proposed action.

(f) When more than one agency has contracts affected by the fraud, the agencies shall consider designating one agency as the lead agency for making the determination and decision.

(g) The agency shall retain in its files the written justification for each—

(1) Decision of the agency head whether to reduce or suspend payments; and

(2) Recommendation received by an agency head in connection with such decision.

(h) Not later than 180 calendar days after the date of the reduction or suspension action, the remedy coordination official shall—

(1) Review the agency head's determination on which the reduction or suspension decision is based; and

(2) Transmit a recommendation to the agency head as to whether the reduction or suspension should continue.

232.173-5 Reporting.

Departments and agencies, in accordance with department/agency procedures, shall prepare and submit to the Under Secretary of Defense (Acquisition), through the Director of Defense Procurement, annual reports containing—

(a) Each recommendation made by the remedy coordination official for payments reduction or suspension;

(b) The actions taken on the recommendation(s), with the reasons for such actions; and

(c) An assessment of the effects of each action on the Government.

4. Section 252.232-7006 is added to read as follows:

252.232-7006 Reduction or Suspension of Contract Payments Upon Finding of Fraud.

As prescribed in 232.111-70, use the following clause.

Reduction or Suspension of Contract Payments Upon Finding of Fraud (Jan. 1992)

(a) 10 U.S.C. 2307(e) permits the head of the agency to reduce or suspend advance, partial, or progress payments upon a written determination by the agency head that substantial evidence exists that the Contractor's request for payment is based on fraud. The provisions of 10 U.S.C. 2307(e) are in addition to any other rights or remedies provided the Government by law or under contract.

(b) Actions taken by the Government under 10 U.S.C. 2307(e) shall not constitute an excusable delay under the Default clause of this contract or otherwise relieve the Contractor of its obligations to perform under this contract.

(End of Clause)

[FR Doc. 92-2105 Filed 1-28-92; 8:45 am]

BILLING CODE 3810-01-M

Proposed Rules

Federal Register
Vol. 57, No. 19
Wednesday, January 29, 1992

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1209

[FV-91-404]

RIN 0581-AA49

Procedures for the Conduct of Referenda in Connection With the Mushroom Promotion, Research, and Consumer Information Order and for Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Such Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Mushroom Promotion, Research, and Consumer Information Act of 1990 authorizes a program of promotion, research, and consumer information to be developed through the promulgation of an order. Based on two proposals submitted by interested persons, the U.S. Department of Agriculture recently proposed the issuance of an order. The term "mushrooms" applies only to those mushrooms marketed or imported for use as fresh mushrooms and not exempted from assessment under the order. To become effective, however, the proposed order must be approved by mushroom producers and importers in a referendum. This rule specifies procedures for the conduct of the initial referendum to determine if producers and importers favor implementation of the proposed order. These procedures would also apply to any subsequent referenda to amend, continue, suspend, or terminate the order. In addition to referenda procedures, this rule contains rules of practice governing proceedings on petitions to modify or to be exempted from the proposed order.

DATES: Comments must be received by February 28, 1992.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal to: Docket Clerk, Fruit and Vegetable Division, Agricultural Marketing Service, USDA, P.O. Box 96456, room 2533–S, Washington, DC 20090–6456. Three copies of all written material should be submitted, and they will be made available for public inspection in the Office of the Docket Clerk during regular working hours. All comments should reference the docket number and the date and page number of this issue of the **Federal Register**. Comments concerning the information collection requirements contained in this action should also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attn: Desk Officer for the Agricultural Marketing Service, USDA.

FOR FURTHER INFORMATION CONTACT: Richard Schultz, Research and Promotion Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2533–S, Washington, DC 20090–6456, telephone (202) 720–5976.

SUPPLEMENTARY INFORMATION: This proposed rule is authorized under the Mushroom Promotion, Research, and Consumer Information Act of 1990 (7 U.S.C. 6101–6112) hereinafter referred to as the Act.

The proposed rule has been reviewed by the U.S. Department of Agriculture (Department) in accordance with Departmental Regulation 1512–1 and the criteria contained in Executive Order No. 12291 and has been determined to be a "non-major" rule.

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this proposed 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 unduly or disproportionately burdened.

The most recent available census of agricultural producers indicates that there are 460 mushroom producers in the United States, an estimated 200 of whom would be subject to a proposed Mushroom Promotion, Research, and Consumer Information Order (order). Of these 200 estimated producers, a minority would be classified as small businesses. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than $500,000, and small agricultural service firms, which include mushroom handlers and importers, have been defined as those having annual receipts of less than $3,500,000. There are approximately 100 handlers, including producers who are also handlers, and not more than 3 importers, out of approximately 30 importers, who would be subject to the provisions of the proposed order, a majority of whom would be classified as small entities. During the 1990–91 crop year, 756 million pounds were produced in the United States; 512 million pounds of this production were for fresh use. Department statistics for 1990 indicate that total imports of fresh mushrooms into the United States were approximately 2.3 million pounds. Major exporting countries, as a percentage of total U.S. fresh mushroom imports, were Canada (92.1%), Japan (3.7%), Taiwan (1.4%), and France (0.9%). The proposed order would require each mushroom producer and importer who produces or imports more than 500,00 pounds of fresh mushrooms per year to pay an assessment not to exceed one percent per pound. In addition, an estimated 100 first handlers of fresh mushrooms, a majority of whom would be classified as small firms, would be required to collect and remit the assessments.

This rule proposes the establishment of procedures for the conduct of a referendum to determine whether a proposed order should be issued. Such procedures would permit all eligible producers and importers of mushrooms to vote. Participation in the referendum would be voluntary. Votes may be cast by mail ballots, at polling places, or by any combination of the foregoing. These procedures would also apply to any subsequent referenda to amend, suspend, or terminate the order, or any provision thereof, should the proposed order be implemented.

This rule also proposes the establishment of rules of practice to govern proceedings on petitions to modify or be exempted from the proposed order. Such petitions could be made by any person subject to the order based on the belief that the order, or a provision of such order, or any obligation imposed in connection with the order, is not in accordance with law.

The Administrator of the Agricultural Marketing Service has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities.

The Act authorizes the development of a nationally coordinated program of promotion, research, consumer information, and industry information designed to strengthen the mushroom industry's position in the marketplace; maintain and expand existing markets and uses for mushrooms; and develop new markets and uses for mushrooms.

In response to an invitation to submit proposals in the January 30, 1991, issue of the Federal Register (56 FR 3425), one proposal for a complete promotion, research, and consumer information order was received from the American Mushroom Institute (AMI), a national trade association. In addition, several provisions to be incorporated into a proposed promotion, research, and consumer information order were received from United Food, Inc. (United), a mushroom producer. The Department reviewed the submissions and issued a proposed rule containing them in the October 4, 1991, issue of the Federal Register (56 FR 50283). The Department, after reviewing and considering comments received on the proposed rule, issued a proposed order incorporating those provisions submitted by AMI and United, insofar as they were practicable and in accordance with the Act. After receiving and considering comments on the proposed order, as well as holding a public meeting, the Department will issue a final order. The Act requires that a referendum be conducted among eligible producers and importers before an order can become effective. The Act further requires that a referendum be held within the 60-day period immediately preceding the effective date of the order as to determine whether persons subject to the order favor issuance of the order.

This rule would establish procedures to be followed by the Department in conducting a referendum to determine whether mushroom producers and importers favor issuance of a proposed order. In addition, referenda may be conducted at the request of a representative group comprising 30 percent or more of eligible producers and importers to determine if producers and importers favor termination or suspension of an order. The proposed provisions include sections on definitions, voting, instructions for referendum agents and subagents, ballots, the referendum report and the confidentiality of information.

Persons voting in such referenda would certify their eligibility to vote, and would designate their status as either a mushroom producer or importer. Only producers or importers who either produced or imported over 500,000 pounds of mushrooms annually during the representative period would be eligible to vote in such referenda. Producers and importers would certify the pounds of mushrooms they either produced or imported during the representative period. These figures would be used to determine the results of the voting based on the volume of mushrooms produced and imported by those eligible and voting.

In addition to referenda procedures, this rule contains rules for proceedings on petitions to modify or be exempted from a proposed order. Section 1927 of the Act provides that any person subject to an order may file a written petition with the Secretary stating that such order or any provision of such order is not in accordance with law. The person may request a modification of such order or an exemption from certain provisions or obligations of such order. The person shall be given an opportunity for a hearing on the petition, in accordance with regulations prescribed by the Secretary.

In accordance with the Paperwork Reduction Act of 1980, the information collection requirements contained in this action have been approved by the Office of Management and Budget (OMB) and assigned OMB control number 0581–0093, except for the Council nominee background statement form which is assigned OMB control number 0505–0001. It is estimated that approximately 203 mushroom producers and importers would be eligible to vote in the initial referendum, and that it would take an average of 6 minutes for each producer and importer to complete the referendum ballot. Comments concerning the information collection requirements of this action should also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503. Attention: Desk Officer for the Agricultural Marketing Service, USDA.

List of Subjects in 7 CFR Part 1209

Administrative practice and procedure, Advertising, Agricultural research, Marketing agreements, Mushrooms, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, it is proposed that chapter XI of title 7 be amended as follows:

PART 1209—MUSHROOM PROMOTION, RESEARCH, AND CONSUMER INFORMATION ORDER

1. The authority citation for 7 CFR part 1209 continues reads as follows:

Authority: The Mushroom Promotion, Research, and Consumer Information Act of 1990; 7 U.S.C. 6101 *et seq.*

2. Part 1209 is amended by reserving subpart B and adding subparts C and D to read as follows:

Subpart B—[Reserved]

Subpart C—Procedure for the Conduct of Referenda in Connection with the Mushroom Promotion, Research, and Consumer Information Order

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Subpart C—Procedure for the Conduct of Referenda in Connection with the Mushroom Promotion, Research, and Consumer Information Order

§ 1209.300 General.

Referenda to determine whether eligible producers and importers favor the issuance, continuance, termination, or suspension of a Mushroom Promotion, Research, and Consumer Information Order shall be conducted in accordance with this subpart.

§ 1209.301 Definitions.

Unless otherwise defined in the subpart, the definitions of terms used in this subpart shall have the same meaning as the definitions in subpart A—Mushroom Promotion, Research, and Consumer information Order.

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to redelegate, or any officer or employee of the Department to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) *Order* means the Mushroom Promotion, Research, and Consumer Information Order, subpart A: §§ 1209.1

through 1209.77, including an amendment to the Order, with respect to which the Secretary has directed that a referendum be conducted.

(c) *Referendum agent* or *agent* means the individual or individuals designated by the Secretary to conduct the referendum.

(d) *Representative period* means the period designated by the Secretary.

(e) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity. For the purpose of this definition, the term "partnership" includes, but is not limited to:

(1) A husband and wife who has title to, or leasehold interest in, mushroom production facilities and equipment as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property, and

(2) So-called "joint ventures" wherein one or more parties to the agreement, informal or otherwise, contributed capital and others contributed labor, management, equipment, or other services, or any variation of such contributions by two or more parties so that it results in the production or importation of mushrooms and the authority to transfer title to the mushrooms so produced or imported.

(f) *Eligible producer* means any person defined as a producer in the Order who produces over 500,000 pounds of mushrooms annually during the representative period and who:

(1) Owns or shares in the ownership of mushroom production facilities and equipment resulting in the ownership of the mushrooms produced;

(2) Rents mushroom production facilities and equipment resulting in the ownership of all or a portion of the mushrooms produced; or

(3) Owns mushroom production facilities and equipment but does not manage them and, as compensation, obtains the ownership of a portion of the mushrooms produced;

(4) Is a party in a lessor-lessee relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce mushrooms who share the risk of loss and receive a share of the mushrooms produced. No other acquisition of legal title to mushrooms shall be deemed to result in persons becoming eligible producers.

(g) *Eligible importer* means any person defined as an importer in the Order who engages in the importation of mushrooms, with total importation over 500,000 pounds annually, during the representative period. Importation occurs when commodities originating outside the United States are entered or withdrawn from the U.S. Customs Service for consumption in the United States. Included are persons who hold title to foreign-produced mushrooms immediately upon release by the U.S. Customs Service, as well as any persons who act on behalf of others, as agents or brokers, to secure the release of mushrooms from the U.S. Customs Service when such mushrooms are entered or withdrawn for consumption in the United States.

§ 1209.302 Voting.

(a) Each person who is an eligible producer or importer, as defined in this subpart, at the time of the referendum and during the representative period, shall be entitled to cast only one ballot in the referendum. However, each producer in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce mushrooms, in which more than one of the parties is a producer, shall be entitled to cast one ballot in the referendum covering only such producer's share of the ownership.

(b) Proxy voting is not authorized, but an officer or employee of an eligible corporate producer or importer, or an administrator, executor, or trustee of an eligible producing or importing estate may cast a ballot on behalf of such producer, importer or estate. Any individual so voting in a referendum shall certify that such individual is an officer or employee of the eligible producer or importer, or an administrator, executor, or trustee of an eligible producing or importing estate, and that such individual has the authority to take such action. Upon request of the referendum agent, the individual shall submit adequate evidence of such authority.

§ 1209.303 Instructions.

The referendum agent shall conduct the referendum, in the manner herein provided, under supervision of the Administrator. The Administrator may prescribe additional instructions, not inconsistent with the provisions hereof, to govern the procedure to be followed by the referendum agent. Such agent shall:

(a) Determine the time of commencement and termination of the period of the referendum, and the time when all ballots may be cast.

(b) Determine whether ballots may be cast by mail, at polling places, or by any combination of the foregoing.

(c) Provide ballots and related material to be used in the referendum. Ballot material shall provide for recording essential information including that needed for ascertaining:

(1) Whether the person voting, or on whose behalf the vote is cast, is an eligible voter.

(2) The total volume of mushrooms produced by the voting producer during the representative period.

(3) The total volume of mushrooms imported by the voting importer during the representative period, and

(4) In a joint venture, names of the parties and each party's share of ownership.

(d) Give reasonable advance public notice of the referendum:

(1) By utilizing available media or public information sources, without incurring advertising expense, to publicize the dates, places, methods of voting, eligibility requirements, and other pertinent information. Such sources of publicity may include, but are not limited to, print and radio; and.

(2) By such other means as the agent may deem advisable.

(e) Make available to eligible producers and importers the instructions on voting, appropriate ballot and certification forms, and, except in the case of a referendum on the termination or continuance of the Order, a summary of the terms and conditions of the Order. No person who claims to be eligible to vote shall be refused a ballot.

(f) If ballots are to be cast by mail, cause all the material specified in paragraph (e) of this section to be mailed to each eligible producer and importer whose name and address is known to the referendum agent.

(g) If ballots are to be cast at pollings places, determine the necessary number of polling places, designate them, announce the hours during which each polling place will be open, provide the material specified in paragraph (e) of this section, and provide for appropriate custody of ballot forms and delivery to the referendum agent of ballots cast.

(h) At the conclusion of the referendum, canvass the ballots, tabulate the results, and except as otherwise directed, report the outcome to the Administrator and promptly thereafter submit the following:

(1) All ballots received by the agent and appointed subagents, together with a certificate to the effect that the ballots forwarded are all of the ballots cast and received by such agent or subagents during the referendum period;

(2) A list of all challenged ballots deemed to be invalid; and

(3) A tabulation of the results of the referendum and a report thereon, including a detailed statement explaining the method used in giving

publicity to the referendum and showing other information pertinent to the manner in which the referendum was conducted.

§ 1209.304 Subagents.

The referendum agent may appoint any individual or individuals deemed necessary or desirable to assist the agent in performing such agent's functions hereunder. Each individual so appointed may be authorized by the agent to perform, in accordance with the requirements herein set forth, any or all of the following functions which, in the absence of such appointment, shall be performed by the agent:

(a) Give public notice of the referendum in the manner specified herein;

(b) Serve as poll officer at a polling place;

(c) Distribute ballots and provide the material specified in § 1209.303(e) of this subpart to producers and importers and receive any ballots which are cast; and

(d) Record the name and address of each person receiving a ballot from, or casting a ballot with, the subagent and inquire into the eligibility of such person to vote in the referendum, indicating all challenged ballots deemed to be invalid.

§ 1209.305 Ballots.

The referendum agent and subagent shall accept all ballots cast; but, should they, or any of them, deem that a ballot should be challenged for any reason, the agent or subagent shall endorse above their signature, on the ballot, a statement to the effect that such ballot was challenged, by whom challenged, the reasons therefore, the results of any investigations made with respect thereto, and the disposition thereof. Ballots invalid under this subpart shall not be counted.

§ 1209.306 Referendum report.

Except as otherwise directed, the Administrator shall prepare and submit to the Secretary a report on results of the referendum, the manner in which it was conducted, the extent and kind of public notice given, and other information pertinent to analysis of the referendum and its results.

§ 1209.307 Confidential information.

All ballots cast and the contents thereof, whether or not relating to the identity of any person who voted or the manner in which any person voted, and all information furnished to; compiled by, or in possession of the referendum agent or subagents shall be treated as confidential.

Subpart D—Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From the Mushroom Promotion, Research, and Consumer Information Order

§ 1209.400 Words in the singular form.

Words in this subpart in the singular form shall be deemed to import the plural, and vice versa, as the case may demand.

§ 1209.401 Definitions.

Unless otherwise defined in this subpart, definitions of terms used in this subpart shall have the same meaning as the definitions in subpart A—Mushroom Promotion, Research, and Consumer Information Order; and Subpart C—Procedures for the Conduct of Referenda in Connection with the Mushroom Promotion, Research, and Consumer Information Order.

(a) *Administrative law judge* or *judge* means any administrative law judge, appointed pursuant to 5 U.S.C. 3105, and assigned to the proceeding involved;

(b) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity subject to an order or to whom an order is sought to be made applicable, or on whom an obligation has been imposed or is sought to be imposed under an order.

(c) *Proceeding* means a proceeding before the Secretary arising under section 1927 of the Act;

(d) *Hearing* means that part of the proceedings which involves the submission of evidence;

(e) *Party* includes the Department of Agriculture;

(f) *Hearing clerk* means the Hearing Clerk, U.S. Department of Agriculture, Washington, DC;

(g) *Decision* means the judge's report to the Secretary and includes the judge's proposed:

(1) Findings of fact and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or basis thereof,

(2) Order, and

(3) Rulings on findings, conclusions and orders submitted by the parties; and

(h) *Petition* includes an amended petition.

§ 1209.402 Institution of proceeding.

(a) *Filing and service of petitions.* Any person subject to the Order desiring to complain that such Order or any provision of such Order or any obligation imposed in connection with the Order is not in accordance with law shall file with the hearing clerk, in quintuplicate, a petition in writing addressed to the Secretary. Promptly upon receipt of the petition in writing the hearing clerk shall transmit a true copy thereof to the Administrator and the General Counsel, respectively.

(b) *Contents of petitions.* A petition shall contain:

(1) The correct name, address, and principal place of business of the petitioner. If the petitioner is a corporation, such fact shall be stated, together with the name of the State of incorporation, the date of incorporation and the names, addresses, and respective positions held by its officers and directors; if an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner;

(2) Reference to the specific terms or provisions of the Order, or the interpretation or application of such terms or provisions, which are complained of;

(3) A full statement of the facts, avoiding a mere repetition of detailed evidence, upon which the petition is based, and which it is desired that the Secretary consider, setting forth clearly and concisely the nature of the petitioner's business and the manner in which petitioner claims to be affected by the terms or provisions of the Order or the interpretation or application thereof, which are complained of;

(4) A statement of the grounds on which the terms or provisions of the Order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law;

(5) Requests for the specific relief which the petitioner desires the Secretary to grant; and

(6) An affidavit by the petitioner, or, if the petitioner is not an individual, by an officer of the petitioner having knowledge of the facts stated in the petition, verifying the petition and stating that it is filed in good faith and not for purposes of delay.

(c) *A motion to dismiss a petitioner: Filing, contents, and responses to a petition.* If the Administrator is of the opinion that the petition, or any portion thereof, does not substantially comply, in form or content, with the Act or with requirements of paragraph (b) of this section, the Administrator may, within 30 days after the filing of the petition, file with the hearing clerk a motion to dismiss the petition, or any portion of the petition, on one or more of the grounds stated in this paragraph. Such motion shall specify the grounds for objection to the petition and if based, in whole or in part, on allegations of fact not appearing on the face of the petition,

shall be accompanied by appropriate affidavits or documentary evidence substantiating such allegations of fact. The motion may be accompanied by a memorandum of law. Upon receipt of such motion, the hearing clerk shall cause a copy thereof to be served upon the petitioner, together with a notice stating that all papers to be submitted in opposition to such motion, including any memorandum of law, must be filed by the petitioner with the hearing clerk not later than 20 days after the service of such notice upon the petitioner. Upon the expiration of the time specified in such notice, or upon receipt of such papers from the petitioner, the hearing clerk shall transmit all papers which have been filed in connection with the motion to the judge for the judge's consideration.

(d) *Further proceedings.* Further proceedings on petitions to modify or to be exempted from the Order shall be governed by paragraph (c)(2) of §§ 900.52 through 900.71 of the Rules of Practice Governing Proceedings on Petitions to Modify or to be Exempted From Marketing Orders and as may hereafter be amended, and the same are incorporated herein and made a part hereof by reference. However, each reference to *marketing order* in the title shall mean *Order.*

Dated: January 22, 1992.

Daniel Haley,

Administrator.

[FR Doc. 92–1916 Filed 1–28–92; 8:45 am]

BILLING CODE 3410–02–M

DEPARTMENT OF ENERGY

Financial Assistance Appeals Board

10 CFR Part 1024

Procedures for Financial Assistance Appeals

AGENCY: Department of Energy Financial Assistance Appeals Board.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Energy Financial Assistance Appeals Board proposes to amend its Rules of Procedure codified at 10 CFR part 1024. The proposed rule would correct an inconsistence in the time specified for filing notices of appeal by conforming the language in 10 CFR 1024.3(c) with that of 1024.4 Rule 1(a).

DATES: Comments must be received February 28, 1992.

ADDRESSES: Interested persons may submit written comments to: E. Barclay Van Doren, Chairman, Department of Energy, Financial Assistance Appeals Board, room 1006, Webb Building, 4040 N. Fairfax Drive, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: C. Joseph Carroll, Department of Energy, Financial Assistance Appeals Board, (703) 235–2700.

SUPPLEMENTARY INFORMATION: The proposed rule is a technical amendment which would correct an inconsistency between two provisions of the rules of procedure governing the filing of notices of appeal before the Energy Financial Assistance Appeals Board. One provision, 10 CFR 1024.3(c), provides that a financial assistance recipient must appeal within 60 days after "issuance" of a final decision. The other provision, 10 CFR 1024.4 Rule 1(a), requires that a notice of appeal be filed with the Board within 60 days after "receipt" of a final decision. The proposed rule would resolve the inconsistency by conforming 10 CFR 1024.3(c) with 10 CFR 1024.4 Rule 1(a), thus providing in both sections that a notice of appeal must be filed within 60 days after receipt of a final decision.

Review Under Executive Order 12291

The proposed rule has been reviewed under Executive Order 12291 and has been determined not to be a "major rule" since it will not result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States based industries to compete in domestic export markets.

Review Under the Paperwork Reduction Act

The proposed rule has been reviewed under the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) and has been determined to be exempt from its requirements by virtue of 44 U.S.C. 3518(c)(1)(B), which provides that the Paperwork Reduction Act does not apply to the collection of information during the conduct of an administrative action involving an agency against specific individuals or entities.

Review Under the Regulatory Flexibility Act

The proposed rule has been reviewed under the Regulatory Flexibility Act of 1980, Public Law 96–354, which requires preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities, i.e., small business, small government jurisdictions. It has been determined that the proposed rule will not have a significant economic impact on a substantial number of small entities and that preparation of a regulatory flexibility analysis is not required.

Review Under the National Environmental Policy Act

The proposed rule has been reviewed under the National Environmental Policy Act (42 U.S.C. 4321, *et seq.*), Council on Environmental Quality Regulations (40 CFR parts 1500-08), and the Department of Energy environmental guidelines (10 CFR part 1021) and has been determined not to represent a major Federal action having a significant impact on the human environment. Therefore, no environmental impact statement has been prepared.

Review Under Executive Order 12612

Executive Order 12612 requires that regulations be reviewed for any substantial direct effects on States, on the relationship between the national Government and the States, or in the distribution of power among various levels of government. If there are sufficient substantial direct effects, the Executive Order requires the preparation of a federalism assessment to be used in decisions by senior policymakers in promulgating or implementing the regulation. The proposed rule will not have a substantial direct effect on the traditional rights and prerogatives of States in relationship to the Federal Government. Therefore, the preparation of a federalism assessment is not required.

Public Comments

Interested persons are invited to participate in this rulemaking by submitting data, views, or arguments with respect to the proposed rule set forth in this Notice. Comments should be submitted to the address for the Financial Assistance Appeals Board given at the beginning of this Notice. All comments received on or before the date specified in the beginning of this Notice, and all other relevant information, will be considered by the Board before taking final action on the proposed rule.

Public Hearing

This notice of proposed rulemaking does not involve any significant issues of law or fact and the rule is unlikely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses. Accordingly, pursuant to 42 U.S.C. 7191(c) and 5

U.S.C. 553, the Department of Energy is not scheduling a public hearing.

List of Subjects in 10 CFR Part 1024

Administrative practice and procedure, Financial assistance appeals.

E. Barclay Van Doren,

Chairman, Financial Assistance Appeals Board.

For the reasons set forth in the Preamble, part 1024 or title 10 of the Code of Federal Regulations is proposed to be amended as set forth below:

PART 1024—PROCEDURES FOR FINANCIAL ASSISTANCE APPEALS

1. The authority citation for part 1024 continues to read as follows:

Authority: Dept. of Energy Organization Act, Pub. L. 95–91, 91 Stat. 577 (42 U.S.C. 7101, et seq.); E.O. 10789; Pub. L. 95–224, 92 Stat. 3 (41 U.S.C. 501–509).

2. In § 1024.3, paragraph (c) is revised to read as follows:

§ 1024.3 General.

* * * * *

(c) In order that a right to appeal may be exercised in a timely manner, a financial assistance recipient must appeal, in writing, within 60 days after receipt of a "final decision" on the matter by a financial assistance or contracting officer.

* * * * *

[FR Doc. 92–2152 Filed 1–28–92; 8:45 am]

BILLING CODE 6450–01–M

FEDERAL RESERVE SYSTEM

12 CFR Part 229

[Regulation CC; Docket No. R–0745]

Availability of Funds and Collection of Checks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule.

SUMMARY: The Board is proposing to amend Regulation CC to conform to recent amendments to the Expedited Funds Availability Act. The proposed amendments make permanent the current availability schedules for deposits at nonproprietary automated teller machines and expand administrative enforcement to cover U.S. offices and branches of foreign banks.

DATES: Comments must be submitted on or before March 27, 1992.

ADDRESSES: Comments, which should refer to Docket No. R–0745, may be mailed to the Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551, Attention: Mr. William W. Wiles, Secretary; or may be delivered to the Board's mail room between 9 a.m. and 5 p.m. All comments received at the above address will be included in the public file and may be inspected at Room B–1122 between 9 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Louise L. Roseman, Assistant Director, Division of Reserve Bank Operations and Payment Systems (202/452–3874); Oliver Ireland, Associate General Counsel (202/452–3625), or Stephanie Martin, Senior Attorney (202/452–3198), Legal Division. For the hearing impaired only: Telecommunications Device for the Deaf, Dorothea Thompson (202/452–3544).

SUPPLEMENTARY INFORMATION: The Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA," Public Law 102–242, 105 Stat. 2236 (1991)) amends the Expedited Funds Availability Act ("Act") (12 U.S.C. 4001 *et seq.*), effective December 19, 1991. Section 227 of the FDICIA amends section 603(e) of the Act regarding deposits at nonproprietary automated teller machines ("ATMs"). Section 212(h) of the FDICIA amends section 610(a) of the Act to provide for administrative enforcement over U.S. branches and agencies of foreign banks. The Board is requesting comment on proposed amendments to Regulation CC (12 CFR part 229) and revisions to the Commentary to implement the amendments to the Act, as described below.[1]

Deposits at Nonproprietary ATMs

Currently, under § 229.12(f)(1) of Regulation CC, a depository bank may treat all deposits made by its customers at a nonproprietary ATM [2] as though the deposits were nonlocal checks under the permanent schedule, i.e., make them available by the fifth business day after the day of deposit. This special treatment was accorded deposits made at nonproprietary ATMs because the depository bank cannot ascertain the composition of these deposits (i.e., whether the deposit consists of cash, checks generally subject to next-day availability, or local or nonlocal checks). Effective November 28, 1992, however, § 229.12(f)(2) requires deposits of cash, "next-day" (as described in § 229.10(c)(1)(i) through (v) and (vii)), and local and other checks (as described in § 229.12(b)) at a nonproprietary ATM to be made available by the second business day following the banking day of deposit. Nonlocal checks deposited at a nonproprietary ATM would continue to be made available by the fifth business day following the banking day of deposit.[3]

Depository institutions and ATM operators have raised concerns with Congress and the Board about the operational problems and potential for fraud under the shorter schedules for nonproprietary ATM deposits. In two reports to Congress on the implementation of the Act and two reports specifically discussing deposits to nonproprietary ATMs,[4] the Board summarized these concerns and recommended that Congress amend the Act to provide fifth-day availability for all deposits at nonproprietary ATMs on a permanent basis.

The FDICIA amendments to section 603(e) of the Act eliminate the shorter holds for deposits at nonproprietary ATMs that were scheduled to take effect in November 1992 and extend the current 5-day hold permanently. The Board is proposing amendments to §§ 229.12 (a) and (f) of the regulation and revisions to the Commentary to reflect these changes.

Administrative Enforcement

Title II, Subtitle A of the FDICIA increases the supervisory responsibilities of U.S. banking regulatory agencies over U.S. offices and branches of foreign banks. Section 212(h) of the FDICIA makes conforming changes to the administrative enforcement provisions in section 610(a) of the Act. These amendments were effective December 19, 1991. The Board is proposing conforming amendments to § 229.3(a) of Regulation CC. (U.S. branches and agencies of foreign banks are already subject to the substantive

[1] Section 225 of the FDICIA amends section 604 of the Act regarding exception holds for "next day" and "second-day" availability checks and one-time exception hold notices. To allow depository institutions to avail themselves of these changes immediately, the Board has adopted interim amendments to Regulation CC and has requested comment pending a final rule. See Docket R–0744, elsewhere in today's **Federal Register.**

[2] A nonproprietary ATM generally is an ATM that is not owned or operated by the depository bank.

[3] The effective date for the shorter schedules for nonproprietary ATM deposits was extended from August 31, 1990, to November 28,1992, by the Cranston-Gonzales National Affordable Housing Act of 1990 (Pub. L. No. 101–625; § 1001). The Board adopted conforming amendments to Regulation CC at that time. *See* 55 FR 50816, December 11, 1990, (interim rule) and 56 FR 7799, February 26, 1991 (final rule).

[4] *See,* Board of Governors of the Federal Reserve System, *Report to Congress Under the Expedited Funds Availability Act,* September 1991 and March 1990, and *Deposits at Nonproprietary Automated Teller Machines: Report to Congress Pursuant to the Expedited Funds Availability Act,* October 1989 and July 1990.

requirements of the Act and Regulation CC.)

Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires an agency to publish an initial regulatory flexibility analysis with any notice of proposing rulemaking. Two of the requirements of an initial regulatory flexibility analysis (5 U.S.C. 603(b))—a description of the reasons why the action by the agency is being considered and a statement of the objectives of, and legal basis for, the proposed rule—are contained in the supplementary information above. The Board's proposed rule requires no additional reporting or recordkeeping requirements, nor are there relevant federal rules that duplicate, overlap, or conflict with the proposed rule.

Another requirement for the initial regulatory flexibility analysis is a description of, and where feasible, an estimate of the number of small entities to which the proposed rule shall apply. The proposed rule will apply to all depository institutions, regardless of size, as required by the amendments to the Expedited Funds Availability Act. The rule should not have a negative economic impact on small institutions, but rather will decrease the risk and cost for all depositary banks by eliminating the requirement for shorter holds on deposits made to nonproprietary ATMs after November 27, 1992.

List of Subjects in 12 CFR Part 229

Banks, banking, Federal Reserve Systems.

For the reasons set out in the preamble, 12 CFR part 229 is amended as follows:

PART 229—[AMENDED]

1. The authority citation for part 229 continues to read as follows:

Authority: Title VI of Public Law 100–86, 101 Stat. 552, 635, 12 U.S.C. 4001 *et seq.*

2. In § 229.3, paragraph (a)(1) is revised and concluding text to paragraph (a) is added after paragraph (a)(3) to read as follows:

§ 229.3 Administrative enforcement.

(a) * * *

(1) Section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818 *et seq.*) in the case of—

(i) National banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(ii) Member banks of the Federal Reserve System (other than national banks), and offices, branches, and agencies of foreign banks located in the United States (other than Federal branches, Federal agencies, and insured State branches of foreign banks), by the Board; and

(iii) Banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

* * * * *

The terms used in paragraph (a)(1) of this section that are not defined in this part or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

* * * * *

3. In § 229.12, paragraph (a) is revised as follows, paragraphs (f)(1)(ii) and (f)(2) are removed, and the designation "(1)(i)" in paragraph (f) is removed:

§ 229.12 Permanent availability schedule.

(a) *Effective date.* The permanent availability schedule contained in this section is effective September 1, 1990.

* * * * *

Appendix E to Part 229—[Amended]

4. Appendix E to part 229 is amended, in the Commentary under § 229.12, by removing the last sentence of paragraph (a) and revising paragraph (f) to read as follows:

Appendix E—Commentary

* * * * *

§ 229.12 Permanent Availability Schedule

* * * * *

(f) *Deposits at nonproprietary ATMs.* The Act and regulation provide a special rule for deposits made at nonproprietary ATMs. This paragraph does not apply to deposits made at proprietary ATMs. All deposits at a nonproprietary ATM must be made available for withdrawal by the fifth business day following the banking day of deposit (i.e., such deposits may be treated in the same manner as deposits of nonlocal checks under the permanent schedule). For example, a deposit made at a nonproprietary ATM on a Monday, including any deposit by cash or checks that would otherwise be subject to next-day (or second-day) availability, must be made available for withdrawal not later than Monday of the following week. The provisions of § 229.10(c)(1)(vii) requiring a depositary bank to make up to $100 of an aggregate daily deposit available for withdrawal on the next business day after the banking day of deposit do not apply to deposits to a nonproprietary ATM.

* * * * *

By order of the Board of Governors of the Federal Reserve System, January 15, 1992.

William W. Wiles,

Secretary of the Board.

[FR Doc. 92–1475 Filed 1–28–92; 8:45 am]

BILLING CODE 6210–01–M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Parts 200, 203, 205, 206, 231, 232, 235, 263, 288, 292, 294, 296, 297, 298, 302, 372, 380, 384, 387, and 399

[Docket No. 47939]

RIN 2105–AB84

Aviation Economic Rules

AGENCY: Department of Transportation, Office of the Secretary.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department is amending parts 200, 203, 205, 206, 231, 232, 235, 263, 288, 292, 294, 296, 297, 298, 302, 372, 380, 384, 387, and 399 in order to make technical corrections, eliminate obsolete terms and provisions, and to provide better organization. Of particular note, the U.S. air taxi liability insurance requirements contained in subpart E of part 298 would be relocated to part 205, which contains the liability insurance rules applicable to all other types of direct air carriers, and the allowed liability exclusions set forth in § 298.44 would be eliminated. In addition, the rules governing exemptions for certificated carriers when operating small aircraft, presently contained in subpart I of part 298, would be transferred to part 206 along with various other special authorizations and exemptions applicable to certificated air carriers.

DATES: Comments must be received on or before March 30, 1992.

ADDRESSES: Comments should be directed to the Documentary Services Division, Docket 47939, Office of the Secretary, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Carol A. Woods, Air Carrier Fitness Division, P–56, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–9721.

Comments Invited

Interested persons are invited to participate in this rulemaking action by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis

supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions. Communications should identify the regulatory docket number and be submitted in duplicate to the address listed above. Commenters wishing the Department to acknowledge receipt of their comments must submit with those comments a self-addressed stamped postcard on which the following statement is made: Comments on Docket No. 47939. The postcard will be date/time stamped and returned to the commenter. All communications on or before the specified closing date will be considered by the Assistant Secretary for Policy and International Affairs before taking action on any further rulemaking. Also, this proposal may be changed in light of comments received. All comments submitted will be available for examination in Docket 47939. A report summarizing each substantive public contact with DOT personnel concerned with this rulemaking will be filed in the docket.

Background

Introduction

Section 204 of the Federal Aviation Act (72 Stat. 743, 49 U.S.C. 1324) ("Act") empowers the Department, in part, to make rules and establish procedures to enable it to carry out its functions under the Act. Pursuant to that authority, the Department has undertaken a review of the aviation economic regulations promulgated by the Civil Aeronautics Board ("CAB"), as contained in 14 CFR chapter II, with a view to eliminating obsolete terms and provisions, and making changes to bring the rules into conformance with the Department's current needs and to facilitate their use by the public. This Notice of Proposed Rulemaking is one of a series of such efforts designed to accomplish these ends.

The particular regulations proposed to be eliminated, relocated, or revised, and the reasons therefor, are discussed in the following paragraphs. Throughout, references to the Civil Aeronautics Board, its offices and forms would be replaced, where appropriate, with references to the Department, its offices and forms.

In Part 200—Definitions and Instructions, new § 200.1—Terms and Definitions would contain the provisions of current §§ 200.1, 200.2, 200.3, 200.4, 200.5, and 200.6, which would be revised and restructured as paragraphs (a) through (f) of new § 200.1. Current § 200.1—Board would become new § 200.1(a). New § 200.1(b) would state that the term "Department" means the Department of Transportation. Paragraph (c) would contain the first sentence of current § 200.2—Act, revised to add the words "as amended" after the reference to the Federal Aviation Act of 1958. The second sentence of § 200.2, containing an obsolete reference to the Civil Aeronautics Act of 1938, would be removed. The discussions in §§ 200.3—Section and 200.5—Other terms would be combined in new § 200.1(d). Sections 200.4—Rule, regulation, and order and 200.6—Terms defined by Act would become §§ 200.1(e) and (f), respectively.

Section 200.7—Instructions would be redesignated § 200.2, and the last sentence, which refers to an obsolete section numbering system, would be removed. Section 200.8—Supplemental air carrier also would be removed. The classification "supplemental air carrier" was redesignated "charter air carrier" in the Airline Deregulation Act of 1978.

Part 203—Waiver of Warsaw Convention Liability Limits and Defenses would be revised by replacing obsolete references to CAB Agreement 18900 and CAB Forms 263 and 298–A with appropriate DOT references.

To Part 205—Aircraft Accident Liability Insurance would be added the provisions of Subpart E—Liability Insurance Requirements of Part 298—Exemption for Air Taxi Operations so that all of the Department's rules relating to aircraft liability insurance could be found in one part. Two new insurance certificates (OST Forms 6410 and 6411) would be created to replace current forms, one to be filed for all U.S. direct air carriers (air taxi operators, commuter air carriers, and certificated carriers operating either large or small aircraft), and one for all foreign direct air carriers (Canadian charter air taxis operating either large or small aircraft and all other foreign air carriers operating either large or small aircraft). The current forms (OST Forms 4520 and 4521, and DOT Form 4522) are confusing and burdensome for air carriers, insurance companies and Department staff, as evidenced by the number of instances in which insurers file incorrect forms, which the Department must return for correction. We believe that use of the newly redesigned and consolidated forms will significantly reduce these filing errors.

The only substantive changes to be made in the insurance requirements would be (1) to eliminate the exclusions contained in § 298.44 and the Standard Endorsement (DOT Form 4522) to air taxi operators' aircraft accident insurance policies, and (2) to make air taxi operators subject to the cargo liability disclosure provisions of § 205.8. Such changes would conform the air taxi operator liability insurance requirements (except for the specific liability limits) to the rules applicable to other air carriers.

The Department's objective in eliminating specifically allowed exclusions is twofold. Our first concern is to ensure that the public is not denied insurance protection because of an excludable action on the part of an air carrier. For example, § 298.44(l) presently allows an insurer to deny liability in the case of the failure by an air taxi operator to perform a certain FAA-required preventive maintenance procedure which failure is later determined to be a contributing cause of an accident. Another example of an excludable action (allowed by § 298.44(h)) is the operation of an air taxi flight piloted by an airman who does not meet the minimum flight time requirements for the particular type of operation being conducted. In this case, the insurer would be able to deny liability for injuries in an accident brought about by the pilot's lack of experience. Such exclusions have the effect of denying an injured person a recovery if the airline's assets are not sufficient to pay the damages.

In the final rule establishing the insurance regulations for air taxi operators (33 FR 18231, effective March 7, 1969), the CAB explained its position on allowing exclusions:

> For an interim period, the Board will accept policies which continue to contain the insurance companies' standard "safety" exclusions, though in modified form. According to insurers, those policy exclusions are customary in the industry and form the keystone of the insurance contracts. * * * While the industry seeks to adjust itself to the rule that air transportation must be covered by insurance, the insurers' ability to retain traditional policy provisions will enhance the likelihood that all Board-authorized air taxi operators will be able to obtain adequate insurance at the lowest possible rates. The Board is aware that air taxi operators will gain increased insurance coverage if the customary exclusions * * * are eliminated * * *. Once the air taxi insurance program is safely on the road to success, the Board intends to reexamine the need for the customary exclusions."

Thus, the CAB agreed to retain the safety exclusions temporarily in the interests of facilitating compliance with the new rule. However, in adopting insurance regulations for Canadian charter air taxi operators in part 294, all-cargo carriers in part 291, and charter carriers in part 208, no exclusions were authorized. Part 205, the insurance regulation adopted in 1981 to cover operations by all types of direct air

carriers except U.S. air taxi operators, states in § 205.6 that no exclusion in the policy nor any violation by the insured of any safety-related requirement imposed by statute or regulation, will relieve the insurer from the liability coverage required by this part.

Between 1980 and 1983, the CAB proposed a series of revisions to the air taxi insurance rules (EDR–395 through EDR–395C), including the elimination of the safety exclusions. However, no agreement was reached among the carriers, insurers and the government as to proposed new minimum limits of liability, and the rulemaking was finally withdrawn by the Department in 1989.

We believe that passengers should be afforded minimum protection for injuries sustained while riding on aircraft engaged in air transportation, and we do not see a meaningful basis for allowing such protection to be denied because an aircraft, operated by an air taxi operator, did not meet safety standards when an accident occurred.

Our other objective in deleting authorized exclusions is to eliminate government interference, except where safety is a factor, from what is a purely contractual matter between a businessperson and an insurance provider. For example, § 298.44(a) states under what circumstances one insurer would be liable if the air taxi operator also has valid and collectible insurance under another policy. Section 298.44(c) states that an insurer is not liable for illness or injuries suffered by air taxi employees if such misfortunes are covered by the operator's workers' compensation insurance. Insurers and insureds commonly negotiate between themselves these purely economic aspects of the insurance policy and should not be expected to look to the government for authorization before deciding whether and how to include such terms. In deciding not to list specifically allowable exclusions in part 205, the CAB stated:

> This type of regulation gives the airlines and the insurance companies a flexible performance standard, instead of having the policy designed in detail by regulation. Bargaining can thus take place to fashion policies to meet airlines' needs at the least possible cost. (ER–1253, 46 FR 52577, October 27, 1981)

Therefore, insurers and carriers would be free to design policies which include deductibles and combinations of self-insurance and commercial insurance to provide catastrophic coverage.

We have seen no evidence that carriers subject to part 205 have been unable to obtain affordable liability insurance because that rule does not authorize exclusions, and we do not believe that the elimination of exclusions for air taxi operators would result in unaffordable coverage. Based on discussions with insurance representatives, it is our understanding that insurance costing decisions are based on an overall assessment of the risk and on claim experience. Insurers of carriers subject to part 205 report that if, because of that rule's prohibition on exclusions, they are required to pay amounts they otherwise would not have paid, they have the right (as provided in § 205.6(a)) to try to recover from carriers for any such amounts paid. Thus, carriers have an added incentive to avoid accidents—to prevent an increase in insurance premiums or a payout of assets to the insurer for claims paid. We welcome the comments of air taxi operators and insurers on these matters.

The other substantive change proposed to be made to the part 298 insurance regulations—to make air taxi operators subject to the cargo liability disclosure provisions of § 205.8—would mean that an air taxi operator engaged in cargo transport would, like other direct air cargo carriers, be required to disclose to shippers whether it has cargo liability insurance, and any limit on its liability, such as a per-pound amount, that it imposes on the shippers. Such disclosure would be required to be made on airwaybills and rate sheets, the documents most likely looked at by shippers either before the shipping decision is made or when the shipment is given to the carrier. Such information is critical to enable a shipper to make an informed decision on whether to ship on a certain carrier and whether to purchase additional insurance. The need for requiring disclosure of this information is heightened by the fact that cargo carriers are not required by the Department to have cargo insurance.

Part 205 would also be revised by replacing obsolete references to CAB organizations and forms with corresponding references to Department offices and forms. In addition, the instruction in §§ 205.4(c) and 205.7(a) that commuter air carriers operating in Alaska should file insurance certificates with the Department's Alaska Field Office would be eliminated. The insurance records for commuter carriers should be located in the Department's Office of Aviation Analysis, where commuter fitness and registration files are maintained. However, the two sections would direct air taxi operators conducting business in Alaska to file their insurance certificates with the Department's Alaska Field Office, where air taxi registration files are located.

In Part 206—Certificates of Public Convenience and Necessity: Special Authorizations, the words "and Exemptions" would be added at the end of the title of the Part. Section 206.2—Omission of stop at route junction points would be removed. This rule was made obsolete by the Airline Deregulation Act's elimination of domestic airline route regulation. In its place, redesignated as § 206.2, we propose relocating the provision contained in Part 231—Exemption from Schedule Filing, which relieves all air carriers from the need to comply with the statutory requirement contained in section 405(b) of the Act to periodically file copies of their flight schedules. Since part 231 contains no other provisions, that part would then be removed.

Section 206.3—Transportation of newspersons by all-cargo carriers would be revised by combining into one paragraph the introductory text and paragraph (a) and removing current paragraphs (b) and (c). The latter two paragraphs stipulate the fair level to be charged newspersons transported by all-cargo carriers and direct such carriers to file information concerning the identity of such newspersons, the routes over which they were transported, and the fares charged. The Department no longer has a regulatory need for this information; however, if the carrier so desires, it may include such fare data in the unpublished fares portion of its tariff filing.

We propose relocating, to new § 206.4, and restructuring the provisions contained in Part 288—Exemption of Air Carriers for Military Transportation, which exempts air carriers providing charter or scheduled air service under contract to the Department of Defense from the tariff filing and certain charter payments requirements of the Act and the Department's regulations.

In the years since Subpart I—Air Taxi Operations by Certificated Carriers of Part 298—Exemption for Air Taxi Operations was adopted in 1982, various of its provisions have been made obsolete by legislative and regulatory changes. We propose to bring these rules up to date and to transfer them to part 208 where other rules on exemptions applicable to certificated carriers are located.

A new section, § 206.5—Small aircraft operations by certificated carriers, would replace subpart I of part 298. The current language in § 298.90 describing under what conditions a certificated carrier is operating under part 298 or pursuant to its certificate is confusing and would be revised in new § 206.5 to state that certificated carriers, when operating with small aircraft, are exempt from the requirements of the Act

as set forth in that section, as if their operations were air taxi operations.

More specifically, when operating small aircraft, certificated carriers are exempt from the sections of the Act that are set forth in part 298 Subpart B—Exemptions, except section 407, which authorizes the Department to require carriers to file reports and submit to inspection of their accounts and property. Section 206.5 would also provide that certificated carriers operating small aircraft would continue to be subject to the following rules:

—Section 298.30, requiring public notification of the carrier's policy regarding baggage liability and denied boarding compensation in accordance with the terms of § 254.5;

—Section 298.38, concerning the bonding or escrow requirements to be met in connection with Public Charter operations under part 380;

—Subpart F of part 298, which sets forth the reporting requirements for small certificated carriers and commuter air carriers (however, any certificated carrier that conducts operations with at least one large aircraft is subject to the reporting requirements of part 241 for all of its aircraft operations); and

—Subpart H of part 298, which provides that violations of any provisions of the Act or any rules or orders issued pursuant to the Act may subject the violator to enforcement proceedings.

New § 206.5 would also state that certificated operators of small aircraft are subject to the rules in part 215 on the use and change of air carrier names instead of the rules pertaining to this subject in § 298.36, and to certain tariff filing requirements for operations conducted in foreign air transportation.

Since the rules concerning air taxi liability insurance are being relocated to part 205, subpart E of part 298 is being removed.

The provisions of subpart I not transferred to part 206 are also being removed; specifically,

—Section 298.90(a) and (c), which contain obsolete provisions;

—Section 298.93(a), regarding tariff filing requirements for interstate and overseas air transportation. Tariffs are no longer required to be filed such air transportation;

—Section 298.94, requiring a 90-day advance notice to be filed by a commuter carrier that is proposing to modify, suspend, or terminate its portion of a joint service agreement with a certificated carrier. With the deregulation of domestic air transportation, this provision is unnecessary;

—Section 298.97, stating that the limitations on the carriage of mail by air taxi operators in § 298.35 are applicable to certificated carriers only when operating small aircraft, is outdated; and

—Section 298.100, which contains an obsolete provision authorizing certificated carrier operating small aircraft to comply with the insurance requirements of subpart E of part 298 until the newly adopted part 205 insurance rules became effective.

(Note: Additional changes being proposed in part 298, which are not specifically elated to certificated carriers conducting operations with small aircraft, are discussed below.)

The changes proposed to Part 232—Transportation of Mail, Review of Orders of Postmaster General are only to eliminate references to the Civil Aeronautics Board.

Part 235—Reinvestment of Gains Derived from the Sale or Other Disposition of Flight Equipment would be removed. This part provides, pursuant to section 406(d) of the Act, that if gains derived by an air carrier from the sale or other disposition of flight equipment are reinvested in flight equipment, such gains will not be considered by the Board in determining he carrier's need for compensation for the carriage of U.S. mail. Section 406(d) ceased to be effective with the sunset of the CAB on December 31, 1984; therefore, part 235 is now moot.

We propose relocating and restructuring the provisions contained in Part 263—Participation of Air Carrier Associations in Board Proceedings, which sets forth the conditions under which air carrier associations may participate in aviation proceedings. This rule, to be redesignated § 302.10a, would be placed amid other rules relating to parties to aviation proceedings.

Part 292—Classification and Exemption of Alaskan Air Carriers would be removed. In conjunction with the elimination of domestic route regulation, the separate classification of Alaskan Air carriers was abolished. Therefore, the provisions of part 292 are now moot.

In § 294.2(j) of Part 294—Canadian Charter Air Taxi Operators, the definitions of "small aircraft" would be amended to eliminate the word "both"and change the word "and" to "and/or" in order to make the definition consistent with the 1974 U.S.-Canada Non-scheduled Air Services Agreement.

Section 296.3 of Part 296—Indirect Air Transportation of Property would be amended by correcting references to the CAB.

In Part 297—Foreign Air Freight Forwarders and Foreign Cooperative Shippers Associations, the typographical error in § 297.10(a)(5) "interstate" would be corrected to "interstate". Also, in § § 297.3 (a) and (b), the definitions of a "foreign air freight forwarder" and a "foreign cooperative shippers association" would be amended to eliminate the reference to registration under part 296. Part 296 does not require U.S. indirect cargo carriers to register with the Department.

Part 298—Exemptions for Air Taxi Operators (§ 298.2(f)) classifies a commuter air carrier as an air taxi operator that performs scheduled passenger service. In order to make it more apparent that the part 298 exemptions apply to commuter air carriers, we propose to add the phrase "commuter air carriers" each time the term "air tax operators" appears in part 298, except for those few instances which clearly do not refer to scheduled passenger carriers.

The typographical error in § 298.2(f) "tips" would be corrected to "trips".

Section § 298.21(d) would be revised to eliminate the provision allowing commuter air carriers that had been providing scheduled passenger service to an eligible point prior to February 25, 1981, to continue to provide such service until their fitness has been determined; all such commuter carriers have now undergone fitness determinations.

Section 298.34 prohibits an air taxi operator from offering air transportation in Alaska or between Alaska and Canada unless it also holds authority from the State of Alaska. However, Alaska State regulation of transportation ended in March 1985 with the sunset of the Alaska Transportation Commission pursuant to a State referendum; thus, § 298.34 is no longer pertinent.

In § 298.35, which prohibits the carriage of mail by air taxi operators except under a contract with the Postal Service, the sections of the Postal Reorganization Act cited are outdated and are being changed; and paragraphs (a) and (b) of the section, which make a distinction between air taxi operators that in 1973 were authorized to carry mail under temporary of final mail rates, are obsolete and are being removed.

In § 298.36, the term "air carrier operating certificate," referring to the FAA-issued document authorizing a company to engage in air carrier operations, is being revised to "air carrier certificate," to reflect current FAA terminology. Also, a new paragraph (c) would be added to

§ 298.36 stating that commuter air carriers are subject to the requirements of part 215 with regard to the use and change of air carrier names. (Current paragraph (c) of § 298.36 would be redesignated as paragraph (d).)

In addition, a majority of sections in part 298 would be revised by replacing obsolete references to CAB organizations and forms with references to Department organizations and forms.

In Part 372—Overseas Military Personnel Charters, §§ 372.20 and 372.30(a) footnote 3 would be revised by deleting obsolete references to air carriers that were engaging in overseas military personnel charter operations on August 27, 1971, but whose applications for operating authorization had not been acted upon.

The reference to appendix B contained in § 372.24(c) and footnote 1 thereto, would be replaced with a reference to appendix A. The footnote sequence would then be corrected in §§ 372.28 and 372.30(a)(13).

At the end of part 372, a new appendix A, overseas military personnel charter operator surety bond, would be added, as shown in the amended rule below.

In Part 380—Public Charters, in order to make it more apparent that the "direct air carrier" classification includes commuter air carriers, we propose to add the phrase "commuter air carrier" after "air taxi operator" in both § 380.2 and § 380.11.

Paragraph (b) of § 380.10(b)—Public Charter general requirements would be amended to make the Public Charter rules applicable to whole plane charters where the aircraft has less than 20 seats.

Section 380.19—Old-rule charters is being deleted. This section refers to charter rules that were revoked in 1979.

Section 380.28(a) would be revised to require charter operators to file an original plus two copies of each charter prospectus with the Department, instead of an original plus one copy as the rule currently states. The additional copy is needed by staff for computerizing charter operator data.

The text of appendix A to part 380, statement of Public Charter operator surety bond, would be revised as shown in the amended rule below. Appendices B, C, D, and F would be replaced by OST Forms 4532, 4533, 4534, and 4535, respectively. Appendix E, Public Charter Operator's Surety Trust Agreement, would be redesignated appendix B. In addition, under the present wording of the Agreement, charter participants who had not signed an operator-participant contract could be considered as not contractually bound to participate in the charter. They could, consequently, not be considered as beneficiaries of the trust created by the agreement. To correct this possible loophole, the wording of the first requirement for "Beneficiaries" is being revised.

Part 384—Statement of Organization, Delegation of Authority, and Availability of Records and Information, which contains a general description of the CAB, is obsolete and may be removed. Information concerning availability of Department records and information and delegation of authority to Department staff is treated in parts 310 and 385, respectively. Similarly, the material describing the functioning of the Board during the national emergency in Part 387—Organization and Operation during Emergency Conditions is obsolete and would be removed.

In Part 399—Statements of General Policy, § 399.110(e), which was adopted in 1979, states that the Board was then adopting existing state insurance and bonding requirements for air carriers until it had determined the need for federal regulation in those areas. Since the Board developed regulations for air carrier insurance and bonding several years ago, and since these rules were subsequently adopted by the Department, there is no longer a need for this section and it is being removed.

Economic Impacts

This proposed rulemaking has been reviewed under Executive Order 12291 and it has been determined that this is not a major rule. It will not result in an annual effect on the economy of $100 million or more. There will be no increase in production costs or prices for consumers, individual industries, Federal, State or local governments, agencies or geographic regions. Furthermore, the proposed amendments would not adversely affect employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. No regulatory evaluation is required because adoption of the amendments would result in minimal economic costs. The proposed amendments are not significant under the Department's Regulatory Policies and Procedures, dated February 26, 1979, because they do not involve important Departmental policies; rather, they are being made solely for the purposes of eliminating or correcting obsolete requirements and reorganizing the presentation of the regulations used by the Department to administer its air carrier economic regulatory functions.

For purposes of its aviation economic regulations, Departmental policy categorizes air carriers operating small aircraft (60 seats or less or 18,000 pounds maximum payload or less) in strictly domestic service as small entities for purposes of the Regulatory Flexibility Act. I certify that this rule will not have a significant economic impact on a substantial number of small entities. The ability of such entities to engage in air carrier operations essentially will be unaffected by the proposed regulation amendments.

The Department has considered the implications of this proposed action under the requirements of Executive Order 12612, Federalism, and has determined that the preparation of a Federalism Assessment is not warranted. The rule would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibility among the various levels of government.

The reporting and recordkeeping requirement associated with this rule is being submitted to the Office of Management and Budget for approval in accordance with 44 U.S.C. chapter 35 under *DOT No.:* 3564; *OMB No.:* 2106–0030; *Administration:* Department of Transportation, Office of the Secretary; *Title:* Aviation Economic Rules; *Proposed Use of Information:* To determine that air carriers possess appropriate levels of aircraft accident liability insurance; *Frequency:* On occasion; *Burden Estimate:* 2,809 hours; *Respondents:* U.S. air carriers, and charter operators; *Form(s):* OST Forms 6410 and 6411; *Average Burden Hours per Respondent:* 0.65 hours. For further information contact: The Information Requirements Division, M–34, Office of the Secretary of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Comments on the proposed information collection requirements should be submitted to: Office of Management and Budget, Office of Information and Regulatory Affairs, New Executive Office Building, Washington, DC 20503, Attention: Desk Officer for OST. It is requested that comments sent to OMB also be sent to the OST rulemaking docket for this proposed action.

List of Subjects

14 CFR Part 200

Air transportation.

14 CFR Part 203

Air carriers, Air transportation, Foreign relations, Insurance, Reporting and recordkeeping requirements.

14 CFR Part 205

Air carriers, Freight, Insurance, Reporting and recordkeeping requirements.

14 CFR Part 206

Air carriers, Emergency medical services, News media.

14 CFR Part 231

Air carriers, Postal Service.

14 CFR Part 232

Administrative practice and procedure, Air carriers, Postal Service.

14 CFR Part 235

Air carriers, Aircraft, Income taxes.

14 CFR Part 263

Administrative practice and procedure, Air carriers.

14 CFR Part 288

Charter flights, Military air transportation.

14 CFR Part 292

Air carriers, Alaska.

14 CFR Part 294

Air taxis, Canada, Charter flights, Reporting and recordkeeping requirements.

14 CFR Parts 296 and 297

Air carriers, Freight forwarders.

14 CFR Part 298

Air taxis, Alaska, Canada, Insurance, Reporting and recordkeeping requirements.

14 CFR Part 302

Administrative practice and procedure, Air carriers, Postal Service.

14 CFR Part 372

Charter flights, Military air transportation, Reporting and recordkeeping requirements, Surety bonds.

14 CFR Part 380

Charter flights, Reporting and recordkeeping requirements, Surety bonds.

14 CFR Part 384

Freedom of information, Organization and functions (Government agencies).

14 CFR Part 387

Civil defense, Organization and functions (Government agencies).

14 CFR Part 399

Administrative practice and procedure, Air carriers, Air rates and fares, Air taxis, Consumer protection, Small businesses.

Proposed Rule

For the reasons set out in the preamble, title 14, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

1. Part 200 is revised to read as follows:

PART 200—DEFINITIONS AND INSTRUCTIONS

Sec.
200.1 Terms and Definitions.
200.2 Instructions.

Authority: 49 U.S.C. 1324, 1371, 1373, 1374, 1377, 1378, 1379, 1381, 1382, 1383, 1384, 1385, 1387, 1482.

§ 200.1 Terms and definitions.

Unless otherwise specifically stated, words and phrases other than those listed in this section have the meaning defined in the Act.

(a) *Board* or *CAB* means the Civil Aeronautics Board.

(b) *Department* or *DOT* means the Department of Transportation.

(c) *Act* means the Federal Aviation Act of 1958, as amended.

(d) *Section* refers to a section of the Act or a section of the regulations in this chapter, as indicated by the context. The terms *this section, pursuant to this section, in accordance with the provisions of this section,* and words of similar import when used in this chapter refer to the section of this subchapter in which such terms appear.

(e) *Rule, regulation,* and *order* refer to the rules, regulations, and orders prescribed by the Board or the Department pursuant to the Act.

§ 200.2 Instructions.

The regulations of the Department may be cited by section numbers. For example, this regulation may be cited as "§ 200.2 of the Aviation Economic Regulations." The sections contained in the Rules of Practices may also be cited by appropriate rule numbers. (See § 302.2 of this chapter.) For example, 14 CFR 302.10 may be cited as "rule 10 of the Rules of Practice."

PART 203—[AMENDED]

2. The authority citation for part 203 is revised to read as follows:

Authority: 49 U.S.C. 1301, 1324, 1371, 1372, 1373, 1374, 1377, 1378, 1381, 1386, 1387, 1388, 1389.

§§ 203.1, 203.4, 203.5 [Amended]

3. In §§ 203.1, 203.4(a), and 203.5, remove the word "CAB".

4. Section 203.3 is revised to read as follows:

§ 203.3 Filing requirements for adherence to Montreal Agreement.

All direct U.S. and foreign air carriers shall have and maintain in effect and on file in the Department's Documentary Services Division (Docket 17325) on OST Form 4523 a signed counterpart to Agreement 18900, an agreement relating to liability limitations of the Warsaw Convention and Hague Protocol approved by CAB Order E–23680, dated May 13, 1966 (the Montreal Agreement), and a signed counterpart of any amendment or amendments to such Agreement that may be approved by the Department and to which the air carrier or foreign air carrier becomes a party. U.S. air taxi operators registering under part 298 of this chapter and Canadian charter air taxi operators registering under part 294 of this chapter may comply with this requirement by filing completed OST Forms 4507 and 4523, respectively, with the Department's Office of Aviation Analysis. Copies of these forms can be obtained from the Office of Aviation Analysis, Regulatory Analysis Division. (Approved by the Office of Management and Budget under control number 3024–0064).

§ 203.4 [Amended]

5. In § 203.4(a), remove the words "Board's Tariff" and add, in their place, the words "Department's Tariffs".

§ 203.5 [Amended]

6. In § 203.5, remove the word "Board" and add, in its place, the word "Department".

PART 205—[AMENDED]

7. The authority citation for part 205 is revised to read as follows:

Authority: 49 U.S.C. 1324, 1371, 1372, 1386, 1388, 1389.

§§ 205.1, 205.3, 205.6, 205.7 [Amended]

8. In §§ 205.1, 205.3(a), 205.3(e), 205.6(a), 205.6(b)(2)—only where it appears the second time, 205.7(a), and 205.7(b), remove the word "Board" and add, in its place, the word "Department".

§ 205.1 [Amended]

9. In § 205.1, remove the word "certain"; and, after the word "foreign" where it appears the second time in the section, add the word "direct".

10. Section 205.2 is revised to read as follows:

§ 205.2 Applicability.

These rules apply to all U.S. direct air carriers, including commuter air carriers and air taxi operators as defined in § 298.2 of this chapter, and foreign direct

air carriers, including Canadian charter air taxi operators as defined in § 294.2(c) of this chapter.

§ 205.3 [Amended]

11. In the third sentence of § 205.3(a), remove the words "self-insurance plan" and add, in their place, the words "complete plan for self-insurance"; in the fourth sentence of § 205.3(a), remove the words "summary of" and add, in their place, the words "a summary of the complete".

12. Sections 205.4 and 205.5 are revised to read as follows:

§ 205.4 Filing of evidence of insurance.

(a) A U.S. or foreign air carrier shall file a certificate of insurance or a complete plan for self-insurance with the Department's Office of Aviation Analysis. Each carrier shall ensure that the evidence of aircraft accident liability coverage filed with the Department is correct at all times. The Department will normally notify the carrier within 20 days of receipt if the certificate or plan does not meet the requirements of this part. The two Certificates of Insurance (OST Form 6410 for U.S. air carriers, including commuter air carriers and air taxi operators, and OST Form 6411 for foreign air carriers, including Canadian charter air taxi operators) are available from the Office of Aviation Analysis. The Department may return the certificate or self-insurance plan to the carrier if it finds for good cause that such plan or certificate does not show adequate evidence of insurance coverage under its part.

(b) If the coverage is by type or class of aircraft or by specific aircraft, endorsements that add previously unlisted aircraft or aircraft types or classes to coverage, or that delete listed aircraft, types, or classes from coverage, shall be filed with the Department's Office of Aviation Analysis not more than 30 days after the effective date of the endorsements. Aircraft shall not be listed in the carrier's operations specifications with the FAA and shall not be operated unless liability insurance coverage is in force.

(c) When the insured air carrier is a U.S. air taxi operator operating in the State of Alaska, certificates and endorsements shall be filed with the Department's Alaska Field Office, 222 West Seventh Street, Box 27, Anchorage, Alaska 99513.

§ 205.5 Minimum coverage.

(a) Insurance contracts and self-insurance plans shall provide for payment on behalf of the carrier, within the specific limits of liability in this section, of all sums that the carrier shall become legally obligated to pay as damages, excluding any deductible in the policy, for bodily injury to or death of a person, or for damage to the property of others, resulting from the carrier's operation or maintenance of aircraft in air transportation provided under its authority from the Department.

(b) U.S. and foreign direct air carriers, including commuter air carriers but excluding U.S. air taxi operators and Canadian charter air taxi operators, shall maintain the following coverage:

(1) Third-party aircraft accident liability coverage for bodily injury to or death of persons, including nonemployee cargo attendants, other than passengers, and for damage to property, with minimum limits of $300,000 for any one person in any one occurrence, and a total of $20,000,000 per involved aircraft for each occurrence, except that for aircraft of not more than 60 seats or 18,000 pounds maximum payload capacity, carriers need only maintain coverage of $2,000,000 per involved aircraft for each occurrence.

(2) Any such carrier providing air transportation for passengers shall, in addition to the coverage required in paragraph (b)(1) of this section, maintain aircraft accident liability insurance coverage for bodily injury to or death of aircraft passengers, with minimum limits of $300,000 for any one passenger, and a total per involved aircraft for each occurrence of $300,000 times 75 percent of the number of passenger seats installed in the aircraft.

(c) U.S. air taxi operators registered under Part 298 shall maintain the following coverage:

(1) Third-party aircraft accident liability coverage for bodily injury to or death of persons, including nonemployee cargo attendants, other than passengers, with minimum limits of:

(i) $75,000 for any one person in any one occurence, and a total of $300,000 per involved aircraft for each occurrence, and

(ii) A limit of at least $100,000 for each occurrence for loss of or damage to property.

(2) U.S. air taxi operators carrying passengers in air transportation shall, in addition to the coverage required in paragraph (c)(1) of this section, maintain aircraft accident liability insurance coverage for bodily injury to or death of aircraft passengers, with minimum limits of $75,000 for any one passenger, and a total per involved aircraft for each occurrence of $300,000 times 75 percent of the number of passenger seats installed in the aircraft.

(d) Canadian charter air taxi operators registered under part 294 of this chapter shall maintain the following coverage:

(1) Third-party aircraft accident liability coverage for bodily injury to or death of persons, including nonemployee cargo attendants, other than passengers, and for damage to property, with a minimum coverage of $75,000 for any one person in any one occurrence, and a total of $2,000,000 per involved aircraft for each occurrence, except that Canadian charter air taxi operators operating aircraft of more than 30 seats or 7,500 pounds maximum cargo payload capacity, and a maximum authorized takeoff weight on wheels not greater than 35,000 pounds shall maintain coverage for those aircraft of $20,000,000 per involved aircraft for each occurrence.

(2) Canadian charter air taxi operators engaging in passenger charter air service under part 294 of this chapter shall, in addition to the coverage required in paragraph (d)(1) of this section, maintain aircraft accident liability coverage for bodily injury to or death of aircraft passengers, with a minimum coverage of $75,000 for any one passenger and a total per involved aircraft for each occurrence of $75,000 times 75 percent of the total number of passenger seats installed in the aircraft.

(e) Notwithstanding paragraphs (b), (c) and (d) of this section, the carrier may be insured for a combined single limit of liability for each occurrence. The combined single-limit coverage must be not less than the combined required minimums for bodily injury and property damage coverage plus, if the aircraft is used in passenger service, the required total passenger coverages stipulated in paragraph (b) of this section for U.S. and foreign direct air carriers and commuter carriers, paragraph (c) of this section for U.S. air taxi operators, or paragraph (d) of this section for Canadian charter air taxi operators.[1] The single-limit liability policy for the required aircraft accident liability coverage may be provided by a single policy or by a combination of primary and excess policies.

(f) The liability coverage shall not be contingent upon the financial condition, solvency, or freedom from bankruptcy of

[1] For example: The minimum single limit of liability acceptable for an aircraft in air taxi passenger service with 16 passenger seats would be computed on the basis of limits set forth in paragraph (c) as follows: 16 × .75 equals 12; 12 × $75,000 equals $900,000; $900,000 plus $300,000 (nonpassenger liability per occurrence) plus $100,000 (property damage per occurrence) equals $1,300,000. The latter amount is the minimum in which a single-limit liability policy may be written.

the carrier. The limits of the liability for the amounts required by this part shall apply separately to each occurrence. Any payment made under the policy or plan because of any one occurrence shall not reduce the coverage for payment of other damages resulting from any other occurrence.

§ 205.6 [Amended]

13. In § 205.6(b)(2), remove the word "CAB".

§ 205.7 [Amended]

14. In § 205.7(a), remove the words beginning with "the Board's Special Authorities Division" through the end of the first sentence, and add, in their place, the words "the Department's Office of Aviation Analysis (or, for Alaskan air taxi operators, to the Department's Alaska Field Office), which 10-day notice period shall start to run from the date such notice is actually received at the Department".

15. The heading of part 206 is revised to read as follows:

PART 206—CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY; SPECIAL AUTHORIZATIONS AND EXEMPTIONS

16. The authority citation for part 206 is revised to read as follows:

Authority: 49 U.S.C. 1324, 1373, 1375, 1386, 1396, 1551.

17. Section 206.2 is revised to read as follows:

§ 206.2 Exemption from schedule filing.

All air carriers are hereby exempted from the requirements of the first sentence of section 405(b) of the Act, which provides that each air carrier must periodically provide the Department and the U.S. Postal Service a listing of all of its regularly operated aircraft schedules and schedule changes, showing for each schedule the points served and the departure and arrival times.

18. Section 206.3 is revised to read as follows:

§ 206.3 Transportation of newspersons by all-cargo carriers.

Notwithstanding the provisions of sections 401(a) and 403 of the Act and part 221 of this chapter, an air carrier holding a certificate of public convenience and necessity for the transportation of only property and mail may provide transportation to persons on regularly scheduled cargo flights for the purpose of collecting data for preparation of feature news, pictorial or like articles provided that the transportation is limited to the writer, journalist, or photographer engaged in the preparation of data for use in feature news, pictorial, or like articles which are to appear in newspapers or magazines, or on radio or television programs and which will publicize the regularly scheduled cargo operations of the carrier.

19. Section 206.4 is added to read as follows:

§ 206.4 Exemption of air carriers for military transportation.

Air carriers providing air transportation pursuant to a contract with the Department of Defense are hereby exempted from section 403 of the Act, and from part 221, §§ 207.4 and 208.32, of this chapter, with respect to those services.

20. Section 206.5 is added to read as follows:

§ 206.5 Small aircraft operations by certificated carriers.

(a) A carrier holding an effective certificate issued under section 401 of the Act, when conducting operations with small aircraft, is exempt from the requirements of the Act as set forth in subpart B of part 298 of this chapter, except section 407 of the Act, and is subject to the requirements set forth in the following provisions of this chapter:

(1) Part 205, with the minimum coverage requirements of § 205.5(b),

(2) Part 215, and

(3) Part 298, subpart D, §§ 298.30, and 298.38; subpart F; and subpart H.

(b) If a certificated carrier, when conducting operations with small aircraft, provides foreign air transportation that includes a segment for which tariff filing is required and another segment for which tariff filing is not required, then for through service over that routing the carrier has the option of filing a tariff or charging the sum of the applicable local rates, fares, or charges. If the carrier files a tariff for through service, it is not exempt from section 403 or section 404(b) of the Act for that air transportation.

PART 231—[REMOVED]

21. Part 231 is removed.

PART 232—[AMENDED]

22. The authority citation for part 232 is revised to read as follows:

Authority: 49 U.S.C. 1324, 1375.

§ § 232.1, 232.2, 232.3, 232.4, 232.5 [Amended]

23. In § § 232.1(a), 232.1(b)(4), 232.2(a), 232.3, 232.4(a), 232.4(c), and 232.5(a), remove the word "Board" and add, in its place, the word "Department", and in § 232.1(b)(10, remove the work "CAB" and add, in its place, the word "DOT".

PART 235—[REMOVED]

24. Part 235 is removed.

PART 263—[REMOVED]

25. Part 236 is removed.

PART 288—[REMOVED]

26. Part 288 is removed.

PART 292—[REMOVED]

27. Part 292 is removed.

PART 294—[AMENDED]

28. The authority citation for part 294 is revised to read as follows:

Authority: 49 U.S.C. 1324, 1386.

29. Throughout part 294, remove the word "Board" and add, in its place, the word "Department"; remove the work "Board's" and add in its place, the word "Department's; remove the words "Civil Aeronautics Board" and add, in their place, the words "Department of Transportation"; and remove the words "Civil Aeronautics Board's and add, in their place, the words "Department of Transportation's.".

30. Section 294.2(j) is revised to read as follows:

§ 294.2 Definitions.

* * * * *

(j) *Small aircraft* means any aircraft designed to have: (1) A maximum passenger capacity of not more than 30 seats or a maximum payload capacity of not more than 7,500 pounds, and/or (2) A maximum authorized takeoff weight on wheels not greater than 35,000 pounds.

§ § 294.3, 394.20, 294.22 [Amended]

31. In § § 294.3(d), 294.20(b), and 294.22(a)(2), remove the words "CAB Form 263" and add, in its place, the words "OST Form 4523".

§ § 294.3, 294.22 [Amended]

32. In § § 294.3(d) and 294.22(a)(2), remove the word "CAB".

§ § 294.20, 294.21, 294.22 [Amended]

33. In § 294.20(b) 294.21.(d), 294.21(e)(1), 294.22 introductory text, and 294.22(a) introductory text, remove the words "CAB Form 294–A" or "Form 294–A" and add, in their place, the words "OST Form 4505" or "Form 4505".

§ 294.20 [Amended]

34. In § 294.20(b), remove the words "Publications Services Division,

Washington, DC 20428" and add, in their place, the words "Office of Aviation Analysis, Regulatory Analysis Division".

§ 294.20, 294.21, 294.22 [Amended]

35. In the introductory text of § § 294.20 and 294.22, and in § § 294.21(b), and 294.40, remove the words "Bureau of International Aviation, Regulatory Affairs Division" and add, in their place, the words "Office of Aviation Analysis, Regulatory Analysis Division".

§ 294.21 [Amended]

36. In § 294.21(e)(1), remove the words "Regulatory Affairs Division, Bureau of International Aviation", and add, in their place, the words "Office of Aviation Analysis, Regulatory Analysis Division".

37. In § 294.30, remove the word "both" in paragraph (b) introductory text, and revise paragraph (b)(1) and (b)(2) to read as follows:

§ 294.30 Scope of service and equipment authorized.

* * * * *

(b) * * *

(1) a maximum passenger capacity of no more than 30 seats or a maximum payload capacity of no more than 7,500 pounds, and/or

(2) a maximum authorized takeoff weight on wheels not greater than 35,000 pounds.

§ 294.33 [Amended]

38. In § 294.33, third paragraph, remove the words "Rochester General Aviation District Office, Rochester-Monroe County Airport" and add, in their place, the words "Flight Standards District Office, 1 Airport Way"; and, in the fourth paragraph, remove the words beginning with "Chief, Flight Standards," through the end of the sentence and add, in their place, the words "Federal Aviation Administration, General Aviation District Office, 1601 Lind Avenue SW., Renton, Washington 98055.".

§ 294.60 [Amended]

39. In § 294.60(a), remove the words "by filing three copies" through the end of the sentence and add, in their place, the words "in writing to the Office of Aviation Analysis, Regulatory Analysis Division."

PART 296—[AMENDED]

40. The authority citation for part 296 is revised to read as follows:

Authority: 49 U.S.C. 1301, 1302, 1324, 1378, 1379, 1386.

41. In § 296.3, remove the word "Board" and add, in its place, the words "Department of Transportation or the Civil Aeronautics Board".

§ 296.20 [Amended]

42. In § 296.20, remove the word "Board" and add, in its place, the word "Department".

PART 297—[AMENDED]

43. The authority citation for part 297 is revised to read as follows:

Authority: 49 U.S.C. 1324, 1386.

44. Throughout part 297, remove the word "Board" and add, in its place, the word "Department"; remove the word "Board's" and add, in its place, the word "Department's; remove the words "Civil Aeronautics Board" and add, in their place, the words "Department of Transportation"; and remove the words "Civil Aeronautics Board's" and add, in their place, the words "Department of Transportation's".

§ 297.3 [Amended]

45. In § 297.3(a) and 297.3(b), remove the words "air freight forwarder registered under part 296" and add, in their place, the words "indirect cargo air carrier as defined in part 296 of this chapter".

46. In § 297.3(c), remove the word "Board" and add, in its place, the words "Department of Transportation or the Civil Aeronautics Board".

§ 297.10 [Amended]

47. In § 297.10(a)(5), the word "interstate" is revised to read "interstate".

§ 297.20 [Amended]

48. In § 297.20(a), remove the words "Director, Bureau of International Aviation" and add, in their place, the words "Director, Office of Aviation Analysis".

§ § 297.20, 297.22, 297.24 [Amended]

49. In § § 297.20(b), 297.22(a), 297.24(a), and 297.24(b), remove the words "CAB Form 297A" or "Form 297A" and add, in their place, the words "OST Form 4506" or Form 4506".

§ § 297.20, 297, 21, 297.24 [Amended]

50. In § § 294.20(b), 297.21, and 297.24(a), remove the words "Bureau of International Aviation, Regulatory Affairs Division" and add, in their place, the words "Office of Aviation Analysis, Regulatory Analysis Division".

§ 297.20 [Amended]

51. In § 297.20(b), remove the words "Civil Aeronautics Board, Publications Services Division, Washington, DC 20428" and add, in their place, the words "Regulatory Analysis Division".

PART 298—[AMENDED]

52. The authority citation for part 298 is revised to read as follows:

Authority: 49 U.S.C. 1301, 1324, 1371, 1374, 1377, 1386, 1388, 1389.

53. Throughout part 298, remove the word "Board" (except in § 298.3(a)(2)) and add, in its place, the word "Department"; remove the word "Board's" and add, in its place, the word "Department's"; remove the words "Civil Aeronautics Board" (except where they occur in § 298.60(a)) and add, in their place, the words "Department of Transportation"; and remove the words "Civil Aeronautics Board's" (except where they occur in § 298.64(e)) and add, in their place, the words "Department of Transportation's".

§ § 298.11, 298.21, 298.31 [Amended]

54. In the heading for part 298, the heading for § 298.21, and § § 298.11 introductory text, 298.11(c) introductory text, 298.30(a), and 298.31, after the words "air taxi" or "air taxi operators", add the words "and commuter air carrier" or "and commuter air carriers".

§ § 298.3, 298.4, 298.5, 298.11, 298.21, 298.23, 298.24, 298.30, 298.35, 298.37, 298.38 [Amended]

55. In the heading for § 298.5 and § § 298.3.(b), 298.4, 298.5, 298.11(b), 298.11(c)(3), 298.11(d), 298.21(b), 298.21(c)(1)(v), 298.21(c)(1)(vi), 298.23(a) introductory text, 298.24 introductory text, 298.30(b), 298.35, 298.37, and 298.38, after the words "air taxi operator", "air taxi operators", or "air taxi", add the words "or commuter air carrier" or "or commuter air carriers".

56. In § 298.1, the last sentence is revised to read as follows:

§ 298.1 Applicability of part.

* * * This part also establishes reporting requirements for commuter air carriers and small certificated air carriers.

§ 298.2 [Amended]

57. In § 298.2(e–1), remove the number "413" and add, in its place, the number "418".

58. In § 298.2(f), the word "tips" is revised to read "trips".

§ 298.3 [Amended]

59. In § 298.3(a)(2), remove the word "Board" and add, in its place, the words "the Department or the CAB".

60. In § 298.3(a)(4), remove the words "Subpart E of this part" and add, in their

place, the words "Part 205 of this chapter".

§§ 298.3, 298.11, 298.21 [Amended]

61. In §§ 298.3(a)(5), 298.11(b)(2), and 298.21(c)(4)(iii), remove the word "CAB" where it occurs in "CAB Agreement 18900"; and remove the words "CAB Form 263" and add, in their place, the words "OST Form 4523".

§§ 298.3, 298.21, 298.23 [Amended]

62. In §§ 298.3(a)(5), 298.21(c)(1) introductory text and footnote 6, 298.21(c)(4), and 298.23(b), remove the words "CAB Form 298–A" or "CAB Form 298–A (Rev.)", and add, in their place, the words "OST Form 4507".

§ 298.4 [Amended]

63. In § 298.4, remove the words "Secretary of the Board" and add, in their place, the words "Director, Office of Aviation Analysis".

§ 298.5 [Amended]

64. In § 298.5, remove the words "On or after January 9, 1978, any" and add, in their place the word "Any".

§ 298.11 [Amended]

65. In § 298.11(b)(2), remove the words "Subpart G of this part" and add, in their place, the words "part 203 of this chapter".

66. In § 298.11(d), before the words "air carriers" where they appear for the first time in the paragraph, add the word "certificated".

§ 298.2 [Amended]

67. In § 298.21(a), remove the words "Director of the Bureau of Pricing and Domestic Aviation" and add, in their place, the words "Director, Office of Aviation Analysis".

68. The introductory text of § 298.21(c) is revised to read as follows:

§ 298.21 Filing for registration by air taxi operators and commuter air carriers.

* * * * *

(c) Registration by all commuter air carriers, and by those air taxi operators with a mailing address in any U.S. State or Territory except Alaska, shall be accomplished by filing with the Department's Office of Aviation Analysis (or with the Department's Alaska Aviation Field Office, 222 West Seventh Street, Box 27, Anchorage, Alaska 99513, for air taxi operators that are not also commuter air carriers and that have a mailing address in the State of Alaska) the following:

* * * * *

§ 298.21 [Amended]

69. In § 298.21(c)(1) introductory text, remove the words " "Air Taxi Operator and Commuter Air Carrier Registration and Amendments Under Part 298 of the Economic Regulations of the Civil Aeronautics Board" ".

70. In §§ 298.21(c)(1) footnote 6 and 298.21(c)(4), remove the words "Publications Services Section, Civil Aeronautics Board, Washington, DC 20428" or "Publications Services Division, Civil Aeronautics Board, Washington, DC 20428" and add, in their place, the words, "Office of Aviation Analysis, Regulatory Analysis Division".

71. In § 298.21(c)(2), remove the word "§ 298.41(b)" and add, in its place, the words "part 205 of this chapter".

72. Section 298.21(d) is revised to read as follows:

§ 298.21 Filing for registration by air taxi operators and commuter air carriers.

* * * * *

(d) No air taxi operator shall provide scheduled passenger service at an eligible point unless it has registered with the Department as a commuter air carrier and has been found by the Department to be fit, willing, and able to conduct such service.

* * * * *

§ 298.22 [Amended]

73. In § 298.22, the word "retrun" is revised to read "return".

§ 298.23 [Amended]

74. In § 298.23(b), remove the words "Bureau of Domestic Aviation" and add, in their place, the words "Office of Aviation Analysis".

75. In § 298.23(b), remove the words "Board's Field Office," and add, in their place, the words "Department's Alaska Aviation Field Office, 222 West Seventh Avenue,".

§ 298.34 [Removed]

76. Section 298.34 is removed and reserved.

§ 298.35 [Revised]

77. Section 298.35 is revised to read as follows:

§ 298.35 Limitations on carriage of mail.

An air taxi operator or commuter air carrier is not authorized to carry mail except pursuant to contract with the Postal Service entered into pursuant to section 5402 of the Postal Reorganization Act (39 U.S.C. 5402).

§ 298.36 [Amended]

78. In § 298.36(a), remove the word "operating".

79. In § 298.36, paragraph (c) is redesignated paragraph (d), and a new paragraph (c) is added to read as follows:

§ 298.36 Limitation on use of business name.

* * * * *

(c) Commuter air carriers are subject to the provisions of part 215 of this chapter with regard to the use and change of air carrier names.

* * * * *

§ 298.37 [Amended]

80. In § 298.37, remove the words "Subpart E" and add, in their place, the words "part 205 of this chapter".

§ 298.41–298.45 [Removed]

81. In part 298, subpart E consisting of §§ 298.41–298.45 is removed and reserved.

§ 298.60 [Amended]

82. In § 298.60(a), remove the words "Civil Aeronautics Board" and add, in their place, the words "Department's Research and Special Programs Administration (RSPA)".

§§ 298.60, 298.61, 298.63, 298.64, 298.65 [Amended]

83. In §§ 298.60(a), 298.60(b), 298.60(d), 298.60(e), 298.61(a), 298.61(g), 298.63(a), 298.64(a), and 298.65(a), remove the word "CAB" and add, in its place, the word "RSPA".

§§ 298.60, 298.65, 298.66 [Amended]

84. In §§ 298.60(b), and 298.65(b) introductory text, 298.66(a), and 298.66(b), remove the word "Comptroller" and add, in its place, the words "Airline Statistics".

§ 298.60 [Amended]

85. In § 298.60(c), remove the number "4123" and add, in its place, the number "4125"; and remove the words "Aviation Information Management" and add, in their place, the words "Airline Statistics".

86. In § 298.60(e), remove the number "426–8847" and add, in its place, the number "366–9847".

§ 298.61 [Amended]

87. In § 298.61(g), remove the words "Comptroller, Civil Aeronautics Board, Washington, DC 20428" and add, in their place, the words, "Director, Office of Airline Statistics, Department of Transportation, Washington, DC 20590".

88. At the end of § 298.61, remove the OMB control number "3024–0009" and add, in its place, the number "2138–0009".

§§ 298.64, 298.65 [Amended]

89. In §§ 298.63(c), 298.64(e) and 298.65(a), remove the words "the Board's Information Management Division" or "the Civil Aeronautics Board's

Information management Division" or "the Board's Office of Comptroller" and add, in their place, the words "RSPA's Office of Airline Statistics".

§§ 298.90–298.100 [Removed]

90. In part 298, subpart I consisting of §§ 298.90–298.100 is removed.

PART 302—[AMENDED]

91. The authority citation for part 302 is revised to read as follows:

Authority: 5 U.S.C. 551 *et seq.*, 39 U.S.C 5402; 42 U.S.C. 4321, 49 U.S.C. Subtitle I, 1301, 1302, 1324, 1371, 1372, 1373, 1374, 1376, 1382, 1471, 1481, 1482, 1485; Reorganization Plan No. 3 of 1961, 75 Stat. 837, 26 FR 5989.

92. Section 302.10a is added to read as follows:

§ 302.10a Participation of air carrier associations in Department proceedings.

(a) An association composed entirely or in part of direct air carriers may participate in any proceedings of the Department to which the Department's procedural regulations apply only if:

(1) The issues substantially affect the property or financial interests of the association as opposed to an interest derivative from its members;

(2) The association acts as a conduit to the Department of factual information gathered from the members, as distinguished from presentation of opinons or positions on issues; or

(3) The association represents members that are identified in any documents filed with the Department, and that have specifically authorized the positions taken by the association in that proceedings. The specific authorizations may be informal and evidence of them shall be provided only upon request of the Department.

(b) Upon motion of any interested person or upon its own initiative, the Department may issue an order requiring an association to withdraw from a case on the ground of significant divergence of interest or position within the association.

93. In part 302 Appendix A—Index to Rules of Practice, under the heading "PARTIES", a new listing is added to read as follows:

"Participation by Air Carrier Associations—§ 302.10(a)"

PART 372—[AMENDED]

94. The authority citation for part 372 is revised to read as follows:

Authority: 49 U.S.C. 1301, 1324, 1371, 1372, 1377, 1386.

95. Throughout Part 372, remove the word "Board" and add, in its place, the word "Department"; remove the word "Board's" and add, in its place, the word "Department's"; remove the words "Civil Aeronautics Board" (except where they occur in § 372.30(a) (8) and (9)) and add, in their place, the words "Department of Transportation"; and remove the words "Civil Aeronautics Board's" and add, in their place, the words "Department of Transportation's."

96. Section 372.20 is revised to read as follows:

§ 372.20 Requirement of operating authorization.

No person shall engage in air transportation as an overseas military personnel charter operator by organizing, providing, selling, or offering to sell, soliciting, or advertising an overseas military personnel charter or charters unless there is in force an operating authorization issued pursuant to § 372.31 authorizing such person to engage in such transportation.

97. Section 372.24(b) is revised to read as follows:

§ 372.24 Surety bond, depository agreement, escrow agreement.

* * * * *

(b) As used in this section, the term *bank* means a bank insured by the Federal Deposit Insurance Corporation.

* * * * *

§ 372.24 [Amended]

98. In § 372.24(c), remove the words "Appendix B[1] attached to this Part 372" and add, in their place, the words "Appendix A to this part"; and remove footnote 1.

§ 372.28 [Amended]

99. In § 372.28, footnote 2 is redesignated footnote 1.

§ 372.30 [Revised]

100. The introductory text of § 372.30(a) is revised to read as follows:

§ 372.30 Application.

(a) *Application.* Any person desiring to operate as an overseas military personnel charter operator may apply to the Department for an appropriate operating authorization. Contact the Office of Aviation Analysis, Regulatory Analysis Division, for filing instructions. The application shall be certified by a responsible official of such person and shall contain the following information:

* * * * *

§ 372.30 [Amended]

101. In § 372.30(a), footnote 3 is removed.

102. In §§ 372.30(a)(8) and 372.30(a)(9), after the words "Civil Aeronautics Board" add the words "or the Department of Transportation."

103. In § 372.30(a)(13), footnote 4 is redesignated footnote 2; and, in newly redesignated footnote 2, the last sentence is removed.

104. A new Appendix A is added to part 372 to read as follows:

Appendix A to Part 372—Overseas Military Personnel Charter Operator's Surety Bond Under Part 372 of the Special Regulations of the Department of Transportation (14 CFR Part 372)

Appendix A—Overseas Military Personnel Charter Operator's Surety Bond Under Part 372 of the Special Regulations of the United States Department of Transportation

Know all men by these presents, that we _____ (name of charter operator) of _____ (address) as Principal (hereinafter called "Principal"), and _____ (name of surety) a corporation created and existing under the laws of the State of _____ (State) as Surety (hereinafter called "Surety") are held and firmly bound unto the United States of America in the sum of _____ (see) § 372.24(a), 14 CFR part 372) for which payment, well and truly to be made, we bind outselves and our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Whereas Principal is an overseas military personnel charter operator pursuant to the provisions of part 372 of the Department's Special Regulations and other rules and regulations of the Department relating to security for the protection of charter participants, and has elected to file with the Department of Transportation such a bond as will insure financial responsibility with respect to all monies received from charter participants for services in connection with overseas military personnel charters to be operated subject to part 372 of the Department's Special Regulations in accordance with contracts, agreements, or arrangements therefor, and

Whereas this bond is written to assure compliance by Principal as an authorized charter operator with part 372 of the Department's Special Regulations, and other rules and regulations of the Department relating to security for the protection of charter participants, and shall inur to the benefit of any and all charter participants to whom Principal may be held legally liable for any damages herein described.

Now, therefore, the condition of this obligation is such that if Principal shall pay or cause to be paid to charter participants any sum or sums for which Principal may be held legally liable by reason of Principal's failure faithfully to perform, fulfill and carry out all contracts, agreements, and arrangements made by Principal while this bond is in effect with respect to the receipt of moneys from charter participants, and proper disbursement thereof pursuant to and in accordance with the provisions of part 372 of the Department's Special Regulations, then

this obligation shall be void, otherwise to remain in full force and effect.

The liability of Surety with respect to any charter participant shall not exceed the charter price paid by or on behalf of such participant.

The liability of Surety shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penalty (face amount) of the bond, but in no event shall Surety's obligation hereunder exceed the amount of said penalty.

Surety agrees to furnish written notice to the Office of Aviation Analysis, Department of Transportation, forthwith of all suits or claims made and judgments rendered, and payments made by Surety under this bond.

This bond shall cover the following Charters:[1]

Surety company's bond No. _____

Date of flight departure _____

Place of flight departure _____

This bond is effective on the _____ day of _____, 1999 _____, 12:01 a.m., standard time at the address of Principal as stated herein and as hereinafter provided. Principal or Surety may at any time terminate this bond by written notice to: "Regulatory Analysis Division (P-57), Office of Aviation Analysis, U.S. Department of Transportation, Washington, DC 20590, such termination to become effective thirty (30) days after the actual receipt of said notice by the Department. Surety shall not be liable hereunder for the payment of any damages hereinbefore described which arise as a result of any contracts, agreements, undertakings, or arrangements for the supplying of transportation and other services made by Principal after the termination of this bond as herein provided, but such termination shall not affect the liability of the bond hereunder for the payment of any damages arising as a result of contracts, agreements, or arrangements for the supplying of transportation and other services made by Principal prior to the date that such termination becomes effective. Liability of Surety under this bond shall in all events be limited only to a charter participant or charter participants who shall within sixty (60) days after the termination of the particular charter described herein give written notice of claim to the charter operator or, if it is unavailable, to Surety, and all liability on this bond shall automatically terminate sixty (60) days after the termination date of each particular charter covered by this bond except for claims made in the time provided herein.

In witness whereof, the said Principal and Surety have executed this instrument of the ____ day of _____, 199__.

Name _____

PRINCIPAL

By: Signature and title _____

Witness _____

SURETY

Name _____

By: Signature and title _____

Witness _____

Only corporations may qualify to act as surety and they must meet the requirements set forth in § 372.24(c) of part 372.

[1]These data may be supplied in an addendum attached to the bond; however, all pages are to bear the Surety's seal.

PART 308—[AMENDED].

105. The authority citation for part 380 is revised to read as follows:

Authority: 49 U.S.C. 1301, 1324, 1371, 1372, 1377, 1386, 1502.

106. Throughout Part 380, remove the word "Board" (except in § 380.1) and add, in its place, the word "Department"; remove the word "Board's" and add, in its place, the word "Department's"; remove the words "Civil Aeronautics Board" and add, in their place, the words "Department of Transportation"; and remove the words "Civil Aeronautics Board's" and add, in their place, the words "Department of Transportation's".

§ 380.1 [Amended]

107. In § 3801, before the word "Board", add the words "Department or the Civil Aeronautics"; and the last sentence is removed.

§ 380.2 [Amended]

108. In § 380.2 paragraph (1) of the definition "Direct air carrier" is amended to add the words "or commuter air carrier" after "air taxi operator".

§ 380.5 [Amended]

109. In § 380.5 the fourth sentence of paragraph (b) is revised to read as follows:

§ 380.5 Procedures for imposition of limitations and restrictions on Public Charter operations.

* * * * *

(b) * * * Copies of such petitions and answers shall be served on the Director, Office of Aviation Analysis.

* * * * *

§ 380.10 [Amended]

110. In § 380.10(b) after the word "seats" add the words "or an entire aircraft's capacity".

§ 380.11 [Amended]

111. In § 380.11, remove the word "taxis" and add, in its place, the words "taxi operators and commuter air carriers".

§§ 380.17, 380.25, 380.42, 380.50 [Amended]

112. In §§ 380.17(b), 380.25(a), 380.25(e), 380.42 introductory text, and 380.50(a), remove the words "Board (Special Authorities Division, Bureau of Pricing and Domestic Aviation)" and add, in their place, the words "Office of Aviation Analysis, Regulatory Analysis Division.".

§ 380.19 [Removed]

113. Section 380.19 is removed.

§ 380.28 [Amended]

114. In § 380.28(a) introductory text, remove the words "one copy" and add, in their place, the words "two copies".

115. In § 380.28(a)(1), the last sentence, remove the words "in the form set out in Appendix B to this part" and add, in their place, the words "filed on OST Form 4532".

116. In § 380.28(a)(2), the last sentence, remove the words "in the form set out in Appendix C to this part" and add, in their place, the words "filed on OST Form 4533".

117. In § 380.28(a)(3), the last sentence, remove the words "in the form set out in Appendix D to this part" and add, in their place, the words "filed on OST Form 4534".

§ 380.34 [Revised]

118. Sections 380.34(b)(2)(vi), (c)(2)(ii), and (c)(7) are revised to read as follows:

§ 380.34 Security and depository agreements.

* * * * *

(b) * * *

(2) * * *

(vi) As used in this section, the term "bank" means a bank insured by the Federal Deposit Insurance Corporation.

* * * * *

(c) * * *

(2) * * *

(ii) A surety trust agreement in the form set forth as Appendix B to this part; or

* * * * *

(7) * * *, and all such banks must be insured by the Federal Deposit Insurance Corporation.

* * * * *

§ 380.34a [Amended]

119. In § 380.34a(c)(1), remove the words "in the form set out in Appendix F of this part by the direct air carrier" and add, in their place, the words "by the direct air carrier on OST Form 4535".

120. In § 380.34a(c)(2), remove the words "in the form set out in Appendix C of this part" and add, in their place, the words "OST Form 4533".

§ 380.50 [Amended]

121. In § 380.50(a), the paragraph designator "(a)" is removed.

§ 380.62 [Amended]

122. In §§ 380.62(a), 380.63, and 380.65(a), remove the words "Board's Bureau of International Aviation,

Regulatory Affairs Division" or "Bureau of International Aviation, Regulatory Affairs Division" and add, in their place, the words "Office of Aviation Analysis, Regulatory Analysis Division".

§ 380.62, 380.64, 380.65 [Amended]

123. In §§ 380.62(b), 380.64(a)(1), 380.65(a), and 380.65(c), remove the words "Form 300" or "CAB Form 300" and add, in their place, the words "OST Form 4530".

§ 380.62 [Amended]

124. In § 380.62(b), remove the words "CAB's Publications Services Division, Washington, D.C. 20428" and add, in their place, the words "Regulatory Analysis Division".

125. Appendix A to part 380 is revised to read as follows:

Appendix A to Part 380—Public Charter Operator's Surety Bond Under Part 380 of the Special Regulations of the Department of Transportation

Public Charter Operator's Surety Bond Under Part 380 of the Special Regulations of the Department of Transportation, 14 CFR Part 380

Know all men by these presents, that we _____ (name of charter operator) of _____, (city) _____ (state) as Principal (hereinafter called Principal), and _____ (name of surety) a corporation created and existing under the laws of the State of _____ (State) as Surety (hereinafter called Surety) are held and firmly bound unto the United States of America in the sum of $____ (see 14 CFR 380.34) for which payment, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Whereas Principal intends to become a Public Charter operator pursuant to the provisions of 14 CFR Part 380 and other rules and regulations of the Department relating to insurance or other security for the protection of charter participants, and has elected to file with the Department of Transportation such a bond as will insure financial responsibility with respect to all monies received from charter participants for services in connection with a Public Charter to be operated subject to Part 380 of the Department's Special Regulations in accordance with contracts, agreements, or arrangements therefor, and

Whereas this bond is written to assure compliance by Principal as an authorized charter operator with 14 CFR Part 380 and other rules and regulations of the Department relating to insurance and other security for the protection of charter participants, and shall inure to the benefit of any and all charter participants to whom Principal may be held legally liable for any damages herein described.

Now, therefore, the condition of this obligation is such that if Principal shall pay or cause to be paid to charter participants any sum or sums for which Principal may be held legally liable by reason of Principal's failure faithfully to perform, fulfill and carry out all contracts, agreements, and arrangements made by Principal while this bond is in effect with respect to the receipt of moneys from charter participants. and proper disbursement thereof pursuant to and in accordance with the provisions of 14 CFR Part 380, then this obligation shall be void, otherwise to remain in full force and effect.

The liability of Surety with respect to any charter participant shall not exceed the charter price paid by or on behalf of such participant.

The liability of Surety shall not be discouraged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penalty of the bond, but in no event shall Surety's obligation hereunder exceed the amount of said penalty.

Surety agrees to furnish written notice to the Office of Aviation Analysis, Department of Transportation, forthwith of all suits or claims filed and judgments rendered, and payments made by Surety under this bond.

The bond shall cover the following charters: [1]

Surety company's bond No. _____
Date of flight departure _____
Place of flight departure _____

This bond is effective on the ____ day of _____, 199__, 12:01 a.m., standard time at the address of Principal as stated herein and as hereinafter provided. Principal or Surety may at any time terminate this bond by written notice to: "Regulatory Analysis Division (P-57), Office of Aviation Analysis, U.S. Department of Transportation, Washington, DC 20590," such determination to become effective thirty (30) days after the actual receipt of said notice by the Department. Surety shall not be liable hereunder for the payment of any damages hereinbefore described which arise as a result of any contracts, agreements, undertakings, or arrangements for the supplying of transportation and other services made by Principal after the termination of this bond as herein provided, but such termination shall not affect the liability of the bond hereunder for the payment of any damages arising as a result of contracts, agreements, or arrangements for the supplying of transportation and other services made by Principal prior to the date that such termination becomes effective. Liability of Surety under this bond shall in all events be limited only to a charter participant or charter participants who shall within sixty (60) days after the termination of the particular charter described herein give written notice of claim to the charter operator or, if it is unavailable, to Surety, and all liability on this bond shall automatically terminate sixty (60) days after the termination date of each particular charter covered by this bond except for claims made in the time provided herein.

In witness whereof, the said Principal and Surety have executed this instrument on the ____ day of _____, 199__.

PRINCIPAL

Name _____
By: Signature and title _____
Witness _____

SURETY

Name _____
By: Signature and title _____
Witness _____

Only corporations may qualify to act as surety and they must meet the requirements set forth in § 380.34(c)(6) of Part 380.

[1] These data may be supplied in an addendum attached to the bond.

126. At the end of part 380, appendix B, appendix C, appendix D, and appendix F are removed, and appendix E is redesignated appendix B and revised to read as follows:

Appendix B to Part 380—Public Charter Operator's Surety Trust Agreement

Appendix B—Public Charter Operator's Surety Trust Agreement

This Trust Agreement is entered into between _____ (charter operator) incorporated under the laws of _____ with its principal place of business being _____ (hereinafter called "Operator"), and _____ (Bank) with its principal place of business being _____ (hereinafter called "Trustee"), for the purpose of creating a trust to become effective as of the _____ day of _____, 199__, which trust shall continue until terminated as hereinafter provided.

Operator intends to become a Public Carter operator pursuant to the provisions of Part 380 of the Department's Special Regulations (14 CFR Part 380) and other rules and regulations of the Department relating to insurance or other security for the protection of charter participants, and has elected to file with the Department of Transportation such a Surety Trust Agreement as will insure financial responsibility with respect to all monies received from chapter participants for services in connection with a Public Charter to be operated subject to Part 380 of the Department's Special Regulations in accordance with contracts, agreements, or arrangements therefor.

This Surety Trust Agreement is written to assure compliance by Operator with the provisions of Part 380 of the Department's Special Regulations and other rules and regulations of the Department relating to insurance or other security for the protection of charter participants. It shall inure to the benefit of any and all charter participants to whom Operator may be held legally liable for any of the damages herein described.

It is mutually agreed by and between Operator and Trustee that Trustee shall manage the corpus of the trust and carry out the purposes of the trust as hereinafter set forth during the term of the trust for benefit of chapter participants (who are hereinafter referred to as "Beneficiaries.")

Beneficiaries of the trust created by this Agreement shall be limited to those charter participants who meet the following requirements:

1. Those for whom Operator or Operator's agent has received payment toward participation in one or more charters operated by or proposed to be operated by Operator.

2. Who have legal claim or claims for money damages against Operator by reason of Operator's failure faithfully to perform, fulfill, and carry out all contracts, agreements, and arrangements made by Operator while this trust is in effect with respect to the receipt of monies and proper disbursement thereof pursuant to Part 380 of the Department's Special Regulations; and

3. Who have given notice of such claim or claims in accordance with this Trust Agreement, but who have not been paid by Operator.

Operator shall convey to Trustee legal title to the trust corpus, which has a value of $_____ by the time of the execution of this Agreement.

Trustee shall assume the responsibilities of Trustee over the said trust corpus and shall distribute from the trust corpus to any and all Beneficiaries to whom Operator, in its capacity as a Public Charter operator, may be held legally liable by reason of Operator's failure faithfully to perform, fulfill, and carry out all contracts, agreements, and arrangements made by Operator, while this trust is in effect with respect to the receipt of monies and proper disbursement thereof pursuant to Part 380 of the Department's Special Regulations in connection with said charters, such damages as will discharge such liability while this trust is in effect; *Provided, however,* That the liability of the trust to any Beneficiary shall not exceed the charter price (as defined in Part 380 of the Department's Special Regulations) paid by or on behalf of any such Beneficiary; *Provided, further,* That there shall be no obligation of the trust to any Beneficiary if Operator shall pay or cause to be paid to any Beneficiary any sum or sums for which Operator may be held legally liable by reasons of its failure faithfully to perform, fulfill, and carry out all contracts, agreements, and arrangements made by Operator in its capacity as charter operator while this trust is in effect with respect to the receipt of monies and proper disbursement thereof pursuant to Part 380 of the Department's Special Regulations; *And provided still further,* That the liability of the trust as administered by Trustee shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments, shall amount in the aggregate to $_____. Notwithstanding anything herein to the contrary, in no event shall the obligation of the trust or Trustee hereunder exceed the aggregate amount of $_____.

Trustee agrees to furnish written notice to the Office of Aviation Analysis, Department of Transportation, forthwith of all suits or claims filed and judgments rendered (of which it has knowledge), and of payments made by Trustee under the terms of this trust.

The trust shall not be liable hereunder for the payment of any damages hereinbefore described which arise as a result of any contracts, agreements, undertakings, or arrangements for the supplying of transportation and other services made by Operator after the termination of this trust as herein provided, but such termination shall not affect the liability of the trust hereunder for the payment of any damages arising as a result of contracts, agreements, or arrangements for the supplying of transportation and other services made by Operator prior to the date that such termination becomes effective.

Liability of the trust shall in all events be limited only to a Beneficiary or Beneficiaries who shall within sixty days after the termination of the particular charter give written notice of claim to Operator or, if it is unavailable, to Trustee, and all liability of the trust with respect to participants in a charter shall automatically terminate sixty days after the termination date of each particular charter covered by this trust except for claims made in the time provided herein.

Sixty-one days after the completion of the last charter covered by this Trust Agreement, the trust shall automatically terminate except for claims of any Beneficiary or Beneficiaries previously made in accordance with this Agreement still pending on and after said sixty-first day. To the extent of such claims, the trust shall continue until those claims are discharged, dismissed, dropped, or otherwise terminated; the remainder of the trust corpus shall be conveyed forthwith to Operator. After all remaining claims which are covered by this Trust Agreement pending on and after the said sixty-first day have been discharged, dismissed, dropped, or otherwise terminated, Trustee shall convey forthwith the remainder of the trust corpus, if any, to Operator.

Either Operator or Trustee may at any time terminate this trust by written notice to: "Regulatory Analysis Division (P–57), Office of Aviation Analysis, U.S. Department of Transportation, Washington, DC 20590," such termination becomes effective thirty days after the actual receipt of said notice by the Department.

In the event of any controversy or claim arising hereunder, Trustee shall not be required to determine same or take any other action with respect thereto, but may await the settlement of such controversy or claim by final appropriate legal proceedings, and in such event shall not be liable for interest or damages of any kind.

Any Successor to Trustee by merger, consolidation, or otherwise, shall succeed to this trusteeship and shall have the powers and obligations set forth in this Agreement.

The trust created under this Agreement shall be operated and administered under the laws of the State of _____.

IN WITNESS WHEREOF, Operator and Trustee have executed this instrument on the date(s) shown below.

Operator _____ (signature).

Date _____.

Name _____ (typed or printed).

Title _____.

Trustee _____ (signature).

Date _____.

Name _____ (typed or printed).

Title _____

PART 384—[REMOVED]

127. Part 384 is removed.

PART 387—[REMOVED]

128. Part 387 is removed.

PART 399—[AMENDED]

129. The authority citation for part 399 continues to read as follows:

Authority: 49 U.S.C. 1301, 1302, 1305, 1324, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1381, 1382, 1384, 1386, 1461, 1481, 1482, 1502 and 1504, unless otherwise noted.

§ 399.110 [Removed]

130. Section 399.110(e) is removed and reserved.

Issued in Washington, DC, on January 3, 1992.

Jeffrey N. Shane,

Assistant Secretary for Policy and International Affairs.

Note: The following forms will not appear in the Code of Federal Regulations.

BILLING CODE 4910-62-M

OMB No. 2106-0005
Expires 1-31-94

AGENCY DISPLAY OF ESTIMATED BURDEN

The public reporting burden for this collection of information is estimated to average 30 minutes per response. If you wish to comment on the accuracy of the estimate or make suggestions for reducing this burden, please direct your comments to DOT and OMB at the following addresses:

U.S. Department of Transportation
Office of Aviation Analysis, P-57
400 7th Street, SW
Washington, DC 20590

and

Office of Management and Budget
Office of Information and Regulatory Affairs
Paperwork Reduction Project 2106-0005
Washington, DC 20503

U.S. Department of Transportation
Office of the Secretary of Transportation

REGISTRATION AND AMENDMENTS OF FOREIGN CHARTER OPERATORS UNDER PART 380 OF THE REGULATIONS OF THE DEPARTMENT OF TRANSPORTATION

FOR USE BY DOT ONLY

INSTRUCTIONS: Submit this form **in duplicate** to Department of Transportation, Regulatory Analysis Division, P-57, Office of Aviation Analysis, 400 7th Street, S.W., Washington, D.C. 20590. Date of filing for purposes of DOT regulations is the date properly completed forms are received by DOT.

1a. Current Name *(and DBA, if applicable)* and Mailing Address of Applicant in the United States:

1b. Telephone No. _____ Fax No. _____

☐ Foreign Air Transportation
☐ Interstate Air Transportation
☐ Overseas Air Transportation

_____
Effective date of registration / amendments

2a. Address of principal place of business in the United States *(if different from above)*:

2b. Telephone No _____ Fax No. _____

3. This filing is the registrant's:

☐ Initial Registration

☐ Amendment to reflect changes since previous filing (complete item 9)

4a. Name and address of designated agent in the United States for service of process

4b. Telephone No. _____ Fax No. _____

5. If this is an initial registration, give proposed date of commencement of operations

6. Indicate country of citizenship. List below the names of each person, their country of citizenship, and the percentage of their ownership or voting interest of 10% or more of the applicant's stock: *(use additional page if necessary)*

_____
Applicant's Country of Citizenship

Name	*Citizenship*	*% of Holdings*

OST Form 4530

7. Names, Addresses and Citizenship of Applicant's President and Directors *(use additional page, if necessary)*

	(Name in Print)	(Address)	(Citizenship)
President:			
Director(s):			

8. Check type or types of services applicant intends to perform upon commencement of operations:

- ☐ Foreign air transportation
- ☐ Interstate air transportation
- ☐ Overseas air transportation

9. FOR USE IN REPORTING CHANGES OR AMENDMENTS TO INFORMATION PREVIOUSLY FILED.

(a) Previously registered name and address:

(b) Description of any other changes/amendments which are required to be reported by Section 380.65:

10. Certification

I certify that the information contained in this application, and in the attachments hereto, is complete and accurate to the best of my knowledge. Furthermore, I certify that all public charter operations performed by the registrant will be conducted in accordance with the provisions of Part 380 of DOT's Regulations (14 CFR 380) and that no flights will be advertized, sold, or operated unless and until the registrant has entered into financial security arrangements as prescribed in Part 380.

(Name in Print) _____ (Signature of Officer) _____

(Title) _____ (Date) _____

NOTE: Application must be signed by a responsible officer, such as the President, Vice President, Secretary, or Treasurer or Partner or Owner of the applicant operator.

This document not acceptable if not dated.

The Department's approval of this registration application is based in part on effective reciprocity between the United States and the Registrant's country of citizenship. If and when the Department of Transportation determines that effective reciprocity no longer exits, this registration is null and void.

OMB No. 2106-0005
Expires 1-31-94

AGENCY DISPLAY OF ESTIMATED BURDEN

The public reporting burden for this collection of information is estimated to average 25 minutes per response. If you wish to comment on the accuracy of the estimate or make suggestions for reducing this burden, please direct your comments to DOT and OMB at the following addresses:

U.S. Department of Transportation
Office of Aviation Analysis, P-57
400 7th Street, SW
Washington, DC 20590

and

Office of Management and Budget
Office of Information and Regulatory Affairs
Paperwork Reduction Project 2106-0005
Washington, DC 20503

U.S. Department of Transportation
Office of the Secretary of Transportation

For DOT Use Only—PC No. _____ Waiver No. _____

STATEMENT OF CHARTER OPERATOR AND DIRECT AIR CARRIER FLIGHT SCHEDULE NUMBER _____

INSTRUCTIONS: Submit this form **in triplicate** to Department of Transportation, Regulatory Analysis Division, P-57, Office of Aviation Analysis, 400 7th Street, S.W., Washington, D.C. 20590. Date of filing for purposes of DOT regulations is the date properly completed forms are received by DOT.

1a. Name *(and DBA, if applicable)* and Mailing Address of Charter Operator:

1b. Telephone Number ( )_____

Fax Number ( )_____

2a. Name *(and DBA, if applicable)* and Mailing Address of Direct Air Carrier:

2b. Telephone Number ( )_____

Fax Number ( )_____

3. Proposed date and routing of each flight:
(use additional pages, if necessary)

4. Type of aircraft and number of seats engaged:

5. Charter price for each flight:*

$_____

6. Tour itinerary *(if any)* including hotels *(names and length of stay at each)*, and other accommodations and services:

* If confidentiality is desired, please state charter price in separate correspondence.

OST Form 4532

We, _____
(Charter Operator)

and _____
(Direct Air Carrier)

certify that we have entered into a charter contract on _____ that covers the flight schedule described above. The contract complies with all applicable DOT regulations.
(Date)

7. A copy of the flight schedule has been sent to *(complete applicable blanks and write "N.A." in those not applicable):*

_____
(Charter Operator's Securer)

_____
(Charter Operator's Depository Bank)

_____
(Direct Carrier's Securer)

_____
(Direct Carrier's Depository Bank)

8. Applicant Charter Operator is a citizen of the United States as defined in Section 380.2 of the Department's regulations:

_____ _____ _____
(Signature of Officer) (Name in print) (Title)

9.

CHARTER OPERATOR	DIRECT AIR CARRIER
By: _____ (Signature)	By: _____ (Signature)
_____ (Name in print)	_____ (Name in print)
_____ (Title)	_____ (Title)
_____ (Date)*	_____ (Date)*

* This document is not acceptable if not dated.

OMB No. 2106-0005
Expires 1-31-94

AGENCY DISPLAY OF ESTIMATED BURDEN

The public reporting burden for this collection of information is estimated to average 15 minutes per response. If you wish to comment on the accuracy of the estimate or make suggestions for reducing this burden, please direct your comments to DOT and OMB at the following addresses:

U.S. Department of Transportation
Office of Aviation Analysis, P-57
400 7th Street, SW
Washington, DC 20590

and

Office of Management and Budget
Office of Information and Regulatory Affairs
Paperwork Reduction Project 2106-0005
Washington, DC 20503

U.S. Department of Transportation
Office of the Secretary of Transportation

STATEMENT OF CHARTER OPERATOR OR DIRECT AIR CARRIER AND SECURER

INSTRUCTIONS: Submit this form **in triplicate** to Department of Transportation, Regulatory Analysis Division, P-57, Office of Aviation Analysis, 400 7th Street, S.W., Washington, D.C. 20590. Date of filing for purposes of DOT regulations is the date properly completed forms are received by DOT.

We, _____
(Charter Operator or Director Air Carrier)

and _____
(Securer)

certify that we have entered into a security agreement number _____, in the
(Security Agreement Number)

amount of $ _____, on _____. This agreement covers
(Amount) *(Date)*

proposed flight schedule number _____, a copy of which has been received by
(Flight Schedule Number)

_____. This agreement complies with
(Securer)

(§380.34) (§380.34a) of DOT's Regulations (14 CFR §380.34 or §380.34a).

This agreement is a *(Check one)*:

- ☐ Surety Bond
- ☐ Surety Trust Agreement
- ☐ Letter of Credit *(for participants of flight schedule number _____)*

Check one of the following:

- ☐ This agreement is in an unlimited amount.
- ☐ There are no outstanding claims against this agreement.
- ☐ There are outstanding claims against this agreement in the amount of $_____. We have executed a rider to the agreement on _____, increasing the coverage by this amount.*
  (Date)

* In place of this sentence, the following statement may be used: "_____ will separately
(Securer)
pay any claims for which it may be liable without impairing the security agreement or reducing the amount of coverage."

CHARTER OPERATOR OR DIRECT AIR CARRIER

By: _____
(Signature)

_____
(Name in print)

_____
(Title)

_____ /
(Phone Number) *(Fax Number)*

_____
(Street, Box Number)

_____
(City, State, Zip Code)

_____
(Date) * *

SECURER

By: _____
(Signature)

_____
(Name in print)

_____
(Title)

_____ /
(Phone Number) *(Fax Number)*

_____
(Street, Box Number)

_____
(City, State Zip Code)

_____
(Date) * *

* * This document is not acceptable if not dated.

OST Form 4533

OMB No. 2106-0005
Expires 1-31-94

AGENCY DISPLAY OF ESTIMATED BURDEN

The public reporting burden for this collection of information is estimated to average 15 minutes per response. If you wish to comment on the accuracy of the estimate or make suggestions for reducing this burden, please direct your comments to DOT and OMB at the following addresses:

U.S. Department of Transportation
Office of Aviation Analysis, P-57
400 7th Street, SW
Washington, DC 20590

and

Office of Management and Budget
Office of Information and Regulatory Affairs
Paperwork Reduction Project 2106-0005
Washington, DC 20503

U.S. Department of Transportation
Office of the Secretary of Transportation

STATEMENT OF CHARTER OPERATOR, DIRECT AIR CARRIER AND DEPOSITORY BANK

INSTRUCTIONS: Submit this form **in triplicate** to Department of Transportation, Regulatory Analysis Division, P-57, Office of Aviation Analysis, 400 7th Street, S.W., Washington, D.C. 20590. Date of filing for purposes of DOT regulations is the date properly completed forms are received by DOT.

We, _____ (Charter Operator)*, _____ (Direct Air Carrier),

and _____ (Depository Bank), certify that we have entered into a depository agreement on _____ (Date). This agreement covers proposed flight schedule number _____ (Flight Schedule Number), a copy of which has been received by _____ (Depository Bank). This agreement complies with (§380.34) (§380.34a) of DOT's Regulations (14 CFR §380.34 or §380.34a). The depository bank is insured by the Federal Deposit Insurance Corporation.

As signatories to this agreement, we fully understand, and will completely fulfill our respective obligations outlined in the agreement and the above-stated DOT regulations.

CHARTER OPERATOR

By: _____ (Signature)*

_____ (Name in print)

_____ (Title)

_____ / _____ (Phone Number) (Fax Number)

_____ (Street, Box Number)

_____ (City, State, Zip Code)

_____ (Date)**

DIRECT AIR CARRIER

By: _____ (Signature)

_____ (Name in print)

_____ (Title)

_____ / _____ (Phone Number) (Fax Number)

_____ (Street, Box Number)

_____ (City, State, Zip Code)

_____ (Date)**

DEPOSITORY BANK

By: _____ (Signature)

_____ (Name in print)

_____ (Title)

_____ / _____ (Phone Number) (Fax Number)

_____ (Street, Box Number)

_____ (City, State, Zip Code)

_____ (Date)**

* Write "N.A." if there is no charter operator.

** This document not acceptable, if not dated.

OST Form 4534

OMB No. 2106-0005
Expires 1-31-94

AGENCY DISPLAY OF ESTIMATED BURDEN

The public reporting burden for this collection of information is estimated to average 5 minutes per response. If you wish to comment on the accuracy of the estimate or make suggestions for reducing this burden, please direct your comments to DOT and OMB at the following addresses:

U.S. Department of Transportation
Office of Aviation Analysis, P-57
400 7th Street, SW
Washington, DC 20590

and

Office of Management and Budget
Office of Information and Regulatory Affairs
Paperwork Reduction Project 2106-0005
Washington, DC 20503

U.S. Department of Transportation
Office of the Secretary of Transportation

STATEMENT OF DIRECT AIR CARRIER

INSTRUCTIONS: Submit this form **in triplicate** to Department of Transportation, Regulatory Analysis Division, P-57, Office of Aviation Analysis, 400 7th Street, S.W., Washington, D.C. 20590. Date of filing for purposes of DOT regulations is the date properly completed forms are received by DOT.

_____ hereby promises that it will take responsibility for all
(Direct Air Carrier)

obligations owed by _____ to participants on charter
(Charter Operator)

flight schedule number _____ (or other designation of charter trip), including
(Flight Schedule Number

obligations for ground services and accommodations.

DIRECT AIR CARRIER

By: _____
(Signature)

_____
(Name in print)

_____
(Title)

_____ / _____
(Phone Number) *(Fax Number)*

_____
(Street, Box Number)

_____
(City, State, Zip Code)

_____
*(Date)**

* *This document not acceptable if not dated.*

OST Form 4535

U.S. Department of Transportation

Office of the Secretary of Transportation

AGENCY DISPLAY OF ESTIMATED BURDEN

The public reporting burden for this collection of information is estimated to average 30 minutes per response. If you wish to comment on the accuracy of the estimate or make suggestions for reducing this burden, please direct your comments to DOT and OMB at the following addresses:

U.S. Department of Transportation
Office of Aviation Analysis, P-57
400 7th Street, SW
Washington, DC 20590

and

Office of Management and Budget
Office of Information and Regulatory Affairs
Paperwork Reduction Project 2106-0030
Washington, DC 20503

OMB No. 2106-0030 Expires 12-31-94

U.S. AIR CARRIERS CERTIFICATE OF INSURANCE

POLICIES OF INSURANCE FOR AIRCRAFT ACCIDENT BODILY INJURY AND PROPERTY DAMAGE LIABILITY

FILING INSTRUCTIONS: File an original of this form with the Regulatory Analysis Division, P-57, Office of Aviation Analysis, Department of Transportation, 400 7th Street, S.W., Washington, D.C. 20590.

(Please type information, except signatures.)

THIS CERTIFIES THAT: _____
(Name of insurer)

has issued a policy or policies of Aircraft Liability Insurance to _____

_____
(Name and address of insured U.S. Air Carrier)

effective from _____ until ten (10) days after written notice from the insurer or carrier of the intent to terminate coverage is received by the Department of Transportation.

NOTE: Part 205 of the Department's Regulations does not allow for a predetermined termination date, and a certificate showing such a date is unacceptable.

1. The Insurer *(Check One)*:

☐ is licensed to issue aircraft insurance policies in the United States;

☐ is licensed or approved by the government of _____ to issue aircraft insurance policies; or

☐ is an approved surplus line insurer in the State(s) of _____

2. The insurer assumes, under the policy or policies listed below, aircraft accident liability insured to minimums at least equal to the following during operation, maintenance, or use of aircraft in "air transportation" as that term is defined in the Federal Aviation Act *(Complete applicable section(s) below)*:

A. **U.S. AIR TAXI OPERATORS WITH PART 298 AUTHORITY ONLY**
The aircraft covered by this policy are SMALL AIRCRAFT (i.e., with 60 or fewer passenger seats or with a maximum payload capacity of 18,000 pounds or less). *(Check separate or combined coverage as appropriate)*:

☐ Separate Coverages:

Policy No.	*Type of Liability*	*Minimum Limit* — *Each Person*	*Each Occurrence*
_____	Bodily Injury Liability (Excluding Passengers)	$ 75,000	$300,000
_____	Passenger Bodily Injury Liability	$ 75,000	$75,000 x 75% of total number of passenger seats installed in the aircraft.
_____	Property Damage		$100,000

☐ Combined Coverage: This combined coverage is a single limit of liability for each occurrence at least equal to the required minimums stated above for bodily injury (excluding passengers), property damage, and passenger bodily injury.

*Policy No.*_____ *Amount of Coverage*_____

☐ This policy covers CARGO operations *only* and *excludes* passenger liability insurance.

OST Form 8410

B. U.S. COMMUTER AND CERTIFICATED AIR CARRIERS OPERATING SMALL AIRCRAFT

The aircraft covered by this policy are SMALL AIRCRAFT (i.e., with 60 or fewer passenger seats or with a maximum payload capacity of 18,000 pounds or less). *(Check separate or combined coverage as appropriate)*:

☐ Separate Coverages:

Policy No.	Type of Liability	Minimum Limit Each Person	Minimum Limit Each Occurrence
_____	Combined Bodily Injury (Excluding Passengers other than cargo attendants) and Property Damage Liability	$300,000	$2,000,000
_____	Passenger Bodily Injury Liability	$300,000	$300,000 x 75% of total number of passenger seats installed in the aircraft.

☐ Combined Coverage: This combined coverage is a single limit of liability for each occurrence at least equal to the required minimums stated above for bodily injury (excluding passengers), property damage, and passenger bodily injury.

Policy No. _____ *Amount of Coverage* _____

☐ This policy covers CARGO operations *only* and *excludes* passenger liability insurance.

C. U.S. CERTIFICATED AIR CARRIERS OPERATING LARGE AIRCRAFT

The aircraft covered by this policy are LARGE AIRCRAFT (i.e., with more than 60 passenger seats or with a maximum payload capacity of more than 18,000 pounds). *(Check separate or combined coverage as appropriate)*:

☐ Separate Coverages:

Policy No.	Type of Liability	Minimum Limit Each Person	Minimum Limit Each Occurrence
_____	Combined Bodily Injury (Excluding Passengers other than cargo attendants) and Property Damage Liability	$300,000	$20,000,000
_____	Passenger Bodily Injury Liability	$300,000	$300,000 x 75% of total number of passenger seats installed in the aircraft.

☐ Combined Coverage: This combined coverage is a single limit of liability for each occurrence at least equal to the required minimums stated above for bodily injury (excluding passengers), property damage, and passenger bodily injury.

Policy No. _____ *Amount of Coverage* _____

☐ This policy covers CARGO operations *only* and *excludes* passenger liability insurance.

3. The policy or policies listed in this certificate insure(s) *(Check One)*:

☐ Operations conducted with all aircraft operated by the Insured

☐ Operations conducted with the following types of aircraft:

☐ Operations with the following aircraft: (Use additional page if necessary)

Make and Model	*FAA or Foreign Flag Registration No.*

4. Each policy listed in this certificate meets or exceeds the requirements in 14 CFR Part 205.

_____ *(Name of Insurer)*

_____ *(Address)*

_____ *(City, State, Zip Code)*

_____ *Contact (person who can verify the effectiveness of the coverage)*

_____ / _____ *(Area Code, Phone Number)* *(Area Code, FAX Number)*

_____ *(Signature, if applicable)*

_____ *(Date)*

_____ *(Name of Broker, if applicable)*

_____ *(Address)*

_____ *(City, State, Zip Code)*

_____ *(Officer or authorized representative)*

_____ / _____ *(Area Code, Phone Number)* *(Area Code, FAX Number)*

_____ *(Signature)*

_____ *(Date)*

U.S. Department of Transportation

Office of the Secretary of Transportation

AGENCY DISPLAY OF ESTIMATED BURDEN

The public reporting burden for this collection of information is estimated to average 30 minutes per response. If you wish to comment on the accuracy of the estimate or make suggestions for reducing this burden, please direct your comments to DOT and OMB at the following addresses:

U.S. Department of Transportation
Office of Aviation Analysis, P-57
400 7th Street, SW
Washington, DC 20590

and

Office of Management and Budget
Office of Information and Regulatory Affairs
Paperwork Reduction Project 2106-0030
Washington, DC 20503

OMB No. 2106-0030 Expires 12-31-94

FOREIGN AIR CARRIERS CERTIFICATE OF INSURANCE

POLICIES OF INSURANCE FOR AIRCRAFT ACCIDENT BODILY INJURY AND PROPERTY DAMAGE LIABILITY

FILING INSTRUCTIONS: File an original of this form with the Regulatory Analysis Division, P-57, Office of Aviation Analysis, Department of Transportation, 400 7th Street, S.W., Washington, D.C. 20590.

(Please type information, except signatures.)

THIS CERTIFIES THAT: _____
(Name of Insurer)

has issued a policy or policies of Aircraft Liability Insurance to _____

_____
(Name and address of Insured Foreign Air Carrier)

effective from _____ until ten (10) days after written notice from the insurer or carrier of the intent to terminate coverage is received by the Department of Transportation.

NOTE: Part 205 of the Department's Regulations does not allow for a predetermined termination date, and a certificate showing such a date is unacceptable.

1. The Insurer *(Check One)*:

☐ is licensed to issue aircraft insurance policies in the United States;

☐ is licensed or approved by the government of _____ to issue aircraft insurance policies; or

☐ is an approved surplus line insurer in the State(s) of _____

2. The insurer assumes, under the policy or policies listed below, aircraft accident liability insured to minimums at least equal to the following during operation, maintenance, or use of aircraft in "foreign air transportation" as that term is defined in the Federal Aviation Act *(Complete applicable section(s) below)*:

A. CANADIAN CHARTER AIR TAXI OPERATORS WITH PART 294 AUTHORITY ONLY-SMALL AIRCRAFT

The aircraft covered by this policy have 30 or fewer passenger seats or a maximum payload capacity of 7,500 pounds or less and a maximum authorized takeoff weight on wheels of no more than 35,000 pounds. *(Check separate or combined coverage as appropriate)*:

☐ Separate Coverages:

Policy No.	*Type of Liability*	*Minimum Limit* — *Each Person*	*Each Occurrence*
_____	Combined Bodily Injury (Excluding Passengers other than cargo attendants) and Property Damage Liability	$75,000	$2,000,000
_____	Passenger Bodily Injury Liability	$75,000	$75,000 x 75% of total number of passenger seats installed in the aircraft.

☐ Combined Coverage: This combined coverage is a single limit of liability for each occurrence at least equal to the required minimums stated above for bodily injury (excluding passengers), property damage, and passenger bodily injury.

Policy No. _____ *Amount of Coverage* _____

☐ This policy covers CARGO operations *only* and *excludes* passenger liability insurance.

B. CANADIAN CHARTER AIR TAXI OPERATORS WITH PART 294 AUTHORITY ONLY-LARGE AIRCRAFT

The aircraft covered by this policy have more than 30 passengers seats or more than a maximum payload capacity of 7,500 pounds and a maximum authorized takeoff weight on wheels of no more than 35,000 pounds. *(Check separate or combined coverage as appropriate)*:

☐ Separate Coverages:

Policy No.	*Type of Liability*	*Minimum Limit* — *Each Person*	*Each Occurrence*
_____	Combined Bodily Injury (Excluding Passengers other than cargo attendants) and Property Damage Liability	$75,000	$20,000,000
_____	Passenger Bodily Injury Liability	$75,000	$75,000 x 75% of total number of passenger seats installed in the aircraft.

☐ Combined Coverage: This combined coverage is a single limit of liability for each occurrence at least equal to the required minimums stated above for bodily injury (excluding passengers), property damage, and passenger bodily injury.

Policy No. _____ *Amount of Coverage* _____

☐ This policy covers CARGO operations *only* and *excludes* passenger liability insurance.

OST Form 6411

C. FOREIGN AIR CARRIERS OPERATING SMALL AIRCRAFT

The aircraft covered by this policy are SMALL AIRCRAFT (i.e., with 60 or fewer passenger seats or with a maximum payload capacity of 18,000 pounds or less). *(Check separate or combined coverage as appropriate):*

☐ Separate Coverages:

Policy No.	Type of Liability	Minimum Limit: Each Person	Minimum Limit: Each Occurrence
_____	Combined Bodily Injury (Excluding Passengers other than cargo attendants) and Property Damage Liability	$300,000	$2,000,000
_____	Passenger Bodily Injury Liability	$300,000	$300,000 x 75% of total number of passenger seats installed in the aircraft.

☐ Combined Coverage: This combined coverage is a single limit of liability for each occurrence at least equal to the required minimums stated above for bodily injury (excluding passengers), property damage, and passenger bodily injury.

Policy No. _____ *Amount of Coverage* _____

☐ This policy covers CARGO operations *only* and *excludes* passenger liability insurance.

D. FOREIGN AIR CARRIERS OPERATING LARGE AIRCRAFT

The aircraft covered by this policy are LARGE AIRCRAFT (i.e., with more than 60 passenger seats or with a maximum payload capacity of more than 18,000 pounds). *(Check separate or combined coverage as appropriate):*

☐ Separate Coverages:

Policy No.	Type of Liability	Minimum Limit: Each Person	Minimum Limit: Each Occurrence
_____	Combined Bodily Injury (Excluding Passengers other than cargo attendants) and Property Damage Liability	$300,000	$20,000,000
_____	Passenger Bodily Injury Liability	$300,000	$300,000 x 75% of total number of passenger seats installed in the aircraft.

☐ Combined Coverage: This combined coverage is a single limit of liability for each occurrence at least equal to the required minimums stated above for bodily injury (excluding passengers), property damage, and passenger bodily injury.

Policy No. _____ *Amount of Coverage* _____

☐ This policy covers CARGO operations *only* and *excludes* passenger liability insurance.

3. The policy or policies listed in this certificate insure(s) *(Check One)*:

	Make and Model	*FAA or Foreign Flag Registration No.*
☐ Operations conducted with all aircraft operated by the Insured		
☐ Operations conducted with the following types of aircraft:		
☐ Operations with the following aircraft: (Use additional page if necessary)		

4. Each policy listed in this certificate meets or exceeds the requirements in 14 CFR Part 205.

_____ *(Name of Insurer)*	_____ *(Name of Broker, if applicable)*
_____ *(Address)*	_____ *(Address)*
_____ *(City, State, Zip Code)*	_____ *(City, State, Zip Code)*
_____ *Contact (person who can verify the effectiveness of the coverage)*	_____ *(Officer or authorized representative)*
_____ / _____ *(Area Code, Phone Number) (Area Code, FAX Number)*	_____ / _____ *(Area Code, Phone Number) (Area Code, FAX Number)*
_____ *(Signature, if applicable)*	_____ *(Signature)*
_____ *(Date)*	_____ *(Date)*

[FR Doc. 92-2007 Filed 1-28-92; 8:45 am]

BILLING CODE 4910-62-C

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 101 and 201

[Docket No. RM92-1-000]

Revisions to Uniform Systems of Accounts to Account for Allowances Under the Clean Air Act Amendments of 1990 and Regulatory-Created Assets and Liabilities and to Form Nos. 1, 1-F, 2 and 2-A; Extension of Time for Comments

January 22, 1992.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of Proposed Rulemaking; extension of time for initial and reply comments.

SUMMARY: On December 2, 1991, the Commission issued a proposed rule to amend its Uniform Systems of Accounts for public utilities, licenses and natural gas companies (56 FR 64567, December 11, 1991). The dates for filing initial and reply comments are being extended at the request of the Edison Electric Institute.

DATES: The date for filing initial comments is extended to April 10, 1992. The date for filing reply comments is extended to May 11, 1992.

ADDRESSES: Office of the Secretary, 825 North Capitol Street, NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Lois D. Cashell, Secretary, (202) 208-0400.

Lois D. Cashell,

Secretary.

On January 14, 1992, Edison Electric Institute (EEI) filed a motion for an extension of time to file comments in response to the Commission's Notice of Proposed Rulemaking issued December 2, 1991, in the above-docketed proceeding. On January 17, 1992, the National Association of Regulatory Utility Commissioners filed an answer supporting EEI's motion.

Upon consideration, notice is hereby given that an extension of time for filing comments is granted to and including April 10, 1992. Reply comments shall be filed on or before May 11, 1992.

Lois D. Cashell,

Secretary.

[FR Doc. 92-2093 Filed 1-28-92; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

RIN 1024-AC04

Golden Gate National Recreation Area Designated Bicycle Routes

AGENCY: National Park Service, Interior.

ACTION: Proposed rule.

SUMMARY: The purpose of this rulemaking is to designate certain routes within the nondeveloped area of Golden Gate National Recreation Area as open to bicycle use, and to regulate their use in these areas. This designation is proposed because bicycle use has been determined by the Superintendent to be a desirable recreational use of certain areas of the park and because such use is consistent with the protection of the park's natural, scenic and aesthetic values, safety considerations and management objectives and will not disturb wildlife or park resources.

DATES: Written comments will be accepted through March 30, 1991.

ADDRESSES: Comments should be addressed to: General Superintendent, Golden Gate National Recreation Area, Building 201, Fort Mason, San Francisco, California 94123.

FOR FURTHER INFORMATION CONTACT: Gil Soper, Chief Ranger, Golden Gate National Recreation Area, Building 201, Fort Mason, San Francisco, CA 94123, Telephone: 415-556-4283.

SUPPLEMENTARY INFORMATION:

Background

The purpose of these proposed special regulations is to designate certain trails (former military, ranch, and fire protection roads) within Golden Gate National Recreation Area as open for bicycle use.

On April 2, 1987, the National Park Service published revised regulations in the **Federal Register** amending 36 CFR part 4 which, among other things, prohibits bicycle use except on park roads, in parking areas and on routes designated for bicycle use (52 FR 10670). These regulations, at 36 CFR 4.30, require that such designation be made only after "a written determination that such use is consistent with the protection of a park area's natural, scenic and aesthetic values, safety consideration and management objectives and will not disturb wildlife or park resources" (36 CFR 4.30(a)). The regulations further require that, except for routes designated in developed areas and special use zones, routes designated for bicycle use shall be promulgated as special regulations.

After extensive consultations with bicyclists, equestrians, hikers, and environmental groups, a "Marin Trail Use Designation Environmental Assessment" was prepared to consider four alternatives for bicycle use of park trails. The result was the development of a "Trail Use Designation Plan" (Plan). In developing the Plan, the park held four public hearings over a three year period through the Golden Gate National Recreation Advisory Commission, as well as three user group workshops and numerous consultations with interested groups and individuals, and considered over 700 written and verbal comments.

The final Plan recommends that certain trails be designated for hiker use only; certain other trails for equestrian and hiker use; certain other trails for bicycle an hiker use; and certain trails for multiple use. Consideration was given to environmental factors, safety, visitor use patterns, management considerations, and special park values. All trails were considered; however, only roads and former roads were determined to be suitable for bicycle use.

The following listed trails or sections of trails are proposed for designation as open to bicycle use:

—Kirby Cove Road, between Conzelman Road and Kirby Cove Campground.
—Coastal/Slacker Road between McCullough Road and Slacker Hill.
—Coastal Trail between Conzelman Road at McCullough Road and the Fort Barry Rifle Range at Bunker Road.
—Coastal Trail between Rodeo Beach parking area and Hill 88.
—Coastal Trail between Tennessee Valley Trail and Coyote Ridge Trail.
—Coyote Ridge Trail between the Coastal Trail and Miwok Trail.
—Coyote Ridge Trail between Fox Trail and the Coastal Trail at the Hack Site.
—Coastal Trail between Coyote Ridge Trail at the Hack Site and Muir Beach.
—Miwok Trail between Rodeo Lagoon and Old Springs Trail.
—Old Springs Trail between Miwok Trail and Miwok Stable.
—Miwok Trail between Miwok Stable and Highway 1.

—Tennessee Valley Trail between Tennessee Beach and Tennessee Valley Road parking area.
—Bobcat Trail between Miwok Trail and Marincello Road.
—Alta Avenue between Wolf Back Ridge Road and Marin City.
—Hawk Camp Trail between Bobcat Trail and Hawk Camp.
—Rodeo Avenue between US Highway 101 and Alta Avenue.
—Marincello Road between Tennessee Valley Parking Area and Bobcat Trail.
—Haypress Road between Tennessee Valley Road and Haypress Campground.
—Smith Road between Marinview and Miwok Trail.
—Bay Trail between Golden Gate Bridge and Sausalito.
—Oakwood Valley Road between Tennessee Valley Road and Oakwood Valley Pond. (Does not include Oakwood Valley Trail between Pond and Alta Avenue)
—Diaz Ridge Trail between Mt. Tamalpais State Park boundary and Highway 1 near Muir Beach.
—Deer Park Fire Road between Frank's Valley Road and Coastal Trail near Pan Toll (Major portion is in Mt. Tamalpais State Park.)
—Willow Camp Fire Road between Stinson Beach and Ridgecrest Boulevard. (Major Portion is in Mt. Tamalpais State Park.)
—Bolinas Ridge Trail between Bolinas-Fairfax Road and Sir Francis Drake Highway near Olema.
—McCurdy Trail between Highway 1 and Bolinas Ridge Trail.
—Randall Trail between Highway 1 and Bolinas Ridge Trail.
—Shafter Trail between Bolinas Ridge Trail and Shafter Bridge. (Portion is in Samuel P. Taylor State Park.)

All of the trails which have been proposed as open for bicycle use are former ranch or military roads or maintained fire roads. Currently, 46.9 miles of former ranch, military and fire roads are recommended for bicycle use. All have adequate width and visibility for passing, and can be adequately maintained for multiple uses including bicycles.

The Plan requires the monitoring and management of these trails in such a manner as to ensure that designation for bicycle use will not adversely impact other park users or the environment. An erosion assessment survey in concert with The Plan will guide the reconstruction, maintenance and use of this trail system over the next several years.

Because the Plan is dynamic and subject to change as trails maintenance and construction activities occur, specific trails or routes are not listed in the regulation text. Any additional trails other than those mentioned in this preamble may be designated by the Superintendent in writing after holding public meetings through the Golden Gate National Recreation Area's Advisory Commission, by marking on maps which will be available in the office of the superintendent and at other places convenient to the public, and through the posting of trails which are open to bicycle use. Further, the authority of the Superintendent to "impose public use limits, or close all or a portion" of a designated trail according to the criteria in 36 CFR 1.5 is not restricted by this proposed regulation.

The Superintendent has made a determination in writing that these routes proposed for designation as bicycle routes are consistent with the protection of Golden Gate National Recreation Area's natural, scenic and aesthetic values, safety considerations and management objectives and will not disturb wildlife or park resources, as required in § 4.30(b) of title 36, Code of Federal Regulations.

Section Analysis

The proposed rule will add a new paragraph (c) to the existing regulations at 36 CFR 7.97, "Designated bicycle routes", specific to the use of bicycles. This new paragraph permits the use of bicycles in accordance with existing regulations at 36 CFR 4.30 and specifics regulations for bicycle use on designated routes in non-developed areas of Golden Gate National Recreation Area.

Paragraph (c)(1) designates, pursuant to 36 CFR 4.30(b), certain roads and trails that were former military and ranch roads, and existing fire management roads as open to bicycle use. Such designated routes shall be identified by the posting of signs and by the identification on maps made available to the public.

Paragraph (c)(2) identifies maximum speed limits for bicycles on designated routes. These trails are not for the exclusive use of bicyclists, and are open to hikers and, in some areas, to horses. Speed limits will assist in preventing conflicts with these users.

Paragraph (c)(3) prohibits the possession of a bicycle in all non-developed areas not designated as open to bicycle use. This prohibition is to discourage the pushing or carrying of bicycles into non-designated areas, thus facilitating the fair enforcement of these proposed regulations.

This paragraph also requires the use of an activated white headlight between sunset and sunrise instead of a white reflector, which is currently prescribed by § 4.30(d). Forward reflectors alone would not be safe on trails in non-developed areas where there is a lack of activated lights that make reflectors useful.

Public Participation

It is the policy of the Department of the Interior, whenever practicable, to afford the public an opportunity to participate in the rule making process. Accordingly, interested persons may submit written comments, suggestions or objections regarding the proposed route designations and proposed additional off-road bicycle regulations to the General Superintendent, Golden Gate National Recreation Area, Fort Mason, San Francisco, California 94123, within 30 days of the publication of this notice in the **Federal Register**.

Drafting Information

The primary author of this rulemaking is Richard B. Hardin, Ranger Activities Specialist, Golden Gate National Recreation Area.

Paperwork Reduction Act

This rulemaking does not contain information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

Compliance with Other Laws

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*).

In compliance with the National Environmental Policy Act (NEPA) an Environmental Assessment was prepared to review the impacts of this action. A Finding of No Significant Impact was signed on May 14, 1991.

In accordance with section 7 of the Endangered Species Act of 1973 formal consultation with the U.S. Fish and Wildlife Service was initiated for trails where use was impacting endangered species habitat. Bicycle use is not proposed for these trails.

The NPS has reviewed this rule as directed by Executive Order 12630, "Government Actions and Interference with Constitutionally Protected Rights", to determine if this rule has "policies that have taking implications." The NPS has determined that this rule does not have takings implications because the

regulations apply only to park lands, and open certain of these lands to bicycle users.

List of Subjects in 36 CFR Part 7

National Parks; Reporting and recordkeeping requirements.

In consideration of the foregoing, it is proposed to amend 36 CFR chapter I as follows:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

1. The authority citation continues to read as follows:

Authority: 16 U.S.C. 1, 3, 9a, 460*bb*–3, 462(k).

2. Section 7.97 is amended by adding paragraph (c) to read as follows:

§ 7.97 Golden Gate National Recreation Area.

* * * * *

(c) *Designated bicycle routes.* The use of a bicycle is permitted according to § 4.30 of this Chapter and, in non-developed areas, as follows:

(1) Bicycle use is permitted on former military roads, former ranch roads, and fire management roads which have been designated by the Superintendent as bicycle routes by the posting of signs, and as designated on maps which are available in the office of the superintendent and other places convenient to the public.

(2) Bicycle speed limits are as follows:

(i) 15 miles per hour: Upon all designated routes in Golden Gate National Recreation Area.

(ii) 5 miles per hour. On blind curves and when passing other route users.

(3) The following are prohibited:

(i) The possession of a bicycle on routes not designated as open to bicycle use.

(ii) Operating a bicycle on designated bicycle routes between sunset and sunrise without exhibiting on the bicycle or on the operator an activated white light that is visible from a distance of at least 500 feet to the front and with a red light or reflector visible from at least 200 feet to the rear.

Dated: December 6, 1991.

Jennifer A. Salisbury,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 92–2142 Filed 1–28–92; 8:45 am]

BILLING CODE 4310–70–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1303

RIN 0970–AB00

Head Start Program

AGENCY: Department of Health and Human Services (HHS), Administration for Children and Families (ACF).

ACTION: Notice of proposed rulemaking.

SUMMARY: This Notice of Proposed Rulemaking (NPRM) requests comments from the public on proposed changes to 45 CFR part 1303 entitled "Procedures for Appeals for Head Start Delegate Agencies, and for Opportunities to Show Cause and Hearings for Head Start Grantees."

The proposed new procedures will reduce reporting and paperwork requirements. The changes also remove unnecessary and duplicative provisions and revise the language of the current regulation for clarity.

The most significant proposed change is to improve the show cause and hearings process for Head Start grantees by abolishing the current complex and costly procedures and utilizing the Departmental Appeals Board.

DATES: In order to be considered, comments on this proposed rule must be received on or before March 30, 1992.

ADDRESSES: Please address comments to: Wade F. Horn, Ph.D., Commissioner, Administration for Children, Youth and Families; PO Box 1182; Washington, DC 20013.

Beginning 14 days after close of the comment period, comments will be available for public inspection in room 2219, 330 C Street, SW., Washington, DC 20201, Monday through Friday between the hours of 9 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Clayton D. Roth, Jr. (202) 245–0504.

SUPPLEMENTARY INFORMATION:

I. Program Purpose

Head Start is a national program providing comprehensive developmental services primarily to preschool children, aged three to the age of compulsory school attendance, and their low-income families. To help enrolled children achieve their full potential, Head Start programs provide comprehensive health, nutritional, educational, social and other services. In addition, Head Start programs are required to provide for the direct participation of the parents of enrolled children in the development, conduct, and direction of local programs. In FY 1990, Head Start served 548,470 children through a network of 1,300 grantees and 620 delegate agencies which have approved written agreements with grantees to operate Head Start programs.

II. Purpose of the NPRM

The Administration for Children, Youth and Families (ACYF) is proposing to amend the current rule governing Head Start grantee and delegate agency appeals at 45 CFR part 1303. The purpose of this revision is to eliminate duplication and increase efficiency in governmental operations by reducing the time expended in preparing and holding an appeal, conducting a hearing and reaching a final decision. We believe this revision will reduce the cost of an appeal and the total time required for an appeal from the initial request for a review or a hearing on the proposed action to a final decision.

III. Summary of the Major Provisions of the NPRM

The proposed regulation significantly revises, clarifies, and simplifies the appeals process for Head Start grantees and/or current and prospective delegate agencies. The proposed changes are in response to a review and analysis of data on actual appeals filed by Head Start grantees and delegate agencies.

The following is a summary of the major provisions of the NPRM:

(1) Currently, grantees may appeal three types of actions by the Administration for Children and Families (ACF): A termination of financial assistance; a denial of refunding; and a suspension. This NPRM proposes to require that all allowable grantee appeals will be heard by the Departmental Appeals Board rather than by ACF staff.

(2) The NPRM continues to permit current and prospective delegate agencies to appeal to the grantee agency the rejection of an application and failure of a grantee to act on an application within a timely period. In addition, we propose to permit delegate agencies, for the first time, to appeal the termination of a grant or contract.

(3) We propose to raise attorney fees from $100.00 per day to the usual and customary fees for the locality in which the grantee or delegate agency is located but no higher than $250.00 per day. This figure will be adjusted annually for inflation.

(4) If a current or prospective delegate agency is dissatisfied with the grantee's decision, it may appeal that decision to ACF. The NPRM proposes to apply the "arbitrary and capricious" standard of

review for appeals to ACF by current or prospective delegate agencies.

(5) Finally, the NPRM proposes to allow the ACF reviewing official to direct a remedy where a specific resolution of the dispute is appropriate.

Section by Section Discussion of the NPRM

We are proposing to retitle 45 CFR part 1303 from "Procedures for Appeals for Head Start Delegate Agencies, and for Opportunities to Show Cause and Hearings for Head Start Grantees" to "Appeal Procedures for Head Start Grantees and Current or Prospective Delegate Agencies." We believe the new title provides a clearer understanding of the intent of 45 CFR part 1303 and conveys the newly reordered sequence of delegate appeals discussion which occurs before the current or prospective delegate agency appeals.

Subpart A

Subpart A, General, of the NPRM sets forth the purpose and application of the proposed rule, provides definitions of terms in the regulation, provides the right to an attorney, attorney fees and travel expenses and allows any other remedies authorized by law. In addition, it deals with certain administrative concerns, such as how documents must be served on parties and the agency, and the continued applicability of this part in the event of organizational changes, reduction of program appropriation levels or changes in agency nomenclature.

Section 1303.1

Purpose and Application. In this section we propose to correct the statutory citation and make editorial changes for clarification purposes.

Section 1303.2

Definitions. This section proposes to add definitions for "agreement," "denial of refunding," "day," "funding agency," "interim grantee," and "submittal"; revises definitions for "prospective delegate agency," "substantial rejection," and "termination"; and deletes definitions for "current delegate agency" and "program account."

A major purpose of the inclusion of a definition for the term "denial of refunding" is to make clear that the appeal rights from such a decision pertain only to situations in which a decision is made not to refund a grant after the end of an existing budget or project period based on findings that the grantee is unfit to continue operating the program.

Section 1303.3

Right to an attorney, attorney fees, and travel costs. This section proposes a number of significant changes, some of which are proposed in order to clarify agency policy. First, the limit on attorney's fees would be raised from $100.00 per day to the usual and customary fees for the locality in which the grantee or delegate agency is located. There is a proposed limitation of $250.00 per day, which shall be adjusted annually for inflation from the effective date of the regulations. This limitation may not be exceeded. The reason for these changes is to update the amounts payable and to keep them current with rises in the Consumer Price Index (CPI) without the necessity for constant amendment of the regulations, and to place a consistent limit on such fees. Actual notice of the current limitations will be provided to each grantee at the time it is notified of an appealable action. ACF officials are mindful of the fact that there are attorneys who charge in excess of the limitation proposed in this regulation. We are also mindful of the fact that the funds involved are scarce social service funds appropriated by Congress to provide valuable services to a population in need of them. Therefore, we believe that limitations on these costs are necessary and in the public interest. We urge the private bar to be similarly mindful of the nature of the programs involved and of the limited funds available for these programs.

We are proposing to remove the existing authority to waive the fee limitation because it has generated excessive disputes. It is believed that limiting the fees to the usual and customary charges, not to exceed $250.00 per day, and indexing that limitation to the national inflation index, or CPI, is reasonable. Moreover, this will result in a uniform and equitable application of the provision throughout the country.

We also have considered a change in current regulations proposing that grantees be allowed to charge the attorney fees discussed above as well as the attorney's travel and per diem costs to the grantee's current operating program funds only in those cases where the grantee is successful in the final outcome of its appeal. This change would result in the grantee not being able to utilize Federal grant funds to pay attorney fees and costs if the appeal was unsuccessful. The revised method of paying for grantee appeals would have resulted in this portion of the Head Start appeals process being compatible with the current fee payment practice of a number of other similar Departmental grant programs. We have decided not to propose such a change at this time. Nevertheless, we are interested in receiving comments concerning whether such a change would be advisable.

Similarly, it is proposed that fees be limited to only one attorney in connection with any one dispute or proceeding. ACF believes that this policy is already embodied in the current regulation which refers to "an attorney" and "such attorney." This is proposed to be clarified since attempts have been made to charge multiple attorneys' fees which would result in excessive costs being charged to programs.

Section 1303.4

Remedies. We propose a technical change to the title of this section by removing the word "other." The content of this section would remain the same.

Section 1303.5

Service of process. This new proposed section would spell out how documents must be filed and served and how notices must be served in any appeal. It also spells out the consequences of failing to use the required methods if an opposing party, or the deciding official or agency, maintains it never received documents. Basically, if the required method is not used, a rebuttable presumption is sent in a timely manner. It is proposed that this presumption may only be overcome by a preponderance of evidence showing they were sent in a timely manner.

Section 1303.6

Successor agencies and officials. This proposed section makes clear that any references to particular officials or agencies that currently have authority over Head Start include any successors to them.

Section 1303.7

Effect of failure to file or serve documents in a timely manner. This proposed section requires strict adherence to the various filing deadlines imposed by the regulations. We believe this is necessary to ensure the expeditious conduct of proceedings which is essential to prompt resolution of disputes. Since we believe prompt resolution of disputes is important for stability and continuity in providing quality Head Start services, we are proposing more stringent requirements than are typical. We believe that the provisions allowing waiver will provide the necessary flexibility in appropriate circumstances.

Section 1303.8

Waiver of requirements. The purpose of this proposed section is to make clear that, while procedural requirements may be waived for good cause, this is not to occur frequently or routinely. It is considered important by ACYF that appeals be concluded as rapidly as possible consistent with basic fairness to all concerned. Rapid resolution of disputes will, in our view, help ensure stability in Head Start programs and allow all concerned to focus on the provision of services rather than on the disputes themselves. Therefore, while discretion is provided to the responsible HHS official to waive procedural requirements when appropriate, this discretion is to be exercised with restraint. Similarly, it is ACYF's intent that the Departmental Appeals Board will apply the same restraint in those cases within its jurisdiction and to which these regulations also apply.

Subpart B

Subpart B, Appeals by Grantees, would replace current § 1303.20 through § 1303.37 (subparts C and D). The purpose of these proposed changes is to eliminate duplication and increase efficiencies in governmental operations by reducing the time spent in preparing and holding an appeal and making a final decision. This new Subpart B provides for a grantee whose financial assistance has been terminated, or whose non-competing continuation application for refunding has been denied, or who has been suspended for a period exceeding 30 days, to appeal such decisions to the Departmental Appeals Board using the procedures described in 45 CFR part 16, except as otherwise provided by Head Start appeals regulations.

Included in this consolidation and change of venue is the elimination of a final review and decision by the Commissioner, ACYF. However, the Commissioner must be consulted about the proposed action in advance and, in writing, must signify concurrence with the proposed action prior to its implementation by the appropriate responsible HHS official.

Section 1303.10

Purpose.—This section proposes to specify the purpose of the new subpart B.

Section 1303.11

Suspension on notice and opportunity to show cause. This proposed section would recodify the procedures which are found in current § 1303.31. Section 1303.31 specifies the appeals procedures regarding non-summary suspensions with opportunity to show cause.

Section 1303.11 contains appeals procedures for non-summary suspensions. In non-summary suspensions, funding in whole or in part is not suspended until after the time for an appeal has expired, or until a decision has been made on an appeal upholding the suspension.

Section 1303.12

Summary suspension and opportunity to show cause. This proposed section would modify and recodify the procedures which are found in current § 1303.32. Section 1303.32 specifies the appeals procedures available to the grantee regarding a summary suspension and opportunity to show cause.

Section 1303.12 continues and modifies appeals procedures for summary suspensions. In order to codify existing agency practice we are proposing to allow the appointment of an interim grantee if termination proceedings are initiated within 30 days of summary suspensions. The purpose of this revision is to avoid financial cost being incurred by a grantee that has been suspended when that suspension is serious enough to cause the initiation of termination proceedings.

In summary suspensions, funding in whole or in part ceases immediately.

Section 1303.13

Appeal by a grantee of a suspension continuing for more than 30 days. This proposed new section applies to summary suspensions that are initially issued for more than 30 days and summary suspensions continued for more than 30 days. It also proposes to allow the responsible HHS official to appoint an interim grantee to operate the program until either the grantee's suspension is lifted or a new grantee is selected.

Section 1303.14

Appeal by grantee from a Termination of Financial Assistance. This proposed regulation separately states the grounds for terminating a grant, the required contents of a notice of termination, and provisions with respect to funding during termination proceedings. We propose to consolidate two current appeal procedures (§ 1303.20 through 26 and § 1303.33 through 37) available to the grantee depending upon whether a denial of refunding or termination action was taken against the grantee. In an effort to provide a uniform, fair and consistent appeal procedure, we propose that an appeal from both actions be to the responsible HHS official who will then notify the Commissioner, ACYF. The Commissioner, ACYF, will promptly send the appeal to the Departmental Appeals Board as provided in 45 CFR part 16.

The only deviation from the procedures in 45 CFR part 16 pertains to whether a hearing is provided. Consistent with 42 U.S.C. 9841, proposed § 1303.12(d) would require that any grantee that requests a hearing from a suspension in excess of 30 days, or from a denial of refunding, or from a decision to terminate a grant shall be afforded a hearing before the Departmental Appeals Board. The appeal provisions of proposed § 1303.12 apply to suspensions in excess of 30 days, including a summary suspension which is continued in effect for more than 30 days, unless the continuance of it is agreed to by the grantee pursuant to proposed paragraph (f)(2) of proposed § 1303.11.

Section 1303.15

Appeal by a grantee from a denial of refunding. The proposed regulation is similar to proposed § 1303.14, except that it pertains to denials of refunding.

Section 1303.16

Conduct of hearing. The proposed regulation is similar to current § 1303.35 paragraphs (a) through (f) and (i), except that it pertains to denials of refunding, suspensions as well as terminations.

Subpart C

Subpart C of the NPRM, Appeals by Current or Prospective Delegate Agencies, sets forth the appeals procedures available to all current or prospective delegate agencies. This subpart consolidates and clarifies appeal rights of delegate agencies if a grantee initiates a termination action, rejects a refunding application or fails to act on an application from a current or prospective delegate agency. It proposes a two step process with the initial appeal at the grantee level and a final decision by the responsible HHS official at the Regional Office level.

Section 1303.20

Appeals to grantees by current or prospective delegate agencies on rejection of an application, failure to act on an application, or termination of a grant or contract. We propose to add in this section the right of a delegate agency to appeal a grantee's decision to terminate an agreement with a delegate agency. Current regulations at 45 CFR 1303.10 provide a current or prospective delegate agency the right to appeal on notice of the grantee agency's rejection

or failure to act on the delegate's funding application. The proposed change would also allow a delegate agency the right to appeal if terminated by a grantee. ACYF has proposed this additional appeal right to protect a delegate agency from a possible arbitrary and capricious action affecting its right to operate a Head Start program. There should be reasonable opportunity to have that action reviewed and, when appropriate, rescinded. We propose to add the word "termination" to the section title.

However, prior to an appeal to the responsible HHS official, there must be an appeal to the grantee. This new requirement also sets forth the procedures and the time frames that apply to those appeals. This is proposed because we believe it will ensure that both parties thoroughly review the situation and that a more complete record is made before the responsible HHS official is called on to review the matter. We believe this will result in the resolution of more problems before they reach HHS. Further, we believe it will lead to a more effective and efficient procedure to resolve such disputes once they reach HHS.

An additional change would be that a delegate agency may have a responsible HHS official review a grantee's action prior to its implementation. The responsible HHS official's decison may not be appealed.

Section 1303.21

Procedures for appeal by current or prospective delegate agencies to the responsible HHS official from denials by grantees of an application or failure to act on an application. This section proposes to consolidate the requirements of the current § 1303.11 and § 1303.14 in order to provide the same appeal process to both current delegate agencies and any agency seeking to become a delegate. The purpose is to simplify the process and increase efficiency by providing a single, consistent appeal process for both current and prospective delegate agencies.

Section 1303.22

Decision on appeal in favor of grantee. This proposed section contains the procedures and options that would apply when the responsible HHS official finds in favor of the grantee. It also sets out the proposed standard of review. The "arbitrary and capricious" standard of review is proposed since there is a large body of law defining and applying it. ACYF officials believe this standard will provide guidance, objectivity, and consistency in the review of grantee decisions.

Section 1303.23

Decision on appeal in favor of current or prospective delegate agency. This proposed section would replace § 1303.13 and § 1303.15 through § 1303.19. The purpose is to simplify the regulations and to broaden the scope of remedies available to the responsible HHS official. Under the proposed regulations the responsible HHS official may direct a remedy. Alternatively, the responsible HHS official may remand the rejection of an application, or the termination of a delegate agency's agreement, to the grantee for further consideration. We believe that providing the responsible HHS official with authority to direct a specific resolution of the dispute is appropriate in those cases where the proper outcome is clear. This alternative will speed resolution of disputes and save costs for all parties.

In addition, this proposed regulation would establish deadlines for certain actions to be taken by the responsible HHS official as well as by grantees when there is a decision adverse to grantees.

Redesignation and Consolidation Table

Current section	New section
1303.1	No redesignation.
1303.2	No redesignation.
1303.3	No redesignation.
1303.4	No redesignation.
None	1303.5.
None	1303.6.
None	1303.7.
None	1303.8.
1303.10	1303.20.
1303.11 and 1303.14	1303.201.
1303.12	1303.22.
1303.13 and 1303.15–19	1303.23.
1303.20	1303.15.
1303.21	1303.15.
1303.22	1303.15.
1303.23	1303.15.
1303.24	1303.15.
1303.25	1303.15.
1303.26	None.
1303.30	1303.10.
1303.31	1303.11.
1303.32	1303.12.
None	1303.13.
1303.33	1303.14.
1303.34	None.
1303.35	1303.16.
1303.36	None.
1303.37	None.

V. Impact Analysis

Executive Order 12291

Executive Order 12291 requires that a regulatory impact analysis be prepared for major rules, which are defined in the Order as any rule that has an annual effect on the national economy of $100 million or more, or certain other specified effects. The Department concluded that these regulations are not major rules within the meaning of the Executive Order because they do not have an effect on the economy of $100 million or more or otherwise meet the threshold criteria. In fact, it is our estimation that this revision of the appeals process will be a direct benefit to the government since one level of review is eliminated.

Regulatory Flexibility Act of 1980

Consistent with the Regulatory Flexibility Act of 1980 (5 U.S.C. Ch. 6) we have tried to anticipate and reduce the impact of rules and paperwork requirements on small businesses. The public burden is estimated to be 45 hours of work load per response. This is a reduction in the paperwork burden placed on grantees because there will be less duplication of documents given the reduction in appeal levels. For each rule with a "significant economic impact on a substantial number of small entities" we must analyze the rule's impact on small entities. Small entities are defined by the Act to include small businesses, small non-profit organizations, and small governmental entities. While this proposed rule would affect small entities, it will not have a significant economic impact on a substantial number of small entities. For these reasons, the Secretary certifies that this rule will not have a significant impact on a substantial number of small entities.

Paperwork Reduction Act

Sections 1303.10 through 1303.23 of this proposed rule contain information collection requirements which are subject to review by the Office of Management and Budget under section 3504(h) of the Paperwork Reduction Act of 1980 (Pub. L. 96–511). The public burden is estimated to be 45 hours per response. Organizations and individuals desiring to submit comments on this information collection requirement should direct them to the agency official designated for this purpose whose name appears in the preamble, and to the Office of Information and Regulatory Affairs, OMB, New Executive Office Building (Room 3002), Washington, DC 20503, Attention: Desk Officer for DHHS, ACF/Head Start Program.

List of Subjects in 45 CFR Part 1303

Administrative practice and procedures, Education of disadvantaged, Grant programs—social programs.

For the reasons set forth in the Preamble, chapter XIII, subchapter B,

part 1303, of title 45 of the Code of Federal Regulations is proposed to be revised as follows:

PART 1303—APPEAL PROCEDURES FOR HEAD START GRANTEES AND CURRENT OR PROSPECTIVE DELEGATE AGENCIES

Subpart A—General

Sec.

1303.1 Purpose and application.
1303.2 Definitions.
1303.3 Right to attorney, attorney fees, and travel costs.
1303.4 Remedies.
1303.5 Service of process.
1303.6 Successor agencies and officials.
1303.7 Effect of failure to file or serve documents in a timely manner.
1303.8 Waiver of requirements.

Subpart B—Appeals by Grantees

1303.10 Purpose.
1303.11 Suspension on notice and opportunity to show cause.
1303.12 Summary suspension and opportunity to show cause.
1303.13 Appeal by a grantee of a suspension continuing for more than 30 days.
1303.14 Appeal by a grantee from a termination of financial assistance.
1303.15 Appeal by a grantee from a denial of refunding.
1303.16 Conduct of hearing.

Subpart C—Appeals by Current or Prospective Delegate Agencies

1303.20 Appeals to grantees by current or prospective delegate agencies of rejection of an application, failure to act on an application, or termination of a grant or contract..
1303.21 Procedures for appeal by current or prospective delegate agencies to the responsible HHS official from denials by grantees of an application or failure to act on an application.
1303.22 Decision on appeal in favor of grantee.
1303.23 Decision on appeal in favor of the current or prospective delegate agency.

Authority: 42 U.S.C. 9801 et seq.

Subpart A—General

§ 1303.1 Purpose and application.

This part prescribes regulations based on section 646 of the Head Start Act, 42 U.S.C. subsection 9841, as it applies to grantees and current or prospective delegate agencies engaged in or wanting to engage in the operation of Head Start programs under the Act. It prescribes the procedures for appeals by current and prospective delegate agencies from specified actions or inaction by grantees. It also provides procedures for reasonable notice and opportunity to show cause in cases of suspension of financial assistance by the responsible HHS official and for an appeal to the Departmental Appeals Board by grantees in cases of denial of refunding, termination of financial assistance, and suspension of financial assistance where provided under this part 1303.

§ 1303.2 Definitions.

As used in this part:

Act means the Head Start Act, 42 U.S.C. section 9831, et seq.

ACYF means the Administration for Children, Youth and Families in the Department of Health and Human Services, and includes Regional staff.

Agreement means either a grant or a contract between a grantee and a delegate agency for the conduct of all or part of the grantee's Head Start program.

Day means the 24 hour period beginning at 12 a.m. local time and continuing for the next 24 hour period. It includes all calendar days unless otherwise expressly noted.

Delegate Agency means a public or private non-profit organization or agency to which a grantee has delegated by written agreement the carrying out of all or part of its Head Start program.

Denial of Refunding means the refusal of a funding agency to fund an application for a continuation of a Head Start program for a subsequent program year when the decision is based on a determination that the grantee has improperly conducted its program, or is incapable of doing so properly in the future, or otherwise is in violation of applicable law, regulations, or other policies.

Funding Agency means the agency that provides funds directly to either a grantee or a delegate agency. ACYF is the funding agency for a grantee, and a grantee is the funding agency for a delegate agency.

Grantee means the local public or private non-profit agency which has been designated as a Head Start agency under 42 U.S.C. 9836 and which has been granted financial assistance by the responsible HHS official to operate a Head Start program.

Interim Grantee means an agency which has been appointed to operate a Head Start program for a period of time not to exceed one year while an appeal of a denial of refunding, termination or suspension action is pending.

Prospective Delegate Agency means a public or private non-profit agency or organization which has applied to a grantee to serve as a delegate agency.

Responsible HHS Official means the official who is authorized to make the grant of financial assistance to operate a Head Start program or his or her designee.

Submittal means the date of actual receipt or the date the material was served in accordance with § 1303.5 of this part for providing documents or notices of appeals, and similar matters, to either grantees, delegate agencies, prospective delegate agencies, or ACYF.

Substantial Rejection means that a funding agency requires that the funding of a current delegate agency be reduced to 80 percent or less of the current level of operations for any reason other than a determination that the delegate agency does not need the funds to serve all the eligible persons it proposes to serve.

Suspension of a grant means temporary withdrawal of the grantee's authority to obligate grant funds pending corrective action by the grantee.

Termination of a grant or delegate agency agreement means permanent withdrawal of the grantee's or delegate agency's authority to obligate previously awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or delegate agency. Termination does not include:

(a) Withdrawal of funds awarded on the basis of the grantee's or delegate agency's underestimate of the unobligated balance in a prior period;

(b) Refusal by the funding agency to extend a grant or award additional funds (such as refusal to make a competing or noncompeting continuation renewal, extension or supplemental award);

(c) Withdrawal of the unobligated balance as of the expiration of a grant;

(d) Annulment, i.e., voiding of a grant upon determination that the award was obtained fraudulently or was otherwise illegal or invalid from its inception.

Work day means any 24 hour period beginning at 12 a.m. local time and continuing for 24 hours. It excludes Saturdays, Sundays, and legal holidays. Any time ending on one of the excluded days shall extend to 5 p.m. of the next full work day.

§ 1303.3 Right to attorney, attorney fees, and travel costs.

(a) All parties to proceedings under this part including informal proceedings, have the right to be represented by an attorney.

(1) Attorney fees may be charged to the program grant in an amount equal to the usual and customary fees charged in the locality. However, such fees may not exceed $250.00 per day, adjusted for inflation beginning one year after the effective date of these regulations. The grantee or delegate agency may use current operating funds to pay these costs. The fees of only one attorney may be charged to the program grant with respect to a particular dispute. Such fees

may not be charged if the grantee or delegate agency has an attorney on its staff, or if it has a retainer agreement with an attorney which fully covers fees connected with litigation. The grantee or delegate agency shall have the burden of establishing the usual and customary fees and shall furnish documentation to support that determination that is satisfactory to the responsible HHS official.

(2) A grantee or delegate agency may designate up to two persons to attend and participate in proceedings held under this part. Travel and per diem costs of such persons, and of an attorney representing the grantee or delegate agency, shall not exceed those allowable under Standard Governmental Travel Regulations in effect at the time of the travel.

(b) In the event that use of program funds under this section would result in curtailment of program operations or inability to liquidate prior obligations, the party so affected may apply to the responsible HHS official for payment of these expenses.

(c) The responsible HHS official, upon being satisfied that these expenditures would result in curtailment of program operations or inability to liquidate prior obligations, must make payment therefore to the affected party by way of reimbursement from currently available funds.

§ 1303.4 Remedies.

The procedures established by subparts B and C of this part shall not be construed as precluding ACYF from pursuing any other remedies authorized by law.

§ 1303.5 Service of process.

Whenever documents are required to be filed or served under this part, or notice provided under this part, certified mail shall be used with a return receipt requested. Alternatively, any other system may be used that provides proof of the date of receipt of the documents by the addressee. If this regulation is not complied with, and if a party alleges that failed to receive documents allegedly sent to it, there will be a rebuttable presumption that the documents or notices were not sent as required by this part, or as alleged by the party that failed to use the required mode of service. The presumption may be rebutted only by a showing supported by a preponderance of evidence that the material was in fact submitted in a timely manner.

§ 1303.6 Successor agencies and officials.

Wherever reference is made to a particular Federal agency, office, or official it shall be deemed to apply to any other agency, office, or official which subsequently becomes responsible for administration of the program or any portion of it.

§ 1303.7 Effect of failure to file or serve documents in a timely manner.

(a) Whenever an appeal is not filed within the time specified in these or related regulations, the potential appellant shall be deemed to have consented to the proposed action and to have waived all rights of appeal.

(b) Whenever a party has failed to file a response or other submission within the time required in these regulations, or by order of an appropriate HHS responsible official, the party shall be deemed to have waived the right to file such response or submission.

(c) A party fails to comply with the requisite deadlines or time frames if it exceeds them by any amount.

(d) The time to file an appeal, response, or other submission may be waived in accordance with § 1303.8 of this part.

§ 1303.8 Waiver of requirements.

(a) Any procedural requirements required by these regulations may be waived by the responsible HHS official or such waiver requests may be granted by the Departmental Appeals Board in those cases where the Board has jurisdiction. Requests for waivers must be in writing and based on good cause.

(b) Approvals of waivers must be in writing and signed by the responsible HHS official or by the Departmental Appeals Board when it has jurisdiction. The requirements of this paragraph may not be waived.

(c) "Good cause" consists of the following:

(1) Litigation dates that cannot be changed;

(2) Personal emergencies pertaining to the health of a person involved in and essential to the proceeding or to a member of that person's immediate family, spouse, parents, or siblings;

(3) The complexity of the case is such that preparation of the necessary documents cannot reasonably be expected to be completed within the standard time frames;

(4) Other matters beyond the control of the moving party, such as strikes and natural disasters.

(d) Under no circumstances may "good cause" consist of a failure to meet a deadline due to the oversight of either a party or its representative.

(e) Waivers of timely filing or service shall be granted only when necessary in the interest of fairness to all parties, including the Federal agency. They will be granted sparingly as prompt resolution of disputes is a major goal of these regulations. The responsible HHS official shall have the right, on his or her own motion or on motion of a party, to require such documentation as he or she deems necessary in support of a request for a waiver.

(f) A request for an informal meeting by a delegate agency, including a prospective delegate agency, may be denied by the responsible HHS official, on motion of the grantee or on his or her own motion, if the official concludes that the written appeal fails to state plausible grounds for reversing the grantee's decision or the grantee's failure to act on an application.

Subpart B—Appeals by Grantees

§ 1303.10 Purpose.

(a) This subpart establishes rules and procedures for the suspension of a grantee, denial of a grantee's application for refunding, or termination of assistance under the Act for circumstances related to the particular grant, such as ineffective or improper use of Federal funds or for failure to comply with applicable laws, regulations, policies, instructions, assurances, terms and conditions or, in accordance with part 1302 of this chapter, upon loss by the grantee of legal status or financial viability.

(b) This subpart does not apply to any administrative action based upon any violation, or alleged violation, of Title VI of the Civil Rights Act of 1964.

§ 1303.11 Suspension on notice and opportunity to show cause.

(a) After receiving concurrence from the Commissioner, ACYF, the responsible HHS official may suspend financial assistance to a grantee in whole or in part for breach or threatened breach of any requirement stated in § 1303.10 pursuant to notice and opportunity to show cause why assistance should not be suspended.

(b) The responsible HHS official will notify the grantee as required by § 1303.5 or by telegram that ACF intends to suspend financial assistance, in whole or in part, unless good cause is shown why such action should not be taken. The notice will include:

(1) The grounds for the proposed suspension;

(2) The effective date of the proposed suspension;

(3) Information that the grantee has the opportunity to submit written material in opposition to the intended suspension and to meet informally with

the responsible HHS official regarding the intended suspension;

(4) Information that the written material must be submitted to the responsible HHS official at least seven days prior to the effective date of the proposed suspension and that a request for an informal meeting must be made in writing to the responsible HHS official no later than seven days after the day the notice of intention to suspend was mailed to the grantee;

(5) Invitation to correct the deficiency by voluntary action; and

(6) A copy of this subpart.

(c) If the grantee requests an informal meeting, the responsible HHS official will fix a time and place for the meeting. In no event will such meeting be scheduled less than seven days after the notice of intention to suspend was sent to the grantee.

(d) The responsible HHS official may in his discretion extend the period of time or date for making requests or submitting material by the grantee and will notify the grantee of any such extension.

(e) At the time the responsible HHS official sends the notice of intention to suspend financial assistance to the grantee, he will send a copy of it to any delegate agency whose activities or failures to act are a substantial cause of the proposed suspension, and will inform such delegate agency that it is entitled to submit written material in opposition and to participate in the informal meeting with the responsible HHS official if one is held. In addition, the responsible HHS official may give such notice to any other Head Start delegate agency of the grantee.

(f) Within three days of receipt of the notice of intention to suspend financial assistance, the grantee shall send a copy of such notice and a copy of this subpart to all delegate agencies which would be financially affected by the proposed suspension action. Any delegate agency that wishes to submit written material may do so within the time stated in the notice. Any delegate agency that wishes to participate in the informal meeting regarding the intended suspension, if not otherwise afforded a right to participate, may request permission to do so from the responsible HHS official, who may grant or deny such permission. In acting upon any such request from a delegate agency, the responsible HHS official will take into account the effect of the proposed suspension on the particular delegate agency, the extent to which the meeting would become unduly complicated as a result of granting such permission, and the extent to which the interests of the delegate agency requesting such permission appear to be adequately represented by other participants.

(g) The responsible HHS official will consider any timely material presented in writing, any material presented during the course of the informal meeting as well as any showing that the grantee has adequately corrected the deficiency which led to the suspension proceedings. The decision of the responsible HHS official will be made within five days after the conclusion of the informal meeting. If the responsible HHS official concludes that the grantee has failed to show cause why financial assistance should not be suspended, he may suspend financial assistance in whole or in part and under such terms and conditions as he specifies.

(h) Notice of such suspension will be promptly transmitted to the grantee as required in § 1303.5 of this part or by some other means showing the date of receipt, and shall become effective upon delivery or on the date delivery is refused or the material is returned. Suspension shall not exceed 30 days unless the responsible HHS official and the grantee agree to a continuation of the suspension for an additional period of time. If termination proceedings are initiated in accordance with § 1303.14, the suspension of financial assistance will be rescinded.

(i) New obligations incurred by the grantee during the suspension period will not be allowed unless the granting agency expressly authorizes them in the notice of suspension or an amendment to it. Necessary and otherwise allowable costs which the grantee could not reasonably avoid during the suspension period will be allowed if they result from obligations properly incurred by the grantee before the effective date of the suspension and not in anticipation of suspension or termination. At the discretion of the granting agency, third-party in-kind contributions applicable to the suspension period may be allowed in satisfaction of cost sharing or matching requirements.

(j) The responsible HHS official may appoint an agency to serve as an interim grantee to operate the program until the grantee's non-summary suspension is lifted.

(k) The responsible HHS official may modify the terms, condition and nature of the suspension or rescind the suspension action at any time on his own initiative or upon a showing satisfactory to him that the grantee has adequately corrected the deficiency which led to the suspension and that repetition is not threatened. Suspension partly or fully rescinded may, at the discretion of the responsible HHS official, be reimposed with or without further proceedings, except that the total time of suspension may not exceed 30 days unless termination proceedings are initiated in accordance with § 1303.14 or unless the responsible HHS official and the grantee agree to continuation of the suspension for an additional period of time. If termination proceedings are initiated, the suspension of financial assistance will be rescinded.

§ 1303.12 Summary suspension and opportunity to show cause.

(a) After receiving concurrence from the Commissioner, ACYF, the responsible HHS official may suspend financial assistance in whole or in part without prior notice and an opportunity to show cause if it is determined that immediate suspension is necessary because of a serious risk of:

(1) Substantial injury to property or loss of project funds; or

(2) Violation of a Federal, State, or local criminal statute; or

(3) If staff or participants' health and safety are at risk.

(b) The notice of summary suspension will be given to the grantee as required by § 1303.5 of this part, or by some other means showing the date of receipt, and shall become effective on delivery or on the date delivery is refused or the material is returned unclaimed.

(c) the notice must include the following items:

(1) The effective date of the suspension;

(2) The grounds for the suspension;

(3) The extent of terms and conditions of any full or partial suspension;

(4) A statement prohibiting the grantee from making any new expenditures or incurring any new obligations in connection with the suspended portion of the program; and

(5) A statement advising the grantee that it has an opportunity to show cause at an informal meeting why the suspension should be rescinded. The request for an informal meeting must be made by the grantee in writing to the responsible HHS official no later than five work days after the effective date of the notice of summary suspension as described in paragraph (b) of this section.

(d) If the grantee requests in writing the opportunity to show cause why the suspension should be rescinded, the responsible HHS official will fix a time and place for an informal meeting for this purpose. This meeting will be held within five work days after the grantees request is received by the responsible HHS official. Notwithstanding the provisions of this paragraph, the

responsible HHS official may proceed to deny refunding or initiate termination proceedings at any time even though financial assistance of the grantee has been suspended in whole or in part.

(e) Notice of summary suspension must also be furnished by the grantee to its delegate agencies within two work days of its receipt of the notice from ACYF by certified mail, return receipt requested, or by any other means showing dates of transmittal and receipt or return as undeliverable or unclaimed. Delegate agencies affected by the summary suspension have the right to participate in the informal meeting as set forth in paragraph (d) of this section.

(f) The effective period of a summary suspension of financial assistance may not exceed 30 days unless:

(1) The conditions creating the summary suspension have not been corrected; or

(2) The parties agree to a continuation of the summary suspension for an additional period of time; or

(3) The grantee, in accordance with paragraph (d) of this section, requests an opportunity to show cause why the summary suspension should be rescinded, in which case it may remain in effect in accordance with paragraph (h) of this section; or

(4) Termination or denial of refunding proceedings are initiated in accordance with § 1303.14 or § 1303.15.

(g) Any summary suspension that remains in effect for more than 30 days is subject to the requirements of § 1303.12 of this part. The only exceptions are where there is an agreement under paragraph (f)(2) of this section, or the circumstances described in paragraphs (f)(4) or (h)(1) of this section exist.

(h)(1) If the grantee requests an opportunity to show cause why a summary suspension should be rescinded, the suspension of financial assistance will continue in effect until the grantee has been afforded such opportunity and a decision has been made by the responsible HHS official.

(2) If the suspension continues for more than 30 days, the suspension remains in effect even if it is appealed to the Departmental Appeals Board.

(3) Notwithstanding any other provisions of these or other regulations, if a denial of refunding occurs or a termination action is instituted while the summary suspension is in effect, the suspension shall merge into the later action and function shall not be available until the action is rescinded or a decision favorable to the grantee is rendered.

(i) The responsible HHS official must consider any timely material presented in writing, any material presented during the course of the informal meeting, as well as any other evidence that the grantee has adequately corrected the deficiency which led to the summary suspension.

(j) A decision must be made within five work days after the conclusion of the informal meeting with the responsible HHS official. If the responsible HHS official concludes, after considering the information provided at the informal meeting, that the grantee has failed to show cause why the suspension should be rescinded, the responsible HHS official may continue the suspension, in whole or in part and under the terms and conditions specified in the notice of suspension.

(k) New obligations incurred by the grantee during the suspension period will not be allowed unless the granting agency expressly authorizes them in the notice of suspension or by an amendment to the notice. Necessary and otherwise allowable costs which the grantee could not reasonably avoid during the suspension period will be allowed if they result from obligations properly incurred by the grantee before the effective date of the suspension and not in anticipation of suspension, denial of refunding or termination.

(l) The responsible HHS official may appoint an agency to serve as an interim grantee to operate the program until either the grantee's summary suspension is lifted or a new grantee is selected in accordance with subpart B of this part.

(m) At the discretion of the funding agency, third-party in-kind contributions applicable to the suspension period may be allowed in satisfaction of cost sharing or matching requirements.

(n) The responsible HHS official may modify the terms, conditions and nature of the summary suspension or rescind the suspension action at any time upon receiving satisfactory evidence that the grantee has adequately corrected the deficiency which led to the suspension and that the deficiency will not occur again. Suspension partly or fully rescinded may, at the discretion of the responsible HHS official, be reimposed with or without further proceedings.

§ 1303.13 Appeal by a grantee of a suspension continuing for more than 30 days.

(a) This section applies to summary suspensions that are initially issued for more than 30 days and summary suspensions continued for more than 30 days except those identified in § 1303.11(g) of this part.

(b) After receiving concurrence from the Commissioner, ACYF, the responsible HHS official may suspend a grant for more than 30 days. A suspension may, among other bases, be imposed for the same reasons that justify termination of financial assistance or which justify a denial of refunding of a grant.

(c) A notice of a suspension under this section shall set forth:

(1) The reasons for the action;

(2) The duration of the suspension, which may be indefinite;

(3) The fact that the action may be appealed to the Departmental Appeals Board and the time within which it must be appealed.

(d) During the period of suspension a grantee may not incur any valid obligations against Federal Head Start grant funds, nor may any grantee expenditure or provision of in-kind services or items of value made during the period be counted as applying toward any required matching contribution required of a grantee, except as otherwise provided in this Part.

(e) The responsible HHS official may appoint an agency to serve as an interim grantee to operate the program until either the grantee's suspension is lifted or a new grantee is selected in accordance with subpart B and C of 45 CFR part 1302.

(f) Any appeal to the responsible HHS official must be made within five days of the grantee's receipt of notice of suspension or return of the notice as undeliverable, refused, unclaimed, or for like reasons. All such appeals will be immediately transmitted to the Commissioner, ACYF, who will send the appeal to the Departmental Appeals Board. Appeals will be governed by the Departmental Appeals Board's regulations at 45 CFR part 16, except as otherwise provided in the Head Start appeals regulations. Any grantee requesting a hearing as part of its appeal shall be afforded one by the Departmental Appeals Board.

(g) If a grantee is successful on its appeal any costs incurred during the period of suspension that are otherwise allowable may be paid with Federal grant funds. Moreover, any cash or in-kind contributions of the grantee during the suspension period that are otherwise allowable may be counted toward meeting the grantee's non-Federal share requirement.

(h) If a grantee's appeal is denied by the Departmental Appeals Board, but the grantee is subsequently restored to the program because it has corrected those conditions which warranted the suspension, its activities during the period of the suspension remain outside

the scope of the program. Federal funds may not be used to offset any cost during the period, nor may any cash or in-kind contributions received during the period be used to meet non-Federal share requirements.

(i) If the Federal agency institutes termination proceedings during a suspension, or denies refunding, the two actions shall merge and the grantee need not file a new appeal. Rather, the Departmental Appeals Board will automatically be vested with jurisdiction over the termination action or the denial or refunding and will, pursuant to its rules and procedures, permit the grantee to respond to the notice of termination. In a situation where a suspension action is merged into a termination action in accordance with this section, the suspension continues until there is an administration decision by the Departmental Appeals Board on the grantee's appeal.

§ 1303.14 Appeal by a grantee from a termination of financial assistance.

(a) After receiving concurrence from the Commissioner, ACYF, the responsible HHS official may terminate financial assistance to a grantee. Financial assistance may be terminated in whole or in part.

(b) Financial assistance may be terminated for any or all of the following reasons:

(1) The grantee is no longer financially viable;

(2) The grantee has lost the requisite legal status or permits;

(3) The grantee has failed to comply with the required fiscal or program reporting requirements applicable to grantees in the Head Start program;

(4) The grantee has failed to meet the performance standards for operation of Head Start programs that are applicable to grantees;

(5) The grantee has failed to comply with the eligibility requirements and limitations on enrollment in the Head Start programs, or both;

(6) The grantee has failed to comply with the Head Start grants administration requirements set forth in 45 CFR part 1301;

(7) The grantee has failed to comply with the requirements of the Head Start Act;

(8) The grantee is debarred from receiving Federal grants or contracts;

(9) The grantee fails to abide by any other terms and conditions of its award of financial assistance, or any other applicable laws, regulations, or other applicable Federal or State requirements or policies.

(c) A notice of termination shall set forth:

(1) The violations or actions justifying the termination.

(2) The fact that the termination may be appealed within 10 days to the responsible HHS official and that such appeals shall be governed by 45 CFR part 16, except as otherwise provided in the Head Start appeals regulations, and that any grantee which represents a hearing shall be afforded one, as mandated by 42 U.S.C. 9841.

(3) That the appeal may be made only by the Board of Directors of the grantee or an official acting on behalf of such Board.

(4) That if the activities of a delegate agency are the basis, in whole or in part, for the reasons for the proposed termination, the identity of the delegate agency.

(5) Information that the matter has been set down for hearing at a stated time and place or that the grantee has a right to request a hearing in writing within a period of time, specified in the notice which is not later than 10 days from the date of sending the notice.

(d) The responsible HHS official will immediately transmit a copy of the grantee's request for a hearing to the Commissioner, ACYF. The Commissioner, ACYF, will send the request for a hearing to the Departmental Appeals Board.

(e)(1) During a grantee's appeal of a termination decision, funding will continue until an adverse decision is rendered or until expiration of the then current budget period. At the end of the current budget period, if a decision has not been rendered, the responsible HHS official may either award an interim grant to the grantee until a decision is made or, at his or her discretion, may award an interim grant to another organization to operate the program quarterly until a decision is rendered. In the latter circumstance, if the grantee prevails its grant will be restored beginning with the first full quarter starting after the decision is rendered.

(2) If a grantee's funding has been suspended, no funding is available during the termination proceedings, or at any other time, unless the action is rescinded or the grantee's appeal is successful.

(f) If a grantee requests a hearing, it shall send a copy of its request to all delegate agencies which would be financially affected by the termination of assistance and to each delegate agency identified in the notice. The copies of the request shall be sent to these delegate agencies at the same time the grantee's request is made to ACYF. The grantee shall promptly send ACYF a list of the delegate agencies to which it has sent the copies and the date on which they were sent.

(g) If the Departmental Appeals Board informs a grantee that a proposed termination action has been set down for hearing, the grantee shall within five days of its receipt of this notice send a copy of it to all delegate agencies which would be financially affected by the termination and to each delegate agency identified in the notice. The grantee shall send the Departmental Appeals Board and the responsible HHS official a list of all delegate agencies notified and the date of notification.

(h) If the responsible HHS official has initiated termination proceedings because of the activities of a delegate agency, that delegate agency may participate in the hearing as a matter of right. Any other delegate agency, person, agency or organization that wishes to participate in the hearing may request permission to do so from the presiding officer of the hearing. Such participation shall not, without the consent of ACYF and the grantee, alter the time limitations for the delivery of papers or other procedures set forth in this section.

(i) The results of the proceeding and any measure taken thereafter by ACYF pursuant to this part shall be fully binding upon the grantee and all its delegate agencies whether or not they actually participated in the hearing.

(j) A grantee may waive a hearing and submit written information and argument for the record. Such material shall be submitted to the responsible HHS official within a reasonable period of time to be fixed by him upon the request of the grantee. The failure of a grantee to request a hearing, or to appear at a hearing for which a date had been set, unless excused for good cause, shall be deemed a waiver of the right to a hearing and consent to the making of a decision on the basis of such information as is then in the possession of ACYF, including the allegations contained in the notice of termination.

(k) The responsible HHS official may attempt, either personally or through a representative, to resolve the issues in dispute by informal means prior to the hearing.

§ 1303.15 Appeal by a grantee from a denial of refunding.

(a) After receiving concurrence from the Commissioner, ACYF, a grantee's application for refunding may be denied by the responsible HHS official for circumstances described in paragraph (c) of this section.

(b) When an intention to deny a grantee's application for refunding is arrived at on the basis to which this subpart applies, the responsible HHS official will provide the grantee as much advance notice thereof as is reasonably possible, in no event later than 30 days after the receipt by ACYF of the application. The notice will inform the grantee that it has the opportunity for a full and fair hearing on whether refunding should be denied.

(1) Such appeals shall be governed by 45 CFR part 16, except as otherwise provided in the Head Start appeals regulations. Any grantee which requests a hearing shall be afforded one, as mandated by 42 U.S.C. 9841.

(2) Any such appeals must be filed within ten work days after the grantee receives notice of the decision to deny refunding.

(c) Refunding of a grant may be denied for any or all of the reasons for which a grant may be terminated, as set forth in § 1303.14(b) of this part. Refunding may also be denied if it is concluded that continuing a particular program is no longer in the public interest.

(d) Decisions to deny refunding shall be in writing, signed by the responsible HHS official, dated, and set in compliance with § 1303.5 of this part or by telegram, or by any other mode establishing the date sent and received by the addressee, or the date it was determined delivery could not be made, or the date delivery was refused. A Notice of Decision shall contain:

(1) A statement that indicates the grounds which justify the proposed denial of refunding;

(2) The identity of the delegate agency, if the activities of that delegate agency are the basis, in whole or in part, for the proposed denial of refunding; and

(3) A statement that if the grantee wishes to appeal the denial of refunding of financial assistance it must appeal directly to the responsible HHS official.

(e) The responsible HHS official will notify the Commissioner, ACYF of the grantee's appeal and request for a hearing. The Commissioner, ACYF, will promptly send the appeal to the Departmental Appeals Board, complying with the procedures provided in 45 CFR part 16, except as otherwise provided in the Head Start appeals regulations.

(f) The appeal may be made only by the Board of Directors of the grantee or an official acting on behalf of such Board.

§ 1303.16 Conduct of hearing.

(a) The presiding officer shall conduct a full and friar hearing, avoid delay, maintain order, and make a sufficient record of the facts and issues. To accomplish these ends, the presiding officer shall have all powers authorized by law, and may make all procedural and evidentiary rulings necessary for the conduct of the hearing. The hearing shall be open to the public unless the presiding officer for good cause shown otherwise determines.

(b) After the notice described in paragraph (g) of this section is filed with the presiding officer, he or she shall not consult with any person or party on a fact in issue unless on notice and opportunity for all parties to participate. However, in performing his or her functions under this part, the presiding officer may use the assistance and advice of an attorney, designated by the General Counsel of the Department of Health and Human Services who has not represented ACYF or any other party or otherwise participated in a proceeding, recommendation, or decision in the particular matter.

(c) Both ACYF and the grantee are entitled to present their case by oral or documentary evidence, to submit rebuttal evidence and to conduct such examination and cross-examination as may be required for a full and true disclosure of all facts bearing on the issues. The issues shall be those stated in the notice required to be filed by paragraph (g) of this section, those stipulated in a prehearing conference or those agreed to by the parties.

(d) In addition to ACYF, the grantee, and any delegate agencies which have a right to appear, the presiding officer may permit the participation in the proceedings of such persons or organizations as deemed necessary for a proper determination of the issues involved. Such participation may be limited to those issues or activities which the presiding officer believes will meet the needs of the proceeding, and may be limited to the filing of written material.

(e) Any person or organization that wishes to participate in a proceeding may apply for permission to do so from the presiding officer. This application, which shall be made as soon as possible after the notice of termination, denial of refunding or suspension has been received by the grantee, shall state the applicant's interest in the proceeding, the evidence or arguments the applicant intends to contribute, and the necessity for the introduction of such evidence or arguments.

(f) The presiding officer shall permit or deny such participation and shall give notice of his or her decision to the applicant, the grantee, and ACYF, and, in the case of denial, a brief statement of the reasons therefor. Even if previously denied, the presiding officer may subsequently permit such participation if, in his or her opinion, it is warranted by subsequent circumstances. If participation is granted, the presiding officer shall notify all parties of that fact and may, in appropriate cases, include in the notification a brief statement of the issues as to which participation is permitted.

(g) The Departmental Appeals Board will send the responsible HHS official, the grantee and any other party a notice which states the time, place, nature of the hearing, and the legal authority and jurisdiction under which the hearing is to be held. The notice will also identify with reasonable specificity the ACYF requirements which the grantee is alleged to have violated. The notice will be served and filed not later than ten work days prior to the hearing.

Subpart C—Appeals by Current or Prospective Delegate Agencies

§ 1303.20 Appeals to grantees by current or prospective delegate agencies of rejection of an application, failure to act on an application or termination of a grant or contract.

(a) A grantee must give prompt, fair and adequate consideration to applications submitted by current or prospective delegate agencies to operate Head Start programs. The failure of the grantee to act within 30 days after receiving the application is deemed to be a rejection of the application.

(b) A grantee must notify an applicant in writing within 30 days after receiving the application of its decision to either accept or to wholly or substantially reject it. If the decision is to wholly or substantially reject the application, the notice shall contain a statement of the reasons for the decision and a statement that the applicant has a right to appeal the decision within ten work days after receipt of the notice. If a grantee fails to act on the application by the end of the 30 days period which grantees have to review applications, the current or prospective delegate agency may appeal to the grantee, in writing, within 15 work days of the end of the 30 day grantee review period.

(c) A grantee must notify a delegate agency in writing of its decision to terminate its agreement with the delegate agency, explaining the reasons for its decision and that the delegate agency has the right to appeal the decision to the grantee within ten work days after receipt of the notice.

(d) The grantee has 20 days to review the written appeal and issue its decision. If the grantee sustains its

earlier termination of an award or its rejection of an application, the current or prospective delegate agency then may appeal, in writing to the responsible HHS official. The appeal must be submitted to the responsible HHS official within ten work days after the receipt of the grantee's final decision. The appeal must fully set forth the grounds for the appeal.

(e) A grantee may not reject the application or terminate the operations of a delegate agency on the basis of defects or deficiencies in the application or in the operation of the program without first:

(1) Notifying the delegate agency of the defects and deficiencies;

(2) Providing, or providing for, technical assistance so that defects and deficiencies can be corrected by the delegate agency; and

(3) Giving the delegate agency the opportunity to make appropriate corrections.

(f) An appeal filed pursuant to a grantee failing to act on a current or prospective delegate agency's application within a 30 day period need only contain a copy of the application, the date filed, and any proof of the date the grantee received the application. The grantee shall have five days in which to respond to the appeal.

(g) Failure to appeal to the grantee regarding its decision to reject an application, terminate an agreement, or failure to act on an application shall bar any appeal to the responsible HHS official.

§ 1303.21 Procedures for appeal by current or prospective delegate agencies to the responsible HHS official from denials by grantees of an application or failure to act on an application.

(a) Any current or prospective delegate agency that is dissatisfied with the decision of a grantee rendered under § 1303.20 may appeal to the responsible HHS official whose decision is final and not appealable to the Commissioner, ACYF. Such an appeal must be in writing and it must fully set forth the grounds for the appeal and be accompanied by all documentation that the current or prospective delegate agency believes is relevant and supportive of its position, including all written material or documentation submitted to the grantee under the procedures set forth in § 1303.20, as well as a copy of any decision rendered by the grantee. A copy of the appeal and all material filed with the responsible HHS official must be simultaneously served on the grantee.

(b) In providing the information required by paragraph (a) of this section, delegate agencies must set forth:

(1) Whether, when and how the grantee advised the delegate agency of alleged defects and deficiencies in the delegate agency's application or in the operation of its program prior to the grantee's rejection or termination notice;

(2) Whether the grantee provided the delegate agency reasonable opportunity to correct the defects and deficiencies, the details of the opportunity that was given and whether or not the grantee provided or provided for technical advice, consultation, or assistance to the current delegate agency concerning the correction of the defects and deficiencies;

(3) What steps or measures, if any, were undertaken by the delegate agency to correct any defects or deficiencies;

(4) When and how the grantee notified the delegate agency of its decision;

(5) Whether the grantee told the delegate agency the reasons for its decision and, if so, how such reasons were communicated to the delegate agency and what they were;

(6) If it is the delegate agency's position that the grantee acted arbitrarily or capriciously, the reasons why the delegate agency takes this position; and

(7) Any other facts and circumstances which the delegate agency believes supports its appeal.

(c) The grantee may submit a written response to the appeal of a prospective delegate agency. It may also submit additional information which it believes is relevant and supportive of its position.

(d) In the case of an appeal by a delegate agency, the grantee must submit a written statement to the responsible HHS official responding to the items specified in paragraph (b) of this section. The grantee must include information that explains why it acted properly in arriving at its decision or in failing to act, and any other facts and circumstances which the grantee believes supports its position.

(e)(1) The responsible HHS official may meet informally with the current or prospective delegate agency if such official determines that such a meeting would be beneficial to the proper resolution of the appeal. Such meetings may be conducted by conference call.

(2) An informal meeting must be requested by the current or prospective delegate agency at the time of the appeal. In addition, the grantee may request an informal meeting with the responsible HHS official. If none of the parties request an informal meeting, the responsible HHS official may hold such a meeting if he or she believes it would be beneficial for a proper resolution of the dispute. Both the grantee and the current or prospective delegate agency may attend any informal meeting concerning the appeal. If a party wishes to oppose a request for a meeting it must serve its opposition on the responsible HHS official and any other party within five work days of its receipt of the request.

(f) A grantee's response to appeals by current or prospective delegate agencies must be submitted to the responsible HHS official within ten work days of receipt of the materials served on it by the current or prospective delegate agency in accordance with paragraph (a) of this section. The grantee must serve a copy of its response on the current or prospective delegate agency.

(g) The responsible HHS official shall notify the current or prospective delegate agency and the grantee whether or not an informal meeting will be held. If an informal meeting is held, it must be held within ten work days after the notice by the responsible HHS official is mailed. The responsible HHS official must designate either the Regional Office or the place where the current or prospective delegate agency or grantee is located for holding the informal meeting.

(h) If an informal meeting is not held, each party shall have an opportunity to reply in writing to the written statement submitted by the other party. The written reply must be submitted to the responsible HHS official within five work days after the notification required by paragraph (g) of this section. If a meeting is not to be held, notice of that fact shall be served on the parties within five work days of the receipt of a timely response to such a request, or the expiration of the time for submitting a response to such a request.

(i) In deciding an appeal under this section, the responsible HHS official will arrive at his or her decision by considering:

(1) The material submitted in writing and the information presented at any informal meeting;

(2) The application of the current or prospective delegate agency;

(3) His or her knowledge of the grantee's program as well as any evaluations of his or her staff about the grantee's program and current or prospective delegate agency's application and prior performance;

(4) Any other evidence deemed relevant by the responsible HHS official.

§ 1303.22 Decision on appeal in favor of grantee.

(a) If the responsible HHS official finds in favor of the grantee, the appeal will be dismissed unless there is cause to remand the matter back to the grantee.

(b) The grantee's decision will be sustained unless it is determined by the responsible HHS official that the grantee acted arbitrarily, capriciously, or otherwise contrary to law, regulation, or other applicable requirements.

(c) The decision will be made within ten work days after the informal meeting. The decision, including a statement of the reasons therefore, will be in writing, and will be served on the parties within five work days from the date of the decision by the responsible HHS official.

(d) If the decision is made on the basis of written materials only, the decision will be made within five work days of the receipt of the materials. The decision will be served on the parties no more than five days after it is made.

§ 1303.23 Decision on appeal in favor of the current or prospective delegate agency.

(a) The responsible HHS official will remand the rejection of an application or termination of a current or prospective delegate agency's agreement to the grantee for prompt reconsideration and decision if the responsible HHS official's decision does not sustain the grantee's decision, and if there are issues which require further development before a final decision can be made. The grantee's reconsideration and decision must be made in accordance with all applicable requirements of this part as well as other relevant regulations, statutory provisions, and program issuances. The grantee must issue its decision on remand in writing to both the current or prospective delegate agency and the responsible HHS official within 15 work days after the date of receipt of the remand.

(b) If the current or prospective delegate agency is dissatisfied with the grantee's decision on remand, it may appeal to the responsible HHS official within five work days of its receipt of that decision. Any such appeal must comply with the requirements of § 1303.21 of this part.

(c) If the responsible HHS official finds that the grantee's decision on remand is incorrect or if the grantee fails to issue its decision within 15 work days, the responsible HHS official will entertain an application by the current or prospective delegate agency for a direct grant.

(1) If such an application is approved, there will be a commensurate reduction in the level of funding of the grantee and whatever other action is deemed appropriate in the circumstances. Such reduction in funding shall not be considered a termination or denial of refunding and may not be appealed under this part.

(2) If such an application is not approved, the responsible HHS official will take whatever action he or she deems appropriate under the circumstances.

(d) If, without fault on the part of a delegate agency, its operating funds are exhausted before its appeal has been decided, the grantee will furnish sufficient funds for the maintenance of the delegate agency's current level of operations until a final administrative decision has been reached.

(e) If the responsible HHS official sustains the decision of the grantee following remand, he or she shall notify the parties of that fact within 15 work days of the receipt of final submittal of documents, or of the conclusion of any meeting between the official and the parties, whichever is later.

(Catalog of Federal Domestic Assistance Program Number 93.600, Project Head Start)

Dated: September 3, 1991.

Jo Anne B. Barnhart,

Assistant Secretary for Children and Families.

Approved: October 22, 1991.

Louis W. Sullivan,

Secretary.

[FR Doc. 92-1940 Filed 1-28-92; 8:45 am]

BILLING CODE 4130-01-M

Notices

Federal Register
Vol. 57, No. 19
Wednesday, January 29, 1992

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

Food Safety and Inspection Service

[Docket No. 90-019N]

Policy Change; Oversight of Poultry Custom Exempt Establishments

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of policy change.

SUMMARY: The Food Safety and Inspection Service (FSIS) is changing its policy regarding the oversight, in designated States, of poultry custom exempt establishments, i.e., establishments that only conduct poultry custom exempt activities and are not subject to the routine inspection requirements of the Poultry Products Inspection Act (PPIA). The change in policy will result in the discontinuance of the current quarterly reviews of such establishments. Instead, FSIS will vary the frequency of reviews of such establishments and will intensify its review efforts on those custom exempt poultry establishments with a history of noncompliance with the custom exempt requirements of the PPIA, as well as the adulteration and misbranding provisions of the PPIA. FSIS is not, however, changing its review process for custom exempt operations which are conducted at federally inspected establishments.

EFFECTIVE DATE: February 28, 1992.

FOR FURTHER INFORMATION CONTACT: Dr. Lester Nordyke, Director, Federal-State Relations, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 720-6313.

SUPPLEMENTARY INFORMATION:

Background

Section 15 of the PPIA (21 U.S.C. 464) provides that certain specified slaughtering and preparation operations, referred to herein as custom exempt activities, that are conducted at establishments that conduct such operations for commerce, are not subject to the routine inspection requirements of the PPIA, provided that the specified slaughtering and preparation operations meet the requirements set forth in section 15 of the PPIA and the regulations promulgated thereunder. When these custom exempt activities comprise the total business of an establishment, the establishment is not subject to the routine inspection requirements of the PPIA. However, although these custom exempt activities are not subject to the routine inspection requirements of the PPIA, they are subject to the adulteration and misbranding provisions of the PPIA.

In particular, section 15(c) of the PPIA (21 U.S.C. 464(c)) provides that custom operations conducted at an establishment that conducts such operations for commerce are not subject to the routine inspection requirements of the PPIA, if the establishment complies with the regulations promulgated under that section (9 CFR 381.10(a)(4)), which provide, among other things, that: (1) Custom-exempt activities must be conducted under sanitary conditions; (2) custom prepared product must bear the owner's name and address and the statement "Exempted—Public Law 90-492"; (3) the custom slaughter by any person must be of poultry delivered by the owner thereof for such slaughter, and the processing by such slaughterer and transportation in commerce of the poultry products must be exclusively for use, in the household of such owner, by him and members of his household and his nonpaying guests and employees, and (4) the custom slaughterer does not engage in the business of buying or selling any poultry products capable of use as human food.

The custom exempt provisions of section 15(c) of the PPIA (21 U.S.C. 464(c)) also apply to custom exempt activities conducted at establishments that conduct their operations solely within a State designated for Federal inspection, either because it does not have or is not effectively enforcing an inspection program which imposes requirements at least equal to those of the PPIA. In nondesignated States, i.e., States that operate their own inspection programs, custom exempt activities conducted at establishments that operate solely within that State are governed by the laws of the nondesignated State. However, such States must provide for and effectively enforce State inspection programs that impose requirements which are at least equal to those of the PPIA.

FSIS conducted an in-depth study of its custom exempt activities in red meat custom exempt establishments and in February 1986, issued a report titled "Oversight of Custom Exempt Activities".[1] The study was conducted to assess the effectiveness and uniformity of procedures utilized in regard to red meat custom exempt activities and to develop options and recommendations for improving the oversight of red meat custom exempt activities. As a result of this study, the Agency concluded that the practice of conducting quarterly reviews of red meat custom exempt establishments, referred to in the study as custom exempt plants, was an inefficient use of Agency resources. With rapidly escalating inspection costs and severe budget constraints, FSIS is compelled to make the most efficient use possible of its limited resources, while at the same time continuing to protect the health and welfare of consumers. Therefore, on December 14, 1988, FSIS published a notice in the Federal Register (53 FR 50273) which announced that, instead of quarterly reviews, red meat custom exempt establishments would be reviewed on a risk basis. That is, Agency resources would be allocated to focus more frequently upon those red meat custom exempt establishments that present the greatest possible amount of potential risk to consumers in regard to violating the adulteration, misbranding, or custom exempt provisions of the FMIA (21 U.S.C. 623).

The Agency has determined that custom exempt poultry establishments will also be reviewed on the same risk basis as red meat custom exempt establishments. Since poultry custom exempt establishments are subject to sanitation, adulteration, and misbranding provisions which are similar to those applicable to red meat custom exempt establishments, the Agency is convinced that a similar risk based review system, which has proven

[1] A copy of the study is on display with the FSIS Hearing Clerk, Policy Office, room 3171, South Building, U.S. Department of Agriculture, Washington, DC 20250. Upon request, a copy of the study will be provided free of charge.

to be effective in red meat custom exempt establishments, will be equally effective for reviewing custom exempt poultry establishments.

FSIS will institute an oversight program that will provide for reviews to be scheduled on the basis of a risk assessment of each poultry custom exempt establishment. The frequency of the reviews will be based on the establishment's history of compliance with the custom exemption, adulteration and misbranding provisions of the PPIA, prior reviews, and other information which may be available to FSIS on the establishment's activities. Based on this information, poultry custom exempt establishments will be assigned one of four risk categories. The number of reviews of each establishment will range from a minimum of once a year to once every quarter of a year, with follow-up reviews as necessary depending on the risk category of the establishment.

The four risk categories are differentiated on the basis of risk to public health and/or failure on the part of poultry custom exempt establishments to comply with adulteration and misbranding provisions of the PPIA and the sanitation requirements of the Federal poultry products inspection regulations.

Establishments will receive a Risk Category 1 designation if, upon review, at least one critical deficiency is found, or the owner/operator continuously fails to correct deficiencies. Critical deficiencies are those that are certain to result in adulterated product entering commerce. Risk Category 1 establishments will be reviewed at least quarterly with a follow-up review within 5 days to determine the acceptability of the corrective action. Additional follow-up review may be made if FSIS determines it is necessary.

Establishments will be designated as Risk Category 2 if, upon review, at least one major deficiency is found. Major deficiencies are those that are likely to result in adulterated product entering commerce. Establishments designated as Risk Category 2 will be reviewed quarterly, with a follow-up on required corrective actions during the next quarterly review to determine that corrective action has been taken.

Establishments designated as Risk Category 3 will be reviewed biannually. These establishments have been found, upon review, to have only minor deficiencies. Minor deficiencies are those that are not likely to result in adulterated product entering commerce.

Establishments designated as Risk Category 4 have been found, upon review, to have no deficiencies. Such establishments will be reviewed annually.

By using a risk-based assessment of poultry custom exempt establishments, the Agency will be able to conduct more frequent reviews of those establishments with a history of noncompliance with the requirements for custom exempt establishments under the PPIA, as well as the adulteration and misbranding provisions of the PPIA.

Under Section 5 of the PPIA (21 U.S.C. 454), the Secretary of Agriculture is authorized, whenever he determines that it would effectuate the purposes of the PPIA, to cooperate with the appropriate State agencies in developing and administering State poultry inspection programs that have requirements that are at least equal to those under the PPIA. Under such cooperative agreements, the Federal Government is authorized to contribute up to 50 percent of the estimated total cost of the State program. States that are approved to participate in such a cooperative program maintain a State poultry inspection program and as part of this program conduct reviews of State establishments that are exempt from inspection under the State laws and regulations. Such reviews are conducted in a manner that is at least "equal to" reviews conducted under the Federal inspection program.

States with their own poultry inspection program will continue their review of poultry custom exempt establishments under the existing cooperative agreements with the Department.

California and Minnesota, which do not operate State inspection programs, and are therefore designated States, presently are conducting compliance reviews of custom exempt establishments in those States under a cooperative agreement with FSIS in accordance with the provisions of 7 U.S.C. 450. Under these cooperative agreements, FSIS reimburses the States for the expenses of reviews. These agreements will be revised to incorporate a risk-based approach to review of poultry custom exempt establishments. FSIS encourages the Governors of any States who desire to enter into a cooperative agreement for conducting compliance reviews of poultry custom exempt establishments that distribute product solely within their borders to contact the appropriate FSIS regional office reviewing custom exempt establishments in their States.

Implementation of this alternate approach to determining the frequency of reviews of custom exempt poultry establishments will not in any way relieve poultry custom exempt establishments of the responsibility to comply with currently applicable provisions of the PPIA and regulations thereunder. The Agency intends to use all its available enforcement tools, where appropriate, to assure that poultry custom exempt establishments comply with all of the applicable provisions of the PPIA and regulations. Such enforcement actions can include, under appropriate circumstances: The detention of poultry and poultry products; the retention of poultry and poultry products and their condemnations, the seizing and condemnation of poultry and poultry products pursuant to judicial procedure; the use of injunctions to prevent establishments from operating in violation of the PPIA and regulations issued thereunder; the institution of criminal action against establishments, their operators and other persons responsibly connected to the establishment; and the removal of exempt status from the establishment.

FSIS would also like to make it clear at this time that when custom exempt establishments that operate in commerce or within a designated State violate the provisions of section 15(c) of the PPIA, they lose their exempt status and can no longer produce product without inspection.

Done at Washington, DC, on: November 25, 1991.

Ronald J. Prucha,

Acting Administrator.

[FR Doc. 92–2091 Filed 1–28–92; 8:45 am]

BILLING CODE 3410–DM–M

DEPARTMENT OF COMMERCE

Agency Form Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of Export Administration.

Title: Service Supply Procedure.

Form Numbers(s): BXA-6026P and EAR Section 773.3.

OMB Approval Number: 0694–0002.

Type of Request: Revision of a currently approved collection.

Burden: 344 hours.

Number of Respondents: 190.

Avg Hours Per Response: Varies between 25 minutes and 3 hours.

Needs and Uses: The Service Supply License Procedure provides U.S. firms with a means to render prompt service

for equipment a) previously exported from the U.S., b) produced abroad by a subsidiary, affiliate or branch of a U.S. firm, or c) produced with U.S. parts included in the manufactured product.

Affected Public: Businesses or other for-profit institutions; small businesses or organizations.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: Gary Waxman, (202) 395–7340.

Copies of the above information collection proposal can be obtained by calling or writing Edward Michals, DOC Forms Clearance Officer, (202) 377–3271, Department of Commerce, room 5312, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Gary Waxman, OMB Desk Officer, room 3208, New Executive Office Building, Washington, DC 20503.

Dated: January 23, 1992.

Edward Michals,

Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 92–2099 Filed 1–28–92; 8:45 am]

BILLING CODE 3510–CW–F

National Oceanic and Atmospheric Administration

Permits; Foreign Fishing

In accordance with a memorandum of understanding with the Department of State, the National Marine Fisheries Service, on behalf of the Secretary of State, publishes for public review and comment a summary of applications received by the Secretary of State requesting permits for foreign fishing vessels to operate in the Exclusive Economic Zone (EEZ) under provisions of the Magnuson Fishery Conservation and Management Act (Magnuson Act, 16 U.S.C. 1801 *et seq.*). Specifically, the Russian Federation has amended an earlier application (reported at 57 FR 2711; 01/23/92) to additionally request 3,000 metric tons of Atlantic mackerel for directed fishing in the Northwest Atlantic Ocean (NWA). The Russian Federation has also requested authorization for the factory ship SERGEY VASILISIN to conduct transshipment and bunkering operations in the NWA area with other Russian Federation support vessels (the SERGEY VASILISIN intends to process fish in internal waters when not transshipping or bunkering in the EEZ). Send comments on these applications to: NOAA—National Marine Fisheries Service, Office of Fisheries Conservation and Management, 1335 East West Highway, Silver Spring, MD 20910, and/or, to one or both of the Regional Fishery Management Councils listed below:

Douglas G. Marshall, Executive Director, New England Fishery Management Council, 5 Broadway (Route 1), Saugus, MA 01906; 617/231–0422;

John C. Bryson, Executive Director, Mid-Atlantic Fishery Management Council, Federal Building, room 2115, 320 South New Street, Dover, DE 19901, 302/674–2331.

For further information contact John D. Kelly or Robert A. Dickinson (Office of Fisheries Conservation and Management, 301–713–2337).

Dated: January 23, 1992.

David S. Crestin,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 92–2146 Filed 1–28–92; 8:45 am]

BILLING CODE 3510–22–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of Import Restraint Limits for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in Macau; Correction

January 23, 1992.

In the letter to the Commissioner of Customs published in the **Federal Register** on November 5, 1991 (56 FR 56506), third column, make the following corrections in the table under "Twelve-month restraint limit" for the following categories:

Category	Correction
239	Change 93,387 kilograms to 92,903 kilograms.
342	Change 39,326 dozen to 39,281 dozen.
349	Change 145,833 dozen to 146,322 dozen.
352	Change 66,636 dozen to 63,618 dozen.
636	Change 15,453 dozen to 15,443 dozen.
649	Change 145,833 dozen to 146,322 dozen.
651	Change 13,462 dozen to 13,455 dozen.
434	Change 1,852 dozen to 1,854 dozen.
438	Change 6,667 dozen to 6,689 dozen.
442	Change 5,556 dozen to 5,574 dozen.

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 92–2098 Filed 1–28–92; 8:45 am]

BILLING CODE 3510–DR–F

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 92–C0001]

Hamilton Beach/Proctor-Silex, Inc., a Corporation, Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Provisional acceptance of a settlement agreement under the Consumer Product Safety Act.

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the Federal Register in accordance with the terms of 16 CFR part 1118.20(e). Published below is a provisionally-accepted Settlement Agreement with Hamilton Beach/Proctor-Silex, Inc., a corporation.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by February 13, 1992.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to Comment 92–C0001, Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

FOR FURTHER INFORMATION CONTACT: Melvin Kramer, Trial Attorney, Directorate for Compliance and Administrative Litigation, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504–0626.

SUPPLEMENTARY INFORMATION: See Settlement Agreement and Order which follow.

Dated: January 23, 1992.

Sheldon D. Butts,

Deputy Secretary.

1. This Settlement Agreement, made by and between Hamilton Beach/Proctor-Silex, Inc. a corporation, (hereinafter "Hamilton Beach" or "the Company") as successor in interest to Hamilton Beach, Inc., and the staff of the Consumer Product Safety Commission (hereinafter, "staff"), is a compromise resolution of the staff allegations described herein, without a

hearing or determination of issues of law and fact.

2. The provisions of this Settlement Agreement and Order shall apply to Hamilton Beach and to each of its successors and assigns.

I. The Parties

3. Hamilton Beach is a corporation organized and existing under the laws of the State of Delaware with its principal corporate offices located at 4421 Waterfront Driver, Glen Allen, VA 23060. Hamilton Peach, Inc. was merged into and became part of Hamilton Beach/Proctor-Silex, Inc. on October 11, 1990, after the alleged reporting violation which is the subject of this Settlement Agreement.

4. The "staff" is the staff of the Consumer Product Safety Commission, an independent regulatory Commission of the United States of America (hereinafter "Commission") created pursuant to section 4 of the Consumer Product Safety Act (hereinafter, "CPSA"), as amended, 15 U.S.C. 2053.

II. Jurisdiction

5. Hamilton Beach manufactured certain drip coffee makers identified further in paragraph 7 below (hereinafter, "coffee makers"), (a) for sale to a consumer for use in or around a permanent or temporary household or residence, or (b) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence. These coffee makers are "consumer products" within the meaning of section 3(a)(1), of the CPSA, 15 U.S.C. 2052(a)(1).

6. Hamilton Beach manufactured and sold these coffee makers to a variety of retailers throughout the United States. Hamilton Beach, therefore, is a "manufacturer" of a "consumer product" which is "distributed in commerce," as those terms are defined in sections 3(a)(1), (4) and (11) of the CPSA, 15 U.S.C. 2052(a)(1), (4) and (11).

III. The Product

7. From November 1987—November 1988, Hamilton Beach manufactured and distributed in commerce approximately 42,000 coffee makers, model numbers 816–2 and 816–3.

IV. Staff Allegations Regarding Hamilton Beach's Failure To Comply with the Reporting Requirements of Section 15(b) of the CPSA

8. On February 23, 1990, the Company reported to the Commission, pursuant to section 15(b) of the CPSA, a defect in the analog clock, made by another manufacturer and installed in each of its model number 816–2 and 816–3 coffee makers manufactured between November 1987 and November 1988. It reported that the contacts in the clock switches could overheat and ignite possibly resulting in ignition of the switch's plastic housing and ultimately the coffee maker's housing. Such ignition could spread to the adjacent cabinet or counter top.

9. Before reporting to the staff, the staff alleges that Hamilton Beach was aware of approximately 24 incidents of product failure, beginning in May of 1988. One incident reportedly resulted in a burn injury to the hands. The rest caused only property damage.

10. The staff is presently aware of a total of 35–38 incidents.

11. In addition, the staff alleges that Hamilton Beach had conducted an investigation in September of 1988 in an attempt to ascertain the causes of a substantial rate of failures of the analog clocks which were evidencing signs of scorching.

12. The staff further alleges that Hamilton Beach possessed sufficient information well in advance of the February 23, 1990, reporting date to reasonably support the conclusion that these coffee makers contained a defect which could create a substantial product hazard but failed to report that information to the Commission in a timely manner as required by Section 15(b) of the CPSA, 15 U.S.C. 2064(b).

V. Response of Hamilton Beach

13. Hamilton Beach specifically denies the staff allegations. Hamilton Beach further denies that its models 816–2 and 816–3 coffee makers contain a defect and denies that a substantial product hazard exists in these coffee makers.

VI. Agreement of the Parties

14. Hamilton Beach and the staff agree that the Commission has jurisdiction in this matter over Hamilton Beach and over the coffee makers.

15. Without admitting the existence of a product defect, substantial product hazard, or a violation of any reporting requirements under section 15(b) of the CPSA, 15 U.S.C. 2064(b), Hamilton Beach agrees to pay to the Commission, in accordance with the attached order, a civil penalty sum of $50,000 within 20 days of the final acceptance of this Settlement Agreement and service of the Commission's Order on Hamilton Beach. This Settlement Agreement is based on the staff's allegations set forth in paragraphs 8–12 above and on Hamilton Beach's denials set forth in paragraph 13 above, on the basis of the information that the Commission staff currently possess concerning these coffee makers.

16. Upon final acceptance of this Settlement Agreement by the Commission, Hamilton Beach knowingly, voluntarily and completely, waives any rights it may have in this matter (1) to an administrative or judicial hearing, (2) to judicial review or other challenge or contest of the validity of the Commission's actions, (3) to a determination by the Commission whether a violation has occurred, and (4) to a statement of findings of fact and conclusions of law. Should the Commission decide not to accept and adopt this Settlement Agreement and Order, the Settlement Agreement and Order shall have no force and effect.

17. Solely for purposes of disclosure pursuant to section 6(b) of the CPSA, 15 U.S.C. 2055(b), this matter shall be treated as if a Complaint had been issued and the Settlement Agreement and Order will be made available to the public.

18. Upon provisional acceptance of this Settlement Agreement and Order by the Commission, this Settlement Agreement and Order shall be placed on the public record and the provisional acceptance of the Agreement shall be announced in the **Federal Register** in accordance with the procedure set forth in 16 CFR 1118.20(e). If the Commission does not receive any written request not to accept the Settlement Agreement and Order within 15 days, the Settlement Agreement and Order will be deemed finally accepted on the 16th day after the date of the announcement in the **Federal Register** in accordance with 16 CFR 1118.20(f).

19. Upon final Commission acceptance of this Settlement Agreement and Order, the Commission shall enter the incorporated Order and make the Settlement Agreement and Order available for public review at the Office of Secretary, Consumer Product Safety Commission. This Settlement Agreement and Order becomes effective only upon such final acceptance by the Commission and service upon Hamilton Beach.

20. The Settlement Agreement and the Order resolve all issues that have arisen or could arise under section 15(b) of the Consumer Product Safety Act, with respect to the allegations contained in Paragraphs 7–12, *supra*, the denials of Hamilton Beach in paragraph 13, *supra*, and are in addition to and not to the exclusion of other remedies under the Consumer Produce Safety Act.

21. The parties further agree that the incorporated Order be issued under the CPSA, 15 U.S.C. 2051 *et seq.*, and that a violation of the Order will subject Hamilton Beach to appropriate legal action.

22. No agreement, understanding, representation, or interpretation not contained in this Settlement Agreement and Order may be used to vary or to contradict its terms.

23. Nothing in this Agreement should be construed as limiting Hamilton Beach's obligation to report pursuant to Section 15(b) of the CPSA.

Hamilton Beach/Proctor-Silex, Inc.

Dated November 18, 1991.

A. H. Dreyfuss,

Chief Executive Officer, Hamilton Beach/Proctor-Silex, Inc.

The Consumer Product Safety Commission.

Dated: November 25, 1991.

Melvin I. Kramer,

Trail Attorney, Office of Compliance and Enforcement.

David Schmeltzer,

Assistant Executive Director, Office of Compliance and Enforcement.

Alan H. Schoem,

Director, Division of Administrative Litigation, Office of Compliance and Enforcement.

Upon consideration of the Settlement Agreement; and the Commission having jurisdiction over the subject matter and the respondents to the Settlement Agreement; and it appearing the Settlement Agreement is in the public interest, it is

Ordered, That the Settlement Agreement be and hereby is accepted, as indicated below; and it is

Further Ordered, That upon final acceptance of the Settlement Agreement, Hamilton Beach/Proctor-Silex, Inc. (hereinafter, "Hamilton Beach") shall pay to the Order of the Consumer Product Safety Commission a civil penalty in the amount of $50,000, within twenty (20) days after receipt of the Final Order and Decision in this matter.

Provisionally accepted and Provisional Order issued on the 23d day of January, 1992.

By Order of the Commission.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 92–2097 Filed 1–28–92; 8:45 am]

BILLING CODE 6355–01–M

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

Per Diem, Travel and Transportation Allowance Committee

AGENCY: Per Diem Travel and Transportation Allowance Committee.

ACTION: Publication of changes in Per Diem Rates: Correction, Bulletin Number 159.

SUMMARY: This notice corrects the previous publication of per diem rate changes of the Per Diem, Travel and Transportation Allowances Committee that appeared in the **Federal Register** on Friday, January 10, 1992 (57 FR 1149).

The rate for American Samoa, appearing on page 1152, was incorrectly printed in Civiliam Personnel Per Diem Bulletin 159. The correct rate is $85 for maximum lodging and $132 for total maximum per diem rate. All other information remains unchanged.

Dated: January 24, 1992.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 92–2108 Filed 1–28–92; 8:45 am]

BILLING CODE 3810–01–M

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: Defense FAR Supplement, Part 237, Service Contracts, and the clause at 252.237–7011; OMB Control Number 0704–0231.

Type of Request: Reinstatement.

Average Burden Hours/Minutes per Response: 1 hour.

Responses per Respondent: 1.

Number of Respondents: 500.

Annual Burden Hours: 500.

Annual Responses: 500.

Needs and Uses: Defense FAR Supplement (DFARS) part 237 concerns information collection requirements associated with acquiring Mortuary Services.

Affected Public: Businesses or other for-profit and Small Businesses or Organizations.

Frequency: On Occasion.

Responsents Obligation: Required to obtain or retain a benefit.

Desk Officer: Mr. Peter Weiss.

Written comments and recommendations on the proposes information collection should be sent to Mr. Weiss at the Office of Management and Budget, Desk Officer for DOD, room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. William P. Pearce.

Written requests for copies of the information collection proposal should be sent to Mr. Pearce, WHS/DIOR, 1215 Davis Highway, suite 1204, Arlington, Virginia, 22202–4302.

Dated: January 24, 1992.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 92–2107 Filed 1–28–92; 8:45 am]

BILLING CODE 3810–01–M

Department of the Air Force

USAF Scientific Advisory Board; Meeting

The USAF Scientific Advisory Board's Committee on Technology to Support Force Projection: Global Reach—Global Power will meet on 3–4 February 1992, at The Pentagon, room 5D982, Washington, DC, from 8 a.m. to 5 p.m.

The purpose of this meeting is to review the tasking, deliberate findings and develop a study plan for the remainder of the study.

The meeting will be closed to the public in accordance with section 552b(c) of Title 5, United States Code, specifically subparagraphs (1) and (4) thereof.

For further information, contact the Scientific Advisory Board Secretariat at (703) 697–4811.

Patsy J. Conner,

Air Force Federal Register, Liaison Officer.

[FR Doc. 92–2110 Filed 1–28–92; 8:45 am]

BILLING CODE 3910–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER92–126–000, et al]

Pennsylvania Power Company, et al.; Electric Rate, Small Power Production, and Interlocking Directorate Filings

Take notice that the following filings have been made with the Commission:

1. Pennsylvania Power Co.

[Docket No. ER92-126-000]

January 21, 1992.

Take notice that on January 15, 1992, Pennsylvania Power Company (Penn Power) filed supplemental Information In Support of Rate Filing of October 18, 1991. This filing does not seek to change the level or application of proposed October 18, 1991 rates, but only provides additional cost support for the prior submittal.

On October 18, 1991, Penn Power pursuant to 18 CFR 35.13 tendered for filing proposed changes in its FPC Electric Service Tariffs Nos. 30, 31, 32, 33 and 34 to the Pennsylvania Boroughs (Boroughs) of New Wilmington, Wampum, Zelienople, Ellwood City and Grove City, respectively. The filing proposed an increase in the State Tax Adjustment Surcharge (Rider 1) to 3.21% effective August 24, 1991. The revenue effect of this change is to increase revenues from the municipal resale class by $262,401 or 3.15% for the test year ending July 31, 1992.

The five municipal resale customers served by Penn Power entered into settlement agreements effective as of September 1, 1984. These settlement agreements were approved by the Federal Energy Regulatory Commission through a Secretarial Letter dated December 14, 1984 in Docket Nos. ER77-277-007 and ER81-779-000. The customers have consented to the Supplemental Information through the provisions of the settlement agreements. The Company in submitting the Supplemental Information has renewed its requests for waiver of certain filing requirements originally requested in its October 18, 1991 filing.

Copies of the filing were served upon Penn Power's jurisdictional customers.

Comment date: February 4, 1992, in accordance with Standard Paragraph E at the end of this notice.

2. Arkansas Power & Light Co.

[Docket No. ER92-277-000]

January 21, 1992.

Take notice that on January 16, 1992, Arkansas Power & Light Company (AP&L) submitted for filing the Second Amendment to the Power Agreement Between the City of North Little Rock, Arkansas and AP&L and the First Amendment to the Agreement for Hydroelectric Power Transmission and Distribution Service Between AP&L and the City of North Little Rock, Arkansas. The Amendments provide for the addition of one point of delivery.

AP&L requests that the Commission waive any requirements with which AP&L has not already complied.

Comment date: February 4, 1992, in accordance with Standard Paragraph E at the end of this notice.

3. The Detroit Edison Co.

[Docket No. ER92-180-000]

January 21, 1992.

Take notice that on January 13, 1992, The Detroit Edison Company (Detroit Edison) submitted additional information requested by the Commission Staff concerning Original Sheet No. 10a to Detroit Edison's FERC Electric Tariff, Volume No. 1, which is a rate scheduling providing for the sale of capacity and energy on a firm and interruptible basis to the City of Detroit, Michigan. Detroit Edison requests an effective date of January 1, 1992, for the proposed service under Original Sheet No. 10a and accordingly, has requested waiver of the Commission's notice requirements.

Comment date: February 4, 1992, in accordance with Standard Paragraph E at the end of this notice.

4. Oklahoma Gas and Electric Co.

[Docket No. ER92-276-000]

January 21, 1992.

Take notice that on January 15, 1992, Oklahoma Gas and Electric Company (OG&E) tendered for filing a set of two Amended Appendices between (OG&E) and the Oklahoma Municipal Power Authority (OMPA).

The Amendments modify the Transmission Service Agreement Appendix "A", and Appendix "D".

Copies of this filing have been served on OMPA, the Oklahoma Corporation Commission, and the Arkansas Public Service Commission.

Comment date: February 4, 1992, in accordance with Standard Paragraph E at the end of this notice.

5. PacifiCorp Electric Operations

[Docket No. ER92-275-000]

January 21, 1992.

Take notice that PacifiCorp Electric Operations (PacifiCorp), on January 14, 1992, tendered for filing Amendment No. 1, dated January 3, 1992, (Amendment) to Firm Transmission Service Agreement dated November 9, 1989 with Montana Power Company (Montana).

The Amendment changes the date of Contract Demand of 30 MW.

PacifiCorp requests that an effective date of April 1, 1992 be assigned to the Amendment. This date is consistent with the change in date of Contract Demand of 30 MW.

Copies of this filing were supplied to Montana, Black Hills Power and Light Company, the Montana Public Service Commission, the Public Utility Commission of Oregon and the Public Service Commission of Wyoming.

Comment date: February 4, 1992, in accordance with Standard Paragraph E end of this notice.

6. Mississippi Power Co.

[Docket No. ER92-122-000]

January 21, 1992.

Take notice that Mississippi Power Company, on January 15, 1992, tendered for filing a request waiver of the notice and filing requirement under Commission Rule 35.3(a).

The reason for the proposed changes are to permit the Company to serve all wholesale, all-requirements customers under its all requirements, wholesale tariff to Peal River Valley Electric Power Association.

Copies of this filing were served upon the public utility's jurisdictional customers and upon the Mississippi Public Service Commission.

Comment date: February 4, 1992, in accordance with Standard Paragraph E at the end of this notice.

7. Union Electric Co.

[Docket No. ER92-125-000]

January 21, 1992.

Take notice that Union Electric Company (Union) on January 10, 1992, tendered for filing an Amended Filing which included a Substitute Power Agreement dated June 14, 1991, with the City of Linneus, Missouri, providing for the sale of substitute electric service.

Union requests an effective date of June 14, 1991, and has included a Request for Waiver as part of its Amended Filing.

Comment date: February 4, 1992, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the

Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-2079 Filed 1-28-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. ST92-1048-000 Through ST92-1628-000]

Natural Gas Pipeline Co. of America; Notice of Self-Implementing Transactions

January 22, 1992.

Take notice that the following transactions have been reported to the Commission as being implemented pursuant to part 284 of the Commission's regulations, sections 311 and 312 of the Natural Gas Policy Act of 1978 (NGPA) and section 5 of the Outer Continental Shelf Lands Act.[1]

The "Recipient" column in the following table indicates the entity receiving or purchasing the natural gas in each transaction.

The "part 284 Subpart" column in the following table indicates the type of transaction.

A "B" indicates transportation by an interstate pipeline on behalf of an intrastate pipeline or a local distribution company pursuant to section 284.102 of the Commission's regulations and section 311(a)(1) of the NGPA.

A "C" indicates transportation by an intrastate pipeline on behalf of an interstate pipeline or a local distribution company served by an interstate pipeline pursuant to § 284.122 of the Commission's regulations and section 311(a)(2) of the NGPA.

A "D" indicates a sale by an intrastate pipeline to an interstate pipeline or a local distribution company served by an interstate pipeline pursuant to § 284.142 of the Commission's regulations and section 311(b) of the NGPA. Any interested person may file a complaint concerning such sales pursuant to § 284.147(d) of the Commission's Regulations.

An "E" indicates an assignment by an intrastate pipeline to any interstate pipeline or local distribution company pursuant to § 284.163 of the Commission's regulations and section 312 of the NGPA.

A "G" indicates transportation by an interstate pipeline on behalf of another interstate pipeline pursuant to § 284.222 and a blanket certificate issued under § 284.221 of the Commission's regulations.

A "G-S" indicates transportation by interstate pipelines on behalf of shippers other than interstate pipelines pursuant to § 284.223 and a blanket certificate issued under section 284.221 of the Commission's regulations.

A "G-LT" or "G-LS" indicates transportation, sales or assignments by a local distribution company on behalf of or to an interstate pipeline or local distribution company pursuant to a blanket certificate issued under § 284.224 of the Commission's regulations.

A "G-HT" or "G-HS" indicates transportation, sales or assignments by a Hinshaw Pipeline pursuant to a blanket certificate issued under § 284.224 of the Commission's regulations.

A "K" indicates transportation of natural gas on the Outer Continental Shelf by an interstate pipeline on behalf of another interstate pipeline pursuant to § 284.303 of the Commission's regulations.

A "K-S" indicates transportation of natural gas on the Outer Continental Shelf by an intrastate pipeline on behalf of shippers other than interstate pipelines pursuant to § 284.303 of the Commission's regulations.

Lois D. Cashell,

Secretary.

[1] Notice of a transaction does not constitute a determination that the terms and conditions of the proposed service will be approved or that the noticed filing is in compliance with the Commission's regulations.

Docket No. [1]	Transporter/seller	Recipient	Date filed	Part 284 subpart	Estimated maximum daily quantity [2]	Aff. Y/N	Rate schedule	Date commenced	Projected termination date
ST92-1048	Natural Gas P/L Co. of America	Midwest Gas, Div. of Iowa Pub. Ser.	12-02-91	B	40,000	N	F	11-01-91	07-01-00
ST92-1049	Natural Gas P/L Co. of America	Access Energy Corp	12-02-91	G-S	20,000	N	F	11-01-91	03-31-92
ST92-1050	Natural Gas P/L Co. of America	Midcon Marketing Corp	12-02-91	G-S	1,000	N	F	11-01-91	03-31-92
ST92-1051	Natural Gas P/L Co. of America	Tex/Con Gas Marketing Co	12-02-91	G-S	25,487	N	F	11-01-91	02-29-92
ST92-1052	Natural Gas P/L Co. of America	Enron Gas Marketing, Inc	12-02-91	G-S	60,000	N	F	11-01-91	10-31-93
ST92-1053	Natural Gas P/L Co. of America	Shell Gas Trading Co	12-02-91	G-S	10,000	N	F	11-01-91	12-31-96
ST92-1054	Natural Gas P/L Co. of America	Enron Gas Marketing, Inc	12-02-91	G-S	20,000	N	F	11-01-91	03-31-92
ST92-1055	Panhandle Eastern Pipe Line Co	Semco Energy Services, Inc	12-02-91	G-S	9,218	N	F	11-01-91	Indef.
ST92-1056	Superior Offshore Pipeline Co	Louisiana Gas System, Inc	12-02-91	B	10,000	N	I	11-01-91	Indef.
ST92-1057	Mississippi River Trans. Corp	Amoco Petroleum Additives Co	12-02-91	G-S	2,500	N	F	11-01-91	2-29-92
ST92-1058	Mississippi River Trans. Corp	Texarkoma Transportation Co	12-02-91	G-S	5,000	N	I	11-01-91	2-29-92
ST92-1059	Texas Gas Gathering Co	Mississippi River Trans. Corp	12-02-91	C	5,086	N	I	11-01-91	Indef.
ST92-1061	Williams Natural Gas Co	City of Orlando	12-02-91	B	14	N	F	11-01-91	Indef.
ST92-1062	Williams Natural Gas Co	Mannford Public Works Authority	12-02-91	B	54	N	F	11-01-91	Indef.
ST92-1063	Williams Natural Gas Co	Reliance Gas Marketing Co	12-02-91	G-S	10,416	N	F	11-01-91	Indef.
ST92-1064	Transcontinental Gas P/L Corp	Philadelphia Electric Co	12-02-91	B	155,000	N	I	05-07-90	10-09-90
ST92-1065	Transcontinental Gas P/L Corp	Transco Energy Marketing Co	12-02-91	B	1,000,000	Y	I	08-24-88	10-09-90
ST92-1066	Transcontinental Gas P/L Corp	Polaris Pipeline Corp	12-02-91	B	1,750,000	N	I	06-29-90	10-09-90
ST92-1067	Transcontinental Gas P/L Corp	Phoenix Diversified Ventures, Inc.	12-02-91	G-S	20,000	N	I	11-02-91	Indef.
ST92-1068	Transcontinental Gas P/L Corp	TXO Gas Marketing Corp	12-02-91	G-S	50,000	N	I	11-01-91	Indef.
ST92-1069	Transcontinental Gas P/L Corp	Gasmark, Inc	12-02-91	G-S	1,093,000	N	I	11-01-91	Indef.
ST92-1070	Texas Gas Transmission Corp	Memphis Light, Gas and Water Div.	12-02-91	G-S	125,000	N	F	11-03-91	Indef.
ST92-1071	Texas Gas Transmission Corp	Energy Marketing Exchange, Inc	12-02-91	G-S	100,000	N	I	11-15-91	Indef.
ST92-1072	Texas Gas Transmission Corp	Chevron U.S.A., Inc	12-02-91	G-S	50,000	N	I	11-09-91	Indef.
ST92-1073	Texas Gas Transmission Corp	Aquila Energy Marketing Corp	12-02-91	G-S	100,000	N	I	11-05-91	Indef.
ST92-1074	Texas Gas Transmission Corp	Arcadian Corp	12-02-91	G-S	50,000	N	I	11-08-91	Indef.
ST92-1075	Texas Gas Transmission Corp	TXG Gas Marketing Co	12-02-91	G-S	100,000	N	I	11-21-91	Indef.
ST92-1076	Tennessee Gas Pipeline Co	Chatanooga Gas Co	12-03-91	B	26,000	N	I	11-06-91	Indef.
ST92-1077	Colorado Interstate Gas Co	K N Energy, Inc	12-03-91	G-S	45,000	N	I	09-09-91	12-31-96

Docket No. [1]	Transporter/seller	Recipient	Date filed	Part 284 subpart	Estimated maximum daily quantity [2]	Aff. Y/N	Rate schedule	Date commenced	Projected termination date
ST92-1078	Mississippi River Trans. Corp	Flat River Glass Co	12-03-91	G-S	1,600	N	F	11-01-91	11-29-92
ST92-1079	Mississippi River Trans. Corp	Texas Gas Transmission Corp	12-03-91	G-S	150,000	N	I	11-15-91	03-14-92
ST92-1080	Tennessee Gas Pipeline Co	Paragon Gas Corp	12-04-91	G-S	40,000	N	I	11-08-91	Indef.
ST92-1081	Tennessee Gas Pipeline Co	Pennsylvania Gas & Water Co	12-04-91	B	10,000	N	I	11-05-91	Indef.
ST92-1082	Tennessee Gas Pipeline Co	Entrade Corp	12-04-91	G-S	1,310,000	N	I	11-07-91	Indef.
ST92-1083	ANR Pipline Co	Northern States Power Co.—Minn.	12-04-91	B	4,829	N	F	11-01-91	Indef.
ST92-1084	ANR Pipline Co	Gas Energy Development Co	12-04-91	G-S	20,000	N	I	11-04-91	Indef.
ST92-1085	ANR Pipline Co	Michigan Gas Utilities	12-04-91	B	200	N	F	11-01-91	Indef.
ST92-1086	ANR Pipline Co	Hadson Gas Systems, Inc	12-04-91	G-S	50,000	N	I	11-04-91	Indef.
ST92-1087	United Gas Pipeline Co	Arkla Energy Marketing Co	12-04-91	G-S	209,600	N	I	11-26-91	03-25-92
ST92-1088	United Gas Pipeline Co	Arkla Energy Marketing Co	12-04-91	G-S	209,600	N	I	11-19-91	03-18-92
ST92-1089	United Gas Pipeline Co	Ledco Inc	12-04-91	G-S	488,629	N	I	11-26-91	03-25-92
ST92-1090	United Gas Pipeline Co	Cedar Gas Co	12-04-91	G-S	116,747	N	I	11-10-91	03-09-92
ST92-1091	United Gas Pipeline Co	Oryx Gas Marketing Ltd., Part	12-04-91	G-S	62,880	N	I	11-19-91	03-18-92
ST92-1092	Seagull Shoreline System	Texas Eastern Transmission Corp.	12-04-91	C	20,000	N	I	11-01-91	Indef.
ST92-1093	Panhandle Eastern Pipe Line Co	National Steel Corp	12-04-91	G-S	8,000	N	F	11-01-91	Indef.
ST92-1094	Trunkline Gas Co	SJR Resources, Inc	12-04-91	G-S	10,000	N	I	11-21-91	Indef.
ST92-1095	Texas Gas Transmission Corp	Superior Natural Gas Corp	12-04-91	G-S	30,000	N	I	11-13-91	Indef.
ST92-1096	Texas Gas Transmission Corp	Aquila Energy Marketing Corp	12-04-91	G-S	100,000	N	I	11-06-91	Indef.
ST92-1097	Arkla Energy Resources	Can-Am Absorbents Co., Inc	12-04-91	G-S	984	N	I	11-01-91	Indef.
ST92-1098	Arkla Energy Resources	Panda Resources, Inc	12-04-91	G-S	20,000	N	I	11-01-91	Indef.
ST92-1099	Arkla Energy Resources	Enserch Gas Co	12-04-91	G-S	50,000	N	I	11-16-91	Indef.
ST92-1100	Transcontinental Gas P/L Corp	Channel Industries Gas Co	12-04-91	B	500,000	Y	I	11-05-91	Indef.
ST92-1101	Transcontinental Gas P/L Corp	Amerada Hess Corp	12-04-91	G-S	600,000	N	I	11-14-91	Indef.
ST92-1102	Transcontinental Gas P/L Corp	Baltimore Gas & Electric Co	12-04-91	B	250,000	N	I	11-06-91	Indef.
ST92-1103	Transcontinental Gas P/L Corp	Samedan Oil Corp	12-04-91	G-S	2,000,000	N	I	11-20-91	Indef.
ST92-1104	Transcontinental Gas P/L Corp	Corpus Christi Industrial P/L Co	12-04-91	B	286,000	N	I	11-06-91	Indef.
ST92-1105	Transwestern Pipeline Co	Hadson Gas Systems, Inc	12-05-91	G-S	100,000	N	I	11-06-91	Indef.
ST92-1106	Transwestern Pipeline Co	Gasmark, Inc	12-05-91	G-S	100,000	N	I	11-05-91	Indef.
ST92-1107	Williston Basin Inter. P/L Co	Rainbow Gas Co	12-05-91	G-S	97,190	N	I	11-07-91	08-31-92
ST92-1108	Williston Basin Inter. P/L Co	Amerada Hess Corp	12-05-91	G-S	10,000	N	F	11-08-91	03-07-92
ST92-1109	Natural Gas P/L Co. of America	Midcon Marketing Corp	12-05-91	G-S	50,000	N	F	11-01-91	03-31-92
ST92-1110	Natural Gas P/L Co. of America	U.S. Steel Group	12-05-91	G-S	10,000	N	F	10-01-91	05-31-94
ST92-1111	Natural Gas P/L Co. of America	U.S. Steel Group	12-05-91	G-S	60,000	N	F	10-01-91	05-31-94
ST92-1112	Natural Gas P/L Co. of America	Aquila Energy Marketing Corp	12-05-91	G-S	25,000	N	F	11-01-91	10-31-92
ST92-1113	ONG Transmission Co	Ozark Pipeline Co	12-05-91	C	75,000	N	I	11-08-91	Indef.
ST92-1114	ONG Transmission Co	Northern Natural Gas Co	12-05-91	C	50,000	N	I	11-09-91	Indef.
ST92-1115	ONG Transmission Co	Natural Gas P/L Co. of America	12-05-91	C	50,000	N	I	11-09-91	Indef.
ST92-1116	ONG Transmission Co	Northern Natural Gas Co	12-05-91	C	20,000	N	I	11-06-91	Indef.
ST92-1117	ONG Transmission Co	Northern Natural Gas Co	12-05-91	C	5,840,000	N	I	11-09-91	Indef.
ST92-1118	Transcontinental Gas P/L Corp	Corpus Christi Industrial P/L Co	12-05-91	B	1,400,000	N	I	11-21-91	Indef.
ST92-1119	Transcontinental Gas P/L Corp	Arco Natural Gas Marketing, Inc	12-05-91	B	100,000	N	I	11-08-91	Indef.
ST92-1120	Transcontinental Gas P/L Corp	Mobil Natural Gas, Inc	12-05-91	B	30,000	N	I	11-17-91	Indef.
ST92-1121	Williams Natural Gas Co	Williams Gas Marketing Co	12-05-91	B	5,000	Y	I	11-05-91	Indef.
ST92-1122	Panhandle Eastern Pipe Line Co	Citizens Gas Fuel Co	12-05-91	G-S	4,188	N	F	11-01-91	Indef.
ST92-1124	Delhi Gas Pipeline Co	Northern Indiana Public Service Co.	12-06-91	D	5,000	N	N/A	10-11-91	04-01-92
ST92-1125	Lone Star Gas Co	El Paso Natural Gas Co	12-06-91	C	50,000	N	I	11-01-91	Indef.
ST92-1126	Lone Star Gas Co	Natural Gas P/L Co. of America	12-06-91	C	10,000	N	I	11-09-91	Indef.
ST92-1127	Valero Transmission, L.P	Northern Natural Gas Co	12-06-91	C	12,500	N	I	11-07-91	01-01-99
ST92-1128	Transtexas Pipeline	Northern Natural Gas Co	12-06-91	C	12,500	N	I	11-07-91	01-01-99
ST92-1129	Tennessee Gas Pipeline Co	Connecticut Natural Gas Corp	12-06-91	B	15,000	N	I	11-08-91	Indef.
ST92-1130	Tennessee Gas Pipeline Co	East Ohio Gas Co	12-06-91	B	3,000	N	I	11-19-91	Indef.
ST92-1131	Tennessee Gas Pipeline Co	Texas-Ohio Gas, Inc	12-06-91	G-S	75,000	N	I	11-07-91	Indef.
ST92-1132	K N Energy, Inc	BHP Petroleum, Inc	12-06-91	G-S	5,500	N	I	11-01-91	09-01-92
ST92-1133	K N Energy, Inc	Anthem Energy Co	12-06-91	G-S	100,000	N	F/I	10-01-91	09-01-01
ST92-1134	K N Energy, Inc	Anthem Energy Co	12-06-91	G-S	100,000	N	F/I	10-01-91	09-01-01
ST92-1135	K N Energy, Inc	K N Gas Marketing, Inc	12-06-91	G-S	1,906	Y	F/I	11-05-91	03-31-92
ST92-1136	K N Energy, Inc	Hiland Partners (Interenergy Corp.).	12-06-91	G-S	2,800	N	F/I	11-01-91	03-31-92
ST92-1137	Transcontinental Gas P/L Corp	Corpus Christi Industrial P/L Co	12-06-91	B	250,000	N	I	11-06-91	Indef.
ST92-1138	Transcontinental Gas P/L Corp	Alabama Gas Corp	12-06-91	B	425,000	N	I	11-06-91	Indef.
ST92-1139	Transcontinental Gas P/L Corp	NGC Transportation, Inc	12-06-91	B	300,000	N	I	11-06-91	Indef.
ST92-1140	Arkla Energy Resources	Aquila Energy Marketing Corp	12-06-91	G-S	10,000	N	I	11-11-91	Indef.
ST92-1141	Arkla Energy Resources	Arkla Energy Marketing Co	12-06-91	G-S	400,000	Y	I	10-29-91	Indef.
ST92-1142	Arkla Energy Resources	Equitable Resources Marketing Co.	12-06-91	G-S	100,000	N	I	11-01-91	Indef.
ST92-1143	Questar Pipeline Co	ANR Pipeline Co	12-06-91	G-S	115,000	N	I	11-19-91	Indef.
ST92-1144	Questar Pipeline Co	Western Natural Gas & Trans. Corp.	12-06-91	G-S	800	N	I	11-06-91	Indef.
ST92-1145	Questar Pipeline Co	KPL Gas Services	12-06-91	B	40,000	N	I	12-01-91	Indef.
ST92-1146	Overthrust Pipeline Co	Wyoming Interstate Co., Ltd	12-06-91	G	30,000	N	I	12-01-91	Indef.
ST92-1147	Overthrust Pipeline Co	Coastal Gas Marketing Co	12-06-91	G-S	100,000	N	I	12-01-91	Indef.
ST92-1148	Overthrust Pipeline Co	Wyoming Interstate Co., Ltd	12-06-91	G	40,000	N	I	11-21-91	Indef.
ST92-1149	Overthrust Pipeline Co	Universal Resources Corp	12-06-91	G-S	100,000	N	I	12-01-91	Indef.
ST92-1150	ANR Pipeline Co	Phillips Petroleum Co	12-06-91	G-S	30,000	N	I	11-08-91	Indef.
ST92-1151	ANR Pipeline Co	East Ohio Gas Co	12-06-91	B	3,600	N	F	11-16-91	Indef.

Docket No. [1]	Transporter/seller	Recipient	Date filed	Part 284 subpart	Estimated maximum daily quantity [2]	Aff. Y/N	Rate schedule	Date commenced	Projected termination date
ST92-1152	ANR Pipeline Co	Texpar Energy, Inc	12-06-91	G-S	100,000	N	I	11-17-91	Indef.
ST92-1153	ANR Pipeline Co	Unigas Energy, Inc	12-06-91	G-S	50,000	N	I	11-14-91	Indef.
ST92-1154	ANR Pipeline Co	Enron Gas Marketing, Inc	12-06-91	G-S	100,000	N	I	11-09-91	Indef.
ST92-1155	Trunkline Gas Co	Texas Eastern Transmission Corp.	12-06-91	G	150,000	Y	F	11-01-91	Indef.
ST92-1156	Texas Eastern Transmission Corp.	Calcasieu Gas Gathering System.	12-06-91	G-S	150,000	N	I	10-31-91	Indef.
ST92-1157	Texas Eastern Transmission Corp.	City of Lawrenceburg	12-06-91	B	19,750	N	I	10-02-91	Indef.
ST92-1158	Texas Eastern Transmission Corp.	City of Lebanon	12-06-91	B	19,750	N	I	10-02-91	Indef.
ST92-1159	Texas Eastern Transmission Corp.	Fall River Gas Co	12-06-91	B	200,000	N	I	10-04-91	Indef.
ST92-1160	Texas Eastern Transmission Corp.	Phoenix Diversified Ventures, Inc.	12-06-91	G-S	10,000	N	I	11-01-91	Indef.
ST92-1161	Northern Border Pipeline Co	Wes Cana Energy Marketing, Inc	12-06-91	G-S	50,000	Y	I	11-01-91	Indef.
ST92-1164	Northern Natural Gas Co	Sioux Center Municipal Natural Gas.	12-06-91	B	400	N	F	11-01-91	Indef.
ST92-1165	Northern Natural Gas Co	City of Duluth	12-06-91	B	3,000	N	F	11-01-91	03-31-92
ST92-1166	Northern Natural Gas Co	Midwest Natural Gas Co	12-06-91	B	20,000	N	I	10-31-91	Indef.
ST92-1167	Northern Natural Gas Co	Midwest Gas, Div. Iowa Pub. Ser. Co.	12-06-91	B	1,000	N	F	11-01-91	03-31-92
ST92-1168	Northern Natural Gas Co	Preston Municipal Natural Gas Dept.	12-06-91	B	128	N	F	11-01-91	03-31-92
ST92-1169	Northern Natural Gas Co	Iowa-Illinois Gas and Electric Co	12-06-91	B	50,000	N	F	11-01-91	10-31-02
ST92-1170	El Paso Natural Gas Co	Fina Oil and Chemical Co	12-09-91	G-S	103,000	Y	I	11-14-91	Indef.
ST92-1171	El Paso Natural Gas Co	Exoko Golden T, Inc	12-09-91	B	10,300	Y	I	11-14-91	Indef.
ST92-1172	Ozark Gas Transmission System	Amoco Energy Trading Corp	12-09-91	G-S	50,000	N	I	11-22-91	Indef.
ST92-1173	Ozark Gas Transmission System	Columbia Gas Development Corp.	12-09-91	G-S	25,000	N	I	11-22-91	Indef.
ST92-1174	Ozark Gas Transmission System	Associated Natural Gas, Inc	12-09-91	G-S	100,000	N	I	11-19-91	Indef.
ST92-1175	ANR Pipeline Co	Philadelphia Gas Works	12-09-91	B	250,000	Y	I	11-07-91	Indef.
ST92-1176	Northern Natural Gas Co	Amoco Energy Trading Corp	12-09-91	G-S	20,835	N	F	11-13-91	Indef.
ST92-1177	Northern Natural Gas Co	Cibola Corp	12-09-91	G-S	100,000	N	I	11-13-91	Indef.
ST92-1178	Northern Natural Gas Co	Continental Natural Gas, Inc	12-09-91	G-S	75,000	N	I	11-13-91	Indef.
ST92-1179	Northern Natural Gas Co	Midwest Gas Co	12-09-91	B	300,000	N	I	11-09-91	Indef.
ST92-1180	Sea Robin Pipeline Co	Tejas Power Corp	12-09-91	G-S	70,000	N	I	11-05-91	Indef.
ST92-1181	Tennessee Gas Pipeline Co	Energy Development Corp	12-09-91	G-S	15,000	N	I	11-08-91	Indef.
ST92-1182	Tennessee Gas Pipeline Co	Santa Fe International Corp	12-09-91	G-S	100,000	N	I	11-08-91	Indef.
ST92-1183	South Georgia Natural Gas Co	Municipal Gas Authority of Georgia.	12-09-91	G-S	19,116	N	I	12-01-91	12-31-05
ST92-1184	South Georgia Natural Gas Co	Texican Natural Gas Co	12-09-91	G-S	500	N	I	11-14-91	Indef.
ST92-1185	Southern Natural Gas Co	Municipal Gas Authority of Georgia.	12-09-91	G-S	9,856	N	I	12-01-91	12-31-05
ST92-1186	Texas Eastern Transmission Corp.	Central Illinois Public Service Co	12-09-91	B	3,000	N	I	11-01-91	Indef.
ST92-1187	Texas Eastern Transmission Corp.	Yuma Gas Corp	12-09-91	G-S	25,000	N	I	11-01-91	Indef.
ST92-1188	Panhandle Eastern Pipe Line Co	Citizens Gas Fuel Co	12-09-91	G-S	1,912	N	I	11-01-91	Indef.
ST92-1189	Panhandle Eastern Pipe Line Co	City of Bainbridge	12-09-91	G-S	364	N	I	11-01-91	Indef.
ST92-1190	Louisiana Resources Co	Chevron Chemical Co	12-09-91	C	7,500	N	I	12-09-91	Indef.
ST92-1191	Columbia Gulf Transmission Co	O & R Energy, Inc	12-09-91	G-S	80,000	N	I	11-16-91	Indef.
ST92-1192	Transcontinental Gas P/L Corp	Consolidated Edison Co. of NY, Inc.	12-09-91	B	200,000	N	I	11-07-91	Indef.
ST92-1193	Transcontinental Gas P/L Corp	UGI Corp	12-09-91	B	48,000	Y	I	11-05-91	Indef.
ST92-1194	Valley Gas Transmission, Inc	Bishop Pipeline Corp	12-09-91	G-S	4,000	N	I	10-01-91	01-28-92
ST92-1195	Delhi Gas Pipeline Corp	Natural Gas P/L Co. of America	12-10-91	C	10,000	N	I	12-01-91	Indef.
ST92-1196	Tennessee Gas Pipeline Co	Stellar Gas Co	12-10-91	G-S	50,000	N	I	11-16-91	Indef.
ST92-1197	Natural Gas P/L Co. of America	Transco Energy Marketing Co	12-10-91	G-S	50,000	N	I	11-12-91	Indef.
ST92-1198	Natural Gas P/L Co. of America	Richardson Products Co	12-10-91	G-S	75,000	N	I	11-10-91	Indef.
ST92-1199	Natural Gas P/L Co. of America	Enron Gas Marketing, Inc	12-10-91	B	150,000	N	I	11-03-91	Indef.
ST92-1200	Panola/Rusk Gatherers	Natural Gas P/L Co. of America	12-11-91	C	10,000	N	I	03-01-91	Indef.
ST92-1201	Natural Gas P/L Co. of America	Interstate Power Co	12-11-91	B	5,000	N	F	03-01-91	11-30-96
ST92-1202	Natural Gas P/L Co. of America	Iowa Southern Utilities Co	12-11-91	B	900	N	F	12-01-91	11-30-95
ST92-1203	Natural Gas P/L Co. of America	Midcon Marketing Corp	12-11-91	G-S	35,000	N	F	11-15-91	03-15-92
ST92-1204	Natural Gas P/L Co. of America	Northern Illinois Gas Co	12-11-91	B	35,000	N	F	12-01-91	11-30-95
ST92-1205	Natural Gas P/L Co. of America	Northern Illinois Gas Co	12-11-91	B	25,000	N	F	12-01-91	11-30-95
ST92-1206	Natural Gas P/L Co. of America	Ball-Icon Glass Packaging Corp	12-11-91	G-S	2,500	N	F	09-01-91	08-31-92
ST92-1207	Natural Gas P/L Co. of America	Associated Natural Gas, Inc	12-11-91	G-S	930	N	F	12-01-91	02-28-92
ST92-1208	Natural Gas P/L Co. of America	City of Findlay	12-11-91	B	750	N	F	12-01-91	11-30-95
ST92-1209	Natural Gas P/L Co. of America	City of Nashville	12-11-91	B	500	N	F	12-01-91	02-28-97
ST92-1210	Rocky Mountain Natural Gas Co	Northwest Pipeline Corp	12-11-91	G-HT	500	N	I	11-01-91	Indef.
ST92-1211	Enogex Inc	El Paso Natural Gas Co	12-11-91	C	15,000	N	I	10-26-91	Indef.
ST92-1212	Enogex Inc	Panhandle Eastern Pipeline Co	12-11-91	C	50,000	N	I	11-22-91	Indef.
ST92-1213	Northern Natural Gas Co	City of Round Lake	12-11-91	B	250	N	F	11-14-91	Indef.
ST92-1214	Northern Natural Gas Co	Peoples Natural Gas Co	12-11-91	B	294,807	N	F	11-30-91	Indef.
ST92-1215	ANR Pipeline Co	Northern Gas Co	12-12-91	B	250,000	N	I	11-13-91	Indef.
ST92-1216	Williston Basin Inter. P/L Co	Inland Oil & Gas Corp	12-12-91	G-S	7,714	N	I	11-12-91	03-21-93
ST92-1217	Williston Basin Inter. P/L Co	Petro-Hunt Corp	12-12-91	G-S	1,000	N	I	11-13-91	10-17-93

Docket No. [1]	Transporter/seller	Recipient	Date filed	Part 284 subpart	Estimated maximum daily quantity [2]	Aff. Y/N	Rate schedule	Date commenced	Projected termination date
ST92-1218	Williston Basin Inter. P/L Co	Amerada Hess Corp	12-12-91	G-S	15,000	N	I	11-15-91	03-07-92
ST92-1219	Northern Natural Gas Co	Western Gas Resources, Inc	12-12-91	G-S	40,000	N	I	11-20-91	11-19-96
ST92-1220	Northern Natural Gas Co	Wisconsin Gas Co	12-12-91	B	3,000	N	I	11-18-91	Indef.
ST92-1221	Florida Gas Transmission Co	Cargill Fertilizer, Inc	12-12-91	G-S	765	N	F	11-16-91	Indef.
ST92-1222	Colorado Interstate Gas Co	Coastal Gas Marketing Co	12-12-91	G-S	50,000	Y	I	11-11-91	Indef.
ST92-1223	Colorado Interstate Gas Co	Snyder Oil Corp	12-12-91	G-S	30,000	N	I	11-19-91	Indef.
ST92-1224	Colorado Interstate Gas Co	Coastal Chem, Inc	12-12-91	G-S	14,000	Y	I	09-01-91	08-31-95
ST92-1225	Colorado Interstate Gas Co	Texaco Gas Marketing, Inc	12-12-91	G-S	300	N	I	11-15-91	Indef.
ST92-1226	El Paso Natural Gas Co	Conoco Inc	12-12-91	G-S	51,500	Y	I	11-28-91	Indef.
ST92-1227	El Paso Natural Gas Co	City of Ignacio	12-12-91	G-S	648	Y	F	11-27-91	Indef.
ST92-1228	El Paso Natural Gas Co	City of Socorro	12-12-91	G-S	2,158	Y	F	11-27-91	Indef.
ST92-1229	El Paso Natural Gas Co	Westar Transmission Co	12-12-91	B	1,545	Y	I	11-24-91	Indef.
ST92-1230	Arkansas Oklahoma Gas Corp	Ozark Gas Transmission System	12-11-91	G-HT	150	N	I	11-01-91	Indef.
ST92-1231	Arkansas Oklahoma Gas Corp	Ozark Gas Transmission System	12-11-91	G-HT	200	N	I	12-01-91	Indef.
ST92-1232	Arkansas Oklahoma Gas Corp	Ozark Gas Transmission System	12-11-91	G-HT	19,882	N	I	12-01-91	Indef.
ST92-1233	Arkansas Oklahoma Gas Corp	Ozark Gas Transmission System	12-11-91	G-HT	1,550	N	I	12-05-91	Indef.
ST92-1234	Stingray Pipeline Co	Nomeco Oil and Gas Co	12-12-91	G-S	4,000	N	I	12-01-91	Indef.
ST92-1235	Stingray Pipeline Co	Vesta Energy Co	12-12-91	G-S	21,344	N	F	12-01-91	Indef.
ST92-1236	Northwest Pipeline Corp	Mountain Fuel Supply Co	12-12-91	G-S	80,000	N	I	11-28-91	Indef.
ST92-1237 [3]	Transcontinental Gas P/L Corp	Apache Marketing, Inc	12-12-91	G-S	300,000	N	I	12-30-91	Indef.
ST92-1238	Transcontinental Gas P/L Corp	End-Users Supply System	12-12-91	B	274,500	N	I	01-01-91	Indef.
ST92-1239	Transcontinental Gas P/L Corp	Transco Energy Marketing Co	12-12-91	B	250,000	Y	I	11-06-91	Indef.
ST92-1240	Transcontinental Gas P/L Corp	Seagull Marketing Services, Inc	12-12-91	B	150,000	N	I	11-25-91	Indef.
ST92-1241	Transcontinental Gas P/L Corp	Republic Refining, Limited	12-12-91	G-S	5,000	N	I	11-14-91	Indef.
ST92-1242	Ozark Gas Transmission System	Natural Gas P/L Co. of America	12-13-91	G	100,000	N	I	11-11-91	Indef.
ST92-1243	Texas Gas Transmission Corp	Bishop Pipeline Corp	12-13-91	G-S	255	N	F	12-01-91	12-01-92
ST92-1244	Texas Gas Transmission Corp	Access Energy Corp	12-13-91	G-S	100,000	N	I	12-01-91	Indef.
ST92-1245	Texas Gas Transmission Corp	Illinois Gas Co	12-13-91	B	5,184	N	F	12-01-91	Indef.
ST92-1246	Texas Gas Transmission Corp	Indiana Gas Co., Inc	12-13-91	G-S	15,000	N	F	12-01-91	02-29-92
ST92-1247	Texas Gas Transmission Corp	Indiana Gas Co., Inc	12-13-91	G-S	5,000	N	F	12-04-91	02-29-92
ST92-1248	Northern Natural Gas Co	Manning Municipal Gas Department.	12-13-91	B	5,000	N	I	11-16-91	Indef.
ST92-1249	Northern Natural Gas Co	Boyd Rosene and Associates, Inc.	12-13-91	G-S	30,000	N	I	11-15-91	Indef.
ST92-1250	United Gas Pipe Line Co	Entex	12-13-91	G-S	75,000	N	F	11-20-91	03-19-92
ST92-1251	United Gas Pipe Line Co	Shell Gas Trading Co	12-13-91	G-S	209,600	N	I	12-02-91	03-31-92
ST92-1252	United Gas Pipe Line Co	Louisiana Operating Co., Inc	12-13-91	G-S	10,480	N	I	11-20-91	03-19-92
ST92-1253	United Gas Pipe Line Co	FMI Hydrocarbon Co	12-13-91	G-S	1,500	N	I	11-20-91	03-19-92
ST92-1254	Mississippi River Trans. Corp	Harcros Pigments, Inc	12-13-91	G-S	1,850	N	F	11-21-91	Indef.
ST92-1255	Transcontinental Gas P/L Corp	Baltimore Gas & Electric Co	12-13-91	B	975,000	N	I	06-20-90	Indef.
ST92-1256	Arkla Energy Resources	Usagas Pipeline Co	12-13-91	B	8,000	N	I	09-01-91	Indef.
ST92-1257	Arkla Energy Resources	Associated Natural Gas, Inc	12-13-91	G-S	150,000	N	I	10-01-91	Indef.
ST92-1258	CNG Transmission Corp	Hadson Gas System, Inc	12-13-91	G-S	50,000	N	I	11-08-91	Indef.
ST92-1259	CNG Transmission Corp	Aquila Energy	12-13-91	G-S	100,000	N	I	11-09-91	Indef.
ST92-1260	CNG Transmission Corp	Graham Energy Marketing	12-13-91	G-S	100,000	N	I	11-08-91	Indef.
ST92-1261	Oasis Pile Line Co	Northern Natural Gas, Co	12-13-91	C	100,000	N	I	02-01-91	Indef.
ST92-1262	Oasis Pile Line Co	Natural Gas P/L Co. of America	12-13-91	C	100,000	N	I	10-01-91	Indef.
ST92-1263	Oasis Pile Line Co	Natural Gas P/L Co. of America	12-13-91	C	10,000	N	I	10-18-91	Indef.
ST92-1264	Oasis Pile Line Co	Transwestern Pipeline Co	12-13-91	C	150,000	N	I	10-24-91	Indef.
ST92-1265	Oasis Pile Line Co	Transwestern Pipeline Co	12-13-91	C	100,000	N	I	01-01-91	Indef.
ST92-1266	Oasis Pile Line Co	El Paso Natural Gas Co	12-13-91	C	100,000	N	I	01-01-91	Indef.
ST92-1267	Oasis Pile Line Co	Transwestern Pipeline Co	12-13-91	C	7,300	N	I	09-01-91	Indef.
ST92-1268	Oasis Pile Line Co	Northern Natural Gas, Co	12-13-91	C	50,000	N	I	12-23-91	Indef.
ST92-1269	Oasis Pile Line Co	Northern Natural Gas, Co	12-13-91	C	50,000	N	I	10-12-91	Indef.
ST92-1270	Colorado Interstate Gas Co	Coastal Gas Marketing Co	12-16-91	G-S	25,000	N	I	12-01-91	Indef.
ST92-1271	Tennessee Gas Pipeline Co	Gulf Energy Marketing Co	12-16-91	G-S	310,000	N	I	11-28-91	Indef.
ST92-1272	Tennessee Gas Pipeline Co	CNG Gas Transmission Corp	12-16-91	B	3,600	N	F	12-01-91	09-30-92
ST92-1273	Tennessee Gas Pipeline Co	United Texas Transmission Co	12-16-91	B	80,000	N	I	11-05-91	Indef.
ST92-1274	Tennessee Gas Pipeline Co	Destoto Pipeline Co., Inc	12-16-91	G-S	1,400	N	I	11-01-91	Indef.
ST92-1275	Williams Natural Gas Co	Rangeline Corp	12-16-91	G-S	1,500	N	F	11-15-91	Indef.
ST92-1276	Transcontinental Gas P/L Corp	Brooklyn Union Gas Co	12-16-91	B	900,000	N	I	09-18-87	Indef.
ST92-1277	Trunkline Gas Co	Polaris Pipeline Corp	12-16-91	G-S	30,000	N	I	12-02-91	Indef.
ST92-1278	Trunkline Gas Co	Coastal Gas Marketing Co	12-16-91	G-S	100,000	N	I	12-01-91	Indef.
ST92-1279	Trunkline Gas Co	Bishop Pipeline Corp	12-16-91	G-S	50,000	N	I	12-03-91	Indef.
ST92-1280	Northern Natural Gas Co	Peoples Natural Gas Co	12-16-91	B	1,900	N	F	11-21-91	Indef.
ST92-1281	Northern Natural Gas Co	Iowa Electric Light & Power Co	12-16-91	B	7,298	N	F	12-01-91	09-30-92
ST92-1282	Equitrans, Inc	Energy Sales Co	12-16-91	G-S	10,121	N	I	12-01-91	Indef.
ST92-1283	Delhi Gas Pipeline Corp	United Gas Pipeline Co	12-17-91	C	10,000	N	I	12-01-91	Indef.
ST92-1284	Delhi Gas Pipeline Corp	Northern Natural Gas Co	12-17-91	C	5,000	N	I	12-04-91	Indef.
ST92-1285	ONG Transmission Co	Northern Natural Gas Co	12-17-91	C	75,000	N	I	11-23-91	Indef.
ST92-1286	El Paso Natural Gas Co	Mobil Natural Gas, Inc	12-17-91	G-S	200,000	Y	I	12-01-91	Indef.
ST92-1287	El Paso Natural Gas Co	City of Lordsburg	12-17-91	G-S	3,613	Y	F	12-05-91	Indef.
ST92-1288	El Paso Natural Gas Co	City of Safford	12-17-91	G-S	2,308	Y	F	12-01-91	Indef.
ST92-1289	El Paso Natural Gas Co	City of Mountainair	12-17-91	G-S	385	Y	F	12-01-91	Indef.
ST92-1290	Valero Transmission, L.P	El Paso Natural Gas Pipeline	12-17-91	C	6,000	N	I	12-01-91	Indef.
ST92-1291	Valero Transmission, L.P	United Gas Pipe Line Co	12-17-91	C	15,000	N	I	12-01-91	Indef.
ST92-1292	Williston Basin Inter. P/L. Co	Koch Hydrocarbon Co	12-17-91	G-S	170,100	Y	I	12-13-91	05-01-93
ST92-1293	Williston Basin Inter. P/L. Co	Koch Hydrocarbon Co	12-17-91	G-S	183,365	Y	I	12-13-91	09-30-92

Docket No. [1]	Transporter/seller	Recipient	Date filed	Part 284 subpart	Estimated maximum daily quantity [2]	Aff. Y/N	Rate schedule	Date commenced	Projected termination date
ST92-1294	Trunkline Gas Co	City of Hamilton	12-17-91	G-S	15,210	N	I	11-27-91	11-01-98
ST92-1295	Trunkline Gas Co	Unocal Exploration Corp	12-17-91	G-S	20,000	N	F	11-01-91	02-29-92
ST92-1296	Trunkline Gas Co	TPC Pipeline, Inc	12-17-91	B	100,000	N	I	12-01-91	Indef.
ST92-1297	Northern Natural Gas Co	Western Gas Market (U.S.A.), Ltd.	12-17-91	G-S	200,000	N	I	12-01-91	Indef.
ST92-1298	Northern Natural Gas Co	City of Duluth	12-17-91	B	1,000	N	F	12-01-91	03-01-92
ST92-1299	Northern Natural Gas Co	City of Two Harbors	12-17-91	B	250	N	F	12-01-91	04-15-92
ST92-1300	Northern Natural Gas Co	Northern States Power Co.—Wisc.	12-17-91	B	10,000	N	F	12-01-91	03-31-92
ST92-1301	Northern Natural Gas Co	Northern States Power Co	12-17-91	B	26,465	N	F	12-01-91	02-29-92
ST92-1302	Northern Natural Gas Co	Great Plains Natural Gas Co	12-17-91	B	3,200	N	F	12-01-91	02-29-92
ST92-1303	Northern Natural Gas Co	City of Duluth	12-17-91	B	2,000	N	F	12-01-91	03-31-92
ST92-1304	Northern Natural Gas Co	Northern Minnesota Utilities	12-17-91	B	2,000	N	F	12-01-91	Indef.
ST92-1305	Northern Natural Gas Co	Semco Energy Services, Inc	12-17-91	G-S	50,000	N	I	11-20-91	Indef.
ST92-1306	Tennessee Gas Pipeline Co	Catex Energy, Inc	12-17-91	G-S	102,600	N	I	12-01-91	Indef.
ST92-1307	Viking Gas Transmission Co	Victoria Gas Corp	12-17-91	G-S	110,000	N	I	11-13-91	Indef.
ST92-1308	Transcontinental Gas P/L Corp	Atlanta Gas Light Co	12-17-91	B	420,000	N	I	09-12-90	Indef.
ST92-1309	Transcontinental Gas P/L Corp	Transco Energy Marketing Co	12-17-91	G-S	500,000	N	I	11-14-91	Indef.
ST92-1310	Transcontinental Gas P/L Corp	Access Energy Corp	12-17-91	G-S	180,000	N	I	11-21-91	Indef.
ST92-1311	Transcontinental Gas P/L Corp	Arco Oil and Gas Co	12-17-91	B	600,000	N	I	05-04-89	Indef.
ST92-1312	Transcontinental Gas P/L Corp	Arco Oil and Gas Co	12-17-91	B	600,000	N	I	05-04-89	Indef.
ST92-1313	Transcontinental Gas P/L Corp	Commonwealth Gas Pipeline Corp.	12-18-91	B	10,000	N	I	04-03-89	10-09-90
ST92-1314	Wyoming Interstate Co., Ltd	Northern Illinois Gas Co	12-18-91	B	30,000	N	I	12-01-91	Indef.
ST92-1315	Wyoming Interstate Co., Ltd	Peoples Natural Gas Co	12-18-91	B	100,000	N	I	12-01-91	Indef.
ST92-1316	Wyoming Interstate Co., Ltd	Northern Illinois Gas Co	12-18-91	B	40,000	N	I	12-01-91	Indef.
ST92-1317	Panhandle Eastern Pipe Line Co	Tenaska Marketing Ventures	12-18-91	G-S	250,000	N	I	11-16-91	Indef.
ST92-1318	Texas Gas Transmission Corp	Western Kentucky Gas Co	12-18-91	B	6,750	N	F	12-06-91	Indef.
ST92-1319	Tennessee Gas Pipeline Co	Consolidated Fuel GS Supply, Inc.	12-18-91	G-S	100,000	N	I	11-24-91	Indef.
ST92-1320	Tennessee Gas Pipeline Co	Tenngasco Corp	12-18-91	G-S	10,100	N	F	12-01-91	12-01-92
ST92-1321	ONG Transmission Co	ANR Pipeline Co	12-18-91	C	20,000	N	I	12-01-91	Indef.
ST92-1322	ONG Transmission Co	Williams Natural Gas Co	12-18-91	C	20,000	N	I	11-28-91	Indef.
ST92-1323	ONG Transmission Co	Ozark Pipeline Co	12-18-91	C	25,000	N	I	12-03-91	Indef.
ST92-1324	ONG Transmission Co	ANR Pipeline Co	12-18-91	C	10,000	N	I	12-01-91	Indef.
ST92-1325	Columbia Gas Transmission Corp.	Northeast Ohio Natural Gas Corp.	12-18-91	B	100	N	F	12-01-91	03-31-92
ST92-1326	Columbia Gas Transmission Corp.	Suburban Natural Gas Co	12-18-91	B	1,464	N	F	12-01-91	03-31-92
ST92-1327	Columbia Gas Transmission Corp.	Commonwealth Gas Services, Inc.	12-18-91	B	43,000	Y	F	12-02-91	Indef.
ST92-1328	Columbia Gas Transmission Corp.	Columbia Gas of Maryland, Inc	12-18-91	G-S	3,500	Y	F	12-01-91	02-29-92
ST92-1329	Columbia Gas Transmission Corp.	Interstate Gas Supply, Inc	12-18-91	G-S	5,000	N	I	12-10-91	Indef.
ST92-1330	Columbia Gas Transmission Corp.	Public Service Electric & Gas Co	12-18-91	G-S	12,500	N	F	12-03-91	11-01-11
ST92-1331	Columbia Gas Transmission Corp.	O & R Energy, Inc	12-18-91	G-S	236	N	F	12-02-91	Indef.
ST92-1332	Columbia Gas Transmission Corp.	Gas Transport, Inc	12-18-91	G-S	50,000	N	I	12-01-91	Indef.
ST92-1333	Columbia Gas Transmission Corp.	Southern Tier Transmission Corp.	12-18-91	G-S	5,000	N	I	12-10-91	Indef.
ST92-1334	Columbia Gas Transmission Corp.	Stand Energy Corp	12-18-91	G-S	90	Y	F	12-01-91	03-31-92
ST92-1335	Columbia Gas Transmission Corp.	Columbia Gas of Kentucky, Inc	12-18-91	B	14,190	Y	F	12-01-91	02-29-92
ST92-1336	Lone Star Gas Co	El Paso Natural Gas Co	12-19-91	C	100,000	N	I	11-20-91	Indef.
ST92-1337	Red River Pipeline	KN Energy, Inc	12-19-91	C	175,000	N	I	11-23-91	Indef.
ST92-1338	Ozark Gas Transmission System	Enserch Gas Co	12-19-91	G-S	50,000	N	F/I	12-06-91	Indef.
ST92-1339	Ozark Gas Transmission System	Arkansas Electric Cooperative Corp.	12-19-91	G-S	16,560	N	F/I	12-04-91	Indef.
ST92-1340	Ozark Gas Transmission System	O & R Energy, Inc	12-19-91	G-S	50,000	N	F/I	12-05-91	Indef.
ST92-1341	Viking Gas Transmission Co	Iowa Public Service Co	12-19-91	B	950	N	F	11-25-91	03-31-92
ST92-1342	Midwestern Gas Transmission Co.	Northern Illinois Gas Co	12-19-91	B	7,800	N	F	12-01-91	01-01-93
ST92-1343	Northern Natural Gas Co	Elf Exploration, Inc	12-19-91	G-S	88,457	N	I	12-01-91	Indef.
ST92-1344	Northern Natural Gas Co	Wisconsin Gas Co	12-19-91	B	2,300	N	F	12-03-91	Indef.
ST92-1345	Northern Natural Gas Co	Wisconsin Power & Light Co	12-19-91	B	1,000	N	F	12-03-91	Indef.
ST92-1346	Northern Natural Gas Co	Alliance Natural Gas, Inc	12-19-91	G-S	30,000	N	I	12-05-91	Indef.
ST92-1347	Northern Natural Gas Co	Arkla Energy Marketing Co	12-19-91	G-S	130,000	N	I	12-01-91	Indef.
ST92-1348	Northern Natural Gas Co	Great Plains Natural Gas Co	12-19-91	B	15,000	N	I	11-25-91	Indef.
ST92-1349	Columbia Gas Transmission Corp.	Honda of America Mgf., Inc	12-19-91	G-S	2,500	Y	F	12-01-91	03-31-92
ST92-1350	Columbia Gas Transmission Corp.	Access Energy Corp	12-19-91	G-S	53	Y	F	12-12-91	Indef.
ST92-1351	Columbia Gas Transmission Corp.	Access Energy Corp	12-19-91	G-S	194	Y	F	12-12-91	3-31-92
ST92-1352	East Tennessee Natural Gas Co	Polaris Pipeline Corp	12-20-91	G-S	50,000	N	I	12-01-91	Indef.

Docket No. [1]	Transporter/seller	Recipient	Date filed	Part 284 subpart	Estimated maximum daily quantity [2]	Aff. Y/N	Rate schedule	Date commenced	Projected termination date
ST92-1353	East Tennessee Natural Gas Co	Coastal Marketing Co	12-20-91	G-S	200,000	N	I	12-01-91	Indef.
ST92-1354	East Tennessee Natural Gas Co	Knoxville Utilities Board	12-20-91	G-S	150,000	N	I	12-01-91	Indef.
ST92-1355	East Tennessee Natural Gas Co	Tenngasco Corp	12-20-91	G-S	400,000	N	I	12-01-91	Indef.
ST92-1356	East Tennessee Natural Gas Co	A.E. Staley Manufacturing Co	12-20-91	G-S	5,464	N	I	12-01-91	Indef.
ST92-1357	East Tennessee Natural Gas Co	City of Loudon-Loudon Utilities Gas.	12-20-91	G-S	8,800	N	I	12-01-91	Indef.
ST92-1358	East Tennessee Natural Gas Co	Woodward Marketing, Inc	12-20-91	G-S	28,280	N	I	12-01-91	Indef.
ST92-1359	East Tennessee Natural Gas Co	United Cities Gas Co	12-20-91	G-S	127,000	N	I	12-01-91	Indef.
ST92-1360	East Tennessee Natural Gas Co	UCG Energy Corp	12-20-91	G-S	75,269	N	I	12-01-91	Indef.
ST92-1361	East Tennessee Natural Gas Co	Manville Sales Corp	12-20-91	G-S	4,000	N	I	12-01-91	Indef.
ST92-1362	East Tennessee Natural Gas Co	Oryx Gas Marketing L.P.	12-20-91	G-S	200,000	N	I	12-01-91	Indef.
ST92-1363	East Tennessee Natural Gas Co	Heath Petra Resources, Inc	12-20-91	G-S	3,500	N	I	12-01-91	Indef.
ST92-1364	East Tennessee Natural Gas Co	Atlanta Gas Light Co	12-20-91	G-S	200,000	N	I	12-01-91	Indef.
ST92-1365	East Tennessee Natural Gas Co	Powell-Clinch Utility District	12-20-91	G-S	15,000	N	I	12-01-91	Indef.
ST92-1366	East Tennessee Natural Gas Co	Chattanooga Gas Co	12-20-91	G-S	45,000	N	I	12-01-91	Indef.
ST92-1367	East Tennessee Natural Gas Co	Conoco Inc	12-20-91	G-S	25,000	N	I	12-01-91	Indef.
ST92-1368	East Tennessee Natural Gas Co	Corning Inc	12-20-91	G-S	1,400	N	I	12-01-91	Indef.
ST92-1369	East Tennessee Natural Gas Co	Entrade Corp	12-20-91	G-S	500,000	N	I	12-01-91	Indef.
ST92-1370	East Tennessee Natural Gas Co	City of Etowah	12-20-91	G-S	10,367	N	I	12-01-91	Indef.
ST92-1371	East Tennessee Natural Gas Co	Gulf Ohio Corp	12-20-91	G-S	25,000	N	I	12-01-91	Indef.
ST92-1372	East Tennessee Natural Gas Co	Kogas, Inc	12-20-91	G-S	200,000	N	I	12-01-91	Indef.
ST92-1373	East Tennessee Natural Gas Co	Middle Tennessee Utility District	12-20-91	G-S	250,000	N	I	12-01-91	Indef.
ST92-1374	East Tennessee Natural Gas Co	Petroleum Source Systems Group, Inc.	12-20-91	G-S	4,000	N	I	12-01-91	Indef.
ST92-1375	East Tennessee Natural Gas Co	Texaco Gas Marketing, Inc	12-20-91	G-S	100,000	N	I	12-01-91	Indef.
ST92-1376	East Tennessee Natural Gas Co	Velsicol Chemical Corp	12-20-91	G-S	3,000	N	I	12-01-91	Indef.
ST92-1377	East Tennessee Natural Gas Co	Centran Corp	12-20-91	G-S	250,000	N	I	12-01-91	Indef.
ST92-1378	East Tennessee Natural Gas Co	Sonat Marketing Co	12-20-91	G-S	100,000	N	I	12-01-91	Indef.
ST92-1379	East Tennessee Natural Gas Co	Southern Gas Co	12-20-91	G-S	12,000	N	I	12-01-91	Indef.
ST92-1380	East Tennessee Natural Gas Co	Ucar Carbon Co., Inc	12-20-91	G-S	7,650	N	I	12-01-91	Indef.
ST92-1381	East Tennessee Natural Gas Co	NGC Transportation, Inc	12-20-91	G-S	500,000	N	I	12-01-91	Indef.
ST92-1382	East Tennessee Natural Gas Co	Phillips Petroleum Co	12-20-91	G-S	50,000	N	I	12-01-91	Indef.
ST92-1383	East Tennessee Natural Gas Co	Kimball Resources, Inc	12-20-91	G-S	25,000	N	I	12-01-91	Indef.
ST92-1384	East Tennessee Natural Gas Co	Petroleum Source & Systems Group.	12-20-91	G-S	4,000	N	I	12-01-91	Indef.
ST92-1385	Questar Pipeline Co	Amoco Production Co	12-20-91	G-S	80,000	N	I	11-10-91	11-09-92
ST92-1386	Questar Pipeline Co	City Utilities of Springfield	12-20-91	B	10,000	N	I	10-30-91	04-30-92
ST92-1387	Questar Pipeline Co	Texaco Gas Marketing, Inc	12-20-91	G-S	1,000	N	I	12-14-91	07-31-96
ST92-1388	Questar Pipeline Co	CNG Producing Co	12-20-91	G-S	9,000	N	I	12-01-91	02-29-92
ST92-1389	Questar Pipeline Co	Nephi City Corp	12-20-91	B	750	N	I	12-17-91	11-30-11
ST92-1390	Natural Gas P/L Co. of America	Northern Indiana Public Service Co.	12-20-91	B	29,700	N	F	12-01-91	11-30-95
ST92-1391	Natural Gas P/L Co. of America	Peoples Gas Light & Coke Co	12-20-91	G-S	15,000	N	F	12-01-91	11-30-95
ST92-1392	Natural Gas P/L Co. of America	Interstate Power Co	12-20-91	B	2,000	N	F	12-01-91	11-30-96
ST92-1393	Natural Gas P/L Co. of America	Vesta Energy Co	12-20-91	G-S	15,000	N	F	12-01-91	03-31-92
ST92-1394	Natural Gas P/L Co. of America	Utrade Gas Co	12-20-91	G-S	40,000	Y	F	12-01-91	01-31-92
ST92-1395	Natural Gas P/L Co. of America	Torch Energy Marketing, Inc	12-20-91	B	3,000	N	F	12-03-91	02-29-92
ST92-1396	Natural Gas P/L Co. of America	North Shore Gas Co	12-20-91	G-S	6,283	N	F	12-01-91	11-30-92
ST92-1397	Natural Gas P/L Co. of America	Pan-Alberta Gas (U.S.) Inc	12-20-91	G-S	5,099	N	F	12-01-91	03-31-92
ST92-1398	Natural Gas P/L Co. of America	North Shore Gas Co	12-20-91	G-S	20,000	N	F	12-01-91	11-30-95
ST92-1399	Equitrans, Inc	Entrade Corp	12-20-91	G-S	101,208	N	I	11-20-91	Indef.
ST92-1400	Equitrans, Inc	Texas-Ohio Gas, Inc	12-20-91	G-S	30,362	N	I	11-16-91	Indef.
ST92-1401	Equitrans, Inc	CNG Trading Co	12-20-91	G-S	50,604	N	I	11-01-91	Indef.
ST92-1402	United Gas Pipe Line Co	Highland Energy Corp	12-20-91	G-S	27,851	N	I	11-20-91	03-19-92
ST92-1403	United Gas Pipe Line Co	Arkla Energy Marketing Co	12-20-91	G-S	209,600	N	I	12-06-91	04-04-92
ST92-1404	United Gas Pipe Line Co	NGC Transportation, Inc	12-20-91	G-S	157,200	N	I	12-06-91	04-04-92
ST92-1405	Transcontinental Gas P/L Corp	Fort Hill Natural Gas Authority	12-20-91	B	973,200	N	F	12-01-91	03-31-05
ST92-1406	Transcontinental Gas P/L Corp	Pennsylvania Gas & Water Co	12-20-91	B	3,300	N	F	12-01-91	07-31-01
ST92-1407	Transcontinental Gas P/L Corp	Arco Oil and Gas Co	12-20-91	B	420,000	N	I	05-04-89	Indef.
ST92-1408	Transcontinental Gas P/L Corp	South Jersey Gas Co	12-20-91	B	2,900	N	F	12-01-91	07-31-11
ST92-1409	Transcontinental Gas P/L Corp	City of Buford	12-20-91	B	300	N	F	12-03-91	07-31-01
ST92-1410	Transcontinental Gas P/L Corp	Atlanta Gas Light Co	12-20-91	B	4,500	N	F	12-03-91	10-31-09
ST92-1411	Transcontinental Gas P/L Corp	Philadelphia Electric Co	12-20-91	B	4,400	N	F	12-01-91	07-31-06
ST92-1412	Viking Gas Transmission Co	Northern States Power Co	12-20-91	B	117,300	N	I	11-06-91	Indef.
ST92-1413	Viking Gas Transmission Co	City of Perham	12-20-91	B	393	N	F	12-01-91	11-01-92
ST92-1414	Transcontinental Gas P/L Corp	Philadelphia Gas Works	12-20-91	B	1,900	N	F	12-01-91	07-31-11
ST92-1415	Transcontinental Gas P/L Corp	City of Monroe	12-20-91	B	200	N	F	12-01-91	07-31-01
ST92-1416	Transcontinental Gas P/L Corp	City of Lexington	12-20-91	B	300	N	F	12-01-91	07-31-06
ST92-1417	Transcontinental Gas P/L Corp	UGI Corp	12-20-91	B	1,300	N	F	12-01-91	07-31-01
ST92-1418	Transcontinental Gas P/L Corp	United Cities Gas Co	12-20-91	B	200	N	F	12-01-91	07-31-01
ST92-1419	Transcontinental Gas P/L Corp	North Carolina Gas Service	12-20-91	B	200	N	F	12-01-91	03-31-05
ST92-1420	Transcontinental Gas P/L Corp	Piedmont Natural Gas Co	12-20-91	B	5,900	N	F	12-01-91	07-31-11
ST92-1421	Midwestern Gas Transmission Co.	Northern Indiana Public Service Co.	12-20-91	B	131,630	N	F	12-01-91	11-01-00
ST92-1422	Tennessee Gas Pipeline Co	Wes Cana Energy Marketing, Inc	12-20-91	G-S	22,500	N	F	12-01-91	01-01-92
ST92-1423	Tennessee Gas Pipeline Co	JMC Fuel Services, Inc	12-20-91	G-S	1,000	N	F	12-01-91	04-01-92
ST92-1424	Tennessee Gas Pipeline Co	Northern Indiana Public Service Co.	12-20-91	B	131,961	N	F	12-01-91	11-01-00
ST92-1425	Tennessee Gas Pipeline Co	Valley Gas Co	12-20-91	B	1,000	N	F	12-01-91	12-31-91

Docket No. [1]	Transporter/seller	Recipient	Date filed	Part 284 subpart	Estimated maximum daily quantity [2]	Aff. Y/N	Rate schedule	Date commenced	Projected termination date
ST92-1426	Tennessee Gas Pipeline Co	Tenngasco Corp	12-20-91	G-S	1,000,000	Y	I	11-22-91	Indef.
ST92-1427	Tennessee Gas Pipeline Co	Boston Gas Co	12-20-91	B	8,600	N	F	12-01-91	12-31-91
ST92-1428	Tennessee Gas Pipeline Co	National Fuel Gas Supply Corp	12-20-91	B	3,200	N	F	12-01-91	10-30-92
ST92-1429	Florida Gas Transmission Co	Florida Gas Utility	12-20-91	G-S	34,465	N	F	12-01-91	Indef.
ST92-1430	Florida Gas Transmission Co	Escambia Partners, Ltd	12-20-91	G-S	4,000	N	I	11-21-91	Indef.
ST92-1431	Northern Natural Gas Co	Texaco Gas Marketing, Inc	12-20-91	G-S	50,000	N	I	12-02-91	Indef.
ST92-1432	Northern Natural Gas Co	Gas Energy Development Co	12-20-91	G-S	50,000	N	I	12-01-91	Indef.
ST92-1433	Northern Natural Gas Co	Wisconsin Power and Light Co	12-20-91	B	54	N	F	12-02-91	03-31-92
ST92-1434	Northern Natural Gas Co	Anadarko Trading Co	12-20-91	G-S	50,000	N	I	12-04-91	Indef.
ST92-1435	Northern Natural Gas Co	K N Energy, Inc	12-20-91	G	310	N	F	12-01-91	Indef.
ST92-1436	Northern Natural Gas Co	Wisconsin Power and Light Co	12-20-91	B	1,500	N	F	12-02-91	03-31-92
ST92-1437	Lone Star Gas Co	El Paso Natural Gas Co	12-23-91	C	5,000	N	I	08-01-91	Indef.
ST92-1438	Delhi Gas Pipeline Corp	K N Energy, Inc	12-23-91	C	65,000	N	I	11-23-91	Indef.
ST92-1439	Natural Gas P/L Co. of America	Midcon Marketing Corp	12-23-91	G-S	200,000	Y	I	12-01-91	Indef.
ST92-1440	Natural Gas P/L Co. of America	Midcon Marketing Corp	12-23-91	G-S	50,000	Y	I	12-01-91	Indef.
ST92-1441	Natural Gas P/L Co. of America	Midcon Marketing Corp	12-23-91	G-S	100,000	Y	I	12-01-91	Indef.
ST92-1442	Natural Gas P/L Co. of America	Aquila Energy Marketing Corp	12-23-91	G-S	50,000	N	F	11-01-91	11-30-91
ST92-1443	Natural Gas P/L Co. of America	Iowa Electric Light & Power Co	12-23-91	G-S	5,000	N	F	09-01-91	08-30-96
ST92-1444	Tennessee Gas Pipeline Co	Amoco Energy Trading Corp	12-23-91	G-S	3,000	N	F	12-01-91	04-01-92
ST92-1445	Tennessee Gas Pipeline Co	Equitrans, Inc	12-23-91	G	40,00	N	I	12-01-91	Indef.
ST92-1446	Tennessee Gas Pipeline Co	National Fuel Gas Supply Corp	12-23-91	G	9,363	N	F	12-01-91	03-31-92
ST92-1447	Tennessee Gas Pipeline Co	NGC Transportation, Inc	12-23-91	G-S	30,000	N	F	12-01-91	12-01-92
ST92-1448	Tennessee Gas Pipeline Co	Mississippi Valley Gas Co	12-23-91	B	100,000	N	I	11-23-91	Indef.
ST92-1449	Tennessee Gas Pipeline Co	Access Energy Corp	12-23-91	G-S	500,000	N	I	12-01-91	Indef.
ST92-1450	Tennessee Gas Pipeline Co	Colonial Gas Co	12-23-91	B	6,000	N	F	12-01-91	12-31-91
ST92-1451	ANR Pipeline Co	Access Energy Corp	12-23-91	G-S	150,000	N	I	11-23-91	Indef.
ST92-1452	ANR Pipeline Co	Seagull Marketing Services, Inc	12-23-91	G-S	35,000	N	I	11-22-91	Indef.
ST92-1453	ANR Pipeline Co	Cokinos Natural Gas Co	12-23-91	G-S	1,000	N	I	11-18-91	Indef.
ST92-1454	ANR Pipeline Co	Triumph Gas Marketing Co	12-23-91	G-S	50,000	N	I	11-21-91	Indef.
ST92-1455	ANR Pipeline Co	Northern States Power Co. Wisc	12-23-91	BB	7,271	N	F	11-26-91	Indef.
ST92-1456	Enogex Inc	Northern Natural Gas Co	12-23-91	C	75,000	N	I	11-01-91	Indef.
ST92-1457	Enogex Inc	ANR Pipeline Co	12-23-91	C	50,000	N	I	12-01-91	Indef.
ST92-1458	Enogex Inc	Phillips Gas Pipeline Co	12-23-91	C	150,000	N	I	12-01-91	Indef.
ST92-1459	Montana Power Co	Colorado Interstate Gas Co	12-23-91	G-HT	10,000	N	I	12-01-91	10-31-92
ST92-1460	Montana Power Co	Colorado Interstate Gas Co	12-23-91	G-HT	15,000	N	I	12-01-91	11-30-92
ST92-1461	Southeastern Natural Gas Co	Texas Eastern Transmission	12-23-91	G=HT	40,000	N	F	11-22-91	11-22-92
ST92-1462	Sonat Intrastate-Alabama Inc	Tennessee Gas Pipeline Co	12-23-91	C	1,000	N	I	12-03-91	Indef.
ST92-1463	Transok, Inc	Arkla Energy Resources Co	12-23-91	C	50,000	N	I	11-21-91	Indef.
ST92-1464	Transok, Inc	Riverside Pipeline Co	12-23-91	C	15,000	N	I	12-01-91	Indef.
ST92-1465	Northern Natural Gas Co	Peoples Natural Gas Co	12-23-91	B	7,500	N	I	12-01-91	11-30-92
ST92-1466	Northern Natural Gas Co	Peoples Natural Gas Co	12-23-91	B	23,500	N	F	12-01-91	02-29-92
ST92-1467	Transwestern Pipeline Co	Northern Canadian Marketing Corp.	12-23-91	G-S	100,000	N	I	12-06-91	Indef.
ST92-1468	Transwestern Pipeline Co	Gasmark, Inc	12-23-91	G-S	100,000	N	I	12-05-91	Indef.
ST92-1469	Transwestern Pipeline Co	Enron Gas Marketing, Inc	12-23-91	G-S	500,000	N	I	12-05-91	Indef.
ST92-1470	Transwestern Pipeline Co	Continental Natural Gas, Co	12-23-91	G-S	15,000	N	I	12-01-91	Indef.
ST92-1471	Transwestern Pipeline Co	NGC Transportation, Inc	12-23-91	G-S	500,000	N	I	12-05-91	Indef.
ST92-1472	Transwestern Pipeline Co	Chevron U.S.A., Inc	12-23-91	G-S	100,000	N	I	11-23-91	Indef.
ST92-1473	National Fuel Gas Supply Corp	NGC Transportation, Inc	12-23-91	G-S	16,500	N	I	12-01-91	03-30-92
ST92-1474	National Fuel Gas Supply Corp	NGC Transportation, Inc	12-23-91	G-S	12,500	N	I	12-01-91	03-30-92
ST92-1475	Transcontinental Gas P/L Corp	Stellar Gas Co	12-23-91	B	100,000	N	I	12-06-91	Indef.
ST92-1476	Transcontinental Gas P/L Corp	United Texas Transmission Co	12-23-91	B	100,000	N	I	12-01-91	Indef.
ST92-1477	Transcontinental Gas P/L Corp	Dow Pipeline Co	12-23-91	B	80,000	N	I	12-02-91	Indef.
ST92-1478	Transcontinental Gas P/L Corp	Baltimore Gas and Electric Co	12-23-91	B	20,000	N	I	12-06-91	Indef.
ST92-1479	Transcontinental Gas P/L Corp	Philadelphia Electric Co	12-23-91	B	40,000	N	I	01-10-91	Indef.
ST92-1480	Transcontinental Gas P/L Corp	United Texas Transmission Co	12-23-91	B	100,000	N	I	12-05-91	Indef.
ST92-1481	Transcontinental Gas P/L Corp	City of Greenwood	12-23-91	B	100	N	F	12-04-91	07-31-06
ST92-1482	Transcontinental Gas P/L Corp	City of Shelby	12-23-91	B	200	N	F	12-01-91	07-31-06
ST92-1483	Panhandle Eastern Pipe Line Co	Eli Lilly and Co	12-23-91	G-S	3,000	N	F	12-01-91	Indef.
ST92-1484	Panhandle Eastern Pipe Line Co	Angas, Inc	12-23-91	G-S	200	N	I	12-01-91	Indef.
ST92-1485	Panhandle Eastern Pipe Line Co	Louis Dreyfus Energy Corp	12-23-91	G-S	100,000	N	I	12-03-91	Indef.
ST92-1486	Panhandle Eastern Pipe Line Co	Western Gas Processors, Ltd	12-23-91	G-S	20,000	N	I	12-05-91	Indef.
ST92-1487	Panhandle Eastern Pipe Line Co	Amgas, Inc	12-23-91	G-S	130	N	I	12-01-91	Indef.
ST92-1488	Panhandle Eastern Pipe Line Co	Central Illinois Public Service Co	12-23-91	B	20,000	N	I	12-03-91	Indef.
ST92-1489	Panhandle Eastern Pipe Line Co	Vesta Energy Co	12-23-91	G-S	110,000	N	I	12-01-91	Indef.
ST92-1490	Houston Pipe Line Co	Texas Eastern Transmission Corp.	12-23-91	C	60,000	N	I	10-23-91	Indef.
ST92-1491	Houston Pipe Line Co	Seagull Interstate Corp	12-23-91	C	100,000	N	I	08-08-91	Indef.
ST92-1492	Houston Pipe Line Co	Black Marlin Pipeline Co	12-23-91	C	100,000	N	I	11-01-91	Indef.
ST92-1493	Houston Pipe Line Co	Natural Gas P/L Co. of America	12-23-91	C	100,000	N	I	11-01-91	Indef.
ST92-1494	Houston Pipe Line Co	United Gas Pipe Line Co	12-23-91	C	100,000	N	I	11-05-91	Indef.
ST92-1495	Houston Pipe Line Co	Transcontinental Gas P/L Corp	12-23-91	C	100,000	N	I	11-07-91	Indef.
ST92-1496	Houston Pipe Line Co	Texas Eastern Transmission Corp.	12-23-91	C	100,000	N	I	09-03-91	Indef.
ST92-1497	Houston Pipe Line Co	Natural Gas P/L Co. of America	12-23-91	C	30,000	N	I	11-01-91	Indef.
ST92-1498	Houston Pipe Line Co	Black Marlin Pipeline Co	12-23-91	C	100,000	N	I	09-01-91	Indef.
ST92-1499	Houston Pipe Line Co	Northern Natural Gas Co	12-23-91	C	100,000	N	I	10-25-91	Indef.
ST92-1500	Houston Pipe Line Co	Seagull Interstate Corp	12-23-91	C	100,000	N	I	10-01-91	Indef.
ST92-1501	Houston Pipe Line Co	Tennessee Gas Pipeline Co	12-23-91	C	100,000	N	I	09-19-91	Indef.

Docket No. [1]	Transporter/seller	Recipient	Date filed	Part 284 subpart	Estimated maximum daily quantity [2]	Aff. Y/N	Rate schedule	Date commenced	Projected termination date
ST92-1502	Houston Pipe Line Co	United Gas Pipe Line Co	12-23-91	C	100,000	N	I	09-05-91	Indef.
ST92-1503	Houston Pipe Line Co	Natural Gas P/L Co of America	12-23-91	C	50,000	N	I	10-03-91	Indef.
ST92-1504	Houston Pipe Line Co	Black Marlin Pipeline Co	12-23-91	C	100,000	N	I	10-15-91	Indef.
ST92-1505	Houston Pipe Line Co	Northern Natural Gas Co	12-23-91	C	50,000	N	I	09-02-91	Indef.
ST92-1506	Houston Pipe Line Co	Transcontinental Gas P/L Corp	12-23-91	C	50,000	N	I	08-28-91	Indef.
ST92-1507	Houston Pipe Line Co	Northern Natural Gas Co	12-23-91	C	50,000	N	I	09-25-91	Indef.
ST92-1508	Houston Pipe Line Co	Sabine Pipeline Co	12-23-91	C	50,000	N	I	09-01-91	Indef.
ST92-1509	Houston Pipe Line Co	Texas Eastern Transmission Corp.	12-23-91	C	100,000	N	I	09-01-91	Indef.
ST92-1510	Houston Pipe Line Co	United Gas Pipe Line Co	12-23-91	C	100,000	N	I	10-10-91	Indef.
ST92-1511	Houston Pipe Line Co	Natural Gas P/L Co. of America	12-23-91	C	100,000	N	I	10-01-91	Indef.
ST92-1512	Houston Pipe Line Co	Tennessee Gas Pipeline Co	12-23-91	C	100,000	N	I	11-01-91	Indef.
ST92-1513	ONG Transmission Co	Caprock Pipeline Co	12-24-91	C	150,000	N	I	12-01-91	Indef.
ST92-1514	ONG Transmission Co	ANR Pipeline Co	12-24-91	C	100,000	N	I	11-13-91	Indef.
ST92-1515	ONG Transmission Co	Northern Natural Gas Co	12-24-91	C	50,000	N	I	12-04-91	Indef.
ST92-1516	Questar Pipeline Co	Grand Valley Gas Co	12-24-91	G-S	30,000	N	I	11-13-91	11-12-92
ST92-1517	Tennessee Gas Pipeline Co	Wes Cana Energy Market. (U.S.) Inc.	12-24-91	G-S	1,500	N	f	12-09-91	04-01-92
ST92-1518	Tennessee Gas Pipeline Co	Citizens Gas Supply Corp	12-24-91	G-S	3,200,000	N	I	12-01-91	Indef.
ST92-1519	Viking Gas Transmission Co	ANR Pipeline Co	12-24-91	B	106,044	N	F	12-01-91	10-31-00
ST92-1520	CNG Transmission Corp	American Central Gas Co	12-26-91	G-S	75,000	N	I	10-18-91	02-15-92
ST92-1521	CNG Transmission Corp	Energy Marketing Exchange	12-26-91	G-S	10,000	N	I	11-27-91	03-26-92
ST92-1522	CNG Transmission Corp	O & R Energy, Inc	12-26-91	G-S	100,000	N	I	12-03-91	04-01-92
ST92-1523	CNG Transmission Corp	Niagara Mahawk Power Corp	12-26-91	B	35,000	N	F	12-01-91	Indef.
ST92-1524	CNG Transmission Corp	Indeck-Oswego L.P	12-26-91	G-S	12,000	N	F	12-06-91	04-04-92
ST92-1525	CNG Transmission Corp	Kamine/Besicorp Carthage L.P	12-26-91	G-S	14,200	N	I	12-01-91	03-30-92
ST92-1526	CNG Transmission Corp	Meridian Marketing and Trans. Corp.	12-26-91	G-S	1,800	N	I	10-22-91	02-19-92
ST92-1527	CNG Transmission Corp	W.R. Grace & Co	12-26-91	G-S	6,000	N	I	10-11-91	02-08-92
ST92-1528	CNG Transmission Corp	River Gas Co	12-26-91	G-S	25,000	N	I	10-18-91	02-15-92
ST92-1529	CNG Transmission Corp	North Penn Gas Co	12-26-91	G-S	25,000	N	I	10-18-91	02-15-92
ST92-1530	CNG Transmission Corp	Niagara Mohawk	12-26-91	G-S	25,000	N	I	10-18-91	02-15-92
ST92-1531	CNG Transmission Corp	Hope Gas Inc	12-26-91	G-S	25,000	N	I	10-18-91	02-15-92
ST92-1532	CNG Transmission Corp	American Central Gas Co	12-26-91	G-S	75,000	N	I	10-18-91	02-15-92
ST92-1533	CNG Transmission Corp	Corning Natural Gas Co	12-26-91	G-S	25,000	N	I	10-18-91	02-15-92
ST92-1534	CNG Transmission Corp	American Central Gas Co	12-26-91	G-S	75,000	N	I	10-18-91	02-15-92
ST92-1535	Enogex Inc	Natural Gas P/L Co. of America	12-26-91	C	50,000	N	I	11-30-91	Indef.
ST92-1536	Williston Basin Inter. P/L Co	Western Gas Resources, Inc	12-26-91	G-S	261,525	N	I	12-09-91	08-31-93
ST92-1537	Williston Basin Inter. P/L Co	Prairielands Energy Marketing, Inc.	12-26-91	G-S	117,500	N	I	11-27-91	10-14-92
ST92-1538	Panhandle Eastern Pipe Line Co	Aquila Energy Marketing Corp	12-26-91	G-S	100,000	N	I	12-01-91	Indef.
ST92-1539	Panhandle Eastern Pipe Line Co	Alsey Refractories Co	12-26-91	G-S	385	N	F	12-01-91	Indef.
ST92-1540	Panhandle Eastern Pipe Line Co	Quantum Chemical Corp	12-26-91	G-S	5,000	N	F	12-01-91	Indef.
ST92-1541	Panhandle Eastern Pipe Line Co	NGC Transportation Inc	12-26-91	G-S	200,000	N	I	12-01-91	01-01-92
ST92-1542	Panhandle Eastern Pipe Line Co	Northern Indiana Public Service Co.	12-26-91	G-S	30,000	N	I	12-01-91	01-01-92
ST92-1543	Natural Gas P/L Co. of America	Unified Natural Gas Group, L.P	12-26-91	G-S	100,000	N	I	12-01-91	Indef.
ST92-1544	Natural Gas P/L Co. of America	Arcadian Corp	12-26-91	G-S	1,000	N	F	12-01-91	12-31-95
ST92-1545	Natural Gas P/L Co. of America	Seagull Marketing Services, Inc	12-26-91	G-S	200,000	N	I	12-01-91	Indef.
ST92-1546	Natural Gas P/L Co. of America	Wisconsin Southern Gas Co., Inc.	12-26-91	B	5,342	N	F	12-01-91	11-30-95
ST92-1547	Natural Gas P/L Co. of America	Midcon Marketing Corp	12-26-91	G-S	300,000	Y	I	12-01-91	Indef.
ST92-1548	Natural Gas P/L Co. of America	Arkla Energy Marketing Co	12-26-91	G-S	10,000	N	F	11-01-91	05-31-97
ST92-1549	Natural Gas P/L Co. of America	Union Carbide Industrial Gases Inc.	12-26-91	G-S	2,000	N	F	10-01-91	09-30-93
ST92-1550	Natural Gas P/L Co. of America	Arcadian Corp	12-26-91	G-S	16,000	N	F	12-01-91	12-31-95
ST92-1551	Houston Pipe Line Co	El Paso Natural Gas Co	12-26-91	C	350,000	N	I	01-01-91	Indef.
ST92-1552	Houston Pipe Line Co	Transwestern Pipeline Co	12-26-91	C	350,000	N	I	01-01-91	Indef.
ST92-1553	Houston Pipe Line Co	Sabine Pipeline Co	12-26-91	C	350,000	N	I	01-01-91	Indef.
ST92-1554	Houston Pipe Line Co	Transcontinental Gas P/L Corp	12-26-91	C	350,000	N	I	01-01-91	Indef.
ST92-1555	Houston Pipe Line Co	Trunkline Gas Co	12-26-91	C	350,000	N	I	01-01-91	Indef.
ST92-1556	Houston Pipe Line Co	United Gas Pipe Line Co	12-26-91	C	350,000	N	I	01-01-91	Indef.
ST92-1557	Houston Pipe Line Co	Texas Eastern Transmission Corp.	12-26-91	C	350,000	N	I	01-01-91	Indef.
ST92-1558	Houston Pipe Line Co	Florida Gas Transmission Co	12-26-91	C	350,000	N	I	01-01-91	Indef.
ST92-1559	Houston Pipe Line Co	Northern Natural Gas Co	12-26-91	C	350,000	N	I	01-01-91	Indef.
ST92-1560	Houston Pipe Line Co	Tennessee Gas Pipeline Co	12-26-91	C	350,000	N	I	01-01-91	Indef.
ST92-1561	Houston Pipe Line Co	Natural Gas P/L Co. of America	12-26-91	C	350,000	N	I	01-01-91	Indef.
ST92-1562	Red River Pipeline Co	El Paso Natural Gas Co	12-26-91	C	50,000	N	I	11-28-91	Indef.
ST92-1563	Arkla Energy Resources	Laclede Gas Co	12-26-91	B	100,000	Y	I	12-01-91	Indef.
ST92-1564	Trunkline Gas Co	Eagle Natural Gas Co	12-27-91	G-S	20,000	N	I	12-03-91	Indef.
ST92-1565	Trunkline Gas Co	Unocal Exploration Corp	12-27-91	G-S	70,000	N	I	12-01-91	Indef.
ST92-1566	Trunkline Gas Co	Vesta Energy Co	12-27-91	G-S	1,200	N	I	12-01-91	Indef.
ST92-1567	Natural Gas P/L Co. of America	Midcon Marketing Corp	12-30-91	G-S	50,000	Y	I	12-01-91	12-31-91
ST92-1568	Natural Gas P/L Co. of America	Phillips 66 Natural Gas Co	12-30-91	G-S	30,000	N	I	12-01-91	Indef.
ST92-1569	Natural Gas P/L Co. of America	Enserch Gas Co	12-30-91	G-S	30,000	N	I	12-01-91	Indef.
ST92-1570	Natural Gas P/L Co. of America	Midcon Marketing Corp	12-30-91	G-S	100,000	Y	I	12-06-91	Indef.
ST92-1571	Natural Gas P/L Co. of America	Exxon Co., U.S.A	12-30-91	G-S	50,000	N	I	12-01-91	Indef.
ST92-1572	Natural Gas P/L Co. of America	Transco Energy Marketing Co	12-30-91	G-S	10,000	N	I	12-03-91	Indef.

Docket No. [1]	Transporter/seller	Recipient	Date filed	Part 284 subpart	Estimated maximum daily quantity [2]	Aff. Y/N	Rate schedule	Date commenced	Projected termination date
ST92-1573	Natural Gas P/L Co. of America	Midcon Marketing Corp	12-30-91	G-S	10,000	Y	F	12-01-91	02-29-92
ST92-1574	Natural Gas P/L Co. of America	City of Frohna	12-30-91	B	75	N	F	12-01-91	11-30-95
ST92-1575	Valero Transmission, L.P	El Paso Natural Gas Co	12-30-91	C	10,000	N	I	12-01-91	Indef.
ST92-1576	Williston Basin Inter. P/L Co	Exxon Corp	12-30-91	G-S	310	Y	F	12-01-91	02-29-92
ST92-1577	Williston Basin Inter. P/L Co	Koch Hydrocarbon Co	12-30-91	G-S	227	Y	F	12-01-91	03-31-92
ST92-1578	Williston Basin Inter. P/L Co	Koch Hydrocarbon Co	12-30-91	G-S	2,131	Y	F	12-01-91	02-29-92
ST92-1579	Valero Transmission, L.P	Transwestern Pipeline Co	12-30-91	C	20,000	N	I	12-01-91	Indef.
ST92-1580	ANR Pipeline Co	West Tennessee Public Utility Dist.	12-30-91	B	1,700	N	F	12-01-91	Indef.
ST92-1581	ANR Pipeline Co	Petro Source Gas Ventures	12-30-91	G-S	5,000	N	F	12-03-91	Indef.
ST92-1582	ANR Pipeline Co	Coastal Gas Marketing Co	12-30-91	B	150,000	Y	I	12-04-91	Indef.
ST92-1583	ANR Pipeline Co	Public Service Electric & Gas Co	12-30-91	B	12,850	Y	F	12-05-91	Indef.
ST92-1584	ANR Pipeline Co	Northern Illinois Gas Co	12-30-91	B	50,000	Y	I	12-01-91	Indef.
ST92-1585	ANR Pipeline Co	Ohio Gas Co	12-30-91	B	30,000	N	I	12-01-91	Indef.
ST92-1586	ANR Pipeline Co	Aquila Gas Processing Corp	12-30-91	G-S	50,000	N	I	12-01-91	Indef.
ST92-1587	ANR Pipeline Co	East Ohio Gas Co	12-30-91	B	71,602	N	F	12-01-91	Indef.
ST92-1588	ANR Pipeline Co	Aquila Gas Processing Corp	12-30-91	G-S	50,000	N	I	12-01-91	Indef.
ST92-1589	ANR Pipeline Co	Northern Indiana Public Service Co.	12-30-91	B	150,000	N	I	12-05-91	Indef.
ST92-1590	Columbia Gulf Transmission Co	Hadson Gas Systems, Inc	12-30-91	G-S	121,500	N	I	12-04-91	Indef.
ST92-1591	Columbia Gulf Transmission Co	Honda of America Manufacturing, Inc.	12-30-91	G-S	4,500	N	F	12-01-91	Indef.
ST92-1592	Columbia Gulf Transmission Co	Enmark Gas Corp	12-30-91	G-S	50,000	N	I	12-02-91	Indef.
ST92-1593	Enogex Inc	El Paso Natural Gas Co	12-30-91	C	100,000	N	I	12-01-91	Indef.
ST92-1594	Enogex Inc	Arkla Energy Resources	12-30-91	C	10,000	N	I	12-01-91	Indef.
ST92-1595	Pacific Gas Transmission Co	Eastex Gas Transmission Co	12-30-91	B	103,520	N	I	01-01-90	09-23-90
ST92-1596	Northern Border Pipeline Co	Petrorep (Canada) Ltd	12-30-91	G-S	25,000	Y	I	11-30-91	11-30-93
ST92-1597	Pacific Gas Transmission Co	Southern California Gas Co	12-31-91	B	158,310	N	I	08-01-89	09-27-90
ST92-1598	Pacific Gas Transmission Co	American Natural Gas Co., Ltd	12-31-91	G-S	103,520	N	I	12-11-91	12-31-92
ST92-1599	Pacific Gas Transmission Co	Trigen Resources	12-31-91	G-S	158,310	N	I	12-01-91	08-01-92
ST92-1600	Pacific Gas Transmission Co	IGI Resources, Inc	12-31-91	G-S	276,379	N	I	12-08-91	11-01-96
ST92-1601	Viking Gas Transmission Co	Great Plains Natural Gas Co	12-31-91	B	2,200	N	F	12-01-91	03-31-92
ST92-1602	Viking Gas Transmission Co	Peoples Natural Gas Co	12-31-91	B	1,900	N	F	12-01-91	02-29-92
ST92-1603	National Fuel Gas Dist. Corp Co	Tennessee Gas Pipeline Co	12-31-91	C	2,500	N	I	12-01-91	11-30-91
ST92-1604	Mississippi River Trans. Corp	National Steel Corp	12-31-91	G-S	7,500	N	F	12-01-91	12-29-92
ST92-1605	Trunkline Gas Co	City of Hamilton	12-31-91	G-S	20,000	N	I	12-04-91	Indef.
ST92-1606	Trunkline Gas Co	Arkla Energy Marketing Co	12-31-91	G-S	50,000	N	I	12-03-91	Indef.
ST92-1607	Trunkline Gas Co	Vesta Energy Co	12-31-91	G-S	30,000	N	I	12-04-91	Indef.
ST92-1608	Williams Natural Gas Co	Brock Gas Systems & Equipment.	12-31-91	G	600	N	I	12-01-91	03-01-92
ST92-1609	Williams Natural Gas Co	Energy Dynamics, Inc	12-31-91	G-S	1,500	N	F	12-01-91	03-01-92
ST92-1610	Williams Natural Gas Co	EMC Gas Transmission Co	12-31-91	G-S	500	N	I	12-01-91	Indef.
ST92-1611	Williams Natural Gas Co	Rangeline Corp	12-31-91	G-S	3,190	N	I	12-01-91	04-01-92
ST92-1612	Williams Natural Gas Co	AG Processing, Inc	12-31-91	G-S	600	N	I	12-01-91	Indef.
ST92-1613	Williams Natural Gas Co	Vesta Energy Co	12-31-91	G-S	9,499	N	I	12-01-91	03-01-92
ST92-1614	Tennessee Gas Pipeline Co	Gasmark, Inc	12-31-91	G-S	10,000	N	I	12-02-91	Indef.
ST92-1615	Iroquis Gas Trans. System, L.P	Citizens Gas Supply Corp	12-31-91	G-S	576,000	N	I	12-01-91	10-31-92
ST92-1616	Iroquis Gas Trans. System, L.P	Niagara Mohawk Power Corp	12-31-91	B	35,000	N	F	12-01-91	10-31-92
ST92-1617	Iroquis Gas Trans. System, L.P	Hadson Gas Systems, Inc	12-31-91	G-S	6,500	N	F	12-01-91	03-31-92
ST92-1618	Iroquis Gas Trans. System, L.P	Boston Gas Co	12-31-91	B	4,500	N	F	12-01-91	10-31-92
ST92-1619	Iroquis Gas Trans. System, L.P	Canstates Petroleum Marketing	12-31-91	G-S	576,000	N	I	12-17-91	10-31-92
ST92-1620	Iroquis Gas Trans. System, L.P	NGC Transportation, Inc	12-31-91	G-S	576,000	N	I	12-01-91	10-31-92
ST92-1621	Iroquis Gas Trans. System, L.P	New York State Elect. & Gas Corp.	12-31-91	B	6,000	N	F	12-01-91	10-31-92
ST92-1622	Iroquis Gas Trans. System, L.P	Santanna Natural Gas Corp	12-31-91	G-S	300,000	N	I	12-11-91	10-31-92
ST92-1623	Iroquis Gas Trans. System, L.P	Altresco Pittsfield, L.P	12-31-91	G-S	250,000	N	I	12-11-91	10-31-92
ST92-1624	Iroquis Gas Trans. System, L.P	Colonial Gas Co	12-31-91	B	4,000	N	F	12-01-91	10-31-92
ST92-1625	Iroquis Gas Trans. System, L.P	Western Gas Marketing U.S.A., Ltd.	12-31-91	G-S	576,000	Y	I	12-01-91	10-31-92
ST92-1626	Iroquis Gas Trans. System, L.P	Texas-Ohio Gas, Inc	12-31-91	G-S	60,000	N	I	12-11-91	10-31-92
ST92-1627	Iroquis Gas Trans. System, L.P	CNG Transmission Corp	12-31-91	G	60,000	Y	F	12-01-91	01-31-92
ST92-1628	Iroquis Gas Trans. System, L.P	JMC Fuel Services, Inc	12-31-91	G-S	1,000	Y	F	12-01-91	03-31-92

[1] Notice of transactions does not constitute a determination that filings comply with commission regulations in accordance with order no. 436 (final rule and notice requesting supplemental comments, 50 FR 42,372, 10/10/85).
[2] Estimated maximum daily volumes includes volumes reported by the filing company in mmbtu, mcf and dt.
[3] Transportation service converted from authority under 18 C.F.R. section 284.106, subpart B, to authority under 18 C.F.R. section 284.223(f)(1), subpart G-S.

[FR Doc. 92-2081 Filed 1-28-92; 8:45 am]
BILLING CODE 6717-01-M

[Docket Nos. CI88-648-005, et al.]

Western Gas Marketing Inc., et al.; Natural Gas Certificate Filings

Take notice that the following filings have been made with the Commission:

1. Western Gas Marketing Inc.

[Docket No. CI88-648-005]

January 16, 1992.

Take notice that on December 31, 1991, Western Gas Marketing Inc. (WMG) of 11 Greenway Plaza, suite 1120, Houston, Texas 77046, 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 the blanket limited-term certificate with pregranted abandonment previously issued to Western Gas Marketing USA Limited (Western Gas USA) in Docket No. CI88-

648–003 for a term expiring March 31, 1991, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

WGM requests extension for an unlimited term or, in the alternative, for a one year period. WGM also requests that the Commission amend the certificate to reflect Western Gas USA's name change to Western Gas Marketing Inc.

Comment date: February 5, 1992, in accordance with Standard Paragraph J at the end of this notice.

2. Amoco Production Co

[Docket no. CI92–16–000]

January 16, 1992.

Take notice that on December 5, 1991, Amoco Production Company (Amoco) of P.O. Box 3092, Houston, Texas 77253, filed an application pursuant to section 7(b) of the Natural Gas Act and the Federal Energy Regulatory Commission's (Commission) regulations thereunder for authorization and permission to abandon permanently a natural gas compressor facility located in Calcasieu Parish, Louisiana, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

The Commission by order of April 24, 1981, in docket No. CI81–47–000, issued a certificate authorizing Amoco to construct and operate the subject compression facility for the purpose of delivering gas to Florida Gas Transmission Company (FGT) in partial satisfaction of its warranty obligation to FGT under its FERC Gas Rate Schedule No. 439 and related certificate in Docket No. CI65–584. The source of the gas was South Timbalier Block 156 and Ship Shoal Block 292. The gas was delivered onshore to FGT by Trunkline Gas Company for the account of Amoco. Amoco states that its warranty obligations have been satisfied and compression is no longer necessary.

Coment date: February 7, 1992, in accordance with Standard Paragraph J at the end of this notice.

3. Masspower

[Docket No. CI92–20–000]

January 16, 1992.

Take notice that on December 31, 1991, MASSPOWER of One Bowdoin Square, Boston, Massachusetts 02114, filed an application pursuant to sections 4 and 7 of the Natural Gas Act (NGA) and the Federal Energy Regulatory Commission's (Commission) regulations thereunder for an unlimited-term blanket certificate with pregranted abandonment authorizing sales for resale in interstate commerce of natural gas subject to the Commission's NGA jurisdiction, including imported gas, without rate restrictions, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Comment date: February 5, 1992, in accordance with Standard Paragraph J at the end of this notice.

4. Destec Gas Services, Inc.

[Docket No. CI92–21–000]

January 16, 1992.

Take notice that on January 3, 1992, Destec Gas Services, Inc. (Destec) of P.O. Box 4411, Houston, Texas 77042–4411, filed an application pursuant to sections 4 and 7 of the Natural Gas Act (NGA) and the Federal Energy Regulatory Commission's (Commission) regulations thereunder for an unlimited-term blanket certificate with pregranted abandonment authorizing sales for resale in interstate commerce of natural gas subject to the Commission's NGA jurisdiction, imported natural gas, liquefied natural gas, gas purchased under any existing or subsequently approved pipeline blanket certificate authorizing interruptible sales for resale of surplus system supply gas and gas purchased from non-first sellers such as interstate pipelines, intrastate pipelines and local distribution companies, without rate restrictions, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Comment date: February 5, 1992, in accordance with Standard Paragraph J at the end of this notice.

5. Algonquin Gas Transmission Co.

[Docket No. CP92–305–000]

January 16, 1992.

Take notice that on January 16, 1992, Algonquin Gas Transmission Company (Algonquin), 1284 Soldiers Field Road, Boston, Massachusetts 02135, filed in Docket No. CP92–305–000 a request pursuant to §§ 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.211) for authorization to construct and operate a sales tap to provide for the delivery of natural gas to Dartmouth Power Associates (Dartmouth Power), an end-user, under Algonquin's blanket certificate issued in Docket No. CP87–317–000 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.

Algonquin proposes to construct and operate a sales tap in Dartmouth, Massachusetts, to provide an interconnect with a meter station (estimated to cost approximately $760,000) to be built by Dartmouth Power on its property at its electric generating facility, and to be purchased by Algonquin as soon as Federal Energy Regulatory Commission permits the cost recovery in Algonquin's rate schedule. Algonquin states that the sales tap would facilitate the delivery to Dartmouth Power of 14,010 MMBtu equivalent of natural gas per day. Algonquin also states that, as an end-user, Dartmouth Power would consume the delivered volumes in its independent power production activities. Algonquin explains that Dartmouth Power currently is in the final stages of completing a 67 Megawatt electric generating station and that Dartmouth Power needs the gas to conduct test operations of the plant.

Algonquin states that it originally sought authorization to construct facilities and provide service to Dartmouth Power under its application in its Open Season Project in Docket No. CP89–661–005. However, according to Algonquin, because of an unresolved cost recovery issue in the Open Season dockets, Algonquin is uncertain whether authorization would be issued in satisfactory form in time to construct facilities to provide service to Dartmouth Power to meet its test gas needs commencing March 1, 1992. Thus, Algonquin states, as a contingency to its application in Docket No. CP89–661–005, it is filing the request for authority under its blanket certificate submitted herein.

Comment date: March 2, 1992, in accordance with Standard Paragraph G at the end of this notice.

6. Northwest Pipeline Corporation

[Docket No. CP92–296–000]

January 16, 1992.

Take notice that on January 10, 1992, Northwest Pipeline Corporation (Northwest), 295 Chipeta Way, Salt Lake City, Utah 84158–0900, filed an application with the Commission in Docket No. CP92–296–000 pursuant to section 7 of the Natural Gas Act (NGA) for permission and approval to abandon a gathering and exchange service with El Paso Natural Gas Company (El Paso), all as more fully set forth in the application which is open to public inspection.

Northwest and El Paso currently gather and exchange interruptible natural gas volumes under the San Juan Gathering Agreement, authorized in the

Commission order issued January 22, 1974, in Docket No. CP73–331, *et al.* (51 FPC 329). The San Juan Gathering Agreement allows Northwest and El Paso to use their respective gathering systems in the San Juan Basin area of Colorado and New Mexico to gather natural gas from those wells owned by one of the parties but connected to the other party's gathering system. Northwest and El Paso gather and exchange gas under their respective FERC Rate Schedules X–24 and X–31. Northwest states that it signed a termination agreement with El Paso by which they agreed to a May 31, 1991, effective termination date for service under Northwest's Rate Schedule X–24, subject to FERC approval. Both parties have generally terminated their system supply purchase commitments in the San Juan Basin and no longer have a need for the historic exchange services provided under the agreement. No abandonment of facilities is proposed.

Northwest also requests a waiver of its first-come, first-served tariff provisions to allow the January 31, 1974, priority of service date under Rate Schedule X–24 to be the initial priority of service date for a replacement open-access transportation agreement with El Paso.

Comment date: February 6, 1992, in accordance with Standard Paragraph F at the end of this notice.

7. Natural Gas Pipeline Company of America

[Docket No. CP92–303–000]

January 16, 1992.

Take notice that on January 13, 1991, Natural Gas Pipeline Company of America (Natural), 701 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP92–303–000 an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to abandon certain pipeline compression facilities, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Natural states that it proposes to abandon its Compressor Station 191 located in Hutchinson County, Texas which, among other things, includes one 9,100 HP compressor unit and one 9,300 HP compressor unit. Natural states that it would sell the two compressor units to El Paso Natural Gas Company (El Paso) for salvage value of $630,000. Natural further indicates that, after El Paso completes the removal of the salvaged materials, Natural would remove all remaining compressor station facilities except for small diameter below grade piping which would be retired in place. The cost of abandonment of these facilities is estimated to be $25,000, it is indicated.

Natural indicates that these facilities are no longer required to facilitate its movement of natural gas since its ability to meet current demands would be unaffected due to a gradual and fundamental shift in gas receipts from the Oklahoma-Texas area to downstream areas on Natural's system. Natural states that the decline in these traditional supply basins combined with increased supplies from the Rocky Mountain area and Canada have resulted in a change in the operating profile of this part of Natural's system.

Comment date: February 6, 1992, in accordance with Standard paragraph F at the end of this notice.

8. Natural Gas Pipeline Company of America

[Docket No. CP92–294–000]

January 16, 1992.

Take notice that on January 10, 1992, Natural Gas Pipeline Company of America (Natural), 701 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP92–294–000 an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the construction and operation of certain storage field pipeline facilities, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Specifically, Natural proposes to construct and operate approximately 1,500 feet of 12-inch pipeline in the Herscher storage field complex in Kankakee County, Illinois, to connect the Herscher-Northwest storage field to the Herscher-Galesville storage field. Natural states that the proposed facilities would allow it to transfer natural gas from Herscher-Northwest to Herscher-Galesville on off peak days. Natural asserts that this transfer of natural gas would allow it to more effectively utilize the higher deliverability from Herscher-Galesville on peak days. Natural further states that the proposal would not affect the present design day and peak day capacities of the Herscher storage complex.

Natural estimates the cost of the facilities to be $282,000.

Comment date: February 6, 1992, in accordance with Standard paragraph F at the end of this notice.

9. Texas Eastern Transmission Corporation and CNG Transmission Corporation

[Docket No. CP92–226–000]

January 16, 1992.

Take notice that on December 9, 1991, Texas Eastern Transmission Corporation (Texas Eastern), P.O. Box 1642, Houston, Texas 77251–1642, and CNG Transmission Corporation (CNG), 445 West Main Street, Clarksburg, West Virginia 26301 (jointly referred to as Applicants) filed in Docket No. CP92–226–000 an application pursuant to sections 7(b) and 7(c) of the Natural Gas Act for a certificate of public convenience and necessity requesting amendment of the June 5, 1990 order in Docket Nos. CP87–312–006 and CP87–5–002 by authorizing: (1) CNG to abandon its storage service to Texas Eastern and assigning such service to Elizabethtown Gas Company (Elizabethtown), The Southern Connecticut Gas Company (Southern Connecticut), and UGI Corporation (UGI); (2) Texas Eastern to render a firm transportation for such storage service; and (3) the elimination of the "at-risk" language included in the June 5, 1990 order, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Applicants state that the Commission, in its order of June 5, 1990, authorized, as part of the APEC IV Project, CNG's request to provide 20,000 Dth equivalent per day of storage service to Texas Eastern for further resale by Texas Eastern to future customers, and authorized Texas Eastern to construct and operate facilities on its system. Applicants further state that the Commission, because of the uncertainty of Texas Eastern's ability to resell this storage service, determined that Texas Eastern should be held at risk for the costs associated with CNG's storage service and Texas Eastern's facilities required to transport the 20,000 Dth equivalent per day of gas until Texas Eastern enters into precedent agreements with customers for this service and receives Commission authorization to resell this storage service to future customers.

Applicants request authorization to amend the certificate issued on June 5, 1990 in order to allow CNG to abandon the 20,000 Dth per day of storage service currently assigned to Texas Eastern and to allow the assignment of Texas Eastern's rights and obligations to Rate Schedule GSS–II storage service from CNG of 20,000 Dth per day of Elizabethtown, Southern Connecticut and UGI. Applicants indicate that the

proposed volumes by customers is as follows:

Company name	Proposed commencement date	Maximum storage quantity (Dth)	Maximum withdrawal quantity (Dth/d)
Elizabethtown	4/01/92	666,600	6,666
Southern Connecticut	4/01/92	666,700	6,667
UGI	4/01/92	666,700	6,667
Aggregate total		2,000,000	20,000

Applicants submit that the storage service to be rendered by CNG is proposed to commence on April 1, 1992. It is indicated that CNG will receive or deliver the gas for storage under Rate Schedule GSS–II from Texas Eastern for the account of Buyer, at the interconnection of CNG's proposed North Summit storage field pipeline and Texas Eastern's existing system.

Applicants further request that the order be amended to allow Texas Eastern to provide a firm transportation service for Elizabethtown, Southern Connecticut and UGI under Texas Eastern's existing Rate Schedule FTS–5, in the following volumes by customer:

Company name	Proposed commencement date	Maximum daily obligation (Dth/d)
Elizabethtown	11/15/92	6,666
Southern Connecticut	11/15/92	6,667
UGI	11/15/92	6,667
Aggregate total		20,000

Applicants state that Texas Eastern would commence firm transportation service upon the later of November 15, 1992 or the completion of all the necessary facilities. Applicants indicate that Texas Eastern would receive the gas for transportation under Rate Schedule FTS–5 from CNG, or deliver gas to CNG for storage for the account of the customer, at the interconnection of CNG's proposed North Summit storage field pipeline and Texas Eastern's existing system. Applicants further indicate that Texas Eastern would deliver gas received from CNG to points of delivery with the customer, or in the case of Southern Connecticut's volumes, to Algonquin Gas Transmission Company (Algonquin) at Measuring Station 087 near Lambertville, Pennsylvania. Applicants state that Texas Eastern would receive the gas from the customers for storage injection at their existing delivery points with Texas Eastern by displacement of quantities otherwise delivered and would redeliver such quantities to CNG at the CNG North Summit facility.

Applicants state that Algonquin is concurrently filing an application to construct the necessary facilities and to provide a transportation service for Southern Connecticut.

Applicants state that Texas Eastern has provided precedent agreements reflecting the addition of the three new customers. Precedent agreements between CNG and the three new customers were filed as supplements to the application on January 6, 1992, January 7, 1992, and January 13, 1992.

Applicants submit that, for all gas transported by Texas Eastern for the customers, commencing November 15, 1992, Texas Eastern would charge the applicable rate under Rate Schedule FTS–5, as conditioned by the Commission's order on rehearing of June 21, 1991 in Docket No. CP87–312–007. Applicants further submit that CNG would charge the customers the Rate Schedule GSS–II rates on file as part of CNG's FERC Gas Tariff.

Applicants request that the Commission amend the June 5, 1990 order by eliminating the "at-risk" language included in the June 5, 1990 order referring to the 20,000 Dth per day of storage and that the Commission grant any such other authorizations as may be necessary to effectuate the assignment.

Comment date: February 6, 1992, in accordance with Standard Paragraph F at the end of this notice.

Northwest Pipeline Corporation

[Docket No. CP92–297–000]

January 16, 1992.

Take notice that on January 10, 1992, Northwest Pipeline Corporation (Northwest), 295 Chipeta Way, Salt Lake City, Utah 84158–0900, filed in Docket No. CP92–297–000 an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to abandon an exchange of natural gas with Questar Pipeline Company (Questar), all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Northwest states that the exchange was authorized by the Commission in Docket No. CP79–115, as amended, and was carried out under the terms of a gathering and exchange agreement on file as Rate Schedule X–63 in Northwest's FERC Gas Tariff, Original Volume No. 2. It is asserted that Northwest was authorized to exchange gas on an interruptible basis with Mountain Fuel Supply Company, Questar's predecessor, from the two companies' respective gathering areas in the Moxa Arch area of Lincoln County, Wyoming. It is asserted that Northwest no longer has any gas supply in the Moxa Arch area and has not gathered any gas for Quester since December 1990. It is explained that Northwest and Quester have mutually agreed to terminate the gathering and exchange service, effective June 1, 1991, by signing a Termination Agreement dated April 1, 1991. It is explained that Northwest and Questar have entered into a non-jurisdictional gathering agreement dated May 6, 1991, under which Northwest would gather Questar's gas in the Moxa Arch area. It is further explained that no facilities would be abandoned in conjunction with the proposed abandonment of service.

Comment date: February 6, 1992, in accordance with Standard Paragraph F at the end of this notice.

10. Tennessee Gas Pipeline Co.

[Docket No. CP92–301–000]

January 16, 1992.

Take notice that on January 13, 1992, Tennessee Gas Pipeline Company (Tennessee), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP92–301–000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to operate 27 existing delivery points as jurisdictional facilities to deliver natural gas to various customers under Tennessee's blanket certificate issued in Docket No. CP82–413–000 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 pubic inspection.

Tennessee states that the delivery points were constructed and operated under NGPA section 311 authority to deliver natural gas transported under subpart B of part 284 of the Commission's Regulations. Tennessee asserts that it now provides significant transportation service under subpart G of part 284 of the Commission's Regulations. Tennessee further states that granting the requested authorization would allow it to utilize these facilities for all transportation services, thereby maximizing its system flexibility.

The facilities are located in Alabama, Kentucky, Louisiana, Massachusetts, Mississippi, New York, Ohio, Texas and West Virginia, it is stated.

Comment date: March 2, 1992, in accordance with Standard Paragraph G at the end of this notice.

11. Arkla Energy Resources, a Division of Arkla, Inc.

[Docket No. CP92–286–000]

January 21, 1992.

Take notice that on January 7, 1992, Arkla Energy Resources, a Division of Arkla, Inc. (AER), P.O. Box 21734, Shreveport, Louisiana 77151, filed in Docket No. CP92–286–000 a request, as supplemented on January 16, 1992, pursuant to §§ 157.205 and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.216) for authorization to abandon certain sales facilities, under its blanket certificate issued in Docket Nos. CP82–384–000 and CP82–384–001, pursuant to section 7(b) 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.

AER requests authorization to abandon four domestic sales taps located on its Line FS–1 in Comanche County, Oklahoma. Specifically, AER proposes to abandon the following facilities:

(1) A 1-inch tap used for delivery of gas to Randy Wayne Harrell,

(2) A 1-inch tap used for delivery of gas to Wayne Harrell,

(3) A 1-inch tap used for delivery of gas to Carol R. Austin,

(4) A 1-inch tap used for delivery of gas to Beluah F. Evans.

AER indicates that it has included in its filing letters from each of the affected customers agreeing to the abandonment of service.

AER states that, following the receipt of the requested authorization in this proceeding, it plans to sell Line FS–1 and all appurtenant facilities to Ford Energy Company which would install at its own expense as part of the sales agreement facilities necessary to convert each of the four customers to propane service. AER alleges that authorization for the abandonment by sale of Line FS–1 is not required because the line performs a non-jurisdictional gathering function.

Comment date: March 6, 1992, in accordance with Standard Paragraph G at the end of this notice.

12. Indiana Utilities Corporation

[Docket No. CP92–299–000]

January 21, 1992.

Take notice that on January 13, 1992, Indiana Utilities Corporation (IUC), 123 West Chestnut Street, P.O. Box 188, Corydon, Indiana 47112, filed in Docket No. CP92–299–000 pursuant to section 7(f) of the Natural Gas Act (NGA) requesting that the Commission make a service area determination for the area in which IUC currently operates and would operate in the future, issue a waiver of regulatory requirements ordinarily applicable to natural gas companies under the NGA and the Natural Gas Policy Act of 1978 (NGPA), and find that IUC qualifies as a local distribution company (LDC) for purposes of section 311 of the NGPA, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

IUC states that it is engaged in the retail distribution of natural gas for residential, commercial and industrial use in the towns of Corydon, Elizabeth and New Middletown and environs in Harrison County, Indiana. IUC further states that it has 1,850 customers located within the State of Indiana and is regulated by the Indiana Regulatory Commission (Indiana Commission).

IUC submits that it receives all of its gas supply from or through Texas Gas Transmission Corporation (Texas Gas), with which IUC has a gas supply contract dated November 1, 1991, and authorized in Docket Nos. CP68–243, 40 FPC 19 (1968), CP70–287, 44 FPC 233 (1970) and CP91–1991–000, 56 FERC ¶ 61,392 (1991). It is stated that all of IUC gas supply is received through a single Texas Gas delivery point in Jefferson County, Kentucky, and is transported from this delivery point by IUC though a 4½-inch pipeline, across the Ohio River to IUC's distribution area.

Since it acquires gas in a state other than that in which the gas is consumed, IUC states that it does not qualify for an exemption as a Hinshaw pipeline under Section 1(c) of the NGA. According to IUC, the pipeline from the Texas Gas delivery point to IUC's distribution area was acquired and is operated pursuant to a certificate issued in Docket No. G–19178, 23 FPC 55 (1960).

It is stated that IUC operates 45.27 miles of distribution lines of sizes varying from 1½ to 6-inches, 5.23 miles of 4-inch transmission lines and 15-miles of 6-inch transmission line. IUC submits that, while it is technically a natural gas company as defined in Section 1 of the NGA, it is in essence a small LDC and should be exempt from Commission jurisdiction. IUC states that the fact that it is subject to Commission regulation for certain purposes imposes economic burdens on both IUC and the Commission, and is unnecessary and duplicative because IUC is regulated by the Indiana Commission. It is stated that the Commission's electric reporting requirements, for example, are economically infeasible for IUC because of its small size and lack of technological capability.

Therefore, IUC proposes that the Commission determine a sevice area for IUC to consist of the right-of-way of the 4½-inch pipeline from the Texas Gas delivery point to the Indiana border and Harrison County, Indiana. IUC states that it will not use the Kentucky portion of the service area to provide natural gas service to the public directly or indirectly within Kentucky. According to IUC, the service area determination would relieve it of Commission regulation otherwise applicable to the transportation of gas in interstate commerce and the enlargement or extension of its facilities within the service area. It is stated that these activities would instead be within the exclusive jurisdiction of the Indiana Commission.

According to IUC, its proposal satisfies the key factors which the Commission has in the past considered in Section 7(f) proceedings. First, IUC states that it does not make any sales for resale in the proposed service area and has no plans to do so. Second, IUC states that the rates applicable to service it will render are regulated by the Indiana Commission. Third, IUC states that it does not have an extensive transportation system inasmuch as the Kentucky pipeline extends only 4.9 miles from the Texas Gas delivery point to the Ohio River. IUC's other tansportation facilities consist of 15 miles of 6-inch pipeline from the Ohio River to Corydon, Indiana, and 45 miles of various size pipeline in its destribution system. Fourth, it is stated that other companies providing gas service in the vicinity should have no concern about the proposal since IUC will not supply consumers in Kentucky and will supply Indiana consumers pursuant to Indiana law and regulation.

IUC also seeks an express waiver by the Commission of all reporting and accounting requirements and rules and regulations which are ordinarily applicable to natural gas companies, including by not necessarily limited to those set forth in title 18 of the Code of Federal Regulations, so that IUC will be treated the same as a non-federally regulated LDC. IUC avers that no regulatory gap will exist because it will remain subject to the accounting, reporting and other rules and regulations of the Indiana Commission.

In addition, IUC requests that the Commission find that it should be a LDC for purposes of determining the applicability of other Commission regulations. IUC submits that this will ensure that IUC has access to the

transportation of gas by interstate pipelines under Section 311 of the NGPA, and this finding would be consistent with other orders of the Commission under section 7(f).

Comment date: February 11, 1992, in accordance with Standard Paragraph F at the end of the notice.

13. Tennessee Gas Pipeline Co.

[Docket No. CP92-300-000]

January 21, 1992.

Take notice that on January 13, 1992, Tennessee Gas Pipeline Company (Tennessee), filed in Docket No. CP92-300-000, as supplemented January 17, 1992, a prior notice request pursuant to §§ 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act for authorization to operate a jurisdictional receipt point as a delivery point for Conoco, Inc., under the blanket certificate issued in Docket No. CP82-413-000 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.

Tennessee states that it currently transports natural gas for Conoco, Inc. pursuant to § 284.223 of the Regulations and pursuant to a contract dated June 26, 1987. Tennessee further states that Conoco, Inc. has requested that an existing jurisdictional receipt point located at Tennessee's Side Valve 526C-1202, West Delta Block 40, offshore Louisiana, be modified as a delivery point in order to deliver up to 1,000 dekatherms of natural gas per day to Conoco, Inc. for gas lift purposes. Tennessee states that other than slight modifications to a check value at the existing tie-in assembly,[1] no construction is involved.

Comment date: March 6, 1992, in accordance with Standard Paragraph G 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, 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 to 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.

Standard Paragraph

J. 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, N.E., 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 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.

Lois D. Cashell,

Secretary.

[FR Doc. 92-2080 Filed 1-28-92; 8:45 am]

BILLING CODE 6717-01-M

[1] Tennessee states that it considers these activities as involving auxiliary installation under § 2.55(a) of the Regulations.

[Docket Nos. TA92-2-20-000, TM92-12-20-000 and RP92-92-000]

Algonquin Gas Transmission Co.; Proposed Changes in FERC Gas Tariff

January 22, 1992.

Take notice that Algonquin Gas Transmission Company ("Algonquin") on January 14, 1992, tendered for filing proposed changes in its FERC Gas Tariff, Third Revised Volume No. 1, as set forth in the revised tariff sheets:

Proposed To Be Effective March 1, 1992

Primary Tariff Sheets

Sub 11 Rev Sheet No. 21
Sub 11 Rev Sheet No. 22
Sub 7 Rev Sheet No. 25
Sub 11 Rev Sheet No. 26
Sub 11 Rev Sheet No. 27
Sub 11 Rev Sheet No. 28
Sub 11 Rev Sheet No. 29

Alternate Tariff Sheets

Sub Alt 11 Rev Sheet No. 21
Sub Alt 11 Rev Sheet No. 22
Sub Alt 11 Rev Sheet No. 25
Sub Alt 11 Rev Sheet No. 26
Sub Alt 11 Rev Sheet No. 27
Sub Alt 11 Rev Sheet No. 28
Sub Alt 11 Rev Sheet No. 29
Sub First Revised Sheet No. 636
Sub First Revised Sheet No. 637
Sub First Revised Sheet No. 638
Sub First Revised Sheet No. 639
Sub First Revised Sheet No. 640

Alquonquin states that the instant filing is being made to comform the electronic portion of Algonquin's Annual Purchased Gas Adjustment ("PTA") with the required regulations as cited in the Commission Letter Order of January 7, 1992 ("January 7 Letter") rejecting Algonquin's Annual PTA and Transportation Cost Adjustment ("TCA") filed on December 31, 1991 in Docket Nos. TA92-1-20-000 and TM92-10-20-000. In the January 7 Letter the Commission stated that the filing was being rejected because "Algonquin's Schedule D1, Record Type 01 exceeds the 132 space character positions provided for entering textual information in this schedule." The Commission also instructed Algonquin to modify the tariff sheets so that the

pagination is not the same as in the original filing.

Algonquin also states that the revised tariff Sheet Nos. 21 through 29, listed above, are being filed as part of Algonquin's regularly scheduled Annual PGA and TCA to reflect the standby service costs to be charged by Texas Eastern Transmission Corporation, Transportation and Compression by Others Costs from Texas Eastern and Transcontinental Gas Pipe Line Corporation and purchased gas costs to be charged by its various suppliers.

Algonquin states that the effect of the change in rates in the primary sheets listed above is to increase the demand charges by 0.0320 per MMBtu and to decrease the commodity charges by $0.1274 per MMBtu under all of Algonguin's firm sales rate schedules from those rates contained in Algonquin's last quarterly PGA and TCA filing, made November 1, 1991 in Docket Nos. TQ92–2–20–000 and TM92–6–20–000 and revised per Commission Letter Order of October 31, 1991 in Docket Nos. TQ92–1–20–001 and TM92–3–20–001.

Algonquin further states that the alternate sheets listed above are being filed to incorporate its request for the annualization of projected GSIR Charges to be paid to Texas Eastern during the contract year ending October 31, 1992. The effect is to increase the demand rate by $2.8830 over the rate found in the primary tariff sheets.

Algonquin states that the proposed effective date for the listed tariff sheets is March 1, 1992.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with § § 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before February 6, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 92–2082 Filed 1–28–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. TM92–11–20–000]

Algonquin Gas Transmission Co.; Proposed Changes in FERC Gas Tariff

January 22, 1992.

Take notice that Algonquin Gas Transmission Company ("Algonquin") on January 14, 1992, tendered for filing proposed changes in its FERC Gas Tariff, Third Revised Volume No. 1, as set forth in the revised tariff sheet:

Proposed to be effective February 1, 1992

Sub 3 Rev Sheet No. 63

Algonquin states that it is filing Sub 3 Rev Sheet No. 63 to comply with the Commission Letter order of January 7, 1992 rejecting the filing made on December 31, 1991 in Docket No. TA92–1–20–000 and TM92–10–000 and directing Algonquin to refile, using different pagination from that used in the rejected filing. Algonquin also states that the instant filing concurrently tracks the change made by Texas Eastern in the underlying rates. Pursuant to section 4.2(c) of Rate Schedule ATAP, the proposed effective date of Sheet No. 63 is February 1, 1992, to coincide with the effective date of Texas Eastern's filing. The effect of the revision in rates in Rate Schedule ATAP is to decrease the Commodity (Maximum, Minimum and Interruptible) rates by .06¢ per MMBtu.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before January 29, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 92–2083 Filed 1–28–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP92–91–000]

Columbia Gas Transmission Corp.; Tariff Filing

January 22, 1992.

Take notice that on January 16, 1992, Columbia Gas Transmission Corporation (Columbia) tendered for filing the following tariff sheet to its FERC Gas Tariff, First Revised Volume No. 1:

Third Revised Sheet No. 224

The proposed effective date of the revised tariff sheet is February 5, 1992. Columbia states that the purpose of this filing is to revise the Request for Transportation form which shippers use in requesting transportation service from Columbia to require certification and sufficient information to Columbia to verify that, for transportation provided pursuant to section 311 of the Natural Gas Policy Act (NGPA) and § 284.102 of the Commission's Regulations, such services qualify as section 311 transportation.

Columbia states that on September 20, 1991, the Commission issued a Final Rule in Order 537 regarding revisions to the Commission's Regulations governing transportation pursuant to section 311 of the Natural Gas Policy Act and blanket transportation certificates. Columbia states that such Order, *inter alia*, requires interstate pipelines to obtain from its shippers certification, including sufficient information, to verify that service is provided to them under section 311 of the Natural Gas Policy Act and § 284.102 of the Commission's Regulations qualify as section 311 transportation and to file by January 6, 1991 any tariff revisions or additions necessary to clarify that an interstate pipeline may require such certifications.

Columbia states that copies of the filing been served upon its customers, State Commissions and other interested parties.

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, Union Center Plaza Building, 825 North Capitol Street, NE., Washington, DC 20426 in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before January 29, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92–2084 Filed 1–28–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP92-90-000]

Columbia Gulf Transmission Co.; Tariff Filing

January 22, 1992

Take notice that on January 16, 1992, Columbia Gulf Transmission Company (Columbia Gulf) tendered for filing the following tariff sheets to its FERC Gas Tariff, First Revised Volume No. 1:

First Revised Sheet No. 000
and
Third Revised Sheet No. 211

The proposed effective date of the revised tariff sheets is February 5, 1992. Columbia Gulf states that the purpose of this filing is to revise the Request for Transportation form which shippers use in requesting transportation service from Columbia Gulf to require certification and sufficient information to Columbia Gulf to verify that, for transportation provided pursuant to section 311 of the Natural Gas Policy Act (NGPA) and § 284.102 of the Commission's Regulations, such services qualify as section 311 transportation. Also, the tariff is being updated to refer to the appropriate Vice President to whom communication concerning the tariff be addressed.

Columbia Gulf states that on September 20, 1991, the Commission issued a Final Rule in Order 537 regarding revisions to the Commission's Regulations governing transportation pursuant to section 311 of the Natural Gas Policy Act and blanket transportation certificates. Columbia Gulf states that such Order, *inter alia*, requires interstate pipelines to obtain from its shippers certification, including sufficient information, to verify that service is provided to them under section 311 of the Natural Gas Policy Act and § 284.102 of the Commission's Regulations qualify as section 311 transportation and to file by January 6, 1991 any tariff revisions or additions necessary to clarify that an interstate pipeline may require such certifications.

Columbia Gulf states that copies of the filing have been served upon its customers, State Commissions and other interested parties.

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, Union Center Plaza Building, 825 North Capitol Street, NE., Washington, DC 20426 in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before January 29, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-2085 Filed 1-28-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP92-309-000]

Northern Natural Gas Co.; Request Under Blanket Authorization

January 22, 1992.

Take notice that on January 17, 1992, Northern Natural Gas Company (Northern) 1111 South 103rd Street, Omaha, Nebraska 68124-1000, filed in Docket No. CP92-309-000 a request pursuant to §§ 157.205 and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.216) for authorization to abandon the industrial setting at the Dakota City No. 2 town border station (TBS), located in Dakota County, Nebraska, under Northern's blanket certificate issued in Docket No. CP82-401-000 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.

Northern states that the equipment proposed to be abandoned was originally installed in 1948 to provide natural gas service to Nebraska Public Service Company for resale to the Beerman Estate Alfalfa Dehydration Plant. Northern also states that residential customers are served from the Dakota City No. 2 TBS. Northern advises that the Beerman industrial operations were discontinued in 1985. Northern explains that a fire destroyed the alfalfa plant in 1988 eliminating any future possibly for natural gas service for the plant. Northern states that it installed a smaller meter and reduced the delivery pressure from 50 psi to 10 psi, to provide more accurate gas measurement for the reduced service obligations at the Dakota City No. 2 TBS in 1988. Northern avers that the smaller facilities are adequate to provide reduced service obligations at the Dakota City No. 2 TBS, and that removal of the old valves, piping, metering and regulating equipment that was used to provide service for the industrial load would not result in abandonment of service to any of Northern's existing customers.

Any person or the Commission's staff may, within 45 days after 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 therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 92-2094 Filed 1-28-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP92-304-000]

Northwest Pipeline Corp.; Application

January 22, 1992

Take notice that on January 13, 1992, Northwest Pipeline Corporation (Northwest) 295 Chipeta Way, Salt Lake City, Utah 84158-0900, filed in Docket No. CP92-304-000 an application pursuant to Section 7(b) of the Natural Gas Act for an order granting permission and approval to abandon an interruptible transportation service provided for Questar Pipeline Company (Questar), all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Northwest states that by Commission order issued December 28, 1978 in Docket No. CP78-449 (5 FERC ¶ 61,302) it was authorized to transport up to 50,000 Mcf of the natural gas per day for the account of Questar (successor to Mountain Fuel Supply Company) pursuant to a Gas Transportation and Exchange Agreement (Agreement) dated June 1, 1978 and designated as Rate Schedule X-50 in Northwest's FERC Gas Tariff, Original Volume No. 2. Northwest further states that in accordance with this Agreement it transports Questar's gas from the Hogback Ridge #20-1 well through its South Lake supply lateral in Rich County, Utah for ultimate redelivery at a point of interconnection with Questar's pipeline in Sweetwater County, Wyoming.

Nortwest states that the Hogback Ridge #20-1 well was plugged and abandoned in 1985 and that Northwest received approval in Docket No. CP86-516-000, effective August 2, 1986, to abandon its South Lake supply lateral

facilities by sale to Questar. Accordingly, no gas supplies have been available to move under Rate Schedule X–50 since that time.

Northwest states that by a Termination Agreement dated January 16, 1991, Northwest and Questar agreed to terminate the Transportation and Exchange Agreement effective January 1, 1991. Northwest further states that no abandonment of facilities is proposed in conjunction with the abandonment of this service.

Any person desiring to be heard or to make any protest with reference to said application should on or before February 12, 1992, file with the Federal Energy Regulatory Commission, 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 385.214 or 385.211) 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 the 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 application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that permission and approval for the proposed abandonment are 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 Northwest to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 92–2092 Filed 1–28–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. TM92–3–18–000]

Texas Gas Transmission Corp.; Proposed Changes in FERC Gas Tariff

January 22, 1992.

Take notice that on January 16, 1992, Texas Gas Transmission Corporation (Texas Gas) tendered for filing the following revised tariff sheets to its FERC Gas Tariff, with a proposed effective date of February 1, 1992:

Fifteenth Revised Sheet No. 12
Twelfth Revised Sheet No. 12A
Sixth Revised Sheet No. 12B
Sixth Revised Sheet No. 12C

Texas Gas states that the proposed tariff sheets are being filed as part of Texas Gas's Annual Reconciliation of Take-or-Pay Settlement Payments contained in Docket No. RP91–61. Texas Gas states that the filing restates only the Fixed Monthly TOP Charge to be collected during the final Annual Recovery Period beginning February 1, 1992, and ending January 31, 1993.

Texas Gas states that copies of the revised tariff sheets are being mailed to Texas Gas's sales customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with 18 CFR 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before January 29, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the public reference room.

Lois D. Cashell,

Secretary.

[FR Doc. 92–2086 Filed 1–28–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP82–487–038]

Williston Basin Interstate Pipeline Co.; Compliance Filing

January 22, 1992.

Take notice that on January 6, 1992, Williston Basin Interstate Pipeline Company (Williston Basin), suite 300, 200 North Third Street, Bismarck, North Dakota 58501, tendered for filing certain revised tariff sheets to original Volume No. 1, First Revised Volume No. 1, Original Volume No. 1–A, Original Volume No. 1–B and Original Volume No. 2 of its FERC Gas Tariff.

Williston Basin states that the revised tariff sheets were filed in compliance with the Commission's December 5, 1991 Opinion and Order directing Williston Basin to file revised tariff sheets for the period January 1, 1985 to the present reflecting the inclusion of its 1983 net injection volumes in rate base. Upon Commission acceptance of these revised tariff sheets, Williston Basin will submit revised bills to its customers consistent with the revised rates reflected in the filing.

Williston Basin also noted that, consistent with Ordering Paragraph B of the Commission's December 5, 1991 Order, on December 18, 1991 it filed in Docket Nos. CP82–487–014 and CP82–487–034 its proposed plan for the removal of excess storage inventory and that such plan will resolve the question of the recovery of the costs of the 1983 net injections.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before January 29, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92–2087 Filed 1–28–92; 8:45 am]

BILLING CODE 6717–01–M

Office of Fossil Energy

[FE Docket No. 91–80–NG]

Poco Petroleum, Inc.; Blanket Authorization To Import Natural Gas From Canada

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of Issuance of Order Granting Blanket Authorization To Import Natural Gas from Canada.

SUMMARY: The Office of Fossil Energy of the Department of Energy (DOE) gives notice that it has issued an order granting blanket authorization to Poco Petroleum, Inc. to import up to 200 Bcf of natural gas from Canada over a two-year period beginning on the date of first delivery after January 20, 1992, the date

Poco's existing blanket import authorization expires.

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. 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, January 17, 1992.

Clifford P. Tomaszewski,

Acting Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.

[FR Doc. 92–2153 Filed 1–28–92; 8:45 am]

BILLING CODE 6450–01–M

ENVIRONMENTAL PROTECTION AGENCY

Office of Research and Development

[FRL–4098–1]

Ambient Air Monitoring Reference and Equivalent Methods; Receipt of Application for an Equivalent Method Determination

Notice is hereby given that on December 27, 1991, the Environmental Protection Agency received an application from OPSIS AB, P. O. Box 244, S–24402 Furulund, Sweden, to determine if their opto-analyzer Model AR 500 long-path O_3 analyzer should be designated by the Administrator of the EPA as an equivalent method under 40 CFR part 53. If, after appropriate technical study, the Administrator determines that this method should be so designated, notice thereof will be given in a subsequent issue of the **Federal Register.**

Erich W. Bretthauer,

Assistant Administrator for Research and Development.

[FR Doc. 92–2162 Filed 1–28–92; 8:45 am]

BILLING CODE 6560–50–M

[FRL–4097–8]

Science Advisory Board Drinking Water Committee; Open Meeting

Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the Science Advisory Board's (SAB) Drinking Water Committee (DWC) will meet on February 11–12, 1992 at the Days Inn Crystal City Hotel, 2000 Jefferson Davis Highway, Arlington, Virginia 22202. The meeting will begin both days at 9 a.m., ending no later than 2 p.m. on February 12. The meeting is open to the public and seating is on a first-come basis.

The purpose of the meeting is for the Committee to review the Agency's Drinking Water Criteria Documents for the following issues: Chlorine Dioxide, Ozone and its By-Products, and Cryptosporidium. The Committee will also receive a presentation on a chemical and microbial risk comparison model. Copies of these documents are NOT available from the Science Advisory Board. For more information concerning these documents and their availability, please contact: Ms. Jennifer Orme Zavaleta, U.S. EPA, Office of Water, Office of Science and Technology (WH–856), 401 M Street SW., Washington, DC 20460, Telephone: (202) 260–7571. The tentative charge to the Committee is to: (1) Provide comments on the technical merit of the Criteria Documents and the proposed risk assessments for the compounds addressed in the documents; (2) provide comment on the draft model and the assumptions for comparing microbial risk with chemical risk; and (3) comment on the tentative maximum contaminant level goals (MCLG) for chlorine dioxide, chlorite, chlorate, cryptosporidium and bromate and issues associated with the MCLG's.

For details concerning this meeting, including a draft agenda, please contact Mr. Robert Flaak, Assistant Staff Director, Science Advisory Board (A–101F), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Telephone: (202) 260–6552 and FAX: (202) 260–7118. Members of the public who wish to make a brief oral presentation to the Committee must contact Mr. Flaak no later than Tuesday, February 4, 1992 in order to be included on the Agenda. Written statements of any length (at least 15 copies) may be provided to the Committee up until the meeting. The Science Advisory Board expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements. In general, each individual or group making an oral presentation will be limited to a total time of five minutes.

Dated: January 22, 1992.

Samuel Rondberg,

Acting Staff Director, Science Advisory Board.

[FR Doc. 92–2163 Filed 1–28–92; 8:45 am]

BILLING CODE 6560–50–M

[FRL–4097–9]

Science Advisory Board, Radiation Advisory Committee; Open Meeting

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the Radiation Advisory Committee (RAC) of the Science Advisory Board will meet February 10–12, 1992, Capitol Holiday Inn, Gemini Conference Room, 550 C Street SW., Washington, DC Telephone 202/479–4000. The meeting will begin at 12:30 on Monday and adjourn no later than 4 p.m. on Wednesday.

PURPOSE: (1) The Committee will consider, and possibly reach final agreement on, a revised RAC commentary, "Harmonizing Chemical and Radiation Risk Reduction Strategies". The draft commentary is available from Mrs. Joanna Foellmer (202/260–4126).

(2) The Committee expects to review the Homebuyer's and Seller's Guide to Radon. Copies can be obtained by calling Ms. Sarita Hoyt at (202/260–5879). The preliminary charge for this review is to review the scientific basis for the real estate radon testing protocols.

(3) The Committee will begin its review of the Office of Radiation Programs' Reevaluation of EPA's Methodology for Estimating Radiogenic Cancer Risks. Copies of the Agency's reevaluation can be obtained by calling Dr. Jerry Puskin (202/260–9633). The Agency's analysis relies upon a number of technical consensus documents produced by other organizations. These include: The 1990 Recommendations of the International Commission on Radiological Protection, Annals of the ICRP 21, No.1–3, 1991; The National Research Council's 1990 Health Effects of Exposure to Low Levels of Ionizing Radiation (BEIR V), National Academy of Sciences, Washington, DC.; the 1980 NCRP Report 64, Influence of Dose and Its Distribution in Time on Dose-Response Relationships for Low-LET Radiations and the 1985 NCRP Report 80, Induction of Thyroid Cancer by Ionizing Radiation, National Council on Radiation Protection and Measurements, Bethesda, Md.; the 1988 NRPB–R226 Health Effects Models Developed from the 1988 UNSCEAR Report, National Radiological Protection Board, Chilton, Didcot, Oxon OX11 ORQ, United Kingdom; the 1985 Health Effects Model for Nuclear Power Plant Accident Consequence Analysis, NUREG/CR–4213 and the 1991 Revision 1, Part II, Addendum 1, LMF–132, Chapter 3: Late Somatic Effects, Nuclear Regulatory Commission, Washington, DC; and the UNSCEAR's United Nations, N.Y. These reference documents are *not* available from the Office of Radiation Programs or the Science Advisory Board.

The charge for this review is:

(a) Has the Agency analysis considered the most relevant risk estimates of low-LET radiation?

(b) Does the Agency analysis accurately compare the most relevant features and assumptions of the various models?

(c) Is the Agency's analysis technically sound?

(d) Are the conclusions of the analysis scientifically defensible?

(e) Are the recommended methods for estimating the cancer risks appropriate and supportable in light of the current scientific evidence?

(4) The Committee will consider whether to undertake Committee-initiated activities concerning (a) Development of a better radom measurement protocol and (b) Radon Science—status and research priorities.

(5) The Committee expects to be briefed on how EPA treats sites containing radioactive materials, the results of OPPE study of EPA's radon programs, and a preliminary analysis by a committee member of uncertainty associated with the risks of radon in drinking water.

FOR FURTHER INFORMATION: The meeting is open to the public; however, seating is limited. Members of the public wishing to attend, provide oral public comment, or have written comment sent to the Committee in advance of the meeting should contact Mrs. Kathleen Conway, Designated Federal Official, of Mrs. Dorothy Clark, Staff Secretary at (202) 260–6552 by COB February 3.

Dated: January 17, 1992.

Donald G. Barnes,

Director, Science Advisory Board.

[FR Doc. 92–2164 Filed 1–28–92; 8:45 am]

BILLING CODE 6560–50–M

[OPPTS–140171; FRL–4042–2]

Access to Confidential Business Information by ICF International, Incorporated, The Bruce Company, and Radian Corporation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor, ICF International, Incorporated (ICF), of Fairfax, Virginia, and Washington, DC, and its subcontractors: The Bruce Company (BRU), of Washington, DC, and Radian Corporation (RAD), of Herndon, Virginia, for access to information which has been submitted to EPA under sections 4, 5, and 8 of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be confidential business information (CBI).

DATES: Access to the confidential data submitted to EPA will occur no sooner than February 12, 1992.

FOR FURTHER INFORMATION CONTACT: David Kling, Acting Director, TSCA Environmental Assistance Division (TS–799), Office of Pollution Prevention and Toxics, Environmental Protection Agency, rm. E–545, 401 M St., SW., Washington, DC 20460, (202) 554–1404, TDD: (202) 554–0551.

SUPPLEMENTARY INFORMATION: Under contract number 68–D9–0068, contractor ICF, Incorporated, of 9300 Lee Hwy., Fairfax, VA, and 1850 K St., NW., Suite 1000, Washington, DC, and its subcontractors: The Bruce Company, of 1100 Sixth St., SW., Suite. 515, Washington, DC, and Radian Corporation, of 2455 Horsepen Rd., Herndon, VA, will assist the Office of Pollution Prevention and Toxics (OPPT) in conducting exposure and risk assessments of chemicals subject to review and approval under TSCA and the Clean Air Act Amendments of 1990.

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA contract number 68–D9–0068, ICF, BRU, and RAD will require access to CBI submitted to EPA under sections 4, 5, and 8 of TSCA to perform successfully the duties specified under the contract. ICF, BRU, and RAD personnel will be given access to information submitted to EPA under sections 4, 5, and 8 of TSCA. Some of the information may be claimed or determined to be CBI.

EPA is issuing this notice to inform all submitters of information under sections 4, 5, and 8 of TSCA that EPA may provide ICF, BRU, and RAD access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract will take place at EPA Headquarters, ICF's Fairfax, VA and Washington, DC, facilities, and RAD's Herndon, VA facility only.

ICF and RAD will be authorized access to TSCA CBI at their facilities under the EPA "Contractor Requirements for the Control and Security of TSCA Confidential Business Information" security manual. Before access to TSCA CBI is authorized at ICF's and RAD's sites, EPA will approve ICF and RAD's security certification statement, perform the required inspection of their facilities, and ensure that the facilities are in compliance with the manual. Upon completing review of the CBI materials, ICF and RAD will return all transferred materials to EPA.

Clearance for access to TSCA CBI under this contract may continue until September 30, 1992.

ICF, BRU, and RAD personnel will be required to sign nondisclosure agreements and will be briefed on appropriate security procedures before they are permitted access to TSCA CBI.

Dated: January 17, 1992.

Linda A. Travers,

Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 92–2166 Filed 1–28–92; 8:45 am]

BILLING CODE 6560–50–F

[OPPTS–140170; FRL–4009–8]

Access to Confidential Business Information by Technical Resources, Incorporated

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor, Technical Resources, Incorporated (TRI), of Rockville, Maryland, for access to information which has been submitted to EPA under all sections of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be confidential business information (CBI).

DATES: Access to the confidential data submitted to EPA will occur no sooner than February 12, 1992.

FOR FURTHER INFORMATION CONTACT: David Kling, Acting Director, TSCA Environmental Assistance Division (TS–799), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E–545, 401 M St., SW., Washington, DC 20460, (202) 554–1404, TDD: (202) 554–0551.

SUPPLEMENTARY INFORMATION: Under contract number 68–D1–0161, contractor TRI, of 3202 Tower Oaks Blvd., Rockville, MD, will assist the Office of Pollution Prevention and Toxics, (OPPT) in reviewing and evaluating new chemical submissions under TSCA.

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA contract number 68–D1–0161, TRI will require access to CBI submitted to EPA under all sections of TSCA to perform successfully the duties specified under the contract. TRI personnel will be given access to information submitted to EPA under all sections of TSCA. Some of the information may be claimed or determined to be CBI.

EPA is issuing this notice to inform all submitters of information under all sections of TSCA that EPA may provide TRI access to these CBI materials on a need-to-know basis only. All access to

TSCA CBI under this contract will take place at EPA Headquarters and TRI's 1000 6th St., SW., Washington, DC facility only.

TRI will be authorized access to TSCA CBI at its Washington, DC facility under the EPA "Contractor Requirements for the Control and Security of TSCA Confidential Business Information" security manual. Before access to TSCA CBI is authorized at TRI's site, EPA will approve TRI's security certification, perform the required inspection of its facility, and ensure that the facility is in compliance with the manual. Upon completing review of the CBI materials, TRI will return all transferred materials to EPA.

Clearance for access to TSCA CBI under this contract may continue until September 30, 1994.

TRI personnel will be required to sign nondisclosure agreements and will be briefed on appropriate security procedures before they are permitted access to TSCA CBI.

Dated: January 17, 1992.

Linda A. Travers,

Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 92-2167 Filed 1-28-92; 8:45 am]

BILLING CODE 6560-50-F

[OPPTS-59931; FRL 4046-4]

Certain Chemicals; Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the **Federal Register** of May 13, 1983 (48 FR 21722). In the **Federal Register** of November 11, 1984, (49 FR 46066) (40 CFR 723.250), EPA published a rule which granted a limited exemption from certain PMN requirements for certain types of polymers. Notices for such polymers are reviewed by EPA within 21 days of receipt. This notice announces receipt of 2 such PMN(s) and provides a summary of each.

DATES: Close of review periods:

Y 92-85, 92-86, January 30, 1992.

FOR FURTHER INFORMATION CONTACT: David Kling, Acting Director, Environmental Assistance Division (TS-799), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E-545, 401 M St., SW., Washington, DC, 20460, (202) 554-1404, TDD (202) 554-0551.

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer on the PMNs received by EPA. The complete nonconfidential document is available in the TSCA Public Docket Office, NE-G004 at the above address between 8 a.m. and noon and 1 p.m. and 4 p.m., Monday through Friday, excluding legal holidays.

Y 92-85

Manufacturer. Seydel Co.

Chemical. (G) Sodium sulfosuccinated polyester resin.

Use/Production. (S) Textile sizing. Prod. range: Confidential.

Y 92-86

Manufacturer. Himont USA., Inc.

Chemical. (G) Thermoplastic olefin elastomer.

Use/Production. (S) Hoses, tubing gasket seal. Prod. range: 4,000,000-30,000,000 kg/yr.

Dated: January 23, 1992.

Steven Newburg-Rinn,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 92-2168 Filed 1-28-92; 8:45 am]

BILLING CODE 6560-50-F

[OPPTS-51784; FRL 4046-5]

Certain Chemicals; Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the **Federal Register** of May 13, 1983 (48 FR 21722). This notice announces receipt of 25 such PMNs and provides a summary of each.

DATES: Close of review periods:

P 92-386, 92-387, April 8, 1992.

P 92-388, 92-389, 92-390, 92-391, 92-392, 92-393, 92-394, 92-395, 92-396, April 11, 1992.

P 92-397, 92-398, April 12, 1992.

P 92-404, 92-405, 92-406, 92-407, 92-408, 92-409, 92-410, 92-411, April 13, 1992.

P 92-412, April 14, 1992.

P 92-413, April 15, 1992.

P 92-414, 92-415, April 19, 1992.

Written comments by:

P 92-386, 92-387, March 9, 1992.

P 92-388, 92-389, 92-390, 92-391, 92-392, 92-393, 92-394, 92-395, 92-396, March 12, 1992.

P 92-397, 92-398, March 13, 1992.

P 92-404, 92-405, 92-406, 92-407, 92-408, 92-409, 92-410, 92-411, March 14, 1992.

P 92-412, March 15, 1992.

P 92-413, March 16, 1992.

P 92-414, 92-415, March 20, 1992.

ADDRESSES: Written comments, identified by the document control number "(OPPTS-51784)" and the specific PMN number should be sent to: Document Processing Center (TS-790), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Rm. L-100, Washington, DC, 20460, (202) 260-3532.

FOR FURTHER INFORMATION CONTACT: David Kling, Acting Director, Environmental Assistance Division (TS-799), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E-545, 401 M St., SW., Washington, DC 20460 (202) 554-1404, TDD (202) 554-0551.

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer on the PMNs received by EPA. The complete nonconfidential document is available in the TSCA Public Docket Office NE -G004 at the above address between 8 a.m. and noon and 1 p.m. and 4 p.m., Monday through Friday, excluding legal holidays.

P 92-386

Importer. Hoechst Celanese Corporation.

Chemical. (G) Substituted azo compound.

Use/Import. (S) Pigment additive. Import range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 > 2,000 mg/kg species (rat). Acute dermal toxicity: LD50 > 2,000 mg/kg species (rabbit). Eye irritation: none species (rabbit). Static acute toxicity: time LC50 96h22-50 mg/l species (zebra fish). Skin irritation: negligible species (rabbit). Skin sensitization: positive species (guinea pig).

P 92-387

Manufacturer. Confidential.

Chemical. (G) Silicone modified polyester resin.

Use/Production. (S) Processing aid for manufacture of polymer lenses. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 > 5 g/kg species (rat). Skin irritation: negligible species (rabbit).

P 92-388

Importer. Xerox Corporation.

Chemical. (G) Graft acrylate copolymer.

Use/Import. (G) Component in reprographic developer. Import range: Confidential.

P 92-389

Manufacturer. The P.D. George Company.

Chemical. (S) Tall oil fatty acid polymer with phthalic anhydride, and glycerine, and neopentyl glycol.

Use/Production. (S) Paint vehicle. Prod. range: 47,740 kg/yr.

P 92-390

Manufacturer. Ashland Chemical, Inc.

Chemical. (G) Modified acrylatic polymer.

Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

P 92-391

Manufacturer. Ciba-Geigy Corporation.

Chemical. (G) Substituted-aryl amino aromatic.

Use/Production. (G) Lubricant additive. Prod. range: Confidential.

P 92-392

Importer. Ausimont USA, Inc.

Chemical. (G) Modified perfluoro polyether salt.

Use/Import. (S) Fiber surface treatment coating. Import range: Confidential.

P 92-393

Importer. Ausimont USA, Inc.

Chemical. (G) Modified perfluoeo polyether salt.

Use/Import. (S) Fiber surface treatment coating. Import range: Confidential.

P 92-394

Importer. Ausimont USA., Inc.

Chemical. (G) Modified perfluoro polyether salt.

Use/Import. (S) Fiber surface treatment coating. Import range: Confidential.

P 92-395

Manufacturer. Ausimont USA., Inc.

Chemical. (G) Modified perfluoro polyether salt.

Use/Import. (S) Fiber surface treatment coating. Import range: Confidential.

P 92-396

Manufacturer. Stepan Company.

Chemical. (G) Alkyl phenoxy poly(oxyethylene)sulfuric acid ester, substituted amine salt.

Use/Production. (G) Additive for fiber and pesticide formulation. Prod. range: Confidential.

Toxicity Data. Static acute toxicity: time LC50 96h0.27 mg/l species (rainbow trout).

P 92-397

Importer. Confidential.

Chemical. (S) Poly acatal poly oxy methylene.

Use/Import. (G) Open, nondispersive use. Import range: Confidential.

P 92-398

Importer. Confidential.

Chemical. (G) Adipic acid polyester.

Use/Import. (S) Plasticizer. Import range: Confidential.

Toxicity Data. Mutagenicity: negative.

P 92-404

Manufacturer. Confidential.

Chemical. (G) Hydroxy functional styrenated acrylate methacrylate polymer.

Use/Production. (G) Component of dispersively applied coating. Prod. range: 66,000–100,000 kg/yr.

P 92-405

Manufacturer. Confidential.

Chemical. (G) Hydroxy functional styrenated acrylate methacrylate polymer.

Use/Production. (G) Component of dispersively applied coating. Prod. range: 66,000–100,000 kg/yr.

P 92-406

Manufacturer. Confidential.

Chemical. (G) Hydroxy functional styrenated acrylate methacrylate polymer.

Use/Production. (G) Component of dispersively applied coating. Prod. range: 66,000–100,000 kg/yr.

P 92-407

Manufacturer. Confidential.

Chemical. (G) Hydroxy functional styrenated methacrylated polymer.

Use/Production. (G) Component of dispersively applied coating. Prod. range: 66,000–100,000 kg/yr.

P 92-408

Manufacturer. Daicolor-Pope Inc.

Chemical. (G) Azoic coupling product of a substituted aniline sulfonic acid and a substituted hydroxy naphthalenecarboxamide.

Use/Production. (G) Azoic pigment modifier. Prod. range: Confidential.

P 92-409

Importer. Confidential.

Chemical. (G) Alkyl benzimidazole derivative.

Use/Import. (S) Ingredient in pre-flex agent. Import range: Confidential.

P 92-410

Importer. Confidential.

Chemical. (G) Polyisobutylene amine.

Use/Import. (S) Detergent additive for gasoline. Import range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 > 2,200 mg/kg species (rat). Static acute toxicity: time LC50 96h4.6–10 mg/l species (rainbow trout).

P 92-411

Importer. Huls America, Inc.

Chemical. (G) Polymer of aliphatic polybasic acid, anhydride of aminocarboxylic acid and hetero cyclic aliphatic compound.

Use/Import. (S) Hot-melt adhesive application. Import range: Confidential.

P 92-412

Importer. Ciba-Geigy Corporation.

Chemical. (G) Substituted triphenyl triazine.

Use/Import. (G) Textile chemical. Import range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 > 5,000 mg/kg species (rat). Acute dermal toxicity: LD50 > 2,000 mg/kg species (rabbit). Eye irritation: none species (rabbit). Mutagenicity: negative. Skin irritation: negligible species (rabbit). Skin sensitization: negative species (guinea pig).

P 92-413

Manufacturer. Henkel Corporation.

Chemical. (G) Trialkylguanidine.

Use/Import. (S) Metal extractant. Import range: Confidential.

P 92-414

Importer. Confidential.

Chemical. (G) Poly-styrene-acrylic resin.

Use/Import. (G) Polymer additive. Import range: Confidential.

P 92-415

Manufacturer. Confidential.

Chemical. (G) Poly(styrene-co-arylonitrile.

Use/Production. (G) Coating. Prod. range: Confidential.

Dated: January 23, 1992.

Steven Newburg-Rinn,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 92-2169 Filed 1-28-92; 8:45 am]

BILLING CODE 6560-50-F

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 1871]

Petitions for Reconsideration of Actions in Rule Making Proceedings

January 22, 1992.

Petitions for reconsideration have been filed in the Commission rule making proceedings listed in this Public Notice and published pursuant to 47 CFR 1.429(e). The full text of these documents are available for viewing and copying in room 239, 1919 M Street, NW., Washington, DC, or may be purchased from the Commission's copy contractor Downtown Copy Center (202) 452-1422. Oppositions to these petitions must be filed on or before February 13, 1992. See § 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions has expired.

Subject: Amendment of § 73.202(b), Table of Allotments, FM Broadcast Stations. (Lancaster, Wisconsin, Clinton, Manchester, Iowa; and Morrison, Illinois) (MM Docket No. 89-521; RM No. 6606 and 7254)

Number of Petitions Received: 1.

Subject: Amendment of part 74 of the Commission Rules Regarding FM Booster Stations. (FFC 91-317)

Number of Petitions Received: 2.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR. Doc. 92-2106 Filed 1-28-92; 8:45 am]

BILLING CODE 6712-01-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA-928-DR]

Iowa; Amendment to a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Iowa (FEMA-928-DR), dated December 26, 1991, and related determinations.

DATED: January 21, 1992.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472 (202) 646-3606.

NOTICE: The notice of a major disaster for the State of Iowa, dated December 26, 1991, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of December 26, 1991:

The counties of O'Brien, Woodbury, Union, and Ida for Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Grant C. Peterson,

Associate Director, State and Local Programs and Support, Federal Emergency Management Agency.

[FR Doc. 92-2147 Filed 1-28-92; 8:45 am]

BILLING CODE 6718-02-M

[FEMA-930-DR]

Texas; Amendment to a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Texas (FEMA-930-DR), dated December 26, 1991, and related determinations.

DATES: January 17, 1992.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472 (202) 646-3606.

NOTICE: The notice of a major disaster for the State of Texas, dated December 26, 1991, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of December 26, 1991:

The counties of Anderson, Calhoun, Comanche, DeWitt, Eastland, Hays, Hill, Hood, Jones, Lampasas, Leon, Milam, Palo Pinto, and Victoria for Individual Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Grant C. Peterson,

Associate Director, State and Local Programs and Support, Federal Emergency Management Agency.

[FR Doc. 92-2148 Filed 1-28-92; 8:45 am]

BILLING CODE 6718-02-M

FEDERAL MARITIME COMMISSION

Ocean Freight Forwarder License Applicants; Tampa International Forwarding, Inc. et al.

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission applications for licenses as ocean freight forwarders pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718 and 46 CFR 510).

Persons knowing of any reason why any of the following applicants should not receive a license are requested to contact the Office of Freight Forwarders, Federal Maritime Commission, Washington, DC 20573.

Tampa International Forwarding, Inc., 4611 North Hale Avenue, Tampa, FL 33614, Officers: Edward J. Henderson, Director of Operations, Dominique W. Root, Director of Sales

Pacific Freight Group International, 105 Embarcadero, Oakland, CA 94606, Officers: John McNulty, President, Paul G. Falk, Vice President

Carpe Air & Sea Shipping Inc., 321 Commercial Ave., Palisades, NJ 07650, Officer: Barbara A. Carpe, President

John M. Hickman, 8729 Bonner Drive, W. Hollywood, CA 90048, Sole Proprietor

Gemini Freight Forwarding Company, 22 El Dorado St., #4, Arcadia, CA 91006, Yihong Wu, Sole Proprietor

Asian Pacific Express, Inc., 1928 Tyler Ave., suite K-168, S. El Monte, CA 91733, Officer: John Nai-Chuang Ngal, President.

Dated: January 23, 1992.

By the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 92-2066 Filed 1-28-92; 8:45 am]

BILLING CODE 6730-01-M

[Petition No. P2-92]

Direct Container Line-Conditions Unfavorable to Shipping in the United States-Korea Trade; Filing of Petition for Relief

Notice is given that a petition for relief from conditions unfavorable to shipping in the United States-Korea trade ("Trade") has been filed by Direct Container Line, Inc. ("Petitioner"), requesting relief under section 19(1)(b) of the Merchant Marine Act, 1920 ("Section 19"), 46 U.S.C. app. 876(1)(b). Petitioner requests Commission assistance in its attempts to establish a branch office in Korea, which is alleged to be prohibited by Korean Nationality requirements as to ownership and

composition of officers. Petitioner suggested counter-measures could include suspension of Korean-owned, U.S.-resident NVOCCs' tariffs, or that the Commission might fashion any appropriate remedy. Under Section 19, the Commission is authorized to make rules and regulations affecting shipping in the foreign trade in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade. In this instance, the Petitioner is asking the Commission to remedy a condition or conditions which it alleges precludes U.S.-owned NVOCCs or freight forwarding businesses from operating in Korea although Petitioner maintains that the U.S. has no similar restrictions on foreign-owned NVOCC or freight forwarding enterprises from operating in the U.S.

Because this petition presents the Commission with its first request for relief under Section 19 on behalf of a transportation intermediary—that is, a NVOCC of a freight forwarder—rather than an ocean common carrier, the Commission would be particularly interested in comments suggesting appropriate actions should a rulemaking be initiated. For example, Petitioner alleges that Korean law treats NVOCC's and forwarders identically, and therefore urges the Commission to consider counter-measures that would apply with equal force to Korean owned NVOCC's and forwarders operating in the United States. Petitioner notes that countervailing voyage fees against Korean ocean carriers might not be an appropriate remedy, even though it may be within the range of options available to the Commission in a Section 19 rulemaking.

To facilitate thorough consideration of the petition, interested persons are requested to reply to the petition no later than March 13, 1992. Replies shall be directed to the Secretary, Federal Maritime Commission, Washington, DC 20573-0001, shall consist of an original and 15 copies, and shall be served on F. Conger Fawcett, esq., Fawcett & Fawcett, 101 Larkspur Landing Circle, suite 321, Larkspur, California 94939.

Copies of the petition are available for examination at the Washington, DC office of the Commission, 1100 L Street NW., room 11101.

Joseph C. Polking,

Secretary

[FR Doc. 92-2095 Filed 1-28-92; 8:45 am]

BILLING CODE 6730-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

President's Committee on Mental Retardation; Meeting

Agency Holding the Meeting: President's Committee on Mental Retardation.

Time and Date: Executive Committee Meeting, Monday, March 2, 1992, 8 a.m.-9 a.m.; Full Committee Meeting, March 2-3, 1992, 9:30 a.m.-5 p.m.

Place: Ritz-Carlton Hotel, 1250 South Hayes Street, Arlington, Virginia.

Status: Meetings are open to the public. An interpreter for the deaf will be available upon advance request. All locations are barrier free.

Matters To Be Considered: Reports by members of the Executive Committee of the President's Committee on Mental Retardation (PCMR) will be given. The committee plans to discuss critical issues concerning prevention, family and community services, full citizenship, public awareness and other issues relevant to the PCMR's goals.

The PCMR: (1) Acts in an advisory capacity to the President and the Secretary of the Department of Health and Human Services on matters relating to programs and services for persons with mental retardation; and (2) is responsible for evaluating the adequacy of current practices in programs for the retarded, and reviewing legislative proposals that affect persons with metal retardation.

Contact Person for More Information: Sambhu N. Banik, Ph.D., Wilbur J. Cohen Building, room 5325, 330 Independence Avenue, SW., Washington, DC 20201-0001, (202) 619-0634.

Dated: January 10, 1992.

Sambhu N. Banik,

Executive Director, PCMR.

[FR Doc. 92-2101 Filed 1-28-92; 8:45 am]

BILLING CODE 4130-01-M

Centers for Disease Control

Ergonomic Interventions for the Beverage Delivery Industry; Meeting

The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control (CDC) announces the following meeting.

Name: Ergonomic Interventions for the Beverage Delivery Industry.

Time and Date: 9 a.m.-3 p.m., February 13, 1992.

Place: Alice Hamilton Laboratory, Conference Room C, NIOSH, CDC, 5555 Ridge Avenue, Cincinnati, Ohio 45213.

Status: Open to the public, limited only by the space available.

Purpose: To conduct an open meeting for the review of a NIOSH project entitled, "Ergonomic Interventions for the Benverage Delivery Industry." This project involves the development of ergonomic interventions to reduce musculoskeletal stress during soft drink container delivery in the beverage delivery industry.

Contact Person for Additional Information: James D. McGlothlin, NIOSH, CDC, 4676 Columbia Parkway, Mailstop R-5, Cincinnati, Ohio 45226, telephone 513/841-4221 or FTS 684-4221.

Dated: January 23, 1992.

Elvin Hilyer,

Associate Director for Policy Coordination, Centers for Disease Control.

[FR Doc. 92-2100 Filed 1-28-92; 8:45 am]

BILLING CODE 4160-19-M

Public Health Service

Food and Drug Administration; Statement of Organization, Functions, and Delegations of Authority

Part H, chapter HK (Food and Drug Administration) of the Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services (56 FR 29484, June 27, 1991, as amended most recently in pertinent part at 56 FR 50126, October 3, 1991), is amended to change the standard administrative code designator for the chapter and all of its sections from HK to HF (35 FR 3685, February 25, 1970.)

The HF designator (35 FR 3685, February 25, 1970) was used for the Food and Drug Administration (FDA) before its realignment (56 FR 29484, June 27, 1991). When the realignment was published, HK was the organizational designator for FDA. However, because of the wide range of organization and management systems that support the FDA, it is more practical and efficient to maintain the HF designator for FDA.

Reentry of the HF designator for the organizations listed below reflect: (1) The June 7, 1991 FDA realignment); (2) the Office of Management, and Center for Veterinary Medicine functional statement revisions (56 FR 50126), October 3, 1991); and (3) the Office of Policy substructure (56 FR 47098, September 17, 1991):

HFA6—Office of Management and Systems.

HFA9—Office of Operations.

HFAQ—Office of External Affairs.
HFAH—Office of Science.
HFAP—Office of Policy.
HFAPA—Regulations Policy and Management Staff.
HFAPB—Policy Development and Coordination Staff.
HFAPC—Policy Research Staff.

Dated: January 22, 1992.

Neil J. Stillman,

Deputy Assistant Secretary for Information Resources Management.

[FR Doc. 92–2121 Filed 1–28–92; 8:45 am]

BILLING CODE 4160–10–M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed information collection and related forms may be obtained by contacting the Bureau's clearance officer at the phone number listed below. comments and suggestions on the requirement should be made directly to the Bureau clearance office and to the Office of Management and Budget, Paperwork Reduction Project 1076–0094, Washington, DC 20503, telephone number (202) 395–7340.

Title: 25 CFR Part 11, Law and Order on Indian Reservations.

OMB Approval Number: 1076–0094.

Abstract: Courts of Indian Offenses have jurisdiction over domestic relations, including issuance of marriage licenses and divorce decrees. The general information collected on a marriage license application or a petition for dissolution is essential to enable the court to issue the proper documents. Respondents are persons who are seeking a marriage license or who wants to petition for divorce.

Frequency: On occasion.

Description of Respondents: Persons seeking marriage decrees or divorce proceedings.

Annual Responses: 300.

Annual Burden Hours: 75.

Bureau Clearance Office: Gail Sheridan (202) 208–2685.

Dated: April 18, 1991.

Carol A. Bacon,

Director, Office of Tribal Services.

Editorial Note: This document was received at the Office of the Federal Register on January 24, 1992.

[FR Doc. 92–2111 Filed 1–28–92; 8:45 am]

BILLING CODE 4310–02–M

Bureau of Land Management

[YA–324–4550–241A]

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed collection of information and related forms may be obtained by contacting the Bureau's Clearance Officer at the phone number listed below. Comments and suggestions on the proposal should be made directly to the Bureau Clearance Officer and to the Office of Management and Budget, Paperwork Reduction Project (not yet assigned), Washington, DC 20503, telephone 202–395–7340.

Title: Survey—Public Room Customer Satisfaction.

OMB Approval Number: (Not yet assigned).

Abstract: Respondents provide information on the quality of Bureau public room/reception area service received, either by telephone, in writing, or in person. This information allows the Bureau to determine if changes to service are necessary to improve assistance, timeliness, or better meet information needs of members of the public.

Bureau Form Number: 1120–8.

Frequency: Annually.

Description of Respondents: Individuals, or organizations using BLM public rooms/reception areas, or any other means of inquiries from the public to acquire information or assistance from BLM.

Estimated Completion Time: Five minutes.

Annual Responses: 400.

Annual Burden Hours: 32.

Bureau Clearance Officer (Alternate): Gerri Jenkins 202–653–6105.

Dated: January 8, 1992.

John J. Moeller,

Assistant Director, Support Services.

[FR Doc. 92–2068 Filed 1–28–92; 8:45 am]

BILLING CODE 4310–84–M

[NV–030–02–4320–02]

Carson City District Grazing Advisory Board; Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Cancellation and notice of rescheduling of a meeting.

SUMMARY: The Carson City District Grazing Advisory Board scheduled meeting for 10 a.m., on Thursday, November 21, 1991, was cancelled for lack of a quorum. The meeting is now rescheduled for Thursday, February 27, 1992 at 10 a.m. in the Carson City District Office Conference Room, 1535 Hot Springs Road, suite 300, Carson City, Nevada. The primary topics will be the FY 1992 Rangeland Improvement Projects, Allotment Management Plans, and the status of the Land Use Plans. The meeting is open to the public. Interested persons may make oral statements at 1 p.m. or file written statements for the Board's consideration.

FOR FURTHER INFORMATION CONTACT: Andy Anderson, Carson City District, Bureau of Land Management, 1535 Hot Springs Road, suite 300, Carson City, Nevada, 89706, phone: (702) 885–6141.

Dated: January 15, 1992.

James W. Elliott,

District Manager, Carson City District.

[FR Doc. 92–2069 Filed 1–28–92; 8:45 am]

BILLING CODE 4310–HC–M

Minerals Management Service

Accounting Procedure for Determining the Sufficiency of Estimate Payment Balances Established by Payors on Federal and Indian Oil and Gas Leases

January 22, 1992.

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice.

SUMMARY: The Minerals Management Service (MMS) published a Notice in the **Federal Register** on July 18, 1991, (56 FR 33040) of its accounting procedure for determining the sufficiency of estimate royalty payment balances. It established December 2, 1991, as the effective date. The Notice was a summary of a Dear Payor letter dated July 8, 1991, that was mailed to all royalty payors on Federal and Indian oil and gas leases. Because the Dear Payor letter was not printed in its entirety, minor differences were noted. Even though we have not received any concern on the differences, we have reprinted the letter to assure

consistent guidance on the accounting procedure for determining the sufficiency of estimated payment balances established by payors on Federal and Indian Oil and gas leases.

EFFECTIVE DATE: December 2, 1991.

FOR FURTHER INFORMATION CONTACT: Betty A. Middle, Chief, Automated Exception Processing Section, Minerals Management Service, P.O. Box 25165, MS 3212, Denver, Colorado 80225–0165, at (303) 231–3582 or (FTS) 326–3582.

SUPPLEMENTARY INFORMATION: By letter of July 8, 1991, MMS notified payors of the accounting procedure for determining the sufficiency of estimate payment balances on both Federal and Indian leases. In addition, MMS provided payors with the existing current estimate balances. This letter established December 2, 1991, as the effective date for the procedure and was signed by Mr. James R. Detlefs, Chief, Fiscal Accounting Division. The letter is reprinted below.

Dear Payor: This letter is to inform you that the Minerals Management Service (MMS) will calculate interest charges on insufficient estimate balances on Federal and Indian leases at the lease level effective with the September 1991 sales month. Please note that the sufficiency/insufficiency comparison will not be calculated at either the product type or payor code levels. This clarification will appear in the **Federal Register.** To avoid interest charges, payors must ensure that the estimate balance on each lease is sufficient to cover actual royalties to be reported. Therefore, we have enclosed a listing of your estimate balances as of June 20, 1991, for your analysis. Your estimate balances on this listing were calculated using only accepted royalty estimate information. Adjustments to your estimate balances received after June 20, 1991, will not appear on this report.

The procedures to establish or to adjust estimate payments are contained in the MMS Oil and Gas Payor Handbook, Volume II, Section 3.5. Federal and Indian oil and gas leases provide that royalties on production shall be done an payable monthly on the last day of the month following the month in which the oil or gas is removed and sold. Royalty payors may, however, make an estimated royalty payment and delay reporting and paying actual royalties an additional month. Your estimates must be adjusted no later than the October 1991 report month to cover September 1991 sales.

In calculating the lease-level insufficiency to determine the principal that is paid late, MMS will compare the estimate balance to the actual royalties reported and paid during and after the "extended estimate period" for each lease. The "extended estimate period" is defined as the time period the due date is extended because of an estimate. For example, for sales month September 1991, royalties are due October 31, 1991. If the payor had previously paid and reported an estimate, the extended due date would be December 2, 1991 (the usual due date of November 30 falls on Saturday). Therefore, the "extended estimate period" is November 1, 1991, through December 2, 1991.

In accordance with 30 CFR 218.54 (1991), we will calculate insufficient estimate interest on the insufficient estimate amount for the number of days payor uses the extended estimate period (the number of days in the "extended estimate period" or fewer if the payor submits payment earlier). When the actual royalties are paid past the "extended estimate period," the interest assessed on the insufficient estimate amount will be calculated only for the number of days in the "extended extended period." On a separate late-payment interest invoice, we will calculate interest on the full amount of the actual royalty for the number of days past the extended due date until the payment receipt date. These two interest bases do not overlap the same time periods; thus, you will not be assessed twice for the same time period.

You should review your estimated payments on each lease to ensure that the estimate balance at the lease level is sufficient to cover actual royalties for all products that you plant to report and pay during and after the "extended estimate period." Sufficient estimate payments will not preclude MMS from assessing applicable late-payment charges and late reporting assessments.

If you have questions regarding the insufficient estimate interest calculation, please call Mr. Dale Peterson at (303) 231–3608. If you have questions regarding the reporting or adjustment of estimates, please call your Lessee Contact Representative at (303) 231–3288.

End of letter.

Dated: January 22, 1992.

Jimmy W. Mayberry,

Associate Director for Royalty Management

[FR Doc. 92–2118 Filed 1–28–92; 8:45 am]

BILLING CODE 4310–MR–M

National Park Service

Jimmy Carter National Historic Site

AGENCY: National Park Service, DOT.

ACTION: Notice of Advisory Commission Meeting.

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Commission Act that a meeting of the Jimmy Carter National Historic Site Advisory Commission will be held at 8:30 a.m. to 4 p.m. at the following location and date.

DATES: February 28, 1992.

ADDRESSES: The Jimmy Carter Library and Museum Conference Room, One Coppenhill Avenue, Atlanta, Georgia 30307.

FOR FURTHER INFORMATION CONTACT: Mr. Fred Boyles, Superintendent, Jimmy Carter National Historic Site, Route 1, Box 800, Andersonville, Georgia 31711.

SUPPLEMENTARY INFORMATION: The purpose of the Jimmy Carter National Historic Site Advisory Commission is to advise the Secretary of the Interior or his designee on achieving balanced and accurate interpretation of the Jimmy Carter National Historic Site.

The members of the Advisory Commission are as follows:

Dr. Steven Hochman.
Dr. James Sterling Young.
Dr. Donald B. Schewe.
Dr. Henry King Stanford.
Dr. James David Barber.
Director, National Park Service, Ex-Officio Member.

The matters to be discussed at this meeting include the status of park development and planning activities. This meeting will be open to the public. However, facilities and space for accommodating members of the public are limited. Any member of the public may file with the commission a written statement concerning the matters to be discussed. Written statements may also be submitted to the Superintendent at the address above. Minutes of the meeting will be available at Park Headquarters for public inspection approximately 4 weeks after the meeting.

Dated: January 17, 1992.

James W. Coleman, Jr.,

Regional Director, Southeast Region.

[FR Doc. 92–2143 Filed 1–28–92; 8:45 am]

BILLING CODE 4310–70–M

Office of the Secretary

[516 DM 6, Appendix 6]

National Environmental Policy Act Proposed Implementing Procedures

AGENCY: Department of the Interior.

ACTION: Notice of Proposed Revisions to the DOI Manual 516 DM 6, Appendix 6, Managing the National Environmental Policy Act (NEPA) Process for the Bureau of Mines.

SUMMARY: This notice announces a proposed revision for implementing NEPA within the Bureau of Mines. The proposed revision primarily reflects changes in organization and responsibilities. The Department's procedures were published in the **Federal Register** on April 23, 1980 (45 FR 27541) and revised on May 21, 1984 (49 FR 21437). Appendix 6 for the Bureau of Mines was published on December 29, 1980 (45 FR 85528).

DATES: Comments due on or before February 28, 1992.

ADDRESSES: Comments to Dr. Jonathan P. Deason, Director, Office of Environmental Affairs, Department of the Interior, 1849 C Street NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Dr. Jonathan P. Deason, address above, telephone (202) 208–3891. For Bureau of Mines, contact Mr. William L. Miller, Division of Policy Analysis, telephone (202) 634–1292.

SUPPLEMENTARY INFORMATION: This proposed revised appendix to the Departmental Manual (516 DM 6, appendix 6) provides specific NEPA compliance instructions to the Bureau of Mines. In particular, it updates information about the Bureau's organizational responsibilities for NEPA compliance and makes minor technical changes in categorical exclusions for the NEPA process.

The appendix must be considered in conjunction with the Department's procedures (516 DM 1–6) and the Council on Environmental Quality's regulations implementing the procedural provisions of NEPA (40 CFR 1500–1508).

Comments on the proposed appendix which are received by February 28, 1992, will be carefully considered in preparing the final appendix. Comments received after that date will also be considered to the extent practicable.

Outline

Chapter 6 (516 DM 6) Managing the NEPA Process
Appendix 6—Bureau of Mines
6.1 NEPA Responsibility
6.2 Guidance to Applicants
6.3 Major Actions Normally Requiring an EIS
6.4 Categorical Exclusions.

Dated: January 24, 1992.

Jonathan P. Deason,

Director, Office of Environmental Affairs.

516 DM 6, Appendix 6

6.1 NEPA Responsibility

A. The Director is responsible for the compliance of all Bureau of Mines activities with NEPA.

B. Chief, Office of Regulatory Projects Coordination is responsible to the Director for overseeing Bureau compliance with the requirements of NEPA. He or she reviews proposed legislation and Bureau programs for NEPA-related implications.

C. Associate Director—Research is responsible for the formulation, planning, management, effective performance, and evaluation of research programs under his/her purview. He or she ensures that environmental concerns are identified early in the planning stages for all proposed research projects, facilities, and related activities.

D. Chiefs, Research Divisions are responsible to the Associate Director—Research for integrating the NEPA process into all research programs.

E. Associate Director—Information and Analysis is responsible for the conduct of engineering investigations and evaluations, and economic investigations relative to the development, utilization, and conservation of mineral resources, assessments of mineral potential on public lands, and the conduct of State mineral activities. He or she is responsible for the overall coordination of the Bureau's NEPA activities, providing guidance and information on NEPA matters pertaining to the Bureau's programs. Information about Bureau of Mines NEPA documents or the NEPA process can be obtained by contacting the Division of Resource Evaluation.

F. Chief, Division of Resource Evaluation is responsible to the Associate Director—Information and Analysis for ensuring that potential environmental impacts on domestic mineral resources are adequately reviewed and assessed. He or she coordinates the internal environmental review process.

6.2 Guidance to Applicants

The Bureau of Mines is not involved in the application process.

6.3 Major Actions Normally Requiring an EIS

A. Approval of construction of a major new research center or test facility normally will require the preparation of an EIS.

B. If it is initially decided not to prepare an EIS, an EA will be prepared and handled in accordance with § 1501.4(c)(2).

6.4 Categorical Exclusions

In addition to the actions listed in the Departmental categorical exclusions outlined in appendix 1 of 516DM2, many of which the Bureau also performs, the following Bureau of Mines actions are designated categorical exclusions unless the action qualifies as an exception under appendix 2 of 516DM2.

A. Data collection activities and field surveys. Included are reconnaissance-type investigations, detailed field investigations, research studies to develop new information, and well logging.

B. Research activities concerning the development and evaluation of metallurgical or environmental technologies, and the demonstration of associated methodologies and related equipment.

C. Research activities concerning health, safety, and mining technology.

D. Research activities that take place in a laboratory where the scale of the activity does not exceed the design capacity of the laboratory and where the methods for proper control and disposal of laboratory wastes have been implemented to prevent any accidental release to the environment and its subsequent degradation.

E. Field demonstrations and pilot plant operations, when undertaken only in conjunction with existing operations and facilities of a cooperator or contractor, when the scale of the proposed demonstrations and pilot-plant tests does not exceed the capacity of the installation to control and contain any accidental release or other impact and such demonstrations or operations are in compliance with all existing Federal, State, and local standards and regulations to protect human health and the environment.

[FR Doc. 92–2140 Filed 1–28–92; 8:45 am]

BILLING CODE 4310–01–M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–334]

Designation of Additional Commission Investigative Attorney

In the matter of certain condensers, parts thereof and products containing same, including air conditioners for automobiles.

Notice is hereby given that, as of this date, Gabrielle Siman, Esq. and Steven A. Glazer, Esq. of the Officer of Unfair Import Investigations are designated as the Commission investigative attorneys in the above-cited investigation instead of Steven A. Glazer , Esq.

The Secretary is requested to publish this notice in the **Federal Register**.

Dated: January 23, 1992.

Respectfully submitted,

Lynn I. Levine,

Director, Office of Unfair Import Investigations, 500 E Street, SW., Washington, DC 20436.

[FR Doc. 92–2135 Filed 1–28–92; 8:45 am]

BILLING CODE 7020–02–M

[Investigation No. 337–TA–333]

Certain Woodworking Accessories

Notice is hereby given that the prehearing conference and hearing in this matter is presently scheduled to

commence 10 a.m., on February 10, 1992 and to continue on February 11, 12 and 13, as necessary in Hearing Room A (room 100) at the International Trade Commission Building at 500 E Street, SW., Washington, DC. The date is subject to change through order of the administrative law judge. Non-parties wishing to attend should contact Mr. Reiser at 202–205–2694 as to whether there have been any changes made in this schedule by the administrative law judge.

The Secretary shall publish this notice in the **Federal Register.**

Issued: January 21, 1992.

Paul J. Luckern,

Administrative Law Judge.

[FR Doc. 92–2136 Filed 1–28–92; 8:45 am]

BILLING CODE 7020–02–M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 31974]

Mountain Laurel Railroad Co.—Acquisition and Operation Exemption—Consolidated Rail Corp.; Notice

Mountain Laurel Railroad Company (MLR), a non-carrier, has filed a notice of exemption to acquire and operate Consolidated Rail Corporation's 127.75-mile Low Grade Cluster, in Cameron , Clarion, Clearfield, Elk, and Jefferson Counties, PA, between: (1) Milepost 6.0, at Lawsonham, and milepost 34.0 at Summerville; (2) milepost 34.0 and milepost 77.7, at Lady Jane Coal; and (3) milepost 77.7 and milepost 110.0, at Driftwood; (4) milepost 104.25, at Piney, and milepost 120.8, at Sutton; and (5) milepost 120.8 and milepost 128.0, at Rose (near Brookville). The transaction was to have been consummated on or about December 31, 1991.

The transaction also involves the issuance of securities under the exemption at 49 CFR 1175.1. In a related proceeding, by decision in Fiance Docket No. 31973, Arthur T. Walker Estate Corporation and Dumaines—Continuance in Control Exemption—Mountain Laurel Railroad Company (not printed), served December 27, 1991, the Commission exempted the continuance in control of MLR by Dumaines and Arthur T. Walker Estate Corporation upon MLR's becoming a rail carrier.

Any comments must be filed with the Commission and served on William P. Quinn, Rubin Quinn Moss Heaney & Patterson, P.C., 1800 Penn Mutual Tower, 510 Walnut Street, Philadelphia, PA 19106.

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition will not automatically stay the transaction.

Decided: January 23, 1992.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.

Secretary.

[FR Doc. 92–2116 Filed 1–28–92; 8:45 am]

BILLING CODE 7035–01–M

[Finance Docket No. 32009]

Norfolk Southern Railway Co.—Trackage Rights Exemption—Cincinnati, New Orleans and Texas Pacific

Cincinnati, New Orleans and Texas Pacific Railway Company (CNO&TP) has agreed to grant overhead trackage rights to Northern Southern Railway Company (NS) over a 1.8-mile line between milepost 164.25H plus 1,331 feet±, at the entrance to the Tennessee Valley Authority's Caney Creek, TN, rail yard, and the junction with NS's line at milepost 165.8H±, near Devonia Street, Harriman, TN. The trackage rights will become effective on or after January 29, 1992.

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: James L. Howe III, Northern Southern Railway Company, Three Commercial Place, Norfolk, VA 23510–2191.

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: January 22, 1992.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92–2112 Filed 1–28–92; 8:45 am]

BILLING CODE 7035–01–M

[Finance Docket No. 31996]

Rail Management and Consulting Corporation, Green Bay Packaging, Inc., and K. Earl Durden—Continuance in Control Exemption—Tomahawk Railway, L.P., and Valdosta Railway, L.P.

Rail Management and Consulting Corporation (RMCC), Green Bay Packaging, Inc. (Green Bay), and K. Earl Durden (Durden), all noncarriers, have filed a notice of exemption to continue to control Tomahawk Railway, L.P. (TR), and Valdosta Railway, L.P. (VR), upon the latter's becoming class III carriers. Consummation was expected to occur on the effective date of the exemption, December 30, 1991.

Concurrently with the filing in this proceeding, TR and VR have filed verified notices to exempt their acquisition and operation of rail lines in Wisconsin and Georgia, respectively. *See* Finance Docket No. 31996 (Sub–No. 1), *Tomahawk Railway, L.P.—Acquisition and Operation Exemption—Marinette, Tomahawk & Western Railroad Company,* and Finance Docket No. 31996 (Sub-No. 2), *Valdosta Railway, L.P.— Acquisition and Operation Exemption—Valdosta Southern Railroad Company.*

Green Bay and Durden each own 50 percent of RMCC. RMCC, Green Bay, and Durden jointly control eight other class III rail carriers. *See* Finance Docket No. 31869, *Green Bay Packaging, Inc.; K. Earl Durden; Galveston Railway, Inc.; Rail Management and Consulting Corporation; and Rail Partners, L.P.—Continuance in Control Exemption—Galveston Railroad, L.P.; LRW RY, L.P.; ET RY, L.P.; ATW RY, L.P.; KWT Railway, Inc.; Copper Basin Railway, Inc.; and Wilmington Terminal Railroad, Inc.* (not printed), served July 5, 1991, and Finance Docket No. 31948, *K. Earl Durden, Green Bay Packaging, Inc., Rail Management and Consulting Corporation, and Wilmington Terminal Railroad, Inc.—Continuance in Control Exemption—Wilmington Terminal Railroad, L.P., and Georgia Central Railway, L.P.* (not printed), served November 21, 1991.

RMCC, Green Bay, and Durden indicate that: (1) TR and VR will not connect with each other or any other railroad in their corporate family; (2) the continuance in control is not a part of a series of anticipated transactions that would connect the railroads with each other or any railroad in their corporate family; and (3) the transaction does not involve a Class I carrier. The transaction therefore is exempt from the prior

approval requirements of 49 U.S.C. 11343. See 49 CFR 1180.2(d)(2).

As a condition to use this exemption, any employees affected by the transaction will be protected by the conditions set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

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: Donald G. Avery, Slover & Loftus, 1224 17th Street, NW., Washington, DC 20036.

Decided: January 23, 1992.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92–2114 Filed 1–28–92; 8:45 am]

BILLING CODE 7035–01–M

[Finance Docket No. 31996 (Sub-No. 1)]

Tomahawk Railway, L.P.—Acquisition and Operation Exemption—Marinette, Tomahawk & Western Railroad Co.

Tomahawk Railway, L.P. (TR), a non-carrier, has filed a notice of exemption to acquire and operate approximately 13.7 miles of rail line in Tomahawk, WI, owned and operated by Marinette, Tomahawk & Western Railroad Company (MTW), a Class III carrier. The transaction was to have been consumed shortly after the December 30, 1991, effective date of the exemption.

This proceeding is related to: Finance Docket No. 31996 (Sub-No. 2), *Valdosta Railway, L.P.—Acquisition and Operation Exemption—Valdosta Southern Railroad Company*, wherein Valdosta Railway, L.P. (VR), concurrently filed a verified notice to exempt its acquisition and operation of a line of railroad in Georgia, and to Finance Docket No. 31996, *Rail Management and Consulting Corporation, Green Bay Packaging, Inc., and K. Earl Durden—Continuance in Control Exemption—Tomahawk Railway, L.P., and Valdosta Railway, L.P.*, wherein Rail Management and Consulting Corporation, Green Bay Packaging, Inc., and K. Earl Durden concurrently filed a verified notice for an exemption to continue to control TR and VR upon their becoming carriers.

Any comments must be filed with the Commission and served on: Donald G. Avery, Slover & Loftus, 1224 Seventeenth Street, NW., Washington, DC 20036.

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. 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 automatically stay the transaction.

Decided: January 23, 1992.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92–2115 Filed 1–28–92; 8:45 am]

BILLING CODE 7035–01–M

[Finance Docket No. 31996 (Sub-No. 2)]

Valdosta Railway, L.P.—Acquisition and Operation Exemption—Valdosta Southern Railroad Co.

Valdosta Railway, L.P. (VR), a non-carrier, has filed a notice of exemption to acquire and operate approximately 13.5 miles of rail line owned and operated by Valdosta Southern Railroad Company (VSC), a class III rail carrier, in Valdosta, Lowndes County, GA. The transaction was to have been consummated shortly after the December 30, 1991, effective date of the exemption.

This proceeding is related to: Finance Docket No. 31996 (Sub-No. 1), *Tomahawk Railway, L.P.—Acquisition and Operation Exemption—Marinette, Tomahawk & Western Railroad Company*, wherein Tomahawk Railway, L.P. (TR), concurrently filed a verified notice to exempt its acquisition and operation of a line of railroad in Wisconsin; and Finance Docket No. 31996, *Rail Management and Consulting Corporation, Green Bay Packaging, Inc., and K. Earl Durden—Continuance in Control Exemption—Tomahawk Railway, L.P., and Valdosta Railway, L.P.*, wherein Rail Management and Consulting Corporation, Green Bay Packaging, Inc., and K. Earl Durden concurrently filed a verified notice for an exemption to continue to control TR and VR upon the latters' becoming carriers.

Any comments must be filed with the Commission and served on: Donald G. Avery, Slover & Loftus, 1224 Seventeenth Street, NW., Washington, DC 20036.

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. 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 automatically stay the transaction.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92–2113 Filed 1–28–92; 8:45 am]

BILLING CODE 7035–01–M

[Docket No. AB–356X]

Cliffside Railroad Co.—Abandonment Exemption—in Rutherford County, NC; Notice

Applicant has filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon its entire system, comprising a 7.84-mile line of railroad: (1) Between milepost 0.00, at Cliffside, and milepost 3.7, at Avondale; and, (2) between milepost 3.7, at Avondale, and milepost 4.14, at Ellenboro, in Rutherford County, NC.

Applicant has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic on the line can be rerouted over other lines; and (3) no formal complaint filed by a user of rail service on the line (or a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or with any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

Although in its verified notice applicant agreed to the imposition of the labor protective conditions normally imposed in abandonment exemption proceedings, by supplemental letter filed January 22, 1992, applicant indicates that labor protective conditions should not be imposed here because its entire system is being abandoned. Labor protective conditions will not be imposed consistent with longstanding precedent where a carrier is abandoning its entire system.

Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on February 28, 1992 (unless stayed pending reconsideration). Petitions to stay that do not involve environmental issues,[1]

[1] A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. See Exemption of Out-of-Service Rail Lines, 5 I.C.C.2d 377 (1989). Any entity seeking a stay involving environmental concerns is

Continued

formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking statements under 49 CFR 1152.29 must be filed by February 10, 1992.[3] Petitions for reconsideration or requests for public use conditions under 49 CFR 1152.28 must be filed by February 18, 1992, with:

Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any petition filed with the Commission should be sent to applicant's representative:

William P. Jackson, Jr., Jackson & Jessup, P.C., P.O. Box 1240, 3426 North Washington Blvd., Arlington, VA 22210.

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio*.

Applicant has filed an environmental report which addresses environmental or energy impacts, if any, from this abandonment.

The Section of Energy and Environment (SEE) will prepare an environmental assessment (EA). SEE will issue the EA by February 3, 1992. Interested persons may obtain a copy of the EA from SEE by writing to it (room 3219, Interstate Commerce Commission, Washington, DC 20423) or by calling Elaine Kaiser, Chief, SEE at (202) 927–6248. Comments on environmental and energy concerns must be filed within 15 days after the EA becomes available to the public.

Environmental, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Decided: January 23, 1992.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92–2117 Filed 1–28–92; 8:45 am]

BILLING CODE 7035–01–M

DEPARTMENT OF JUSTICE

Lodging of Consent Decree Pursuant to CERCLA

In accordance with Department policy 28 CFR 50.7, and pursuant to section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9622(i), notice is hereby given that a proposed consent decree in *United States* v. *ABCO Industries, Ltd., et al.*, Civil Action No. 6:92–0153–20 was lodged with the United States District Court for the District of South Carolina on January 17, 1992. This agreement resolves a judicial enforcement action brought by the United States against the defendants pursuant to sections 106 and 107 of CERCLA, 42 U.S.C. 9606 and 9607.

The proposed consent decree provides that the defendants will install a soil vapor extraction system for the in-situ treatment of contaminated soils at the medley Farm Superfund Site in Gaffney, South Carolina. The defendants will also design a system to extract and treat contaminated groundwater beneath and in the vicinity of the Medley Farm Superfund Site. The proposed consent decree also requires the defendants to conduct continuous monitoring to assess the effectiveness of both the soil vapor extraction system and the groundwater extraction and treatment system. The proposed consent decree also requires that the defendants reimburse the Hazardous Substances Superfund in the amount $237,287.23 for costs incurred by the United States Environmental Protection Agency at the Medley Farms Superfund Site.

The Department of Justice will receive, for a period of thirty (30) days from the date of publication, comments relating to the proposed consent decree. Comments should be addressed to the Acting Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *ABCO Industries, Ltd., et al.*, D.O.J. Ref. 90–11–3–104A

The proposed consent decree may be examined at the offices of the United States Attorney, District of South Carolina, Greenville Division, room 318, Federal Building, 300 East Washington Street, Greenville, South Carolina 29601, at the Office of Regional Counsel, United States Environmental Protection Agency, Region IV, 345 Courtland Street, NE., Atlanta, Georgia 30365, and at the offices of the Environmental Enforcement Section, Environment and Natural Resources Division of the Department of Justice, room 1535, Ninth Street and Pennsylvania Avenue, NW., Washington, DC 20530. The proposed consent decree may also be examined at the Environmental Enforcement Section Document Center, 601 Pennsylvania Avenue Building, NW., Washington, DC, 20004, 202–347–7829. A copy of the proposed consent decree may be obtained in person or by mail from the Document Center. In requesting a copy, please enclose a check in the amount of $75.50 (25 cents per page reproduction costs) payable to the Consent Decree Library.

Roger Clegg,

Acting Assistant Attorney General, Environmental and Natural Resources Division.

[FR Doc. 92–2071 Filed 1–28–92; 8:45 am]

BILLING CODE 4410–01–M

Lodging of Consent Decree

In accordance with the policy of the Department of Justice, 28 CFR 50.7, and pursuant to section 122(d)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. 9622(d)(2), notice is hereby given that the final proposed Consent Decree in *United States* v. *Fred Webb.*, 89–41–CIV–2–BO, was lodged with the United States District Court for the Eastern District of North Carolina on January 2, 1992. This action was brought by the United States Environmental Protection Agency pursuant to Section 107 of CERCLA, 42 U.S.C. 9607.

United the proposed Consent Decree, Fred Webb, Inc., agrees to pay $540,000 to the United States to resolve the claims of the United States against Webb for environmental response actions taken and to be undertaken at the former FCX, Inc., pesticide blending facility located in Washington, North Carolina. The Department of Justice will receive comments relating to the proposed Consent Decree for a period of 30 days from the date of this publication. Comments should be addressed to the Acting Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, 10th and Pennsylvania Ave., Washington, DC 20530. All coments should refer to *United States* v. *Fred Webb, Inc.*, D.J. Ref. 90–11–3–483.

The proposed Consent Decree may be examined at the office of the United States Attorney, Fourth Floor Federal Building, 310 New Bern Avenue, Raleigh, NC 27611. A copy of the proposed Consent Decree may also be examined at the Environmental Enforcement Section, Document Center, 601 Pennsylvania Avenue Building, NW., Washington, DC 20004 (202–347–2072).

A copy of the proposed Consent Decree may be obtained in person or by mail from the Enviornmental Enforcement Section Document Center, 601 Pennsylvania Avenue, NW., Box 1097, Washington, DC 20004. Any

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encouraged to file its request as soon as possible in order to permit this Commission to review and act on the request before the effective date of this exemption.

[2] See Exempt. of Rail Abandonment—Offers of Finan. Assist., 4 I.C.C.2d 164 (1987).

[3] The Commission will accept a late-filed trail use statement as long as it retains jurisdiction to do so.

request for a copy of the proposed Consent Decree should be accompanied by a check in the amount or $3.75 for copying costs ($0.25 per page) payable to "Consent Decree Library."

Barry M. Hartman,

Acting Assistant Attorney General, Environment and Natural Resources Division.

[FR Doc. 92-2072 Filed 1-28-92; 8:45 am]

BILLING CODE 4410-01-M

Antitrust Division

Pursuant to the National Cooperative Research Act of 1984 "Ultra-Low Emissions Engine Program"

Notice is hereby given that, on January 9, 1992, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301, *et seq.* ("the Act"), Southwest Research Institute ("SwRI") filed a written notification simultaneously with the Attorney General and the Federal Trade Commission disclosing the addition a the party to its group research project regarding "Ultra-Low Emission Engine Program". The notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, the SwRI advised that Toyota Motor Corporation (effective December 17, 1991), 1 Toyota-cho, Toyota-shi, Aichi-ken 471, Japan has become a party to the group research project.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and the members intend to file additional written notification disclosing all changes in membership.

On November 13, 1991, SwRI filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on December 9, 1991, 56 FR 64276.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 92-2073 Filed 1-28-92; 8:45 am]

BILLING CODE 4410-01-M

Pursuant to the National Cooperative Research Act of 1984 "Ultra-Low Emission Engine Program"

Correction

In notice document 91-29303 appearing on page 64276 in the issue of Monday, December 9, 1991, in the second column, in the first full paragraph, in the fifth and sixth lines, "Honda R&D Ltd." should read "Honda R&D, Co., Ltd."

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 92-2074 Filed 1-28-92; 8:45 am]

BILLING CODE 4410-01-M

Drug Enforcement Administration

[Docket No. 91-2]

Gilbert L. Franklin, D.D.S., Revocation of Registration

On January 12, 1990, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA) issued an Order to Show Cause to Gilbert L. Franklin, D.D.S., of 4312 W. Market Street, Louisville, Kentucky 40212, (Respondent), proposing to revoke his DEA Certificate of Registration, BF0375368, as a practitioner under 21 U.S.C. 823(f). The Order to Show Cause was issued based on a lack of state authorization to handle controlled substances. Prior to the publication of a final order in the matter, Respondent's Kentucky license to practice dentistry was reinstated. A Superseding Order to Show Cause was issued on December 21, 1990, alleging that Respondent's continued registration would be inconsistent with the public interest.

By letter dated January 21, 1991, Respondent, through counsel, requested a hearing on the issues raised by the Superseding Order to Show Cause and the matter was docketed before Administrative Law Judge Mary Ellen Bittner. Following prehearing procedures, a hearing was held before Judge Bittner in Louisville, Kentucky, on May 21, 1991. On August 19, 1991, the administrative law judge issued her opinion and recommended ruling, findings of fact, conclusions of law and decision. On September 30, 1991, the administrative law judge transmitted the record of these proceedings to the Administrator. The Administrator has considered the record in its entirety and pursuant to 21 CFR 1316.67 hereby adopts the findings, conclusions and recommendations of the administrative law judge and issues his final order in this matter.

The administrative law judge found that the Respondent had been convicted in the Commonwealth of Kentucky of theft by taking of over $100.00, which conviction was based on Medicaid fraud charges; being a felon in possession of a handgun; and, in Tennessee, of five counts of sexual battery, two of the counts specifying that Respondent "had reason to know that [the victim] was physically helpless." The administrative law judge further found that the Department of Health and Human Services had excluded Respondent from participation in the Medicare program for a period of not less than five years. The administrative law judge noted that, while Respondent's license to practice dentistry in the Commonwealth of Kentucky was revoked on May 4, 1988, the license was reinstated with probationary terms on December 19, 1990. These facts are not disputed in the record.

The administrative law judge specifically found that the Respondent offered no explanation or justification for his misconduct, nor did he acknowledge any wrongdoing or produce evidence of rehabilitation. The Respondent clearly failed to demonstrate that his illegal behavior was not likely to recur; therefore, the administrative law judge recommended that the Respondent's Certificate of Registration be revoked. Again, the facts bear out the administrative law judge's findings.

The administrative law judge found that the Government made a prima facie showing of 21 U.S.C. 823(1) and (5), and found that the Government established conduct by the Respondent that would threaten the public health and safety. The Administrator takes particular note of the administrative law judge's citation to 21 U.S.C. 823(f)(5) and 824(a)(5), which make clear that misconduct which does not involve controlled substances may constitute grounds for the revocation of a DEA Certificate of Registration. Quite obviously, the criminal behavior of the Respondent creates a danger to the public even if he is not a registrant with the Drug Enforcement Administration. Further, mandatory exclusion from participation in the Medicare program constitutes an independent ground for revocation pursuant to 21 U.S.C. 824(a)(5).

The Administrator finds that not only was a showing made of Respondent's illegal behavior, but that the behavior of the Respondent indeed posed a threat to the public health and safety. The Respondent clearly is oblivious to the laws and regulations under which he must function as a DEA registrant. The Administrator determines that, based on the evidence in the record, the Respondent's DEA Certificate of Registration must be revoked.

Accordingly, the Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him under the provisions of 21 U.S.C. 823

and 824 and 28 CFR 0.100(b), hereby orders that DEA Certificate of Registration, BF0375368, previously issued to Gilbert L. Franklin, D.D.S., be and it is hereby, revoked. It is further ordered that any pending applications for renewal of that registration be, and they are hereby, denied.

This order is effective February 28, 1992.

Dated: January 22, 1992.

Robert C. Bonner,

Administrator of Drug Enforcement.

[FR Doc. 92-2088 Filed 1-28-92; 8:45 am]

BILLING CODE 4410-09-M

DEPARTMENT OF LABOR

Office of the Secretary

Agency Recordkeeping/Reporting Requirements Under Review by the Office of Management and Budget (OMB)

Background

The Department of Labor, in carrying out its responsibilities under the Paperwork Reduction Act (44 U.S.C. chapter 35), considers comments on the reporting/recordkeeping requirements that will affect the public.

List of Recordkeeping/Reporting Requirements Under Review

As necessary, the Department of Labor will publish a list of the Agency recordkeeping/reporting requirements under review by the Office of Management and Budget (OMB) since the last list was published. The list will have all entries grouped into new collections, revisions, extensions, or reinstatement. The Departmental Clearance Office will, upon request, be able to advise members of the public of the nature of the particular submission they are interested in. Each entry may contain the following information:

The Agency of the Department issuing this recordkeeping/reporting requirement.

The title of the recordkeeping/reporting requirement.

The OMB and/or Agency identification numbers, if applicable.

How often the recordkeeping/reporting requirement is needed.

Whether small businesses or organizations are affected.

An estimate of the total number of hours neded to comply with the recordkeeping/reporting requirements and the average hours per respondent.

The number of forms in the request for approval, if applicable.

An abstract describing the need for and uses of the information collection.

Comments and Questions

Copies of the recordkeeping/reporting requirements may be obtained by calling the Departmental Clearance Officer, Kenneth A. Mills ((202) 523-5095). Comments and questions about the items on this list should be directed to Mr. Mills, Office of Information Resouces Management Policy, U.S. Department of Labor, 200 Constitution Avenue, NW., room N-1301, Washington, DC 20210. Comments should also be sent to the Office of Information and Regulatory Affairs, attn: OMB Desk Officer for (BLS/DM/ESA/ETA/OLMS/MSHA/OSHA/PWBA/VETS), Office of Management and Budget, room 3001, Washington, DC 20503 ((202) 395-6880).

Any member of the public who wants to comment on recordkeeping/requirements which have been submitted to OMB should avise Mr. Mills of this intent at the earliest possible date.

Revision

Employment and Training Administration

Quarterly Determinations, Allowance Activities and Employability Services under the Trade Act; Training Waivers Issued and Revoked; Trade Adjustment Assistance Annual Characteristics and Follow-up Report.

1205-0016.

ETA 563, 9027 9036.

	Form No.	Affected public	Respondents	Average time per Response
ETA 563	State or local governments	45	252	12 mins.
ETA 9027	State or local governments	52	4	15 mins.
ETA 9036	State or local governments	52	1	80 hrs.

6,480 total hours.

Quarterly data on trade adjustment activity is needed for timely program evaluation necessary for competent administration and for providing legally mandate reports to the Congress on the Trade Adjustment Assistance Program. The number of waivers of training issued and revoked by reason are needed quarterly for proper administration and to provide the statutorily required report to the Congress. Annual reports are to follow up workers in training.

Departmental Management

Compliance Informaiton Report (29 CFR part 31 title V) and Nondiscrimination—Handicapped (29 CFR part 32 (section 504)) 1225-0046.

On occasion.

State or local governments; non-profit institutions.

58 respondents; 24 average hours per response; 1,392 hours.

5,285 recordkeepers; 44 average hours per response; 232,534 hours.

Total burden hours 233,926.

The Directorate of Civil Rights has been delegated responsibility for enforcing equal opportunity and nondiscrimination laws pertaining to programs and activities that benefit from Department of Labor financial assistance. To ensure that services are provided equitably, various equal opportunity regulatory provisions require grantees to collect, maintain and report beneficiary characteristics data.

Extension

Employment Standards Administration

29 CFR part 516—Records to be kept by Employers.

1215-0017.

Recordkeeping.

Individuals or households; State or local governments; farms; businesses or other for profit; Federal agencies or employees; small businesses or organizations.

3.6 million recordkeepers; 654,937 total hours; 1 hour per recordkeeper.[1]

These records are maintained in order that employer compliance with Fair Labor Standards Act can be determined by the U.S. Department of Labor.

[1] Average hours per recordkeeper was calculated based on a percentage of private and public sector employees.

Signed at Washington DC this 22nd day of January, 1992.

Kenneth A. Mills,

Departmental Clearance Officer.

[FR Doc. 92-2151 Filed 1-28-92; 8:45 am]

BILLING CODE 4510-30-M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Arts in Education Advisory Panel; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), as amended, notice is hereby given that a meeting of the Arts in Education Advisory Panel (Partnership Grants I Section) to the National Council on the Arts will be held on February 19-20, 1992 from 9 a.m.-5:30 p.m. and February 21 from 9 a.m.-3 p.m. in room M-14 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

Portions of this meeting will be open to the public on February 19 from 9 a.m.-3 p.m. and February 21 from 10:45 a.m.-1:30 p.m. The topics will be welcoming remarks, panelist orientation, guidelines review and policy discussion.

The remaining portions of this meeting on February 19 from 3 p.m.-5:30 p.m., February 20 from 9 a.m.-5:30 p.m., and February 21 from 9 a.m.-10:45 a.m. and 1:30 p.m.-3 p.m. are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of November 20, 1991, these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (9)(B) of section 552b of title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels which are open to the public, and may be permitted to participate in the panel's discussions at the discretion of the panel chairman and with the approval of the full-time Federal employee in attendance.

If you need special accommodations due to a disability, please contact the Office of Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue NW., Washington, DC 20506, 202/682-5532, TTY 202/682-5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call (202) 682-5433.

Dated: January 16, 1992.

Yvonne M. Sabine,

Council and Panel Operations, National Endowment for the Arts.

[FR Doc. 92-2075 Filed 1-23-92; 8:45 am]

BILLING CODE 7537-01-M

Arts in Education Advisory Panels; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), as amended, notice is hereby given that a meeting of the Arts in Education Advisory Panel (Partnership Grants II Section) to the National Council on the Arts will be held on February 26-27, 1992 from 9 a.m.-5:30 p.m. and February 28 from 9 a.m.-3 p.m. in room M-07 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

Portions of this meeting will be open to the public on February 26 from 9 a.m.-3 p.m. and February 28 from 10:45 a.m.-1:30 p.m. The topics will be welcoming remarks, panelist orientation, guidelines review and policy discussion.

The remaining portions of this meeting on February 26 from 3 p.m.-5:30 p.m., February 27 from 9 a.m.-5:30 p.m. and February 28 from 9 a.m.-10:45 a.m. and 1:30 p.m.-3 p.m. are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of November 20, 1991, these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (9)(B) of section 552b of title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels which are open to the public, and may be permitted to participate in the panel's discussions at the discretion of the panel chairman and with the approval of the full-time Federal employee in attendance.

If you need special accommodations due to a disability, please contact the Office of the Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682-5532, TTY 202/682-5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call (202) 682-5433.

Dated: January 16, 1992.

Yvonne M. Sabine,

Director, Council and Panel Operations, National Endowment for the Arts.

[FR Doc. 92-2076 Filed 1-28-92 8:45 am]

BILLING CODE 7537-1-M

Literature Advisory Panel; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), as amended, notice is hereby given that a meeting of the Literature Advisory Panel (Audience Development Section) to the National Council on the Arts will be held on February 19-21, 1992 from 9 a.m.-5 p.m. in room 516 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

A portion of this meeting will be open to the public on February 21 from 1 p.m.-2 p.m. The topics will be guidelines review and policy discussion.

The remaining portions of this meeting on February 19-20 from 9 a.m.-5 p.m. and February 21 from 9 a.m.-1 p.m. and 2 p.m.-5 p.m. are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of November 20, 1991, these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (9)(B) of section 552b of title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels which are open to the public, and may be permitted to participate in the panel's discussions at the discretion of the panel chairman and with the approval of the full-time Federal employee in attendance.

If you need special accommodations due to a disability, please contact the Office of Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682-5532,

TTY 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call (202) 682–5433.

Dated: January 16, 1992.

Yvonne M. Sabine,

Director, Council and Panel Operations, National Endowment for the Arts.

[FR Doc. 92–2077 Filed 1–28–92; 8:45 am]

BILLING CODE 7537–01–M

NUCLEAR REGULATORY COMMISSION

Proposed Availability of FY 92 Funds for Financial Assistance (Grants) to Support Research at Educational Institutions and the Exchange of Information

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice.

SUMMARY: The Nuclear Regulatory Commission (NRC), Office of Nuclear Regulatory Research, announces proposed availability of Fiscal Year (FY) 92 funds to support a limited number of research grants to educational institutions. These funds may also be used to support professional meetings and conferences for the exchange and transfer of research concepts and findings related to the safety of nuclear power production.

The FY 92 ceiling for research grants to educational institutions is approximately $1,440,000.00. Of this amount, approximately $797,000.00 will be available for new grants. Because of this limitation, proposed grant budgets should be restricted to about $50,000.00 per year, with total project funding not exceeding $100,000.00 over a two-year period. Proposals for new FY 92 research grants should be submitted between the date of this Notice and March 13, 1992. Proposals received after March 13, 1992 will be considered for FY92 funding to the extent practicable.

ADDRESS: Nuclear Regulatory Commission, ATTN: Grants Officer, Mail Stop P–841, Division of Contracts and Property Management, Office of Administration, Washington, DC 20555.

FOR FURTHER INFORMATION CONTACT: Leslie Mills or Dennis Tarner on (301) 492–7054.

SUPPLEMENTARY INFORMATION:

Background

On December 3, 1990, the Nuclear Regulatory Commission (NRC) published in the Federal Register a notice that announced the proposed availability of FY 91 funds for the NRC Grant Program. The NRC is revising that notice to provide information on their grant program for FY 92.

Scope and Purpose of This Announcement

Pursuant to section 31.a and 141.b. of the Atomic Energy Act of 1954, as amended, the NRC's Office of Nuclear Regulatory Research proposes to support educational institutions, nonprofit entities, state and local governments, and professional societies through providing funds for expansion, exchange and transfer of knowledge, ideas, and concepts directed toward the NRC safety research program. The program includes, but is not limited to, support of professional meetings and conferences. In addition, the NRC has a limited amount for research grants to educational institutions (see topics below). The FY 92 ceiling for these grants is approximately $1,440,000.00 with approximately $797,000.00 of this amount available for new grants.

The purpose of this program is to stimulate research to provide a technological base for the safety assessment of system and subsystem technologies used in nuclear power applications. The results of this program will be to increase public understanding relating to nuclear safety, to pool the funds of theoretical and practical knowledge and technical information, and ultimately to enhance the protection of the public health and safety. In addition, each grant to an educational institution should contain elements which will potentially benefit the graduate research program of the institution, e.g., graduate student training.

The NRC encourages educational institutions to submit research grant proposals in the following areas:

1. Predictive modeling for thermal stratification, thermal, striping and flow-induced vibration in plant fluid systems.

2. Advantages and disadvantages of cooling water addition to a degraded core.

3. Behavior of hot hydrogen while exiting a break in the primary pressure boundary.

4. Modeling and experimentation on two-phase flow, interfacial relations, and heat transfer in reactor coolant systems.

5. Evaluation of severe accident phenomena including: High temperature chemistry of fission product and reactor fuel and structural materials, advanced modeling of the behavior of fluids, combustible gases and molten core materials in reactor primary systems during severe accidents.

6. Advanced demographic models or statistical methods to predict population density and distribution around future power reactor sites.

7. Interaction of reactor materials at very high temperature (e.g., core/concrete, core debris/vessel component interactions).

8. Evaluation of the risk reduction effectiveness of human factors requirements in nuclear power plant operations and maintenance.

9. Methods for applying the growing pool of human performance data to nuclear power plant safety requirements.

10. Development of methods for Risk Reliability Analysis of closed loop control systems, including advanced digital based control system.

11. Develop and codify pragmatic, statistically valid, methods for updating severe accident frequency and consequence analysis to reflect results of new operational, experimental, and calculation data.

12. Develop merit of methods and procedures for establishing the degree to which Probabilistic Risk Assessment (PRA) results compare with operational data and experience.

13. Development of methods to analyze and understand the aging effects, including irradiation damage effects, improved examination and testing methods for determining the condition of structures and components, and methods to assess residual lifetime of structures and components.

14. Development of nondestructive testing methods for in-situ evaluation of material properties and property degradation due to aging, such as fracture toughness and fatigue.

15. Development of approaches to assure that corrosion damage has not significantly reduced the capacity of containment structures at nuclear power plants.

16. Development of methods of assuring integrity of the primary system, i.e., pressure vessels, piping steam generator tubing, such as advanced nondestructive testing techniques, continuous monitoring techniques and fracture analysis procedures.

17. Development of methods to establish and validate decommissioning criteria and effects of water chemistry on the primary system integrity.

18. Development and/or validation of models to explain the tectonics of the

Central and Eastern United States (East of 106 degrees W).

19. Development and/or validation of models is to predict the propagation of seismic ground motions in the Central and Eastern United States or in a shallow soil column.

20. Investigations/studies including field observations of the paleoseismicity of the Central and Eastern United States.

21. Development of rapid bioassay analysis techniques for application to accidental internal exposure situation.

22. Natural analog studies of long-term stability of waste forms for low- and high-level nuclear waste.

23. Studies of volcanism in the Basin and Range.

24. Simplified modeling of thermohydrologic phenomena in high-level waste geological repositories.

25. Investigations of coupled tectonic-hydrological processes.

26. Development of a continuum approach for modeling unsaturated fractured rock.

27. Development of improved instrumentation or techniques for measuring activities, radiation dose, and dose rates, especially from small radioactive particles.

28. Development of methods for contamination prevention, measurement, and control.

29. Development of improved radiological air sampling methodology.

30. Research on the metabolism of radionuclides and their compounds relative to the calculation of internal dose.

31. Development of condensation model for systems codes such as RELAP5/MOD3 or TRAC—PFI/MOD2 for two cases: with and without condensible gases.

32. Investigation of radiation induced effects at the cellular/molecular levels emphasizing the reduction of uncertainties in risk of deleterious health effects from low-level radiation.

33. Validation of approaches to quantitatively assess human health effects of radiation, including new approaches to analyses of human epidemiological studies and experimental animal studies.

34. Studies of status, availability and accuracy of radiation measurements around and related to landfills, including establishment of baseline environmental dose rates.

35. Techniques to simplify the measurement of parameters used in pathway modeling.

36. Analysis of effectiveness of decontamination technologies for land, structures, recycling materials and equipment and their individual comparative costs to the envrionment.

37. Natural analog studies applicable to the assessment of long term performance of natural and engineered components of high-level and low-level radioactive waste disposal systems.

38. Studies of volcanism, tectonics, and other large scale geologic processes in the Basin and Range within the last ten million years (e.g., temporal and spatial history of volcanic events; volcanic hydo-thermalism; applications of seismic tomography).

39. Simplified modeling of thermohydrologic phenomena in high-level waste geological repositories.

40. Investigations of coupling between hydrologic, thermal, chemical, and/or mechanical processes as they effect the simulation of high-level waste repository performances.

41. Development of a continuum approach to modeling unsaturated, fractured rock.

42. Improved techniques for dating geologic formations and events for the period from one hundred to ten million years.

43. Studies of the thermodynamics and/or kinetics of the formation and alteration of solids controlling the release of HLW and LLW radionuclides.

Eligible Applicants

Educational institutions, nonprofit entities, State and Local governments, and professional societies are eligible to apply for a grant under this announcement.

Factors Generally Indicating Support Through Grants

The NRC's benefit from the results of grants should be no greater than for other interested parties, i.e., the public must be the primary beneficiary of the work performed. Surveys, studies, or research which provide specific information or data necessary for the NRC to exercise its regulatory or research mission responsibilities will not be funded by a grant. Applicants requesting support for work which has a direct regulatory application should submit their requests as an unsolicited proposal for consideration as a contract rather than a grant.

1. The primary purpose of NRC grants is to support the development of knowledge or understanding of the subject or phenomena under study.

2. The exact course of the work and its outcome are usually not defined precisely, and specific points in time for achievement of significant results need not be specified.

3. The NRC desires that the nature of the proposed investigation be such that the recipient will bear prime responsibility for the conduct of the research and exercise judgment and original thought toward attaining the scientific goals within broad parameters of the proposed research areas and the resources provided.

4. Meaningful technical reports (as distinguished from Semi-Annual Status Reports) can be prepared only as new findings are made, rather than on a predetermined time schedule.

5. Simplicity and economy in execution and administration are mutually desirable.

Proposal Format

Proposals should be concise and provide a thorough understanding of the proposed project. Neither unduly elaborate applications nor voluminous supporting documentation is desired.

State and local governments shall submit proposals utilizing the standard forms specified in Office of Management and Budget (OMB) Circular A–102 (Revised), Paragraph 6.c). Nonprofit organizations, universities, and professional societies shall submit proposals utilizing the standard forms stipulated in OMB Circular A–110, (Attachment M).

The format used for project proposals should give a clear presentation of the proposed project and its relation to the specific objectives contained in this notice. Each proposal should follow the format outlined below unless the NRC specifically authorizes exception.

1. *Cover Page.* The Cover Page should be typed according to the following format (submit separate cover pages if the proposal is multi-institutional):

Title of Proposal.—To include the term "research, "study," "conference," "symposium," "workshop," or other similar designation to assist in the identification of the project;

Location and Dates for Conferences, Symposium, Workshop, etc.;

Names of Principal Researchers or Participants;

Total Cost of Proposal; (Identify Cost by Fiscal Year)

Period of Proposal;

Organization or Institution and Department;

Required Signatures:

Principal Participants:

Name:_____
Date: _____
Address: _____
Telephone No.:_____

Required Organization Approval:

Name:_____
Date: _____
Address: _____
Telephone No.:_____

Organization Financial Officer:

Name:———————————
Date:— ———————————
Address:— ———————————
Telephone No.:———————————

2. *Project Description.* Each proposal shall provide, in ten pages or less, a complete and accurate description of the proposed project. This section should provide the basic information to be used in evaluating the proposal to determine its priority for funding. Applicants must identify other possible sources of financial support for a particular project, and list those sources from which financial support has been or will be requested.

The information provided in this section must be brief and specific. Detailed background information may be included as supporting documentation to the proposal.

The following format shall be used for the project description:

(a) *Project Goals and Objectives.* The project's objectives must be clearly and unambiguously stated. The proposal should justify the project including the problems it intends to clarify and the development it may stimulate.

(b) *Project Outline.* The proposal should show the project format and agenda, including a list of principal areas or topics to be addressed.

(c) *Project Benefits.* The proposal should indicate the direct and indirect benefits that the project seeks to achieve and to whom these benefits will accrue.

(d) *Project Management.* The proposal should describe the physical facilities required for the conduct of project. Further, the proposal should include brief biographical sketches of individuals responsible for planning the project.

(e) *Project Costs.* Nonprofit organizations shall adhere to the cost principles set forth in OMB Circular A–122. Educational instructions shall adhere to the cost principles set forth in OMB Circular A–21, and state and local government shall adhere to the cost principles set forth in OMB Circular A–87.

The proposal must provide a detailed schedule of project costs, identifying in particular—

(1) *Salaries*—in proportion to the time or effort directly related to the project;

(2) Equipmemt (rental only);

(3) Travel and Per Diem/Subsistence in relation to the project;

(4) Publication Costs;

(5) Other Direct Costs (specify)—e.g., supplies or registration fees;

Note:—Dues to organizations, federations or societies, exclusive of registration fees, are not allowed as a charge.

(6) Indirect Costs (attached negotiated agreement/cost allocation plan); and

(7) Supporting Documentation. The supporting documentation should contain any additional information that will strengthen the proposal.

Proposal Submission and Deadline

This notice is valid for Federal Government Fiscal Year 92 (October 1, 1991 to September 30, 1992). Potential grantees are advised, however, that due to the limited funding available for new research grants to educational institutions, such proposals received after March 13, 1992, will be considered for FY92 funding to the extent practicable.

Funds

For Fiscal Year 92, the U.S. Nuclear Regulatory Commission, Office of Nuclear Regulatory Research, anticipates making a total of approximately $1,440,000.00 available for funding research grants to educational institutions. Of this amount, approximately $797,000.00 will be available for new research grants in FY 92. Because of this limitation, proposed grant budgets should be restricted to about $50,000.00 per year, with total project funding not exceeding $100,000.00 over a period of two years.

Evaluation Process

All proposals received as a result of this announcemenmt will be evaluated by an NRC review panel.

Evaluation Criteria

The award of NRC grants is discretionary. Generally, projects are supported in order of merit to the extent permitted by available funds.

Evaluation of proposals for research projects will employ the following criteria. No level of importance is implied by the order in which these criteria are listed.

1. Adequacy of the research design.
2. Scientific significance of proposal.
3. Technical adequacy of the investigators and their institutional base.
4. Relevance to a research area(s) described above.
5. Reasonableness of estimated cost in relation to the work to be performed and anticipated result.
6. Potential benefit of the project to the overall benefit of the institution's graduate research program.

Evaluation of proposals for professional meetings, conferences, symposia, etc., will employ the following criteria:

1. Potential usefulness of the proposed project for the advancement of scientific knowledge.
2. Clarity of statement of objectives, methods, and anticipated results.
3. Range of issues covered by the meeting agenda.
4. Qualifications and experience of project speakers.
5. Reasonableness of estimated cost in relation to anticipated results.

Disposition of Proposals

Notification of award will be made by the Grants Officer, and organizations whose proposals are unsuccessful will be so advised.

Proposal Instructions and Forms

Questions concerning the preceding information, copies of application forms, and applicable regulations shall be obtained from or submitted to (Grant application packages, Standard Form 424, must be requested in writing): U.S. Nuclear Regulatory Commission, ATTN: Grants Officer, Division of Contracts and Property Management, Mail Stop P–841, Office of Administration, Washington, DC 20555.

The address for hand-carried applications is: U.S. Nuclear Regulatory Commission, ATTN: Grants Officer, Division of Contracts and Property Management, Office of Administration, Mail Stop P–841, 7920 Norfolk Avenue, Bethesda, MD 20814.

Note: Upon delivery of the application to the NRC guard desk (at the above address), the guard should be requested to telephone the Division of Contracts and Property Management (Extension 27054) for a pick-up of the application.

Nothing in this solicitation should be construed as committing the NRC to dividing available funds among all qualified applicants.

Dated at Bethesda, MD this 23rd day of January, 1992.

For the U.S. Nuclear Regulatory Commission.

Ronald D. Thompson,

Grants Officer, Division of Contracts and Property Management, Office of Administration.

[FR Doc. 92–2131 Filed 1–28–92; 8:45 am]

BILLING CODE 7590–01–M

ACNW Working Group on Systems Analysis Approach to Reviewing the Overall High-Level Waste Program; Notice of Meeting

The ACNW Working Group on Systems Analysis Approach to Reviewing the Overall High-Level Waste Program will hold a meeting on

February 19–20, 1992, 7920 Norfolk Avenue, Bethesda, Maryland. The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, February 19, 1992—8:30 a.m. until the conclusion of business (Room P–422)

Thursday, February 20, 1992—8:30 a.m. until 1 p.m. (tentative) (Room P–110)

The Working Group will discuss the feasibility of systems-analysis approach to reviewing the overall high-level waste program, including the short and mid-range technical milestones for handling high-level waste.

Oral statements may be presented by members of the public with the concurrence of the ACNW Working Group Chairman; written statements will be accepted and made available to the Working Group. Recordings will be permitted only during those sessions of the meeting when a transcript is being kept, and questions may be asked only by members of the ACNW Working Group, their consultants, and staff. Persons desiring to make oral statements should notify the ACNW staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the ACNW Working Group, along with any of their consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

Further information regarding the agenda for this meeting, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the Designated Federal Official, Mr. Howard J. Larson, ACNW (telephone 301/492–7707) between 8 a.m. and 5:30 p.m. Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., that may have occurred.

Dated: January 22, 1992.

R. K. Major,

Chief Nuclear Waste Branch.

[FR Doc. 92–2133 Filed 1–28–92; 8:45 am]

BILLING CODE 7590–01–M

Advisory Committee on Reactor Safeguards, Joint Subcommittee on Materials and Metallurgy/Maintenance Practices and Procedures; Notice of Meeting

The Subcommittees on Materials and Metallurgy/Maintenance Practices and Procedures will hold a meeting on February 13, 1992, room P–110, 7920 Norfolk Avenue, Bethesda, MD.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Thursday, February 13, 1992—8:30 a.m. until the conclusion of business

The Subcommittees will discuss the ASME Risk-Based Inspection Guidelines.

Oral statements may be presented by members of the public with the concurrence of the Subcommittee Chairman; written statements will be accepted and made available to the Committee. Recordings will be permitted only during those portions of the meeting when a transcript is being kept, and questions may be asked only by members of the Subcommittees, their consultants, and staff. Persons desiring to make oral statements should notify the ACRS staff member named below as far in advance as practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the subcommittees, along with any of their consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

The Subcommittees will then hear presentations by and hold discussions with representatives of the NRC staff, their consultants, and other interested persons regarding this review.

Further information regarding topics to be discussed, the scheduling of sessions open to the public, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the Designated Federal Official, Mr. Elpidio Igne (telephone 301/492–8192) between 7:30 a.m. and 4:15 p.m. Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., that may have occurred.

Dated: January 22, 1992.

Gary R. Quittschreiber,

Chief, Nuclear Reactors Branch.

[FR Doc. 92–2134 Filed 1–28–92; 8:45 am]

BILLING CODE 7590–01–M

Regulatory Guide; Issuance, Availability

The Nuclear Regulatory Commission has issued a new guide in its Regulatory Guide Series. This series has been developed to describe and make available to the public such information as methods acceptable to the NRC staff for implementing specific parts of the Commission's regulations, techniques used by the staff in evaluating specific problems or postulated accidents, and data needed by the staff in its review of applications for permits and licenses.

Regulatory Guide 3.67, "Standard Format and Content for Emergency Plans for Fuel Cycle and Materials Facilities," provides guidance acceptable to the NRC staff on the information to be included in emergency plans for fuel cycle and materials facilities, and it establishes a format for presenting the information.

Comments and suggestions in connection with (1) items for inclusion in guides currently being developed or (2) improvements in all published guides are encouraged at any time. Written comments may be submitted to the Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington DC 20555.

Regulatory guides are available for inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC. Copies of issued guides may be purchased from the Government Printing Office at the current GPO price. Information on current GPO prices may be obtained by contacting the Superintendent of Documents, U.S. Government Printing Office, Post Office Box 37082, Washington, DC 20013–7082, telephone (202) 275–2060 or (202) 275–2171. Issued guides may also be purchased from the National Technical Information Service on a standing order basis. Details on this service may be obtained by writing

NTIS, 5285 Port Royal Road, Springfield, VA 22161.

(5 U.S.C. 552(a))

Dated at Rockville, Maryland, this 8th day of January 1992.

For the Nuclear Regulatory Commission.

Themis P. Speis,

Deputy Director for Research, Office of Nuclear Regulatory Research.

[FR Doc. 92-2132 Filed 1-28-92; 8:45 am]

BILLING CODE 7590-01-M

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

President's Council of Advisors on Science and Technology, Meeting

The President's Council of Advisors on Science and Technology will meet on February 6, 1992. The meeting will begin at 9 a.m. in the Conference Room, Council on Environmental Quality, 722 Jackson Place, NW., Washington, DC. The meeting will conclude at approximately 5 p.m.

The purpose of the Council is to advise the President on matters involving science and technology.

Proposed Agenda

1. Briefing of the Council on the current activities of the Office of Science and Technology Policy.

2. Briefing of the Council on current Federal activities and policies in science and technology.

3. Discussion of progress of working group panels.

Portions of the February 6 session will be closed to the public.

A portion of the briefings on current federal activities and policies in science and technology will require discussion of budget preparation of the Executive Office of the President and other Federal agencies which, if prematurely disclosed, would significantly frustrate the implementation of decisions made requiring agency action. Also, a portion of the discussion of panel progress will necessitate discussion of information which is formally classified in the interest of national security. Accordingly, these portions of the meeting will be closed to the public pursuant to 5 U.S.C. 552b(c)(1), (2), and (9)(B).

Because of the security requirements, persons wishing to attend the open portion of the meeting should contact Ms. Ann Barnett (202) 395-4692, prior to 3 p.m. on February 5, 1992. Ms. Barnett is available to provide specific information regarding time, place, and agenda.

Dated: January 15, 1992.

Damar W. Hawkins,

Executive Assistant, Office of Science and Technology Policy.

[FR Doc. 92-2171 Filed 1-28-92; 8:45 am]

BILLING CODE 3170-01-M

Panel on High Performance Computing and Communications of the President's Council of Advisors on Science and Technology; Meeting

The Panel on High Performance Computing and Communications of the President's Council of Advisors on Science and Technology (PCAST) will meet on February 7, 1992. The meeting will begin at 9 a.m. in room 180 of the Old Executive Office Building, Washington, DC. The meeting will conclude at approximately 5 p.m.

The purpose of the panel is to advise the PCAST on issues related to high performance computing and communications that have a bearing on long-range national goals, government relation, the transition of Federal programs to industry, and on foreign access.

Proposed Agenda

1. Briefing of the panel by expert witnesses from industry on high performance computing and communication issues.

2. Briefing of the panel by agency personnel on ongoing Federal activities in high performance computing and communications.

The February 7 meeting will be closed to the public.

The briefing on some of the current Federal activities necessarily will involve discussion of materials that are formally classified in the interest of national defense or for foreign policy reasons. A portion of these briefings will also require discussion of internal personnel procedures of the Executive Office of the President and information which, if prematurely disclosed, would significantly frustrate the implementation of decisions made requiring agency action. Finally, the briefings will necessarily include discussion of potentially sensitive proprietary information. Therefore, the meeting will be closed to the public pursuant to *5 U.S.C. 552b(c) (1), (2), and (9)(B).*

Dated: January 23, 1992.

Damar W. Hawkins,

Executive Assistant, Office of Science and Technology Policy.

[FR Doc. 92-2172 Filed 1-28-92; 8:45 am]

BILLING CODE 3170-70-M

POSTAL RATE COMMISSION

[Order No. 916; Docket No. A92-6]

Village, Virginia 22570 Ed King, Petitioner; Order Accepting Appeal and Establishing Procedural Schedule Under 39 U.S.C. 404(b)(5)

Issued January 22, 1992.

Docket Number: A92-6.

Name of Affected Post Office: Village, Virginia 22570.

Name of Petitioner: Ed King.

Type of Determination: Closing.

Date of Filing of Appeal Papers: January 15, 1992.

Categories of Issues Apparently Raised: 1. Effect on the community (39 U.S.C. 404(b)(2)(A)); 2. Effect on postal services (39 U.S.C. 404(b)(2)(C)).

Other legal issues may be disclosed by the record when it is filed; or, conversely, the determination made by the Postal Service may be found to dispose of one or more of these issues.

In the interest of expedition, in light of the 120-day decision schedule (39 U.S.C. 404(b)(5)), the Commission reserves the right to request of the Postal Service memoranda of law on any appropriate issue. If requested, such memoranda will be due 20 days from the issuance of the request; a copy shall be served on the petitioner. In a brief or motion to dismiss or affirm, the Postal Service may incorporate by reference any such memoranda previously filed.

The Commission Orders

(A) The record in this appeal shall be filed on or before January 30, 1992.

(B) The Secretary shall publish this Notice and Order and Procedural Schedule in the **Federal Register.**

By the Commission.

Charles L. Clapp,

Secretary.

Appendix

January 15, 1992.—Filing of Petition
January 22, 1992.—Notice and Order of Filing of Appeal
February 10, 1992.—Last day for filing of petitions to intervene (*see* 39 CFR 3001.111(b))
February 20, 1992.—Petitioner's Participant Statement or Initial Brief (*see* 39 CFR 3001.115(a) and (b))
March 11, 1992.—Postal Service Answering Brief (*see* 39 CFR 3001.115(c))
March 26, 1992.—Petitioner's Reply Brief should petitioner choose to file one (*see* 39 CFR 3001.115(d))
April 2, 1992.—Dead for motions by any party requesting oral argument. The Commission will schedule oral argument only when it is a necessary addition to the written filings (*see* 39 CFR 3001.116)

May 14, 1992.—Expiration of 120-day decisional schedule (*see* 39 U.S.C. sec. 404(b)(5))

[FR Doc. 92–2089 Filed 1–28–92; 8:45 am]

BILLING CODE 7710–FW–M

SECURITIES AND EXCHANGE COMMISSION

[Securities Exchange Act Release No. 30287; File No. 265–17]

Securities and Exchange Commission Market Oversight and Financial Services Advisory Committee; Meeting and Request for Public Comment

AGENCY: Securities and Exchange Commission.

ACTION: Notice of meeting of the Securities and Exchange Commission Market Oversight and Financial Services Advisory Committee.

SUMMARY: This is to give public notice that the Securities and Exchange Commission Market Oversight and Financial Services Advisory Committee will conduct a meeting on February 5, 1992, at 8:30 a.m. in room 1C30 at the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC. The meeting will be open to the public. This notice also serves to invite the public to submit written comments to the Committee.

ADDRESSES: Written comments should be submitted in triplicate and should refer to File No. 265–17. Comments should be submitted to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: Thomas Selman, Special Counsel, or Miriam Goldstein, Attorney, (202) 272–2428, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: In accordance with section 10(a) of the Federal Advisory Committee Act, 5 U.S.C. app. 2, 10(a), and the regulations thereunder, the Chairman has ordered publication of this notice that the Securities and Exchange Commission Market Oversight and Financial Services Advisory Committee will conduct a meeting on February 5, 1992, at the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC, beginning at 8:30 a.m. This meeting will be open to the public. This will be the second meeting of the Advisory Committee. The purpose of the meeting will be to discuss small business initiatives and improvements to the regulation of financial markets. The Committee will consider issues relating to capital formation, systemic risk evaluation, and other matters regarding the financial markets.

The Chairman has determined that this meeting should be held sooner than fifteen days after publication of this notice in the **Federal Register** in view of prior scheduling commitments of the Committee members and Commissioners.

Dated: January 27, 1992.

Jonathan G. Katz,

Advisory Committee Management Officer.

[FR Doc. 92–2271 Filed 1–27–92; 12:24 pm]

BILLING CODE 8010–01–M

[Release No. 34–30281; File No. SR–NASD–91–62]

Self-Regulatory Organizations; Notice of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to an Exemption From the Filing Requirements of the Corporate Financing Interpretation

January 22, 1992.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on November 22, 1991, and December 16, 1991, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change and amendment [1] thereto as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD is herewith filing a proposed rule change to the filing requirements of the Interpretation of the Board of Governors—Review of Corporate Financing, Article III, Section 1 of the Rules of Fair Practice (the "Corporate Financing Interpretation"). Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

[1] In Amendment No. 1 to rule filing SR–NASD–91–62, the NASD deleted proposed changes to the rule language of paragraph (1) to the exemptions from the Filing Requirements of the Interpretation as unnecessary. *See* discussion below in connection with Form F–9.

Interpretation of the Board of Governors—Review of Corporate Financing

Article III, Section 1 of the Rules of Fair Practice

* * * * *

Filing Requirements

* * * * *

Documents related to the following public offerings need not be filed with the Association for review, unless subject to the provisions of Schedule E to the By-Laws, provided, however, it shall be deemed a violation of Article III, Section 1 of the Rules of Fair Practice, or Appendix F to Article III, Section 34 of the Rules of Fair Practice if a direct participation program, for a member to participate in any way in such offerings if the underwriting or other arrangements in connection with the offering are not in compliance with this Interpretation or Appendix F, as applicable:

(1) securities offered by a corporate, foreign government or foreign government agency issuer which has non-convertible debt with a term of issue of at least four (4) years, or non-convertible preferred securities, rated by a nationally recognized statistical rating organization in one of its four (4) highest generic rating categories;

(2) securities registered with Securities and Exchange Commission on registration statement Forms S–3, *F–3 or F–10 (only with respect to Canadian issuers)* and offered pursuant to Rule 415 adopted under the Securities Act of 1933, as amended;

(3) securities offered pursuant to a redemption standby "firm commitment" underwriting arrangement registered with the Securities and Exchange Commission on Forms S–3, *F–3 or F–10 (only with respect to Canadian issuers)*; and

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) On May 30, 1991, the Securities and Exchange Commission and the Canadian provinces of Quebec and Ontario adopted rules, forms and schedules effective July 1, 1991, to

facilitate cross-border offerings of securities and continuous reporting by specified Canadian issuers (the "Multi-Jurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuer's" or "MJDS"). SEC Rel. No. 33–6902 (June 21, 1991). In order to facilitate the SEC's efforts to facilitate cross-border offerings of securities under the MJDS, and NASD is proposing to amend the exemptions from the filing requirements in the Corporate Financing Interpretation to recognize new SEC Forms F–9 and F–10 for Canadian private and crown corporations. The NASD is simultaneously filing a proposed rule change to make the same amendments to the Corporate Financing Rule pending at the SEC in SR–NASD–91–19, consistent with the different provisions therein.[2]

Form F–9: A Canadian private or crown corporation relying on Form F–9 must have a reporting history with Canadian securities authorities of at least 36 months. Form F–9 is available to companies that are offering nonconvertible debt and nonconvertible preferred stock which, at the time of effectiveness of the registration statement, is recognized as investment grade by at least one nationally recognized rating organization. The Corporate Financing Interpretation currently includes in paragraph (1) to the exemption provisions of the Filing Requirements an exemption for offerings of securities by an issuer that has nonconvertible debt with a term of issue of at least four years or nonconvertible preferred securities rated investment grade. The NASD stated in its Notice to Members 91–34 (June 1991), requesting comment on the proposed rule change, that "The NASD has also interpreted this exemption to cover a current offering of investment-grade-rated debt or preferred securities."

The NASD believes that offerings of investment-grade-rated nonconvertible debt and nonconvertible preferred securities on Form F–9 (and Form F–10) would be exempt from the filing requirements of the Corporate Financing Interpretation under current paragraph (1) thereof. In rule filing SR–NASD–84–27, proposing to adopt the exemption in paragraph (1), the NASD stated "The exemption is proposed to be available to corporate issuers which include private corporations in the United States and foreign private corporations." Canadian corporate issuers are, therefore, already permitted to rely on this exemption. Moreover, a specific reference to a Canadian crown corporation is unnecessary as this type of entity comes within the categories of "foreign government" or "foreign government agency" issuers that may rely on the exemption provided by paragraph (1). In addition, a Canadian issuer is permitted to use Form F–9 to issue debt or preferred stock that is convertible if such convertibility does not occur prior to one year from the date of issuance and the issuer has total market value of its common stock of at least (CN) $180 million and a public float of at least (CN) $75 million. These offerings would not be exempt from the filing requirements of the Corporate Financing Interpretation unless the Canadian issuer can meet the requirements of paragraph (1) to the exemption provisions of the Filing Requirements, i.e., that the issuer have outstanding investment grade rated unsecured non-convertible debt with a term of issue of at least four years or investment grade rated unsecured non-convertible preferred securities.

Form F–10: All other securities offered for cash, or in connection with business combinations and exchange offers that cannot be registered on Form F–9 may be registered on Form F–10 by issuers with common stock with a value of at least (CN) $360 million and a public float of at least (CN) $75 million. The form is also limited to issuers that have a reporting history with Canadian authorities of at least 36 months.

The NASD is proposing to amend paragraphs (2) and (3) to the exemption provisions of the Filing Requirements of the Corporate Financing Interpretation to exempt offerings registered with the SEC on Form F–10 from the Corporate Financing Rule filing requirements if the securities are offered pursuant to Rule 415 or the securities are offered pursuant to a redemption standby "firm commitment" underwriting arrangement.

The SEC stated in the adopting release of the MJDS that it hoped to expand the concept to other countries. The NASD is concerned that, while Form F–10 is currently limited to offerings by Canadian issuers, it is possible that it may be amended to be available to offerings by issuers of other foreign countries. The NASD is, therefore, also proposing to limit the availability of the exemption to be provided by paragraphs (2) and (3) for offerings on Form F–10 only to Canadian issuers in order to specifically address at the time of an amendment to Form F–10 the applicability of the filing requirements to offerings by issuers from non-Canadian foreign countries.

Miscellaneous Amendment: The NASD is also proposing to amend paragraph (3) to the exemption provisions of the Filing Requirements to exempt offerings on Form F–3. The exemption for offerings registered with the SEC on Form F–3 was excluded through an oversight from the exemption provided by paragraph (3). This proposed change is consistent with the NASD's long-standing position that those exemptions available to domestic issuers qualified to register on Form S–3 are also available to foreign issuers qualified to register on Form F–3.

(b) The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act in that the proposed rule change will promote just and equitable principles of trade and in general protect investors and the public market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The proposed rule change to the filing requirements of the Corporate Financing Interpretation was published for comment in Notice to Members 91–34 (June 1991). No comments were received in response thereto.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange

[2] This notice shall serve as notice of Amendment No. 1 to SR–NASD–91–19.

Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by February 19, 1992.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92-2122 Filed 1-28-92; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-30279; File No. SR-NASD-91-65]

Self-Regulatory Organizations; Notice of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Permitting Direct Participation Program Principals and Representatives to Offer and Sell Direct Participation Program Debt

January 22, 1992.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on November 27, 1991, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD.[1] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD is proposing to amend Parts II and III of Schedule C to the NASD By-Laws to permit Direct Participation Program ("DPP") Principals and Representatives to offer and sell direct participation program debt. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

Schedule C to the NASD By-Laws

Part II—Registration of Principals

* * * * *

(2) Categories of Principal Registration.

* * * * *

(e) Limited Principal—Direct Participation Programs.

(i) Each person associated with a member who is included within the definition of principal in Part II, Section (1) hereof, may register with the Corporation as a Limited Principal—Direct Participation Programs if:

a. his activities in the investment banking and securities business are limited solely to *the equity interests in or the debt of* direct participation programs as defined in Part II, Section (2)(e)(ii) hereof: and

* * * * *

Part III—Registration of Representatives

* * * * *

(2) Categories of Representative Registration.

* * * * *

(c) Limited Representative—Direct Participation Programs.

(i) Each person associated with a member who is included within the definition of a representative in Part III, Section (1) hereof, may register with the Corporation as a Limited Representative—Direct Participation Programs if:

a. his activities in the investment banking and securities business are limited *solely* to the solicitation, purchase and/or sale of *equity interest in or debt of* direct participation programs as defined in Part II, Section (2)(e)(ii) hereof: and.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in sections (A), (B), and (C) below of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The NASD is proposing to amend parts II and III of Schedule C to the NASD's By-Laws to permit persons who are registered as DPP Principals and Representatives to offer and sell direct participation program debt instruments.

It has come to the NASD's attention that DPP synicators are offering debt securities of DPP's to pension plans and other institutional accounts which are considered "qualified plans" under the Employee Retirement and Income Security Act ("ERISA"). The NASD is informed that syndicators are offering such debt instruments in order to avoid having distributions classified as "unrelated business taxable income" under Internal Revenue Service regulations.

Schedule C currently allows a person to qualify to sell all types of securities (except options) by passing the Series 7 examination or to qualify to sell a specific category of security by passing a more limited examination such as the Series 22 (DPP Examination). The current definition of direct participation programs contained in Schedule C does not specify debt securities as instruments which a DPP registered person is permitted to sell.

Nevertheless, while DPP salesman must be familiar with the structure and tax consequences of a DPP offering, selling a DPP debt security does not require general market knowledge or knowledge of the debt securities market because the DPP debt security is typically sold to retirement plans that intend to hold the security to maturity. Consistent with this position, the proposed rule change would not permit a DPP registered person to buy or sell DPP debt securities in the secondary market. The NASD believes that there is no discernible difference between the knowledge required for the initial sale of debt and equity instruments issued by a DPP and, accordingly, believes that DPP principles and representatives should be permitted to offer and sell such instruments.

The NASD is, therefore, proposing to amend part II, section 2(e)(i)a and part III, section 2(c)(i) a of Schedule C to add language specifying that a person may register as a DPP Principal or Representative, respectively, if their securities activities are "limited solely to the solicitation, purchase and/or sale of *equity interests in or the debt of* direct participation programs * * *." This change would specify that the sale of both DPP equity and debt instruments is permissible under the limited DPP registrations.

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(3) of the Act in that the proposed rule change allows persons engaged in specific types of activity (the offer and sale of DPP debt instruments) to become associated with NASD members without being

[1] The NASD filed Amendment No. 1 on December 18, 1991, which made technical changes to this filing. This amendment is available for inspection and copying in the Public Reference Room.

required to pass the more extensive Series 7 examination.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members Participants, or Others

Comments were neither solicited nor received

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by February 19, 1992.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92-2124 Filed 1-28-92; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-30280; File No. SR-NYSE-91-38]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Approval to the Addition of Rules 704, 705, 780.10(b), 80A(c) and (d), and 116.30 to Rule 476A and Amending the Minor Rule Violation Enforcement and Reporting Plan

January 22, 1992.

I. Introduction

On November 6, 1991, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to sections 19(b)(1) and (d)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rules 19b-4 and 19d-1(c)(2) thereunder,[2] a proposed rule change to add NYSE Rules 704, 705, 780.10(b), 80A(c) and (d), and 116.30 to both NYSE Rule 476A, the List of Exchange Rule Violations and Fines Under Rule 476A ("Rule 476A List"), and the Exchange's minor rule violation enforcement and reporting plan ("minor rule violation plan").[3]

The proposed rule change was published for comment in Securities Exchange Act Release No. 29955 (November 18, 1991), 56 FR 59311 (November 25, 1991). No comments were received on the proposal.

SEC Rule 19d-1(c)(2) under the Act authorizes national securities exchanges to adopt minor rule violation plans for the summary discipline and abbreviated reporting of minor rule violations by exchange members and member organizations.[4] In this regard, the NYSE adopted a minor rule violation plan,[5] now embodied in NYSE Rule 476A, which provides that the Exchange may designate violations of certain rules as minor rule violations and issue summary fines in lieu of commencing a full disciplinary proceeding before a hearing panel.[6] Accordingly, the NYSE is relieved of the current reporting requirements of section 19(d)(1) with respect to disciplinary action taken pursuant to the Exchange's minor rule violation plan.

Moreover, the Commission approved NYSE Rule 476A,[7] which provides that the Exchange may impose a fine, not to exceed $5,000, on any member, member organization, allied member, approved person, or registered or non-registered employee of a member or member organization for a minor violation of certain specified Exchange rules.[8] Specifically, the Exchange will fine an individual $500, $1,000 or $2,500, and a member organization $1,000, $2,500 or $5,000, respectively, of first, second and subsequent violations within a rolling twelve month period of any rules on the Rule 476A List.[9] The Commission approved several amendments to this list, adding new or existing NYSE rules that are appropriate for summary disciplinary procedures.[10]

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[1] 15 U.S.C. 78s(b)(1) and (d)(1) (1988).

[2] 17 CFR 240.19b-4 and 240.19d-1(c)(2) (1991).

[3] See letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Howard Kramer, Assistant Director, Division of Market Regulation, SEC, dated November 5, 1991, requesting approval to amend the Exchange's 19(d)(1) minor rule violation plan.

[4] See Securities Exchange Act Release No. 21013 (June 1, 1984), 49 FR 23828 (order approving amendments to paragraph (c)(2) of Rule 19d-1under the Act). A self-regulatory organization ("SRO") is required, pursuant to paragraph (c)(1) of Rule 19d-1, to file promptly with the Commission any final disciplinary action taken by the SRO. However, paragraph (c)(2) of Rule 19d-1 establishes that minor rule plan determinations are not final, thereby permitting the SRO to report on a periodic, as opposed to immediate, basis.

[5] See Securities Exchange Act Release No. 22415 (September 17, 1985), 50 FR 38600 (approving File No. 4-284).

[6] See NYSE Rule 478.

[7] See Securities Exchange Act Release No. 21688 (January 25, 1985), 50 FR 5025 (approving File No. SR-NYSE-84-27).

[8] A list of the NYSE rules subject to Exchange Rule 476A procedures and the corresponding fine schedule were attached to the rule filing as Exhibit A. Both are contained under Supplementary Material to NYSE Rule 476A and are available at the Commission and the NYSE.

[9] In accordance with SEC Rule 19d-1(c)(2), fines in excess of $2,500, assessed under NYSE Rule 476A, are not considered pursuant to the minor rule violation plan and are thus subject to the current reporting requirements of section 19(d)(1) of the Act.

[10] See Securities Exchange Act Releases No. 22490 (October 2, 1985), 50 FR 41084 (order granting accelerated approval to File No. SR-NYSE-85-30); No. 23104 (April 11, 1986), 51 FR 13307 (approving File No. SR-NYSE-86-12); No. 24985 (October 5, 1987), 52 FR 41643 (approving File No. SR-NYSE-86-21); No. 25763 (May 27, 1988), 53 FR 20925 (approving File No. SR-NYSE-87-10); No. 27702 (February 12, 1990), 55 FR 6139 (approving pilot of 5 rules until October 5, 1990, File No. SR-NYSE-90-04); No. 27878 (April 4, 1990), 55 FR 13345 (approving File No. SR-NYSE-89-44); No. 28003 (May 8, 1990), 55 FR 20004 (approving File No. SR-NYSE-90-09); No. 28505 (October 2, 1990), 55 FR 41288 (permanently approving File No. SR-NYSE-90-04); No. 28995 (March 21, 1991), 56 FR 12967 (approving File No. SR-NYSE-91-04).

According to the Exchange, the purpose of NYSE Rule 476A is to provide a process to govern minor rule violations that necessitate a meaningful sanction, but do not require a more costly and time-consuming Rule 476 disciplinary proceeding in view of the minor nature of the violation.[11] The Exchange believes that the specific, required procedures of Rule 476A preserve the due process rights of the accused party.[12]

II. Proposal

The NYSE proposes to add to the Rule 476A List and the Exchange's minor rule violation plan the following three rules pertaining to options: Rule 704, which imposes option position limits; Rule 705, which prescribes option exercise limits; and Rule 780.10(b), which requires the delivery of an "exercise advice" to the Exchange for option exercises of a certain size.

In addition, the Exchange is seeking approval to add Exchange Rules 80A(c) and (d) and 116.30 to the Rule 476A List. Rule 80A establishes requirements for execution of index arbitrage orders when the Dow Jones Industrial Average has moved 50 points from the previous day's close. Rule 116.30 contains restrictions on a specialist's ability to stop stock.

The Exchange believes it is appropriate, in order to induce compliance, to make the failure to comply with the provisions of the above-named rules subject to the possible imposition of a fine under NYSE Rule 476A procedures. The Exchange further believes that, in many instances, the most appropriate sanction for the failure to comply with the requirements of these rules would be a summary fine under the minor rule violation plan.

III. Discussion and Conclusion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of Sections 6(b)(1), (6), and (7), 6(d) (1) and 19(d).[13] The proposal is consistent with the section 6(b)(6) requirement that the rules of an exchange provide that its members, and persons associated with its members, be appropriately disciplined for violation of the rules of the exchange. In this regard, the Commission believes that the proposed additions to NYSE Rule 476A should provide a fair procedure for appropriately disciplining members and member organizations for minor rule violations warranting a sanction more severe than a warning or a cautionary letter.[14] In addition, the Commission believes the proposal is consistent with the Section 6(b)(7) requirement that the rules of an exchange be consistent with section 6(d)(1) and provide fair procedures. As noted in previous Commission orders regarding NYSE Rule 476A, [15] because the minor rule violation plan provides procedural rights to persons who are fined and permits disciplined persons to contest the Exchange's imposition of the fine and request a full disciplinary hearing, the proposal provides a fair procedure for the disciplining of members and persons associated with members, which is consistent with sections 6(b)(7) and 6(d)(1) of the Act.

The Commission also believes that the proposal furthers the purposes of section 6(b)(1) of the Act by providing an alternate means of deterring potential violations of the specified rules. Moreover, the Commission believes that inclusion of these rules on the violations list should prove to be an effective response to a violation when the initiation of full disciplinary proceedings is unsuitable because it would be costly and time-consuming in view of the minor nature of the particular violation. An exchange's ability to effectively enforce compliance with Commission and exchange rules by its members and member organizations is central to its self-regulatory functions. In this regard, the Commission believes that the inclusion of the above-cited rules will provide a more effective means of deterrence than, alternatively, either verbal or written cautions for lesser violations of the five rules.

As set forth above, NYSE Rules 704, 705, 780.10(b), 116.30 and 80A(c) and (d) contain certain requirements regarding options and equity trading. The Commission believes that many violations of these rules could be determined objectively and adjudicated quickly. For example, noncompliance with the Rules 704's position limits and Rule 705's exercise limits is easily determined by surveillance mechanisms. Position limits impose a ceiling on the number of option contracts of each class on the same side of the market (*i.e.*, aggregating long calls and short puts or long puts and short calls) that can be held or written by an investor or group of investors acting in concert. Exercise limits prohibit the exercise by an investor or group of investors acting in concert of more than a specified number of puts or calls in a particular underlying security within five consecutive business days. Aggressive enforcement of these limits through Rule 476A procedures should assist the Exchange in its efforts to thwart the use of large options positions to manipulate or disrupt the underlying market so as to benefit the options position.

As a second example, a specialist's failure to abide by Rule 116.30's restrictions on stopping stock is also easily determined. The rule requires, in part, that in order for the specialist to stop stock in response to a request by a member, the spread in the quotation cannot be less than twice the permitted minimum variation of trading in the stock and, after granting a stop, the specialist cannot reduce the size of the market and the spread between the bid and offer must be reduced. [16] These are objective standards that are amenable to enforcement through the mechanism of Rule 476A. Efficient and equitable enforcement of these two provisions should not entail the complicated factual and interpretive inquiries associated with more sophisticated Exchange disciplinary actions.

NYSE Rule 80A(c) and (d) imposes conditions on the entry of index arbitrage and stock basket orders when the Dow Jones Industrial Average moves 50 points or more from the previous day's close. Specifically, index arbitrage orders to buy must be entered "buy minus," while index arbitrage orders to sell must be marked "sell plus." Violations of these requirements could be readily and conclusively determined by, for example, examining order tickets.

For the above reasons, inclusion of these rules in NYSE's minor rule violation plan is consistent with the intent of SEC Rule 19d–1(c) and, accordingly, the Commission believes

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[11] Although the NYSE's Board of Governors makes the initial determination of whether an Exchange rule violation is "minor" for purposes of inclusion in NYSE Rule 476A, this determination is subject to Commission review pursuant to sections 19(b)(1) and (d)(1) of the Act and Rules 19b–4 and 19d–1(c)(2) thereunder.

[12] The party penalized by a Rule 476A citation and fine may either accept the citation or seek a full disciplinary hearing under Rule 476. In addition, the Exchange has the option of instituting a full disciplinary hearing for any violation of rules included on the Rule 476A List.

[13] 15 U.S.C. 78f(b)(1), (6), and (7), 78f(d)(1) and 78s(d) (1988).

[14] The Commission notes that the NYSE retains the discretion to bring full disciplinary proceedings for violations of the rules listed in Rule 476A and should do so when appropriate for the particular violation involved.

[15] See *supra* note 10.

[16] See NYSE Rule 116.30(3). See also Securities Exchange Act Release No. 28999 (March 21, 1991), 56 FR 12964.

that these rules should be added to the NYSE Rule 476A List.[17] In addition, the Commission believes that adding these rules to the Exchange's minor rule violation plan, in light of the Exchange's discretion to bring a full disciplinary hearing, should enhance, as opposed to reduce, the NYSE's enforcement capabilities regarding these rules. Inclusion of a rule in an exchange's minor rule violation plan should not be interpreted to mean it is an unimportant rule. On the contrary, the Commission recognizes that inclusion of rules under a minor rule violation plan should not only reduce the reporting burdens of an SRO, but also can make its disciplinary system more efficient in prosecuting violations of these rules. Finally, for any of the violations included in NYSE Rule 476A, the NYSE could bring a full disciplinary proceeding rather than use the abbreviated procedures and stipulated fines.

It is therefore ordered, pursuant to sections 19(b)(2) [18] and 19(b)(1) of the Act, That the proposed rule change (SR–NYSE–91–38) be and hereby is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92–2123 Filed 1–28–92; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF STATE

Bureau of Consular Affairs

[Public Notice 1563]

Replacement of Cancelled Passports Endorsed as Valid Only for Travel to Israel

By a final rule appearing elsewhere in this issue, the Department is cancelling all passports that are endorsed as valid only for travel to Israel. The cancellation action is effective as of April 25, 1992. As reflected in the final rule, this cancellation is required by the provisions of section 129 of Public Law 102–138, enacted on October 28, 1991. This notice informs bearers of those passports of the alternative passport documentation they may be eligible to obtain to replace such cancelled passports.

In addition to setting forth the reasons for the cancellation action, the "SUPPLEMENTARY INFORMATION" section of the final rule notes that in lieu of a passport limited for travel only to Israel, any passport issued as an exception to the prohibition on possession and use of more than one passport to facilitate the foreign travel of United States citizens and nationals now is being issued valid for an initial period of two years from date of issue with the possibility of extension for additional two year periods up to the maximum period of validity prescribed for such passport, upon a showing of continued need by the bearer.

Consistent with the foregoing, bearers of passports valid only for travel to Israel that are cancelled under the final rule may, upon submission to a passport issuing office or U.S. diplomatic or consular post abroad of the cancelled passport and two new passport photographs, request issuance of a replacement passport that will be issued valid for a period of two years or for the remaining validity period of the cancelled passport, whichever is less.

In the alternative, the bearer of a passport cancelled under the final rule appearing elsewhere in this issue may present that passport and request that the Israel-only endorsement be invalidated and the passport be revalidated for the limited validity period described in the preceding paragraph. Such request for revalidation of the cancelled passport will be granted only where it is determined that their inability to use the passport for further travel or residence abroad would work an unnecessary hardship upon the bearer.

This notice will expire on October 28, 2002.

Dated: January 22, 1992.

James L. Ward,

Acting Assistant Secretary for Consular Affairs.

[FR Doc. 92–1948 Filed 1–28–92; 8:45 am]

BILLING CODE 4710–06–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Noise Exposure Map Notice, Montgomery County Airpark Gaithersburg, MD

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the noise exposure maps submitted by the Montgomery County Revenue Authority for Montgomery County Airpark under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Pub. L. 96–193) and 14 CFR part 150 are in compliance with applicable requirements.

EFFECTIVE DATE: The effective date of FAA's determination on the noise exposure maps is January 13, 1992.

FOR FURTHER INFORMATION CONTACT: Frank Squeglia, Environmental Specialist, FAA—Eastern Regional Office, Airports Division, AEA–610, Fitzgerald Federal Building, JFK International Airport, Jamaica, NY 11430, (718) 553–0902.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the noise exposure maps submitted for the Montgomery County Airpark are in compliance with applicable requirements of Part 150, effective January 13, 1992.

Under section 103 of Title I of the Aviation Safety and Noise Abatement Act of 1979 (hereinafter referred to as "the Act"), an airport operator may submit to the FAA noise exposure maps which meet applicable regulations and which depict non-compatible land uses as of the date of submission of such maps, a description of projected aircraft operations, and the ways in which such operations will affect such maps. The Act requires such maps to be developed in consultation with interested and affected parties in the local community, government agencies and persons using the airport.

An airport operator who has submitted noise exposure maps that are found by FAA to be in compliance with the requirements of FAR part 150, promulgated pursuant to Title I of the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken or proposes for the reduction of existing non-compatible uses and for the prevention of the introduction of additional non-compatible uses.

The FAA has completed its review of the noise exposure maps and related descriptions submitted by the Montgomery County Revenue Authority. The specific maps under consideration are the noise exposure maps: Figure 12.1 Ldn Contours for Existing (1991) Annual Average Day Operations and Figure 13.1 Ldn Contours for Future (1996) Annual Average Day Operations on pages 83 and 85 respectively of the July 1991 submission, as amended.

The FAA has determined that these maps for Montgomery County Airpark are in compliance with applicable requirements. This determination is effective on January 13, 1992. FAA's

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[17] See Securities Exchange Act Release No. 13726 (July 8, 1977), 42 FR 36411.

[18] 15 U.S.C. 78s(b)(2) (1988).

[19] 17 CFR 200.30–3(a)(12) and (44) (1991).

determination on an airport operator's noise exposure maps is limited to finding that the maps were developed in accordance with the procedures contained in Appendix A of FAR Part 150. Such determination does not constitute approval of the applicant's data, information or plans, or a commitment to approve a noise compatibility program or to fund the implementation of that program.

If questions arise concerning the precise relationship of specific properties to noise exposure contours depicted on noise exposure maps submitted under Section 103 of the Act, it should be noted that the FAA is not involved in any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the noise exposure maps to resolve questions concerning, for example, which properties should be covered by the provisions of section 107 of the Act. These functions are inseparable from the ultimate land-use control and planning responsibilities of local government. These local responsibilities are not changed in any way under part 150 or through FAA's review of noise exposure maps. Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the maps depicting properties on the surface rests exclusively with the airport operator which submitted those maps, or with those public agencies and planning agencies with which consultation is required under section 103 of the Act. The FAA has relied on the certification by the airport operator under section 150.21 of FAR part 150, that the statutorily required consultation has been accomplished.

Copies of the noise exposure maps and of the FAA's evaluation of the maps are available for examination at the following locations:

Federal Aviation Administration, Eastern Regional Office, Fitzgerald Federal Building, Airports Division, rm. 337, JFK International Airport, Jamaica, NY 11430

Federal Aviation Administration, Washington Airports District Office, 101 West Broad St. Suite 300, Falls Church, Virginia 22046

Montgomery County Revenue Authority, 211 Monroe Street, Rockville, Maryland 20850

Questions may be directed to the individual named above under the heading **"FOR FURTHER INFORMATION CONTACT".**

Issued in Jamaica, NY on January 13, 1992.

Louis P. DeRose,

Manager, Airports Division, Eastern Region.

[FR Doc. 92-2104 Filed 1-28-92; 8:45 am]

BILLING CODE 4710-13-M

Federal Highway Administration

Environmental Impact Statement; Delaware and Chester Counties, PA

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 proposed highway improvements to US 202, section ES1, in Delaware and Chester Counties, Pennsylvania

FOR FURTHER INFORMATION CONTACT: Philibert A. Ouellet, District Engineer, Federal Highway Administration, 228 Walnut Street, P.O. Box 1086, Harrisburg, Pennsylvania 17108-1086, telephone (717) 782-4422, or Timothy O'Brien, Project Manager, Pennsylvania Department of Transportation, 200 Radnor-Chester Road, St Davids, Pennsylvania 19087, telephone (215) 964-6611

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Pennsylvania Department of Transportation, will be preparing an Environmental Impact Statement (EIS) on a proposal to improve US 202 between Matlack Street in West Chester, Chester County and the Pennsylvania/Delaware State line, Delaware County. Alternatives under consideration include: Widening of US 202; transportation system management (TSM) measures; and a No Build alternative

The various alternatives will be studied, and their impacts to the environment will be assessed in detail as they relate to the areas of regional and community growth, wetlands, soil erosion and sedimentation, vegetation, geological resources, parks and recreation facilities, water pollution, hazardous waste sites, visual quality, air quality, noise pollution, historical and archaeological resources, traffic/transportation/energy, public facilities and services, socio-economic, community cohesion, displacement of people, business and farms. In addition the EIS will contain a cost analysis of the various alternatives, preliminary engineering information and documentation of the public and agency consultation and coordination process.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State and local agencies, and to private organizations and individuals who express interest in the proposal. Meetings will take place with the appropriate Federal and State agencies between October 1991 and December 1993. Public notices of the time and place of these meetings, and any required public hearings, will be given. Public involvement and interagency coordination will be maintained throughout the development of the EIS

To ensure that the full range of issues related to this proposed action are addressed and that all significant issues are identified, comments or questions concerning this action and the EIS should be directed to the FHWA at the address provided above

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The provisions of Executive Order 12372, Intergovernmental Review of Federal Programs, regarding State and local review of Federal and Federally assisted programs and projects apply to this program.

Issued on January 16, 1992

George L. Hannon,

Assistant Division Administrator, Federal Highway Administration, Harrisburg, Pennsylvania

[FR Doc. 92-2078 Filed 1-28-92; 8:45 am]

BILLING CODE 4910-22-M

UNITED STATES INFORMATION AGENCY

U.S. Congress-Korean National Assembly Project

AGENCY: United States Information Agency

ACTION: Notice—Request for Proposals.

SUMMARY: The Bureau of Educational and Cultural Affairs, U.S. Information Agency, announces its intention to award a grant of up to $70,000 to bring up to 10 Korean participants (university students and one adult leader) to the United States and to send an equivalent group of Americans to Korea for three to four weeks during the summer of 1992. The project is jointly funded by the U.S. and Korean Governments. Participants will spend part of their time as interns in the offices of interested members of the host country's national legislature, receive briefings from government officials and other specialists, meet with their peers and participate in cultural and educational activities.

DATES: Deadline for proposals: All copies must be received at the U.S. Information Agency by 5 p.m. e.s.t. on February 28, 1992. Faxed documents will not be accepted, nor will documents postmarked on February 28 but received at a later date. It is the responsibility of each grant applicant to ensure that proposals are received by the above

deadline. Grant activities may begin no earlier than June 1.

ADDRESSES: The original and twelve copies of the completed application, including required forms, should be submitted by the deadline to: U.S. Information Agency, Ref.: US Congress-Korean National Assembly, Grants Management Office, E/XE, room 357, 301 4th Street SW., Washington, DC 20547.

FOR FURTHER INFORMATION CONTACT: Interested U.S. organizations/institutions should contact Bettye Stennis at the Youth Programs Division (E/VY), Office of International Visitors, room 357, 4th Street SW., Washington, DC 20547, telephone 202–619–6299, to request detailed application packets, which include award criteria additional to this announcement, all necessary forms, and guidelines for preparing proposals, including specific budget preparation information.

SUPPLEMENTARY INFORMATION: Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social and cultural life.

Overview—The purpose of this program is to broaden the perspectives of select groups of Korean and American young people on the legislative process, the history for U.S-Korean relations and current political, economic and security aspects of the bilateral relationship. It will also provide both groups with first-hand experience of the host country, its people and culture, as well as enable the participants to form personal contacts. The program should take place while the Congress and the Korean National Assembly are in session.

Eligibility—Not-for-profit private or public educational or exchange organizations may apply. Grants awarded to eligible organizations with less than four years experience in conducting international exchange programs will be limited to $60,000.

Guidelines—The program for each group should be for a minimum stay in country of 3 weeks. The program for the Korean participants should begin in Washington and the group should spend 10–15 days in Washington. Members of Congress will offer internships for the Koreans in their offices. The Koreans should be given a chance to interact with fellow interns in the Congressmen's offices where they are assigned, as well as meet with other young Americans in formal, structured situations designed by the grantee. In both cases, these should supplement orientations and lectures about the host country in which the speakers are government officials, professors, legislators or legislative staff. The group may then be programmed to travel to two or three locations outside of Washington, to experience the diversity of American society. Programming at one of these sites will be arranged in conjunction with the office of one of the Congressmen and include a visit to his/her district. It is desirable for the participants to spend a weekend with a host family without a structured program.

Members of Congress nominate American participants, using criteria prepared by USIA. The Korean National Assembly organizes the program for the Americans in Korea, part of which may include internships in the offices of Assemblymen. The Americans should have the opportunity to exchange views on current bilateral issues with Korean university students and other young people. Some travel in Korea will be arranged for them. The grantee organization will need to assign a responsible group leader to accompany the group, monitor these arrangements and work with the Korean Government in providing supplementary educational and cultural activities as needed. It is desirable for the American and Korean groups to meet, preferably at the beginning of the program when the Americans are undergoing pre-departure orientation. The exact date of the Korean group's arrival is not yet known, but it is usually in July. The time period of July 15 to August 15 may be used for planning purposes.

The grantee organization is responsible for the following: Arranging all programming including orientation; arranging lodging; working with Congressional staff in planning and implementing the internships for the Koreans and in the selection of the Americans; payment of per diem and allowances; administering the USIA health and accident insurance plan; travel arrangements; the assignment of an American escort for the travel portion of the Koreans' program in the U.S.; and the assignment of an American escort to accompany the American group in Korea.

Proposed Budget—The Korean Government pays for: International travel for the Korean participants; and all hosting costs for the Americans in Korea including local travel and per diem. The USIA grant covers: International and domestic (within the US) airfare for Americans and the costs of their pre-departure orientation and debriefing; and all hosting costs for the Koreans. Specific details on the submission of a budget are available in the application packet.

Review Process:

USIA will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines established herein and in the application packet. Eligible proposals will be forwarded to panels of USIA officers for advisory review. All eligible proposals will also be reviewed by the USIA Office of East Asian and Pacific Affairs, and the budget and contracts offices. They may also be reviewed by the Agency's Office of the General Counsel. Funding decisions are at the discretion of the Associate Director for Educational and Cultural Affairs. Final technical authority for grant awards resides with USIA's contracting officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the following criteria:

1. Quality of the program plan and adherence of the proposed activity to the criteria and conditions described above.

2. Reasonable, feasible and flexible objectives. Proposals should clearly demonstrate how the institution will meet the program's objectives and plan.

3. Multiplier effect/impact. Proposed programs should strengthen long-term mutual understanding, to include maximum sharing of information and establishment of long-term institutional and individual linkages.

4. Value to U.S.-Korean relations—The assessment of USIA's geographic area desk of the potential impact and significance of the proposed project in Korea.

5. Cost effectiveness. The overhead and administrative components of grants, as well as salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. Proposals should maximize cost-sharing through other private sector support as well as institutional direct funding contributions.

6. Institutional capacity. Proposed personnel and institutional resources should be adequate and appropriate to achieve the project's goals.

7. Proposals should demonstrate potential for program excellence and/or track record of applicant institution. The Agency will consider the past performance of prior grantees and the demonstrated potential of new applicants.

8. Evaluation plan. Proposals should provide a plan for evaluation by the grantee institution.

Notice

The terms and conditions published in this RFP are binding and may not be modified by any USIA representative. Explanatory information provided by the Agency that contradicts published language will not be binding. Issuance of the RFP does not constitute an award commitment on the part of the Government. Final award cannot be made until funds have been fully appropriated by Congress, allocated and committed through internal USIA procedures.

Notification

All applicants will be notified of the results of the review process on or about May 15, 1992. Funded proposals will be subject to periodic reporting and evaluation requirements.

Dated: January 23, 1992.

Carl D. Howard,

Acting Associate Director, Bureau of Educational and Cultural Affairs.

[FR Doc. 92-2170 Filed 1-28-92; 8:45 am]

BILLING CODE 8230-01-M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. 301-85]

Request for Public Comment: Intellectual Property and Market Access Acts, Policies and Practices of the Government of India

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of request for written comments from the public.

SUMMARY: The United States Trade Representative (USTR) is seeking further public comment on acts, policies and practices of the Government of India concerning the protection and enforcement of intellectual property rights and market access conditions for motion pictures. In particular, USTR is requesting comments on whether such acts, policies and practices are unreasonable and burden or restrict U.S. commerce, and if so, what responsive action, if any, should be taken pursuant to section 301 of the Trade Act of 1974, as amended, ("the Trade Act").

DATES: Written comments from interested persons are due on or before 12 noon, Monday, February 24, 1992.

FOR FURTHER INFORMATION CONTACT: Peter Collins, Director, Southeast Asian and Indian Affairs (202) 395-6813, Emery Simon, Deputy Assistant USTR for Intellectual Property (202) 395-7320, or Catherine Field, Associate General Counsel (202) 395-3432, Office of the United States Trade Representative.

SUPPLEMENTARY INFORMATION: On May 26, 1991, pursuant to section 302(b)(2)(A) of the Trade Act, the United States Trade Representatives initiated an investigation of those acts, policies and practices of the Government of India that were the basis for identification of India as a priority foreign country under section 182 of the Trade Act (19 U.S.C. 2242). In identifying India as a priority foreign country, the USTR noted deficiencies in that country's intellectual property acts, policies and practices including: (1) Numerous deficiencies in its patent law, in particular the failure to provide product patent protection for a wide range of products including pharmaceuticals and products resulting from chemical processes, an inadequate term of protection, and overly broad involuntary licensing provisions; (2) lack of protection for service marks and restrictions on use of foreign trademarks and (3) copyright compulsory licensing provisions that are overly broad. Further, the USTR noted the absence of effective enforcement of intellectual property rights in India, including copyrights, which has led to a high level of piracy in that country.

With respect to market access for persons that rely on intellectual property protection, USTR noted that access for U.S. motion pictures is severely restrained through quotas, fees and other barriers.

On November 26, 1991, the USTR decided to extend the investigation because the relevant issues are complex and complicated and require additional time to attempt to resolve. (56 FR 61447.) In this case, section 304(a)(3)(B) of the Trade Act requires the USTR to determine by February 26, 1992, whether the Government of India's acts, policies and practices are unreasonable and burden or restrict U.S. commerce. If that determination is affirmative, the USTR must determine what action, if any, to take under section 301 in response.

Requirements for Submissions

The USTR invites all interested persons to submit written comments on the required determinations. Comments will be considered in recommending any determination or action under section 301 to the USTR.

Comments must be filed in accordance with the requirements set forth in 15 CFR 2006.8(b) (55 FR 20593) and are due no later than 12 noon, Monday, February 24, 1992. Comments must be in English and provided in twenty copies to: Chairman, Section 301 Committee, room 223, USTR, 600 17th Street, NW., Washington, DC 20506.

Comments will be placed in a file (Docket 301-85) open to public inspection pursuant to 15 CFR 2006.13, except confidential business information exempt from public inspection in accordance with 15 CFR 2006.15. (Confidential business information submitted in accordance with 15 CFR 2006.15 must be clearly marked "BUSINESS CONFIDENTIAL" in a contrasting color ink at the top of each page on each of 20 copies, and must be accompanied by a nonconfidential summary of the confidential information. The nonconfidential summary shall be placed in the Docket which is open to public inspection.) The docket shall be available for public inspection at the USTR Reading Room, room 101, Office of the U.S. Trade Representative, 600 17th Street, NW., Washington, DC. An appointment to review the docket may be made by calling Brenda Webb, (202) 395-6186. The USTR Reading room is open to the public from 10 a.m. to 12 p.m. and from 1 p.m. to 4 p.m., Monday to Friday (except holidays).

A. Jane Bradley,

Chairman, Section 301 Committee.

[FR Doc. 92-2090 Filed 1-28-92; 8:45 am]

BILLING CODE 3190-01-M

Investment Policy Advisory Committee Schedule

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of Investment Policy Advisory Committee Meeting Schedule.

SUMMARY: The meetings will include a review and discussion of current issues which influence U.S. trade policy. Pursuant to section 2155(f)(2) of title 19 of the United States Code, I have determined that this meeting will be concerned with matters the disclosure of which would seriously compromise the Government's negotiating objectives or bargaining positions.

DATES: The meetings of the Investment Policy Advisory Committee (INPAC) will be held from 10 a.m. to noon on: Tuesday, March 10; Monday, July 13; and Friday, October 16.

ADDRESSES: The meetings will be held at the Office of the United States Trade Representative, room 203, 600 17th Street, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Mollie Shields, Director, Office of

Private Sector Liaison, Office of the United States Trade Representative, Executive Office of the President.

Carla A. Hills,

United States Trade Representative.

[FR Doc. 92–2127 Filed 1–28–92; 8:45 am]

BILLING CODE 3190–01–M

Advisory Committee for Trade Policy and Negotiations, Meeting

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of Advisory Committee for Trade Policy and Negotiations meeting schedule.

SUMMARY: The meetings will include a review and discussion of current issues which influence U.S. trade policy. Pursuant to section 2155(f)(2) of title 19 of the United States Code, I have determined that this meeting will be concerned with matters the disclosure of which would seriously compromise the Government's negotiating objectives or bargaining positions.

DATES: The meetings of the Advisory Committee for Trade Policy and Negotiations (ACTPN) are to be held between 1:30–4 p.m. on: Wednesday, March 11; Thursday, June 25; Tuesday, September 22 and Thursday, December 3.

ADDRESSES: The meetings will be held at the Hay Adams Hotel, 800 16th Street, NW., Washington, DC, 20006.

FOR FURTHER INFORMATION CONTACT: Mollie Shields, Director, Office of Private Sector Liaison, Office of the United States Trade Representative, Executive Office of the President.

Carla A. Hills,

United States Trade Representative.

[FR Doc. 92–2125 Filed 1–28–92; 8:45 am]

BILLING CODE 3190–01–M

Services Policy Advisory Committee Schedule; Meeting

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of Services Policy Advisory Committee Schedule.

SUMMARY: The meetings will include a review and discussion of current issues which influence U.S. trade policy. Pursuant to section 2155(f)(2) of title 19 of the United States Code, I have determined that this meeting will be concerned with matters the disclosure of which would seriously compromise the Government's negotiating objectives or bargaining positions.

DATES: The meetings of the Services Policy Advisory Committee will be held from 2–4:30 p.m. on: Tuesday, March 24; Wednesday, July 22; and Thursday, October 15.

ADDRESSES: The meetings will be held at the Hay Adams Hotel, 800 16th Street, NW., Washington, DC, 20006.

FOR FURTHER INFORMATION CONTACT: Mollie Shields, Director, Office of Private Sector Liaison, Office of the United States Trade Representative, Executive Office of the President.

Carla A. Hills,

United States Trade Representative.

[FR Doc. 92–2126 Filed 1–28–92; 8:45 am]

BILLING CODE 3190–01–M

DEPARTMENT OF VETERANS AFFAIRS

Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information: (1) The title of the information collection, and the Department form number(s), if applicable; (2) a description of the need and its use; (3) who will be required or asked to respond; (4) an estimate of the total annual reporting hours, and recordkeeping burden, if applicable; (5) the estimated average burden hours per respondent; (6) the frequency of response; and (7) an estimated number of respondents.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from Janet G. Byers, Veterans Benefits Administration (20A5), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233–3021.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, NEOB, room 3002, Washington, DC 20503, (202) 395–7316. Do not send requests for benefits to this address.

DATES: Comments on the information collection should be directed to the OMB Desk Officer on or before February 28, 1992.

Revision

1. Declaration of Status of Dependents, VA Form 21–686c.
2. The form is used to confirm marital status and the existence of any dependent children.
3. Individuals or households.
4. 56,500 hours.
5. 15 minutes.
6. On occasion.
7. 226,000 respondents.

Dated: January 22, 1992.

By direction of the Secretary.

Frank E. Lalley,

Associate Deputy Assistant Secretary for Information Resources Policies and Oversight.

[FR Doc. 92–2101 Filed 1–28–92; 8:45 am]

BILLING CODE 8320–01–M

Sunshine Act Meetings

Federal Register
Vol. 57, No. 19
Wednesday, January 29, 1992

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

COMMODITY FUTURES TRADING COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 57 F.R. 2950.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 10:00 a.m., Wednesday, January 29, 1992.

CHANGES IN THE MEETING: The Commodity Futures Trading Commission has rescheduled the meeting to discuss a rule enforcement review to Friday, January 31, 1992 at 11:30 a.m.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–63142.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 92–2309 Filed 1–27–92; 2:40 pm

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:45 a.m., Friday, January 31, 1992.

PLACE: 2033 K St., NW., Washington, D.C. 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: ENFORCEMENT MATTERS.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 92–2310 Filed 1–27–92; 2:40 p.m.]

BILLING CODE 6351–01–M

federal register

Wednesday
January 29, 1992

Part II

Environmental Protection Agency

40 CFR Parts 260, 264, 265, 270, and 271
Liners and Leak Detection Systems for Hazardous Waste Land Disposal Units; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260, 264, 265, 270, and 271

[FRL-4028-2]

RIN 2050-AA76

Liners and Leak Detection Systems for Hazardous Waste Land Disposal Units

AGENCY: Environmental Protection Agency.

ACTION: Notice of final rulemaking.

SUMMARY: The Environmental Protection Agency (EPA) is today amending its current regulations under the Resource Conservation and Recovery Act (RCRA) concerning liner and leachate collection and removal systems for hazardous waste surface impoundments, landfills, and waste piles. EPA is also adding new regulations requiring owners and operators of hazardous waste surface impoundments, waste piles, and landfills to install and operate leak detection systems at such time as these units are added, laterally expanded, or replaced. EPA is promulgating most of these regulations in response to the requirements of the 1984 Hazardous and Solid Waste Amendments (HSWA) to RCRA.

EFFECTIVE DATE: July 29, 1992.

ADDRESSES: The public docket (docket reference code F-92-LLDF-FFFFF) for this rule is in room M2427, US EPA, 401 M Street SW., Washington, DC 20460, and is open from 9 am to 4 pm, Monday through Friday, excluding holidays. Call 202-260-9327 for an appointment to review docket materials. Up to 100 pages may be copied free of charge from any one regulatory docket. Additional copies are $0.15 per page.

FOR FURTHER INFORMATION CONTACT: The RCRA/Superfund Hotline at 1-800-424-9346 (toll free), or 703-920-9810 in the Washington, DC area. For information on technical aspects of this rule, contact Ken Shuster, Office of Solid Waste (OS-340), U.S. Environmental Protection Agency, 401 M St SW., Washington, DC 20460, 202-260-2214.

SUPPLEMENTARY INFORMATION: Copies of the following documents are available for purchase through the National Technical Information Services (NTIS), U.S. Department of Commerce, Springfield, VA 22161, phone 1-800-553-6847 or 703-487-4650: (1) U.S. EPA, "Compilation of Current Practices at Land Disposal Facilities", January 1992; (2) U.S. EPA, "Action Leakage Rates for Leak Detection Systems", January 1992.

Preamble Outline

I. Authority
II. Background
III. Summary of Today's Rule
  A. Summary of Rule
  B. Achievement of EPA Program Goals
IV. Detailed Discussion of the Rule
  A. Scope of the Rule
  B. Standards for Liners and Leak Detection Systems
  1. Technical Standards for Liner Systems
  2. Technical Standards for Leak Detection Systems
  3. Alternative Systems
  4. Applicability to Waste Piles
  5. Applicability to Land Treatment Units
  C. Response to Leaks
  1. Action Leakage Rate
  2. Response Action Plan
  D. Monitoring and Inspection Requirements
  E. Construction Quality Assurance
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I. Authority

These regulations are being promulgated under authority of sections 3004, 3005, 3006, and 3015 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6924, 6925, 6926, and 6936.

II. Background

On November 8, 1984, Congress enacted the Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act (RCRA), placing stringent new requirements on the land disposal of hazardous waste. Among other requirements, Congress amended section 3004 of RCRA and added section 3015 to impose specific design standards for land disposal units.

Section 3004(o)(1)(A) of RCRA, added by HSWA, requires each new landfill and surface impoundment, and each replacement and lateral expansion of a landfill and surface impoundment for which an application for a final permit determination is received after November 8, 1984, to install two or more liners (i.e., a double-liner system) and a leachate collection system above (for landfills) and between the liners. Section 3004(o)(5)(A) of RCRA requires EPA to promulgate regulations or issue technical guidance implementing the requirements of section 3004(o)(1)(A) by November 8, 1986. These HSWA requirements for double liner systems are intended to prevent the migration of hazardous constituents to ground water from land disposal units. Until the effective date of regulations promulgated under section 3004(o)(5)(A), Congress provided that an interim statutory double-liner standard in section 3004(o)(5)(B) could be used to meet the section 3004(o)(1)(A) double-liner system requirement.

Section 3004(o)(4) of RCRA requires EPA by May 8, 1987, to promulgate standards requiring new landfills, surface impoundments, waste piles, land treatment units, and underground hazardous waste tanks to use approved leak detection systems. The statute defines an "approved leak detection system" as a system or technology that EPA determines to be "capable of detecting leaks of hazardous constituents at the earliest practicable time." The term "new units" is defined as those units on which construction commences after the date of promulgation of the Agency's rule for leak detection systems. The impact of this language upon the applicability of this rule between today's promulgation and the effective date July 29, 1992 is discussed elsewhere in this preamble (See Section IV.A.).

Section 3015(a) of RCRA establishes standards for interim status waste piles. Any new waste pile, or replacement or lateral expansion of an existing waste pile at an interim status facility, must comply with requirements for liners and leachate collection systems or equivalent protection provided in regulations issued by EPA under section 3004 of RCRA before October 1, 1982, or revised under section 3004(o) of RCRA with respect to waste received beginning May 8, 1985.

Section 3015(b) of RCRA establishes standards for interim status surface impoundments and landfills. Any new unit, or replacement or lateral expansion of an existing unit at an interim status facility, is subject to the requirements promulgated under section 3004(o)(1) (relating to double-liners and leachate collection systems), with respect to waste received beginning on May 8, 1985.

The HSWA requirements described above either directly amended or directed the Agency to amend the existing RCRA liner standards for new hazardous waste landfills, surface impoundments, and waste piles issued by EPA on July 26, 1982 (47 FR 32262). On July 15, 1985, EPA issued a final rule (50 FR 28702) amending the existing liner standards by codifying the new liner standards of sections 3004(o)(1)(A), 3004(o)(5)(B), and 3015 (a) and (b) that

were to become effective immediately or shortly after the enactment of HSWA, as directed by the statute.

On March 28, 1986 (51 FR 10706), under section 3004(o)(5)(A) of RCRA, EPA proposed amendments to the statutory double-liner and leachate collection system standards for surface impoundments and landfills codified in EPA's regulations on July 15, 1985. The proposal set forth two types of designs for double-liner systems. One design consisted of a geomembrane (then referred to as a flexible membrane liner (FML)) as the top liner and a composite bottom liner consisting of a geomembrane underlain by compacted soil material to minimize flow through the geomembrane component should a breach occur, and having a hydraulic conductivity of no more than 1×10^{-7} cm/sec. The other proposed double-liner design consisted of a geomembrane top liner and a bottom liner constructed to prevent migration through the liner through the post-closure period and of at least 3 feet of compacted clay or other compacted soil material with a hydraulic conductivity of no more than 1×10^{-7} cm/sec. On April 17, 1987, EPA published a notice (52 FR 12566) requesting additional comments on certain aspects of the March 28, 1986 proposal. Specifically, EPA requested comments on data that demonstrated the advantages of a composite bottom liner versus a compacted soil material bottom liner. EPA also noticed the availability of two draft technical guidance documents for the design, construction, and operation of single- and double-liner systems and leachate collection systems. EPA solicited comments from the general public on the draft technical guidance documents.

On July 14, 1986 (51 FR 25422), EPA promulgated leak detection system requirements for underground hazardous waste tanks. In promulgating these regulations, EPA partially fulfilled its mandate under section 3004(o)(4) of RCRA to establish leak detection system requirements.

On May 29, 1987 (52 FR 20218), EPA proposed a rule establishing leak detection system requirements to fully implement section 3004(o)(4) of RCRA. The proposal specified design standards for leak detection systems for new and replacement landfills, surface impoundments, land treatment units, and waste piles, and for lateral expansions of these units at both permitted and interim status facilities. The proposal also expanded the double-liner requirements to waste piles. The proposal also included a requirement for a construction quality assurance program to be implemented by owners and operators to ensure the proper construction, installation, and closure of these units. Finally, the proposal included a requirement to develop a response action plan specifying actions that would be taken in reaction to liquid flow into the leak detection system above action leakage rates proposed by the owner or operator and approved by the Regional Administrator.

Today's rule finalizes EPA's proposed actions of March 28, 1986 and May 29, 1987, and completes the Agency's statutory rulemaking responsibilities imposed by RCRA sections 3004(o)(4) and 3004(o)(5)(A). EPA has not included additional leak detection standards for permitted land treatment units in today's rule because, as explained later in today's notice, existing unsaturated zone monitoring requirements in §§ 264.278 and 265.278 for such units are sufficient to ensure the detection of leaks at the earliest practicable time.

III. Summary of Today's Rule

A. Summary of Rule

Today's rule modifies the existing double-liner and leachate collection and removal system requirements for new and replacement surface impoundments and landfills and for lateral expansions of these units, including those units at interim status facilities. New surface impoundment and landfill units for which construction commences after January 29, 1992, and replacement units reused after and lateral expansions of existing units for which construction commences after July 29, 1992 must have a double liner consisting of a top liner designed to prevent the migration of hazardous constituents into the liner during the active life and post-closure period (e.g., a geomembrane) and a composite bottom liner consisting of a geomembrane underlain by at least 3 feet of compacted soil material having a hydraulic conductivity of no more than 1×10^{-7} cm/sec. EPA is also extending the revised landfill double-liner and leachate collection and removal system requirements to new waste pile units for which construction commences after January 29, 1992, and replacement units reused after and lateral expansions of waste pile units for which construction commences after July 29, 1992.

Today's rule also requires a leak detection system for each new surface impoundment, waste pile, and landfill for which construction commences after January 29, 1992, and each replacement surface impoundment, waste pile, and landfill reused after, and each lateral expansion of these units for which construction commences after July 29, 1992. The leachate collection and removal system drainage layer immediately above the bottom composite liner at these units must be used as the leak detection system. The drainage layer functioning as the leak detection system must meet minimum design criteria and ensure that leaks are detected at the earliest practicable time. Specifically, the drainage layer bottom slope must be one percent or more. If granular material is used in the drainage layer, it must have a minimum hydraulic conductivity of 1×10^{-2} cm/sec for waste piles and landfills and 1×10^{-1} cm/sec for surface impoundments and a minimum thickness of 1 foot. If synthetic drainage material is used in the drainage layer, the drainage material must have a minimum hydraulic transmissivity of 3×10^{-5} m²/sec for waste piles and landfills and 3×10^{-4} m²/sec for surface impoundments. These transmissivities are equivalent to the above hydraulic conductivities and thickness specifications for granular drainage layers. EPA is requiring that each unit have a leak detection sump to collect and remove liquids, sized to prevent liquids from backing up into the drainage layer. In lieu of meeting these requirements, the owner or operator may receive a variance for an alternative leak detection system that functions in an equivalent manner.

EPA is establishing a site-specific action leakage rate that specifies a liquid flow rate detected in the leak detection system sump that warrants followup actions by the owner or operator. Owners and operators are required to develop a response action plan specifying monitoring, inspection, and corrective measures to be implemented if the action leakage rate is exceeded.

The Agency is requiring owners and operators of units affected by today's rule to develop a construction quality assurance (CQA) program for various components of surface impoundments, waste piles, and landfills. The program will be implemented through a construction quality assurance plan that the owner or operator prepares to ensure that the constructed unit meets or exceeds all design criteria, plans, and specifications.

Owners or operators of facilities applying for a permit for new surface impoundments, waste piles, and landfills must submit information on liners and leak detection system designs, the action leakage rate, the response action plan, and CQA plans as part of the permit application. For new and replacement surface impoundment, waste pile, and landfill units, and lateral

expansions of existing units at permitted facilities, owners and operators must submit this information as part of a permit modification request. For affected units at interim status facilities, the owner or operator must submit proposed action leakage rates, response action plans, and a certification that construction has been completed according to the design specifications in the CQA plan to the Agency in advance of the receipt of wastes. Liner and leak detection system designs and CQA plans need not be submitted to EPA, but must be maintained on site.

B. Achievement of EPA Program Goals

In developing today's rule, EPA paid careful attention to several principles that now guide its environmental programs: Pollution prevention, ground-water protection, cost-effective policies which provide protection of human health and the environment, flexibility in implementation, and fostering of an effective State-Federal partnership. Today's rule incorporates each of these principles.

The primary focus of today's rule is on pollution prevention and, more specifically, on ground-water protection. Effective liner and leak detection systems will minimize the potential for releases of hazardous constituents from hazardous waste land disposal units to underlying ground water. In this way, today's rule complements the Agency's waste minimization policies, which seek to reduce the quantities of waste produced, and the RCRA land disposal restrictions programs. Today's liner and leak detection standards contribute to pollution prevention by providing for the containment and isolation of hazardous waste after final disposal.

In today's rule, EPA has taken an important step in implementing its Ground-Water Principles, recently published in the Agency's "Protecting the Nation's Ground Water: EPA's Strategy for the 1990's (21Z–1020, July 1991). A central theme in EPA's ground-water policy, enunciated in the principles, is that prevention of ground-water contamination is often more cost effective and environmentally more desirable than remediation of ground-water after contamination. Experience in the RCRA and Superfund programs demonstrates that improperly designed landfills, surface impoundments, and waste piles can result in ground-water contamination. At the same time, remediation of contaminated ground-water has proved to be time-consuming, expensive, and in some cases technically infeasible. On the other hand, the release of hazardous constituents from landfills, surface impoundments, and waste piles can largely be eliminated through good design and construction.

Regarding costs, it should be noted that most of the standards incorporated into today's rule are already widely in use at hazardous waste facilities and are generally considered good engineering practices. Because HSWA required new landfills and surface impoundments, and lateral expansions and replacements of existing landfills and surface impoundments, for which an application for a permit is received after November 8, 1984, and those units in interim status receiving waste after May 8, 1985, to be designed with double-liner and leachate collection systems, most facilities already meet many of the design standards of today's rule. In addition, many facilities have designed units that are in compliance with today's final rule in anticipation of the promulgation of a final rule based on the March 28, 1986, and May 29, 1987 proposed rules. Thus, for a relatively small increase in cost (to those facilities that are not already meeting the standards of today's rule), the rule may save large corrective action costs. However, since all new units must comply with all the provisions of this rule and bear the corresponding costs, EPA has carefully chosen the minimum technical standards that adequately protect human health and the environment.

Although today's rule includes specific design standards, EPA has taken care to ensure that its requirements can be flexibly implemented. The presence of specific standards in the rules will simplify compliance by the regulated community, implementation by EPA and State permit writers, and enforcement by EPA and state officials. EPA, however, recognizes that national design standards may not be appropriate for every site and that technologies may improve. Therefore, today's rule allows EPA or an authorized State to approve alternative designs, as long as they achieve comparable or better levels of performance.

Similarly, today's rule requires construction quality assurance—a critical feature in land disposal unit construction—but it does so through general narrative performance standards. Thus, facility owners or operators can tailor the details of their construction quality assurance plans to the specifics of their facilities. These and similar provisions of today's rule ensure that the rule can be flexibly implemented, in a way that accommodates each regulated unit.

Finally, in today's rule EPA has paid special attention to eliminating the frequent strains resulting from the joint implementation of RCRA by EPA and the States. In proposals for this rule, EPA laid out a complicated State authorization process, which would require EPA to implement some parts of the rule for selected land disposal units and the States to implement other parts for the same units, over different timeframes. After radically simplifying the proposal, EPA is now promulgating most of the rule under HSWA, which avoids much of the confusion of joint implementation at individual units. In this way, today's rule is consistent with the Agency's attempt to simplify and rationalize Federal and State implementation of RCRA. Today's rule also requires fewer reports and mandatory Agency reviews than the proposal while still providing opportunity for Agency reviews.

IV. Detailed Discussion of the Final Rule

A. Scope of the Rule

The double liner and leak detection standards in today's final rule apply to new and replacement landfills, surface impoundments, and waste piles, and lateral expansions of these units. Today's rule applies, as it was proposed in May, 1987, to these units regardless of their permit status, including facilities that were issued permits prior to and after the enactment of HSWA and facilities that are still in interim status. In consideration of the explicit language of section 3004(o)(4) defining a new unit as a unit for which construction commences after the promulgation date of today's rule, the Agency maintains that the permit does not act as a shield with respect to the leak detection requirements under today's rule for new units. Because lateral expansions and replacement units are comparable in their environmental impact, the Agency has, as a policy matter, decided to similarly remove the permit as a shield for leak detection systems at replacement units and lateral expansions of existing units. EPA believes that the opportunity for constructing replacement units and lateral expansions of existing units to meet today's requirements is similar to that for new units. In addition, by requiring replacement units and lateral expansions at existing units to meet today's requirements, EPA is ensuring that these units meet the same minimum technological requirements and provide the same protection of human health and the environment. Therefore, the Agency is amending § 270.4 to require

owners or operators to apply for a permit modification to meet the standards of today's final rule. Owners and operators at permitted facilities may not begin construction of units subject to today's requirements, until the permitting Agency has approved the owner or operator's permit modification (see § 270.42).

Today's rule exempts certain replacements of permitted surface impoundment, waste pile, and landfill units from today's double-liner and leak detection system requirements. However, EPA has modified the scope of the exemption since the May 29, 1987 proposal. Sections 264.221(f), 264.251(f), 264.301(f), 265.221(c), 265.254(a), and 265.301(c) in today's rule exempt replacements of surface impoundments, waste piles, and landfills from the double-liner system and leak detection requirements if the replacements meet the following conditions: (1) The existing unit was constructed in compliance with the design standards for double-liner and leachate collection systems in sections 3004 (o)(1)(A)(i) and (o)(5) of RCRA; and (2) there is no reason to believe that the liner system is not functioning as designed. Of course, any replacement surface impoundment, waste pile, or landfill unit that otherwise qualified for a variance from the double-liner and leachate collection system requirements pursuant to sections 3004(o)(2), 3004(o)(3), or 3005(j) of RCRA remains exempt from today's double-liner and leak detection requirements.

In the May 29, 1987 proposed rule, EPA considered exempting replacements that were constructed in compliance with existing part 264 single-liner requirements for surface impoundments, waste piles, and landfills. EPA acknowledges that the arguments for this exemption in the proposed rule were erroneous and has decided not to exempt replacements of permitted single-lined surface impoundments, waste piles, and landfills in today's final rule, because owners or operators of these units have no early method of detecting whether the single liner is leaking. Owners or operators of such units would have to rely on ground-water monitoring to determine if the single liner was leaking. EPA agrees with the commenters that this is inconsistent with the statutory goal of leak detection at the earliest practicable time and of preventing leakage out of the unit.

The May 29, 1987 proposal indicated an effective date for most of the provisions, including the leak detection requirements, of six months after promulgation. The July 29, 1992 effective date of today's rule is consistent with that proposal and with section 3010(b) of RCRA. It is important to note that section 3004(o)(4)(B)(ii) defines "new units" as those units on which construction commences after date of promulgation (versus the effective date) of the Agency's rule for leak detection systems. Therefore, due to the clear language of the statute, construction of new landfills, new surface impoundments, and new waste piles is defined with respect to the promulgation date but today's final regulations become effective 6 months after promulgation. This interpretation is consistent with the Agency's definition of "new tank systems" discussed in the final hazardous waste tank requirements (51 FR 25446).

During the six month time period between promulgation and the effective date, owners and operators of new units have time to determine and then make any necessary adjustments to their designs, contract specifications, and other pre-construction plans so that the requirements of today's rule are satisfied by the effective date. This also allows adequate time, in the Agency's opinion, for preparation and submission to the Agency of documents and requests for approvals that are prerequisites to construction and operation. For permitted facilities, this includes permit modification requests. Similarly, any interim status facility that adds a new unit following the promulgation date is expected to comply with the requirements in today's rule to submit, along with their notification under §§ 265.221(b), 265.254(a), or 265.301(b), proposed action leakage rates and a response action plan, if the due date for that notification (i.e., at least 60 days prior to receipt of waste in the new unit) falls before the effective date.

Thus, the Agency anticipates that at the few facilities (both permitted and interim status) that plan to develop new units during this six month period, most of the effort will be the preparatory design and administrative work needed to comply by the effective date. If owners or operators at interim status facilities should commence construction of new units during this period, the construction would be subject to Agency review upon the effective date of today's requirements.

Replacement landfills, surface impoundment, or waste piles, or lateral expansions to those units are, in the absence of specific statutory direction, subject to this rule after July 29, 1992 (i.e., six months after promulgation as normally provided under section 3010(b) of RCRA).

It should be noted that EPA interprets the term "construction commences," as used in the "new unit" definition of section 3004(o)(4)(B)(ii) and in today's rule, according to its definition within the § 260.10 definitions of "existing hazardous waste management (HWM) facility" and "existing tank system." That is, a unit has commenced construction if (1) the owner or operator has obtained the Federal, State and local approvals or permits necessary to begin physical construction, and either (2)(i) a continuous on-site, physical construction program has begun; or (ii) the owner or operator has entered into a contractual obligation—which cannot be canceled or modified without substantial loss—for physical construction of the facility to be completed within a reasonable time. Therefore, any new unit that has commenced construction, according to this long-standing Agency definition of the term, prior to the promulgation date (i.e., today's **Federal Register** publication date) is outside the scope of today's rule. Similarly, any replacement unit that is reused (unlike new units and lateral expansions, construction is not a necessary step prior to reuse of a replacement unit) or lateral expansion on which construction commences prior to the effective date (i.e., six months after today's **Federal Register** publication date) of this rule is also beyond the scope of today's rule.

Today's rule includes a definition of "replacement unit" in § 260.10. EPA is today defining a replacement unit as a unit (1) from which all or substantially all of the waste is removed, and (2) that is subsequently reused after July 29, 1992 to treat, store, or dispose of hazardous waste. This definition, which is similar to the May 29, 1987, proposal, is consistent with the definition EPA has used in implementing the statutory liner requirements of section 3004(o)(5)(B) for replacement units.

In the 1987 proposal, EPA excluded from the definition of replacement units those units from which waste was removed and treated in preparation for closure and only the treated waste was replaced in the unit. EPA explained in the proposal that replacement units are units that remain in service for active waste management, not units that are permanently taken out of service through closure. EPA believed this approach not only reflected statutory intent, but also would encourage (or at least not discourage) environmentally beneficial activities during closure (e.g., waste treatment), because owners or

operators would not have to retrofit closing units from which waste was removed and replaced.

Today's definition of "replacement unit," like the proposal, exempts certain units undergoing closure. However, the exemption is slightly expanded in that today's definition of replacement unit would also exempt those closing units that receive compatible wastes from other closing units and/or corrective action areas at the facility, provided that such use of the closing unit is approved by EPA (or an authorized state) in the facility's closure plan or corrective action program. The Agency believes that the expanded exemption is a logical extension of the proposal since it is similarly necessary to encourage environmentally beneficial activities (e.g., treatment and consolidation of compatible wastes from on-site closing units into one unit, waste removal to inspect a liner, expeditious closure of other on-site units) that may not otherwise occur if the owner or operator had to retrofit the closing unit to meet today's liner and leak detection system requirements.

Thus, units and activities qualifying for exemption from the "replacement unit" definition are limited to the following conditions and safeguards: (1) The activity must be reviewed and approved by EPA or an authorized state as part of the closure plan or corrective action approval process, including a corrective action order; (2) only closing units that have notified EPA in accordance with § 264.113 or § 265.112 or notified an authorized State, may qualify; and (3) only compatible waste and debris that are from closing units or corrective action areas on-site may be deposited in these units. For a unit to qualify for this exemption, off-site waste, new waste generated on site, and waste from active units on site may not be disposed of in the unit.

The situations EPA envisions as qualifying for this exemption from the "replacement unit" definition include: (1) Waste is removed from a closing unit, treated (e.g., incinerated, dewatered, or solidified), and returned to the same unit; (2) waste is removed from a closing unit to inspect and/or repair the liner, and the waste is returned to the same unit; (3) scenario 1 or 2, plus waste from other closing units is disposed in the original unit; and (4) scenario 1 or 2, plus waste that is the result of corrective action at the same facility, is placed into the original unit.

Finally, EPA also proposed in the May 29, 1987, rule that the liner and leak detection system requirements apply to significant unused portions of existing units, where those portions did not have double liners and leachate collection systems meeting the minimum technological requirements. Today's rule has dropped this requirement. A number of commenters on the proposal pointed out the difficulty of defining "significant" unused portions of a unit, and EPA was unable to develop an unambiguous definition. Furthermore, after reviewing land disposal units constructed and permitted since 1984 (which is the universe most likely to have portions of units not yet covered by wastes), EPA noted that virtually all of these units were required in their permits to incorporate double liner and leak detection requirements into their respective designs. Therefore, EPA has concluded that it is no longer necessary to extend today's rule to significant unused portions of existing units. It should be noted, however, that lateral expansions of existing units remain subject to today's rule.

B. Standards for Liners and Leak Detection Systems

1. Technical Standards for Liner Systems

Today, EPA is promulgating regulations containing design standards for double liners in accordance with the requirements of section 3004(o)(1) and (o)(5)(A) of RCRA. These standards replace those contained in the interim statutory design provision of section 3004(o)(5)(B) of RCRA that were codified on July 15, 1985 (50 FR 28702).

Today's rule amends the double-liner requirements for surface impoundments and landfills in §§ 264.221(c), 264.301(c), 265.221(a), and 265.301(a). The major change from the existing rule is that the final rule requires owners or operators to install a composite bottom liner. Based on available data and public comments received by the Agency, the double liner system specified in today's rule, with the composite bottom liner, represents the best available technology with respect to: (1) Preventing hazardous constituent migration out of the unit during the active life and post-closure care period, (2) detecting leaks through the top liner at the earliest practicable time, and (3) maximizing the efficiency of the leachate collection and removal system.

Today's rule does not change the existing top liner performance standard for surface impoundment and landfill units. Owners or operators of affected units must still design the top liner to prevent the migration of hazardous constituents into the liner throughout the active life and post-closure period. EPA notes that for purposes of today's rule, the top liner is the liner directly above the leachate collection and removal system serving as the leak detection system (see Technical Standard for Leak Detection Systems in Section IV.B.2 of today's preamble).

The Agency, in the preambles to the July 26, 1982 rule (47 FR 32274) and the March 28, 1986 proposal (51 FR 10709), endorsed geomembranes as meeting the top liner performance standard. EPA was aware of a number of landfill unit designs that included a composite top liner consisting of a geomembrane upper component and a compacted soil or a soil/bentonite blanket lower component. Consequently, EPA raised several questions in the preamble to the May 29, 1987 proposal concerning the use of a composite liner as a top liner and the effect the compacted soil component would have on other components of the double liner system, principally the early detection of a leak through the upper geomembrane.

The Agency received several comments on this issue, all of which were in favor of allowing the use of a composite liner as a top liner. One comment on appropriate standards for a composite liner favored minimum thickness requirements for a compacted soil lower component. Most commenters, however, favored no restrictions on the use of top composite liners.

In response to these comments, EPA is not prohibiting the use of composite top liners in today's rule. A parenthetical reference to geomembranes has been included as an example to illustrate that the performance standard can be met through use of a geomembrane. EPA does not intend that this reference be interpreted to mean that the geomembrane is the only top liner design that will meet the performance standard. EPA does not want to discourage owners or operators from using top composite liners because such liners can provide additional environmental benefits by minimizing the flow rate through a leak in a geomembrane liner and potentially minimizing migration of hazardous constituents by attenuation. Although not specified in today's rule, EPA maintains that the soil component of the top liner, however, should generally not be more than three feet thick since a thickness of 2 to 3 feet adequately serves the purpose of minimizing the flow through the geomembrane component (a lesser thickness may be appropriate for soil/bentonite blankets). EPA finds that this depth balances the increased environmental protection afforded by top composite liners and the ability to detect leaks at the earliest

practicable time. The Agency does not intend, however, to imply that multiple liner systems (including multiple composite liners) or that thicker soil components of bottom liners (e.g., 4 or 5 feet) should be precluded.

EPA notes that such general performance standards provide flexibility which is essential since liner and leak detection system technologies have advanced significantly over the past several years and are continuing to do so. Some examples include the use of geonets, the use of geotextile fabric filters, and better seaming and construction quality assurance. Recent EPA studies show soil/bentonite blankets may be effective and reliable complements to top liners, resulting in a new type of composite top liner. As technologies improve, today's performance standards will allow different materials and designs to be used and specified in permits as site-specific considerations.

Today's rule amends the requirements for bottom liners at surface impoundment and landfill units to require owners and operators of units subject to today's rule to use a composite bottom liner instead of a compacted-soil bottom liner allowed by the interim statutory design. The composite bottom liner required by today's rule specifies that the upper component of the bottom-liner must consist of a geomembrane, and the lower component of the bottom-liner must consist of a minimum of 3 feet of compacted soil with a hydraulic conductivity of no more than 1×10^{-7} cm/sec. The compacted soil component must be able to minimize hazardous constituent migration in the event of a breach in the geomembrane.

In the March 28, 1986 proposal, EPA offered two options for the bottom liner of the double-liner system. One option corresponded to a compacted soil liner with a maximum hydraulic conductivity of 1×10^{-7} cm/sec and sufficient thickness (minimum 3 feet) to prevent hazardous constituent migration through the liner during the active life and post-closure care period (51 FR 10710). The other proposed option was the composite liner specified in today's rule, consisting of a top component that would prevent hazardous constituent migration into the top component (a geomembrane) and a bottom compacted-soil component with a maximum hydraulic conductivity of 1×10^{-7} cm/sec and the preamble to the proposal recommended a minimum thickness of 3 feet (90 cm).

EPA received comments supporting both bottom liner options. Several commenters argued that the compacted soil bottom liner, coupled with the leachate collection and removal system between the top and bottom liners, would provide adequate protection of the environment. Some of these commenters also proposed the use of a composite top liner with a compacted soil bottom liner. Others supported the use of composite bottom liners as the design best able to enhance leachate detection, collection, and removal efficiency of the leachate collection and removal system between the liners. Several commenters favored the promulgation of performance standards in the rule and the specification of designs and materials in accompanying guidance documents.

After the proposal, EPA compiled information and data on performance of these two bottom liner systems with respect to maximizing leachate detection, collection, and removal, and preventing hazardous constituent migration out of the unit. The liners were evaluated based on leachate collection efficiency, leak detection capability, and leakage through the bottom liner. Results from computer simulations and engineering calculations showed that, on a comparative basis, the composite bottom liner will perform significantly better than the compacted soil liner with respect to the three criteria. The results were summarized in the April 17, 1987 Notice of Availability of Information (52 FR 12566–12575), with more detailed discussion of the calculations and analytical approach contained in the "Bottom Liner Performance in Double-Lined Landfills and Surface Impoundments" (EPA/530–SW–87–013). In the May 29, 1987 proposed rule on leak detection systems, the Agency indicated that it was likely to finalize a rule on double liners that would require a composite bottom liner as the generally applicable standard (52 FR 20251).

EPA also conducted a review of applications submitted for RCRA hazardous waste facility permits between November 8, 1984 and February 1987 to determine the type of bottom liner selected for installation at new landfills and surface impoundments. Of some 183 units for which permit applications were submitted as of February 1987, only seven units were to be constructed with compacted soil bottom liners. The vast majority of owners or operators selected the composite bottom liner rather than a compacted soil bottom-liner. More recent data available to EPA also confirms that the majority of owners and operators are using composite bottom-liners in their designs of hazardous waste surface impoundment and landfill units (Supporting Document #3 "Compilation of Current Practices of Land Disposal Facilities," 1992).

In summary, today's rule requires composite bottom liners, based on: (1) Available information that composite bottom-liners perform significantly better than compacted soil liners in terms of maximizing leachate detection, collection, and removal, and preventing hazardous constituent migration out of the unit; and (2) evaluation of current hazardous waste industry practices.

Consistent with existing requirements for single liners at surface impoundments and landfills, today's rule in §§ 264.221(c)(1)(ii), 264.301(c)(1)(ii), 265.221(a), and 265.301(a) requires that each liner that is included in the unit's design must be chemically resistant to the waste, placed on a structurally stable foundation, and large enough to cover all areas likely to be exposed to the waste.

Double liner systems must be constructed of materials that have appropriate chemical properties and sufficient strength and thickness to prevent failure due to pressure gradients (including status head and external hydrogeologic forces), physical contact with the waste or leachate to which they are exposed, climatic conditions, the stress of installation, and the stress of daily operation. The liners must be placed upon materials capable of providing support to the liners and resistance to pressure gradients above and below the liners to prevent failure of the liners due to settlement, compression, or uplift. They must also be installed to cover all surrounding earth likely to be in contact with the waste or leachate.

2. Technical Standards for Leak Detection Systems

EPA is today establishing design standards for the leak detection systems for new landfills, surface impoundments, and waste piles, and replacements and lateral expansions of these units (§§ 264.221(c)(2), 264.251(c)(3), 264.301(c)(3), 265.221(a), 265.254(a), and 265.301(a)). These leak detection standards are designed to detect a leak through the top liner at the earliest of practicable time. Today's final rule also establishes the following design criteria for leak detection system drainage layers for affected landfills, surface impoundments, and waste piles: (1) A minimum bottom slope of 1 percent; (2) a minimum thickness of 1 foot and a minimum hydraulic conductivity of 1×10^{-2} cm/sec for granular materials used for the drainage layer for waste piles and landfills and 1×10^{-1} cm/sec

for granular materials used in surface impoundments; (3) a minimum hydraulic transmissivity of 3×10^{-5} m^2/sec for synthetic materials used in drainage layers for waste piles and landfills and 3×10^{-4} m^2/sec for synthetic drainage materials used in surface impoundments; and (4) sump design and operating requirements.

Location of leak detection systems. EPA proposed in the May 29, 1987 preamble (52 FR 20229) that the leachate collection and removal system adjacent to and below the top liner and above the bottom liner be designated as the leak detection system, but requested comments on the proper location of the leak detection system in a system with more than two liners. Commenters on this aspect of the rule stated that the leak detection system should be located immediately above the bottom liner. These comments claimed that specifying additional leachate collection and removal systems above the bottom liner as leak detection systems would create a regulatory disincentive for owners and operators to design systems with more than two liners by requiring these additional (intermediate) leachate collection and removal systems to meet the requirements for leak detection systems and to implement response actions in accordance with the unit's response action plan. As a result of these comments, EPA is today specifying that the leak detection system is the leachate collection and removal system drainage layer located immediately above the bottom composite liner. Under today's final rule, any additional leachate collection and removal systems located above the leak detection system are not required to meet the design and performance standards for leak detection systems.

Leak detection time. The design standards being promulgated today for leak detection systems will ensure that these systems meet the requirement in section 3004(o)(4) of RCRA for the detection of leaks of hazardous constituents at the "earliest practicable time". EPA has interpreted the term "earliest practicable time" to be the time lapse from the time a liquid has passed through a breach in the top liner to the time a technology-based leak detection system can detect the liquid, assuming saturated, steady-state flow. Without these simplifying assumptions, modelling flow rates in the leak detection system is difficult given the complexity and uncertainty of fluid flow under unsaturated conditions. After careful consideration of public comments on the proposal, EPA has decided not to specify 1 day (i.e., 24 hours) as the earliest practicable time for the detection of a leak through the top liner.

Commenters on the proposed 1-day leak detection time requirement argued that it was unnecessary and overly restrictive. Another commenter stated that the detection time could not be verified by field measurements. EPA agrees with the commenters that the proposed 1-day leak detection time requirement is unnecessary given that the Agency is promulgating minimum design specifications for leak detection systems. In addition, the Agency acknowledges that field measurement of leak detection times is a problem. EPA has determined that a leak detection system meeting today's design requirements will be capable of detecting leaks "at the earliest practicable time" consistent with the statutory mandate. Therefore, EPA is simplifying the rule by deleting the 1-day performance standard.

Leak detection sensitivity. EPA is also not finalizing the proposed leak detection sensitivity value of 1 gallon per acre per day (gpad) that was proposed. When developing a leak detection sensitivity performance standard for the May 29, 1987 proposed rule, EPA conducted comparative studies between the performance of composite bottom liners versus compacted soil bottom liners (Background Document "Bottom Liner Performance in Double-Lined Landfills and Surface Impoundments", 1987). These studies showed that composite bottom liners have a much more sensitive leak detection capability than do compacted soil-only bottom liners. For example, a compacted soil liner with a hydraulic conductivity of 1×10^{-7} cm/sec will allow some liquid migration into the liner; as a result, a simple, one-dimensional theoretical model predicts that a leak will not be detected until the flowrate through the top liner is approximately 80 gpad. In contrast, simple, one-dimensional theoretical models predict that the leak detection sensitivities of landfills and surface impoundments with composite bottom liners similar to those required in today's rule range from 0.001 to 0.1 gpad. Because EPA is today stipulating the use of a composite bottom liner, the Agency is confident that lower leak detection sensitivities will be achieved for all units affected by today's rule. Consequently, a separate requirement for leak detection sensitivity is no longer necessary and EPA has dropped this requirement from the final rule.

Slope. EPA is today finalizing a minimum slope requirement for the leak detection system. After further consideration of the slope requirement, the Agency has determined that a minimum 1 percent slope will provide adequate drainage at land disposal units at which proper construction quality assurance is used to minimize settlement (§§ 264.221(c)(2)(i), 264.251(c)(3)(i), 264.301(c)(3)(i), 265.221(a), 265.254(a), and 265.301(a)). The purpose of the requirement is to promote good drainage in the leak detection systems of units affected by today's rule. This slope requirement applies to all planar components of the leak detection system.

In the May 29, 1987 proposed rule, EPA proposed a 2-percent minimum slope but requested comments on whether the minimum bottom slope should be increased to a value between 2 and 4 percent. One commenter preferred that a 3-percent bottom slope be used to account for settlement in the final slope value. However, most commenters argued that the minimum should not be above 2 percent, expressing opposition to raising the minimum slope value above 2 percent. Many of these commenters pointed out that other improvements included in the proposed rules, such as construction quality assurance and an increased transmissivity value for synthetic drainage materials, would obviate the need for a slope greater than two percent. One commenter argued that slopes of less than 2 percent should be allowed for certain circumstances provided that the leak detection system meets other minimum design criteria and performance goals and the owner or operator can demonstrate that post-construction settlement/consolidation will be minimized or eliminated. The Agency agrees that with good CQA a lesser slope can be adequate.

Based on these comments, EPA carefully evaluated the minimum bottom slope requirement for today's rule. EPA recognizes that slope is one of several factors that will affect the performance of the leak detection system. For example, the hydraulic conductivity of materials used in the drainage system is important. In addition, the appropriate minimum slope required will also depend on the spacing of leachate collection laterals in the leak detection system; closer spacing will allow for a flatter slope. All of these design factors should be considered in selecting the appropriate slope for the system.

EPA agrees with commenters that today's rule sets in place improvements that affect the minimum slope that is needed to construct an effective leak detection system. First, the new

requirement to install a composite bottom liner provides a smooth impermeable base on which to install the leak detection system. The decreased permeability of the composite bottom liner over that of a soil liner required under previous regulations allows for a reduced slope while at the same time continuing to promote good drainage. Second, today's enhanced construction quality assurance requirements enable owners or operators the flexibility to build a flatter slope by maintaining consistent drainage without significant ponding of liquids. In addition, some of the new, rapidly draining synthetic draining materials promote more rapid drainage on flatter slopes.

Because of these improvements, EPA believes that minimum bottom slopes of less than 2 percent should be allowed where the owner or operator uses proper construction quality assurance to minimize settlement and resultant ponding of any leachate, as required by §§ 264.19 and 265.19 of today's rule. Such construction quality assurance should include surveying and other inspection techniques to measure the horizontal and vertical alignment of the bottom slope to minimize ponding and ensure leachate flow to the sump. Some owners or operators may elect to design leak detection systems using bottom slopes of greater than 1 percent. EPA emphasizes that the requirements promulgated today are minimum technical standards; owners and operators can always adopt more stringent designs at their discretion.

Thickness of granular drainage layer. Today's rule also requires that a granular drainage layer be a minimum of 12 inches in thickness for use in leak detection systems of new and replacement landfills, surface impoundments, and waste piles, and for lateral expansions of these units (§§ 264.221(c)(2)(ii), 264.251(c)(3)(ii), 264.301(c)(3)(ii), 265.221(a), 265.254(a), and 265.301(a)). EPA received no comments on this requirement in the May 29, 1987 proposed rule, and therefore is finalizing the 12-inch thickness requirement as proposed. The purpose of this minimum thickness is to decrease the chance that the underlying geomembrane will be damaged by equipment during placement of the drainage material. Current equipment used to install granular layers can only place drainage material to an accuracy of a few inches. The Agency is concerned that if granular drainage layers are designed to less than 12 inches, this equipment could damage underlying liners in areas where the drainage material is thin.

Further, this requirement for granular layer thickness is consistent with current EPA policy. A 12-inch granular layer thickness is specified in current Agency guidance (Background Document "Draft Minimum Technology Guidance Document on Double Liner Systems", 1985). In addition, a recent EPA evaluation of existing hazardous waste land disposal units (Background Document "Compilation of Current Practices at Land Disposal Units", January 1992) showed that 24 out of 28 landfills, surface impoundments, and waste piles with granular drainage layers, had a specified thickness of 12 inches.

Hydraulic conductivity of granular drainage materials. EPA proposed to require that granular materials used in leak detection systems have a minimum hydraulic conductivity of 1 cm/sec. The Agency contended that greater permeability afforded by granular materials having 1 cm/sec hydraulic conductivity was necessary to minimize capillary tensions present in leak detection system granular materials and to satisfy the proposed leak detection time performance standard of 1 day.

EPA requested and received comments on the proposed hydraulic conductivity requirement. Commenters opposed the 1 cm/sec requirement for several reasons. Several commenters stated that the requirement would force them to use rounded gravels or other granular materials meeting the hydraulic conductivity value. These commenters maintained that such materials were either not available or only available at significantly higher costs in many areas of the country. One commenter suggested that EPA should provide a variance to owners or operators in areas where suitable granular drainage materials having the proposed hydraulic conductivity are unavailable. Another commenter stated that the Agency should continue to require granular materials to have minimum hydraulic conductivities of 1×10^{-2} cm/sec as currently specified in EPA guidance. This commenter asserted that sand, which is the most common granular material used in leak detection systems, generally has a hydraulic conductivity of 1×10^{-2} cm/sec. Other commenters argued that using granular materials with hydraulic conductivities on the order of 1 cm/sec would significantly increase the susceptibility of geomembranes (above and below the drainage layer) to puncture, because it would be difficult to remove angular materials from the materials used to construct the drainage layer. Another commenter argued that by requiring granular materials to have a 1 cm/sec hydraulic conductivity, EPA was forcing owners or operators to use synthetic drainage materials that are incompatible with many materials used for synthetic liners.

The Agency acknowledges that the availability of granular materials meeting the proposed hydraulic conductivity requirement may be limited. The Agency is also concerned with the greater potential for geomembranes to be damaged from the use of granular materials having hydraulic conductivities of 1 cm/sec. In response to the commenters concerns, the final rule (§§ 264.221(c)(2)(ii), 264.251(c)(3)(ii), 264.301(c)(3)(ii), 265.221(a), 265.254(a), and 265.301(a)) requires that granular materials used in leak detection systems at waste pile and landfill units subject to today's rule have a minimum hydraulic conductivity of 1×10^{-2} cm/sec consistent with current Agency guidance. However, the final rule specifies that granular materials used in leak detection systems at surface impoundments subject to today's rule must have a minimum hydraulic conductivity of 1×10^{-1} cm/sec.

The Agency has determined that granular materials used in leak detection systems at surface impoundments must have a higher hydraulic conductivity (one order of magnitude greater than what is currently specified by Agency guidance) to account for the potentially greater hydraulic heads imposed on the top liner in surface impoundments. Surface impoundments are typically used to manage liquids, therefore the hydraulic heads on the liner systems of these units are often much higher than those in waste piles and landfills, which are not allowed to manage wastes containing free liquids and must have a leachate collection system above the top liner. Consequently, if a leak occurs in the top liner of a surface impoundment, and is not rapidly drained to the detection sump, areas of the bottom-liner system will potentially be subjected to hydraulic heads in excess of one foot, increasing the probability of migration of hazardous constituents out of the unit. A greater permeability in the leak detection system will drain any leak more rapidly and thus reduce the head on the bottom liner system. Although granular materials having hydraulic conductivities of 1×10^{-1} cm/sec will typically be coarser sands and fine gravels, the Agency feels that two common construction techniques can be

used in combination to prevent any damage to geomembranes adjacent to the drainage materials. First, facilities may select rounded drainage materials; these materials are less likely to puncture or otherwise damage geomembranes. Second, owners or operators may use additional layers of synthetic materials (e.g., a needle-punched nonwoven geotextile) next to the liner to provide a cushion for the drainage materials and reduce the probability of puncturing. In addition, today's construction quality assurance requirements help to assure against such punctures.

The Agency's recent evaluation of current industrial practices (see "Compilation of Current Practices at Land Disposal Facilities", January 1992) revealed that many facilities are selecting synthetic drainage materials, such as geonets, for their leak detection systems. Synthetic drainage materials are often selected instead of granular materials because they typically require less space and are easier to install than granular materials. Also, as discussed below, virtually all synthetic drainage materials have permeabilities greater than 10^{-2} cm/sec.

Transmissivity of synthetic drainage materials. EPA proposed a minimum transmissivity value of 5×10^{-4} m^2/sec for synthetic drainage materials that are used in lieu of granular drainage materials. This value was selected because it provides equivalent drainage capacity to that of a granular drainage layer meeting the requirements of the proposed rule; that is, 12 inches of a granular drainage layer with a hydraulic conductivity of 1 cm/sec. The minimum value of 5×10^{-4} m^2/s for hydraulic transmissivity was based on numerical simulations of typical leak detection systems. In these simulations, EPA considered a range of synthetic drainage materials, including nets, mats, and waffles. From the results of these simulations ("Liner and Leak Detection Rule Background Document", 1987), EPA concluded that a hydraulic transmissivity value of 5×10^{-4} m^2/sec would enable the leak detection system to collect and remove relatively large amounts of leakage while maintaining gravity flow conditions. This specification was to ensure that the liquids in the leak detection system would be rapidly collected while the hydraulic head on the bottom liner would be minimized.

One commenter objected to the transmissivity standard, claiming that a value of 5×10^{-4} m^2/sec is not achievable with a single layer of currently available netting, and that performance may be worse when creep, loading, and rib layover come into effect. EPA disagrees. The Agency has data (Liner and Leak Detection Rule Background Document, 1987) showing transmissivities of single layers of synthetic drainage materials produced by four major manufacturers under the conditions of ASTM Test Method D 4716–87 (that is, a pressure of 100 kilopascals (kPa) and a hydraulic gradient between 0.1 and 0.25). At the time of the proposal, these transmissivities ranged from approximately 2×10^{-4} m^2/sec to 4×10^{-4} m^2/sec. Improvements in geonets since then have resulted in typical transmissivities of 2×10^{-3} to 4×10^{-3} m^2/sec using the same ASTM test method. The Agency maintains that the conditions at which ASTM D 4716–87 is conducted are representative of the pressures and hydraulic gradients in many land disposal units, and as a result, a transmissivity value of 5×10^{-4} m^2/sec can be obtained with typical commercially available synthetic drainage materials. However, the Agency recognizes that the requirements for synthetic drainage materials should be consistent with the requirements for granular drainage systems in leak detection systems. Thus, the Agency has revised the transmissivity requirements in today's rule (§§ 264.221(c)(2)(ii), 264.251(c)(3)(ii), 264.301(c)(3)(ii), 265.221(a), 265.254(a), and 265.301(a)) to require that synthetic drainage materials achieve equivalent flow rates to drainage layers utilizing granular materials.

Other performance requirements. Today's final rule also includes several general performance standard requirements for leak detection systems that are simply restatements of what is already required in existing regulations for leachate collection and removal systems at surface impoundments, waste piles, and landfills subject to today's final rule. Under today's rule, leak detection systems for affected units must be constructed of materials that are chemically resistant to wastes and leachate in the unit, and be of sufficient strength to resist pressure gradients generated within the unit (§§ 264.221(c)(2)(iii), 264.251(c)(3)(iii), 264.301(c)(3)(iii), 265.221(a), 265.254(a), and 265.301(a)). These requirements are designed to ensure that leak detection systems are not damaged from chemical and physical stresses associated with the unit. Also, these requirements are simply an extension of the performance standards for liners.

Leak detection systems for units regulated under today's rule must also be designed and operated to minimize clogging during the active life and post-closure period (§§ 264.221(c)(2)(iv), 264.251(c)(3)(iv), 264.301(c)(3)(iv), 265.221(a), 265.254(a), and 265.301(a)). This requirement is to ensure that drainage in leak detection systems is not impeded over time. EPA is concerned about the potential for drainage layers to become clogged as a result of physical, chemical, or biological mechanisms. EPA data indicate that the potential for clogging increases as the hydraulic conductivity of drainage material decreases. Examples of techniques to minimize clogging include: Using properly graded granular filter materials, filter fabrics (geotextiles), or other filter materials to reduce fines; using poorly graded (i.e., uniform) granular drainage material; increasing collection pipe slot numbers or size; reducing liquid residence time by increasing slope, decreasing pipe spacing, or increasing the size of granular drainage material; and cleaning collection system pipes and drainage media using hydraulic jetting, steam, or acidic solutions.

In addition, today's rule requires that leachate collection and removal systems immediately above the top liner (for landfill and waste pile units) be capable of ensuring that the leachate depth over the top liner does not exceed 1 foot (30 cm) as proposed in the March 28, 1986 proposed rule. EPA received no comments on these requirements and is therefore finalizing them as proposed.

EPA is today also promulgating several requirements for sumps that are part of a leak detection system. Owners or operators of new and replacement landfills, surface impoundments, waste piles, and lateral expansions of such units must use sumps of sufficient size to collect and remove liquids efficiently and prevent these liquids from accumulating on the drainage layer. In addition, the design of the sump and removal system must provide a method for measuring and recording the volume of liquids present in the sump and of liquids removed. EPA received no comments on these requirements and is therefore finalizing them as proposed (§§ 264.221(c)(2)(v), 264.251(c)(3)(v), 264.301(c)(3)(v), 265.221(a), 265.254(a), and 265.301(a)).

EPA is today promulgating a requirement for owners or operators of units affected by today's rule to collect and remove pumpable liquids in leak detection sumps to minimize the head on the bottom liner (§§ 264.221(c)(3), 264.251(c)(4), 264.301(c)(4), 265.221(a), 265.254(a), and 265.301(a)). The Agency had proposed, in the May 29, 1987

Federal Register, that the head in the sump for the leak detection sump be minimized; in the preamble, the Agency suggested that the average liquid levels in the sump should be below 12 inches. One commenter on the proposed rule stated that the 12-inch maximum was unachievable in many instances because of the size and geometry of most sumps and the pumps used to empty them. The commenter also mentioned that automated level control systems and minimum submergence requirements make the 12-inch maximum level an impossible performance standard. EPA agrees that the geometry of sumps may vary and that minimum pumping levels may be greater than 1 foot. Thus, the Agency is not setting a maximum level of liquids in the sump, but specifying only that the head on the bottom liner must be minimized by requiring owners and operators to remove pumpable liquids from the sump. "Pumpable liquids" means any amount of liquids that can be reasonably pumped out of the sump, based on sump dimensions, pump operating levels for automated pump systems, and the goals of minimizing head in the sump and backup of liquids (from the sump and drainage tile or pipes) into the drainage layer.

Today's rule also modifies the definition of the term "sump" in § 260.10 to redefine sumps used as part of leak detection systems for waste piles, surface impoundments, and landfills. The purpose of this modification is to make clear that the regulations for hazardous waste tanks that are otherwise applicable to certain sumps do not apply to those sumps used at land disposal units that function as part of the leak detection system. These sumps serve fundamentally different purposes than many other types of sumps. Sumps used at land disposal units are usually surrounded by one or more liners; therefore, many requirements, especially secondary containment, are not practicable for these units. The Agency maintains that subjecting these units to the requirements for hazardous waste tanks will not provide a substantial environmental benefit and has therefore modified the definition of the term sump to redefine sumps used as part of leachate collection and removal or leak detection systems for surface impoundments, waste piles, and landfills.

Finally, today's rule includes a requirement applicable only to those leak detection systems installed at new, replacement, or lateral expansions of landfills, surface impoundments, and waste piles that are not located above the seasonal high water table. EPA received no comments on this requirement and is finalizing it as proposed. The Agency is therefore requiring in today's rule that owners or operators of leak detection systems not located completely above the seasonal high water table demonstrate that the operation of the leak detection system will not be adversely affected by the presence of ground water (§§ 264.221(c)(4), 264.251(c)(5), 264.301(c)(5), 265.221(a), 265.254(a), and 265.301(a)).

3. Alternative Systems

Alternative designs. The existing rules (§§ 264.221(d), 264.251(b), 264.301(d), 265.221(c), and 265.301(c)) already provide for alternative designs to the liners and leachate collection and removal systems if an owner or operator can demonstrate that an alternative design will prevent the migration of any hazardous constituent into the ground water or surface water at least as effectively as the requirements in §§ 264.221(c), 264.251(a), and 264.301(c), as appropriate. Today's rule adds §§ 264.221(d), 264.251(d), 264.301(d), 265.221(a), 265.254(a), 261.301(a) to allow alternative designs for leak detection systems that are capable of detecting leaks of hazardous constituents at least as effectively as the new leak detection system requirements in §§ 264.221(c)(2), 264.251(c)(3), 264.301(c)(3), 265.221(a), 265.254(a), and 265.301(a). EPA feels that variance procedures allow owners or operators flexibility in designing their leak detection systems without discouraging the use of new leak detection systems.

In order to be granted a variance from the leak detection requirements of today's final rule, an owner or operator must demonstrate to the Regional Administrator that the proposed design detects leaks through the top liner at least as effectively as a leak detection system designed to meet today's minimum design standards. In deciding whether to allow a variance for an alternative leak detection system or technology, the Regional Administrator will consider: (1) The ability of the proposed system or technology to operate as effectively through the active life and post-closure period of the unit as a unit designed using the minimum design specifications; (2) the nature and quantity of the wastes to be managed in the unit; and (3) the ability of the system to detect leaks, and in combination with response actions to be taken upon discovery of leakage, prevent migration of hazardous constituents out of the unit during the active life and post-closure care period. For example, an alternative leak detection system that did not provide information about leakage until after the leakage migrated through the bottom liner would be deemed unacceptable, because such a system would trigger an owner or operator response after hazardous constituents migrated into the environment.

Owners or operators may apply for a variance if they wish to propose a leak detection system design that deviates from today's design parameters. For example, if an owner or operator specified that the drainage layer of a surface impoundment would utilize granular materials having a hydraulic conductivity of 1×10^{-2} cm/sec (instead of the minimum required value of 1×10^{-1} cm/sec), the owner or operator would have to describe how other components of the system (e.g., depth of impoundment, bottom slope, flow path to a collection pipe or sump or pipe spacing) or the action leakage rate or response action plan would detect leaks at the earliest practicable time, minimize head on the bottom liner, and prevent migration of potentially hazardous constituents out of the unit as effectively as the design required in today's rule.

Temporary units. In the May 29, 1987 proposal EPA invited comment about whether double liners and leachate collection systems are necessary for all waste piles, or if alternative systems might provide adequate environmental protection at some units. In response to the Agency's request, a commenter questioned whether double liner and leachate collection systems are necessary for short-term waste piles created during corrective action. The same commenter also suggested that EPA should propose an overall policy in its upcoming corrective action rule as to what technological requirements will apply to units used for corrective action.

The Agency agrees with these comments. There are circumstances where the Agency believes it should allow temporary units constructed as a part of corrective action pursuant to a permit or 3008(h) enforcement order, or an approved closure plan, to be constructed without a double liner and a leachate collection system. Due to the limited time these units are in operation, in concert with alternative design, location and operating practices, there are situations which are equally effective as double lined units in preventing migration of constituents to ground water or surface water. Many waste piles (as well as some temporary storage surface impoundments) may thus qualify for the double liner waiver

found in §§ 264.221(d), 264.251(d), 265.221(a), and 265.254(a).

These provisions provide for a generic waiver of the double liner system, but do not specifically address temporary units. In response to the special needs posed by corrective action and facility closure (e.g., rapid cleanup and short-term operation) the Agency has published a proposed "Subpart S" rule (55 FR 30798) that, among other things, specifically addresses standards for temporary units. That proposal outlines Agency guidance on what factors to consider in determining what constitutes a temporary unit.

4. Applicability to Waste Piles

EPA is requiring that new and replacement waste piles, and lateral expansions of waste piles, install, operate, and maintain double liner and leak detection systems (§§ 264.251 and 265.254). The Agency is extending the double liner and leachate collection and removal system requirements to waste piles, as discussed in the preamble to the May 29, 1987 proposal (52 FR 20250), because the Agency maintains, for several reasons, that these units pose threats similar to or greater than landfills concerning leakage through the top liner and releases of hazardous constituents. First, waste piles are often exposed to precipitation for longer periods of time than landfills. Many owners or operators of landfills provide an intermediate cover to minimize leachate generation; this practice is not as common for waste piles. Second, waste piles have a higher potential for equipment-related damage than do landfills, because equipment is frequently used to add and remove waste from piles during these units' active lives. This increased equipment activity at waste piles increases the risk of damage to the primary liner and merits use of a secondary liner for these units. Finally, waste piles typically have much longer active lives than landfills: Waste piles are typically used for 20 years or more, whereas landfill units are more common used for periods of 6 months to 5 years before being closed.

Today's rule provides a waiver from the double liner and leachate collection and removal system requirements for certain waste piles that are monofills. In the May 29, 1987 proposal rule, EPA proposed a variance for monofills when (1) the monofill contains only hazardous wastes from foundry furnace emission controls or metal casting molding sand, (2) such waste do not contain constituents which would render the wastes hazardous for reasons other than EP toxicity characteristic, (3) the monofill has at least one liner for which there is no evidence that such liner is leaking, (4) the monofill is located more than a quarter mile from an underground source of drinking water, and (5) the monofill is in compliance with generally applicable ground-water monitoring requirements for facilities with permits. The Agency proposed this waiver to codify the language in section 3004(o)(3) of RCRA and to be consistent with regulations for landfills and surface impoundments. Because EPA received no comments on this proposed waiver, it is being finalized as proposed in today's rule (§§ 264.251(e)(1) and 265.254(a)).

Today's rules do not affect the existing exemption in § 264.250(c) and now in § 265.254 for certain indoor waste piles. These units continue to be excluded from today's double-liner and leak detection requirements because they contain no free liquids and are protected from precipitation and surface water run-on and are therefore unlikely to have any leakage.

5. Applicability to Land Treatment Units

EPA proposed a number of leak detection requirements for land treatment units in the May 29, 1987 proposed rule. These requirements included (1) a 95-percent confidence level for detecting hazardous constituents in the treatment zone, (2) monitoring conducted above the seasonal high water table, (3) response action plans, and (4) inspection of unsaturated zone monitoring equipment. Today's rule does not include additional leak detection requirements for land treatment units. EPA has concluded that the current regulatory requirements for unsaturated zone monitoring at land treatment units are sufficient to ensure that leakage of hazardous constituents will be detected at the earliest practicable time. Therefore, EPA finds that additional regulations for such units are not needed to meet the statutory requirements of section 3004(o)(4) of RCRA for these units.

In the preamble to the 1987 proposal, EPA noted that unsaturated zone monitoring systems serve as effective leak detection systems for land treatment units. The Agency received no comments challenging this position or suggesting more effective alternatives. The existing regulations, however, already require unsaturated zone monitoring—i.e., leak detection systems—at all land treatment units, both new and existing. Specifically, §§ 264.278 and 265.278 contain detailed technical standards for soil and soil-pore liquid monitoring in the unsaturated zone below the land treatment unit to ensure detection of any hazardous constituents migrating out of the treatment zone. Furthermore, when releases are detected, the owner or operator of a permitted facility is required to modify operating procedures at the land treatment unit to prevent further release. EPA has implemented these requirements through two guidance documents: "Permit Guidance Manual on Hazardous Waste Land Treatment Demonstrations" and "Guidance Manual on Unsaturated Zone Monitoring for Hazardous Waste Land Treatment Units." After reviewing public comments and its experience in permitting land treatment units since the proposal, EPA concluded that the current regulatory requirements, coupled with existing guidance, are sufficient to ensure that leak detection systems in new land treatment units are capable of detecting releases at the earliest practicable time.

In the May, 1987 proposal, EPA did not propose to change the basic regulatory requirements for unsaturated zone monitoring, but added several relatively minor amendments. For example, the proposal would have added a requirement that constituents migrating out of the treatment zone be detected at a 95% confidence level and that the unsaturated zone monitoring take place above the seasonal high water table as well as below the treatment zone (as the current standards specify). EPA has concluded that these minor changes are unnecessary, either to meet the statutory standard or to protect human health and the environment. Available guidance documents already specify a 95% level of confidence for monitoring, and EPA and the States have successfully incorporated this standard into permits. Therefore, it is unnecessary to impose this requirement as a matter of regulation. Similarly, monitoring below the seasonal high water table is already prohibited by the existing regulations, because monitoring below the water table would not qualify as unsaturated zone monitoring. Therefore, the regulatory requirement that the monitoring be above the seasonal high water table is also unnecessary.

Today's final rule also does not finalize requirements for a response action plan describing remedial action if releases are detected in the unsaturated zone. EPA has concluded that a response action plan for permitted land treatment units is superfluous, because the current regulations (§ 264.278(g)) already require facility owners or operators to take specific responses in the case of hazardous constituents detected in the unsaturated zone monitoring system. EPA also notes that

migration found in the unsaturated zone monitoring system would constitute migration from the unit, and therefore could be addressed by the Agency, if necessary, under RCRA corrective action requirements. Finally, EPA notes that, because of the RCRA land disposal restrictions, most if not all hazardous waste land treatment units in the future will be able to operate only if wastes placed in them meet applicable treatment standards before placement in the unit or if they are granted a no-migration variance. A unit granted a no-migration variance that then releases hazardous constituents from the unit would have to cease receipt of prohibited wastes (§ 268.6(f)). In this case, a unit found to be releasing hazardous constituents to the unsaturated zone would be required to cease operating. For these reasons, EPA has concluded that a response action plan is not necessary for land treatment units.

A December 6, 1991 decision of the United States Court of Appeals, District of Columbia addressed the soil-pore water monitoring requirements for interim status land treatment facilities (*Shell Oil Company* v. *EPA*, No. 80–1532). As of the date of this rule, the Court's mandate was not yet issued and the regulation remains in place. The Agency is still considering what response to take to the Court's decision.

C. Response to Leaks

1. Action Leakage Rate

The final rule requires owners or operators to establish one action leakage rate (ALR) for each unit affected by today's rule (§§ 264.222, 264.252, 264.302, 265.222, 265.225, and 265.302). The action leakage rate is a leakage rate that requires implementation of a response action to prevent hazardous constituent migration out of the unit. The Agency has determined, the public comments support, the need for an ALR and response actions that the ALR triggers. EPA believes that the ultimate goal of the liner and leak detection system requirements is to prevent the release of hazardous constituents from the unit, thereby protecting the ground water and surface water. A system in place to detect leaks at the earliest practical time should be complemented by early follow-up actions to effectively minimize the chance for migration of hazardous constituents from the unit. Furthermore, it is often more effective to address leaks within the liners than to later address ground-water contamination through corrective action.

Today's final rule requires owners or operators to monitor the rate of leakage into the leak detection sump and to determine whether the measured rate of leakage over a specified period of time exceeds the action leakage rate (see Section IV.D. of the preamble for further discussion of today's monitoring requirements). If the owner or operator determines that the measured rate of leakage exceeds the ALR, the owner or operator must notify EPA and implement procedures contained in a response action plan that owners or operators must prepare for units affected by today's rule.

The proposed rule allowed the owner or operator a choice in establishing an action leakage rate. EPA proposed to specify an action leakage rate between 5–20 gallons/acre/day (gpad). Alternatively, the owner or operator could propose a site-specific action leakage rate for EPA approval. The proposed rule required owners and operators to develop and submit a plan for responding to the action leakage rate.

The proposed rule also required owners and operators to establish a value and a response action plan for a rapid and large leakage rate (RLL). The RLL was defined as the maximum design leakage rate (plus a safety factor) that the leak detection system can remove under gravity flow conditions (i.e., without the fluid head on the bottom liner exceeding one foot in granular leak detection systems and without the fluid head exceeding the thickness of synthetic lead detection systems). EPA also considered in the proposal the possibility of owners or operators developing responses to leakage rates between the action leakage rate and rapid and extremely large leakage rate (referred to as an intermediate leakage rate). In addition, the Agency considered requiring owners or operators to develop responses to "significant changes" in the flow rate (EPA suggested a 100 gpad or 25–50 percent increase, whichever was larger), leakage that exceeded health-based concentrations of hazardous constituents, and a leakage rate exceeding 50 gpad for any one-day period. In summary, EPA discussed six leakage rates in the proposal that could trigger various response actions by owners or operators.

Although no commenters objected to the establishment of an action leakage rate, EPA received many comments on the proposed action leakage rate value. Several commenters favored EPA setting an action leakage rate within the proposed range of 5–20 gpad. Some suggested that EPA should not finalize a specific value within the proposed range, but keep the range of 5–20 gpad and allow the permit writer to select a specific value within the range to apply to the unit. Some commenters suggested an action leakage rate of 50 or 100 gpad. Another commenter suggested that EPA set an action leakage rate at 75 percent of the proposed rapid and extremely large leakage rate. One commenter stated that the action leakage rate should be decreased over the life of the unit according to a formula, thus allowing a higher action leakage rate during initial operation of the unit to account for presence of liquids in the sump from sources other than leaks (e.g., construction water).

In general, most commenters stated that EPA had little or no field data to set an action leakage rate within the proposed range, and argued that the Agency should allow site-specific action leakage rates to be set by the permit writer, especially to account for other potential sources of liquids in the leak detection sump (e.g., soil liner construction water, precipitation during construction, and ground-water infiltration). Although the proposed rule would allow site-specific variances to the proposed action leakage rate, commenters expressed concern that EPA would not allow many site-specific action leakage rates. These commenters claimed that site-specific action leakage rates based on the design and operation of the unit should be common.

EPA also received many comments on other leakage rates that would require owners or operators to develop response actions. Commenters opposed using "significant changes" in the flow rate or health-based concentrations of hazardous constituents in liquids entering the detection sump to trigger a response by the owner or operator. Commenters felt that the proposed "significant change" concept was unclear and difficult to define. Commenters felt using leachate quality analysis at flow rates below the rapid and extremely large leakage rate to trigger a response was costly, time-consuming, and provided no additional environmental benefit. These commenters generally felt that liquid flow rates into the detection sump should be the sole trigger of an owner or operator's response. Many of these commenters also disagreed with the use of health-based levels (e.g., maximum contaminant levels) in the leachate to trigger a response. They argued that EPA's assumptions in proposing such levels were overly conservative and unrealistic because such liquid was still contained in the leak detection system and migration to the environment was

controlled by the bottom-liner and drainage system.

Many commenters maintained that EPA was proposing too many leakage rates without a clear distinction between them as to the differences in response associated with the leakage. These commenters claimed that some of the responses actions discussed by EPA in the preamble seemed to be redundant for different leakage rates, and that EPA's requirements were confusing, burdensome, and provided no additional benefit. As an example, the commenters cited that flow rates above the proposed action leakage rate (5–20 gpad) would trigger many of the same responses that exceedance of other leakage rates, such as the rapid and extremely large leakage rate (an example in the preamble showed a RLL of 3000 gpad) or significant change in leakage rate, would mandate. Some of these commenters stated that leakage rates less than the rapid and extremely large rate did not necessarily indicate a failure of the top liner, and that leakage would still be contained within the unit by the bottom liner. Therefore, they felt that the Agency should not stipulate excessive and redundant responses on the part of owners or operators for leakage rates that do not pose environmental concerns.

EPA requested and received field data on actual leakage rates from commenters on the proposed rule, and obtained additional data from more recent studies of leakage rates through top liners at land disposal units. However, these data are limited and furthermore, indicate that a portion of units (>25%) with CQA could exceed 20 gpad, the highest end of the proposed range for action leakage rates. Therefore, the Agency agrees with commenters that existing field data do not support establishment of an action leakage rate within the proposed range of 5–20 gpad for all units.

In response to EPA's request for comments on the appropriateness of the proposed range for surface impoundments, commenters argued that it was inappropriate for the Agency to set the same action leakage rate for landfills and surface impoundments and that the Agency should take into account the type, size, and operation of the unit when establishing an action leakage rate. EPA agrees with the commenters that the size, type, and operation of the unit should be accounted for in establishing a leakage rate that will trigger a response by the owner or operator, and that a standard leakage rate value for all units is not appropriate at this time.

In addition, EPA acknowledges commenters' concerns about the proposed number of leakage rates triggering a response by the owner or operator, and the lack of distinction among them for purposes of implementation. To simplify the final rule, EPA has chosen to establish one leakage rate that will trigger a response by the owner or operator, account for the site-specific design of the unit, and indicate significant evidence that there is problematic leakage through the top liner that mandates a response. EPA is requiring owners or operators to propose an action leakage rate for each unit subject to today's rule based on an approach that is similar to the proposed definition of the rapid and extremely large leakage rate. That is, owners or operators must calculate an action leakage rate based on the maximum design leakage rate that the leak detection system can remove without the fluid head on the bottom liner exceeding one foot. This leakage rate must account for an adequate margin of safety for uncertainties in design, construction, and operation of the leak detection system. The action leakage rate must not be greater than the flow capacity of the drainage layer in order to assure detection of leaks (e.g., if the ALR is 500 gpad and the flow capacity is 400 gpad then the ALR would never be exceeded no matter how large the leak). The action leakage rate should always be less than or equal to the pumping capacity of the leak detection sump since the pumping capacity is required to be greater than the maximum leak detection system flow rate under which gravity flow conditions prevail (i.e., to prevent liquids from backing up into the drainage layer). If the owner or operator determines that the action leakage rate is exceeded, the owner or operator must implement the procedures contained in the response action plan.

EPA believes that flow rates in excess of the action leakage rate indicate a major localized or general failure of the top liner, thus increasing the potential for a buildup of head on the bottom liner and increasing the potential for migration of hazardous constituents into the bottom liner. For this reason, it is necessary to maintain leak detection flow rates below the action leakage rate and for the owner or operator to take response actions for leaks greater than the action leakage rate.

Under today's rule, as in the May 29, 1987 proposal, the owner or operator must propose an action leakage rate based on calculations of the maximum flow capacity of the leak detection system design so as not to exceed one foot head on the bottom liner (called rapid and extremely large leak in the proposal). The proposal background document "Liner and Leak Detection Rule Background Document", (EPA/530–SW–87–015, May 1987) presented a number of mathematical models for making such a determination. All of these models are based on Darcy's Law for non-turbulent flow through saturated media. Of these models, the Agency finds that the following formula for flow originating through a hole in the liner is the most likely leak scenario for a geomembrane liner:

$$Q = k.h.\tan\alpha.B$$

where

Q = flow rate in the leak detection system (drainage layer),
h = head on the bottom liner,
k = hydraulic conductivity of the drainage medium,
α = slope of the leak detection system,
B = width of the flow in the leak detection system, perpendicular to the flow.

Using this formula, the Agency calculated the maximum flow rates using the minimum specifications in today's rule: 1% slope, and 1×10^{-1} cm/sec hydraulic conductivity for surface impoundments and 1×10^{-2} cm/sec hydraulic conductivity for landfills and waste piles. Assuming that the head is 1 foot and the width of flow (B) is 100 feet, the results show maximum flow rates of 2,100 gpad for surface impoundments and 210 gpad for landfills and waste piles. Using a safety factor of two, as suggested in the proposed rule preamble, yields about 1,000 gpad for surface impoundments and 100 gpad for landfills and waste piles as the Agency recommended action leakage rates. Because this calculation used the minimum technical requirements and other design assumptions to maximize potential head on the bottom liner, the Agency believes that the units meeting the minimum technical requirements would not require action leakage rates below 100 gpad for landfills and waste piles and 1000 gpad for surface impoundments. The final background document on action leakage rates ("Action Leakage Rates for Leak Detection Systems," January 1992) provides further discussion and background on these recommended action leakage rates. As discussed earlier in the preamble, this document is available from the docket for this rule or from NTIS, U.S. Department of Commerce.

While EPA recommends the above action leakage rates for the minimum design specifications, the Agency recognizes that a number of site-specific

factors affect the maximum flow capacity of a leak detection system, and owners or operators may want to propose alternative action leakage rates. For example, the leak detection system design may be different than the minimums specified in today's rule. As indicated above and in the background document, hydraulic conductivity is a factor that significantly affects the flow capacity of the system. The Agency believes that leak detection systems with greater hydraulic conductivities would have higher action leakage rates. In additional, owners or operators may have information to justify a different width of flow in the above calculation. Owners or operators also may justify a higher action leakage rate by using a different formula or model. While the Agency recommends the use of the above model for defining the maximum flow capacity of the leak detection system and action leakage rate, EPA recognizes that there may be alternative models available now or in the future that may more accurately predict system flow capacity to justify higher action leakage rates. Therefore, owners or operators may propose to use an alternative model that they believe more accurately predicts the maximum flow capacity of the leak detection system. Further, owners or operators may want to do a flow (pump) test on the leak detection system to show actual flow capacity, which may justify a higher action leakage rate. Finally, the owner or operator may have flow rate data on similarly designed units to use to justify a different level. As more and more units are built, the Agency as well as owners or operators will develop a better data base that may be used to establish appropriate action leakage rates.

For facilities seeking a permit, the action leakage rate will be set after the Regional Administrator reviews the rate proposed by the owner or operator in either the facility's part B permit application or permit modification. for interim status facilities, the owner or operator must submit a proposed action leakage rate for the affected unit to the Regional Administrator 60 days prior to the receipt of waste in the unit. The Regional Administrator will either approve, modify, or deny the proposed leakage rate. The Regional Administrator may extend the review period to evaluate the owner or operator's proposed action leakage rate for up to 30 more days. If none of these actions occur within 60 days (or if the review period is extended, within 90 days), the proposed rate can be considered approved.

Owners and operators of units affected by today's rule must monitor the leak detection sump and use the monitoring information to determine if the action leakage rate has been exceeded. The final rule sets forth the procedures owners or operators must use in determining whether the action leakage rate has been exceeded §§ 264.222(b), 264.252(b), 264.302(b), 265.222(c), 265.255(c), and 265.302(c)). To calculate the flow rate into the leak detection sump, owners, or operators must convert flow rate data into an average daily flow rate per acre (i.e., gpad) for each leak detection sump. This calculation must be performed weekly during the active life and closure period of the unit, unless the Regional Administrator approves otherwise. Upon closure (installation of the final cover for the unit), owners or operators will monitor the leak detection sump monthly, or in some cases quarterly or semi-annually (see Section IV.D. for further discussion). While on a monthly monitoring schedule, owners or operators will have to convert the monitoring data to an average daily flow rate to determine if the action leakage rate has been exceeded. If an owner or operator is monitoring quarterly or semi-annually no calculations are needed unless liquids are detected in the sump above the pump operating level, in which case the owner or operator must resume monitoring the sump on a monthly basis. Such an owner or operator would then have to convert monitoring data to an average daily flow rate per acre for the purpose of determining if the action leakage rate has been exceeded.

2. Response Action Plan

The final rule requires owners or operators of affected units to develop a response action plan for leaks exceeding the action leakage rate §§ 264.223, 264.253, 264.304, 265.223, 265.259, and 265.303). The response action plan is a site-specific plan that the owner or operator develops to address leakage through the top liner to assure that it does not migrate out of the unit. It is based on an assessment of the capability of the total design, construction, and operation of the unit rather than of individual components of the unit.

The majority of commenters on the proposed response action plan requirements stated that there were too many potential triggers (i.e.,leakage rates) that the response action plan must potentially address in the proposed rule. These commenters argued that these trigger levels lacked distinction as to the responses they would necessitate. Other commenters felt that the response action plan requirements were confusing and inconsistent in certain cases. The commenters noted that many of the response actions for leaks above the proposed rapid and extremely large leakage rate were similar to actions for leaks above the proposed action leakage rate. In response to these comments, EPA has simplified and clarified the response action requirements in today's final rule.

The final rule specifies minimum response actions that the owner or operator must take when the owner or operator determines that the action leakage rate has been exceeded. The minimum response actions are included in the response action plan that the owner or operator must prepare. Although minimum response actions are required to be in the response action plan, the content of a response action plan is determined by site-specific factors. The minimum responses required under today's rule are typical of response action plans EPA has identified at operating facilities and incorporate comments EPA received on the proposed response action plan requirements. Although today's rule only requires the owner or operator to initiate response actions upon exceedance of the action leakage rate, owners or operators may want to implement some types of response actions for leakage rates less than the action leakage rate, because these actions will lower the probability that leakage will exceed the action leakage rate and trigger today's final response action requirements.

An owner or operator's response action plan must include notifying EPA within 7 days that the action leakage rate has been exceeded. EPA received no comments on the proposed notification requirement and thus, is finalizing this requirement. The Agency is also requiring that the owner or operator submit a preliminary written assessment to the Regional Administrator within 14 days of the determination as to amount and source of the liquids in the detection sump, information on possible size, location, and cause of the leak, and any immediate and short term actions the owner or operator will take (e.g., additional pumping and removal of the leachate, changes in operating practices to reduce the leakage). As stated above, the Agency believes that exceedance of the action leakage rate is significant and indicates a major localized or general failure of the top liner, thus increasing the potential for a buildup of head on the bottom liner and increasing the potential for migration of hazardous

constituents into the bottom liner and out of the unit. For this reason, the Agency must be notified and given a preliminary assessment of the actions taken by the owner or operator.

The focus of the response action requirements for flow rates above the action leakage rate is the degree and schedule of what remediation, if any, is needed to reduce the leakage to the action leakage rate. The final rule requires that owners or operators identify the location, size, and cause of the leakage, and sample and analyze the leachate present in the detection sump. EPA believes that analyzing the leachate is necessary as part of determining the response needed to reduce the leakage to below the action leakage rate. For example, such information may be useful in locating a leak at sites where different wastes are disposed of in different cells. The owner or operators's's response action plan must discuss whether wastes should be removed to locate and repair the leak, whether repairs or controls will be used to minimize the leakage, and if so, whether operational changes, such as reduction or cessation of waste receipt, or partial or final closure of the unit, will be implemented, and if so, what types.

Today's rule clarifies when the owner or operator must submit a report documenting the response actions taken concerning leakage above the action leakage rate. The final rule requires that the owner or operator submit a report to the Regional Administrator describing how effective the response actions have been in reducing the leakage below the action leakage rate and preventing migration of hazardous constituents out of the unit within 30 days of exceeding the action leakage rate. The final rule also requires that the owner or operator continue to submit these reports monthly as long as the action leakage rate is exceeded.

EPA received several comments on the proposed response action submission and approval process. Several commenters expressed concern over possible delays associated with requiring a response action plan before receipt of waste. EPA received comments both supporting and objecting to submittal of the response action plan as part of the permit application process. One commenter suggested that the response action plan for both leakage rates above the rapid and extremely large leakage rate and leakage rates above the proposed action leakage rate but below the rapid and extremely large leakage rate should be submitted as part of the permit application. Another commenter argued against submittal as part of the permit application. The commenter stated that the bottom liner system can contain leakage rates in excess of the rapid and extremely large leakage rate until the response action plan is approved, and that such liquid would not migrate very far into the bottom liner before the response action plan was approved.

Unlike the proposed rule, the final rule requires owners or operators to submit only one response action plan for leakages exceeding the action leakage rate. Although EPA acknowledges that the bottom liner will provide initial containment of any leakage into the leak detection system, EPA still feels that leakage above the action leakage rate is an indication of a significant problem with the unit. The Agency believes that a response action plan is necessary before receipt of the waste into a unit to assure that there is both a commitment and an instrument in place to initiate responses upon exceedance of the action leakage rate, before leaks can potentially migrate out of the unit.

The final rule requires that new hazardous waste management facilities submit their response action plans and have them approved as part of the permit application process. Permitted facilities must submit the plan as part of a permit modification according to the procedures in § 270.42. Consistent with the minimum technology notification requirements of RCRA section 3015 for surface impoundments and landfills, owners and operators of units at interim status facilities subject to today's leak detection system rules are required to submit a response action plant in conjunction with the proposed action leakage rate 60 days prior to receiving waste into the unit.

D. Monitoring and Inspection Requirements

In today's final rule, EPA is promulgating several minor amendments to monitoring and inspection requirements for new and replacement landfills, surface impoundments, and waste piles, and lateral expansions of these units. These amendments add inspection requirements for leak detection systems (§§ 264.226, 264.254, 264.303, 265.226, 265.260, and 265.304). Specifically, today's rule requires facility owners and operators to monitor the sumps in leak detection systems for the presence of liquids in the sumps and record the amount of liquid removed from the sumps. Under §§ 264.222(b), 264.252(b), 264.302(b), 265.222(c), 265.255(c), and 265.302(c), owners or operators must calculate the average daily flow rate in gpad for each leak detection system sump on a weekly basis during the active life and monthly during the post-closure period, when monthly monitoring is required, to determine if the action leakage rate has been exceeded.

In the May 29, 1987, proposal, EPA proposed to require daily monitoring of the leak detection system sump during the active life of the units, and weekly monitoring during the post-closure period. EPA received several comments on the issue of the frequency of leak detection system sump monitoring requirements. Among those who commented, several objected to the requirement for leak detection system sump measurement on a daily basis during the active life because (1) not all facilities are operational on weekends and holidays, and (2) the payment of overtime rates to personnel for monitoring activities on weekends and holidays would be a significant financial burden. Other commenters stated that it would be difficult to monitor many sumps on a daily basis, especially large sumps or facilities with small leakage rates. One commenter suggested monthly monitoring of the leak detection sump. Most of these commenters suggested that monitoring the sump weekly during the active life was sufficient to determine exceedance of an action leakage rate.

EPA maintains that precipitation or other events may lead to large heads on the bottom liner over a period of a week, and that monthly monitoring of the sump during the active life is insufficient for observing changes in liquid levels in the sump that may necessitate action on the part of the owner or operator. However, EPA agrees with commenters that daily monitoring of the sumps is excessive given that the Agency has redefined the action leakage rate that triggers a response action. Thus, EPA has changed the requirement from daily monitoring of the leak detection system sump to require weekly monitoring during the active life and closure period. As discussed earlier, EPA has also changed the requirement from daily removal of accumulated liquids in the sump to a requirement to remove liquids from the sump as necessary to minimize head on the bottom liner (§§ 264.221(c)(3), 264.251(c)(4), 254.301(c)(4), 265.221(a), 265.254(a), and 265.301(a)).

Two commenters also objected to the requirement to monitor the leak detection system sump weekly during post-closure. These commenters stated that monthly monitoring would be sufficient because the elimination of liquids from incident precipitation and the reduction of drainage from wastes will result in insignificant leachate

generation in the years following closure. These commenters stated that monitoring should be conducted monthly or quarterly and more often only if the volumes of liquid in the sump increased.

EPA acknowledges that leachate generation should decrease in the years following closure of the unit, due to the effectiveness of the final cover. In response to comments received on this issue, EPA is allowing owners or operators to conduct monthly monitoring of the sump after the final cover is installed on the unit (§§ 264.226(d), 264.303(c), 265.226(c), and 265.304(a)). The Agency has also decided in the final rule to allow owners or operators to conduct quarterly monitoring of the sumps during post-closure, if the liquid levels in the sump stay below the pump operating level for two consecutive months, and/or semi-annual monitoring of the sumps if the liquid level in the sump stays below the pump operating level for two consecutive quarterly inspections. However, if pumping is required to remove liquids from the leak detection sump (i.e., liquids above the operating level of the sump) at any time during quarterly or semi-annual inspections, owners or operators must increase their monitoring to a monthly or quarterly basis, respectively. However, the Agency acknowledges that in some cases the levels may vary at facilities depending on the design and geometry of the sump and the type of pump used.

The "pump operating level" is a level proposed by the owner or operator and approved by the Regional Administrator based on sump dimensions, pump activation levels, and a level that avoids backup of liquids (from the sump and drainage tile or pipes) into the drainage layer.

Today's rule requires the owner or operator to monitor for and record the presence and level of liquids present in each leak detection sump, as well as the amount of liquids removed from the sump, to determine the leakage rate through the top liner. The leachate volume in the sump typically will be determined by measuring the liquid level in the sump. The leachate volume removed from the sump can be determined by collecting (in containers, tanks, etc.) and measuring the quantity of liquid pumped out of the sump or, alternatively, by installing flow-metering equipment to record the volumes. A third option is to install a device to measure inflow into the sump, for those units where the sump is located outside the unit; this may be a weir or pump at the sump inflow pipe. The leakage rate is to be calculated as the volume of liquid entering the sump over a period of time divided by the time and then also divided by the unit area served by the sump.

EPA is today requiring, as proposed, that the measured leakage rate in each sump in the leak detection system be used for determining whether the action leakage rate for the unit has been exceeded. EPA received several comments on this requirement. These commenters maintained that a variance from the action leakage rate should be available when it can be demonstrated that liquid in the leak detection system is from a source other than leakage through the top liner. EPA acknowledges that the actual leakage rate through the top liner may be different (larger or smaller) than the measured leakage rate at the sump depending on: (1) The collection efficiency of the system and (2) the presence of water in the leak detection system from construction, ground-water infiltration, consolidation of compacted soil liners, or additional sources of liquid other than leakage. However, owners and operators may consider these other sources of liquid when determining an action leakage rate that is appropriate for their unit and in developing their response action plan.

Today's final rule makes several technical amendments to the general inspection requirements and operating record requirements for units affected by today's rule. EPA today is amending § 264.15 by correcting an earlier oversight by adding requirements to inspect hazardous waste tanks as required by §§ 264.193 and 264.195 (today's amendments also remove two erroneous cross-references—§§ 264.194 and 264.253—from § 264.15). Section 265.15 is being amended by adding today's inspection requirements for units at interim status facilities under §§ 265.260, 265.278, and 265.304. EPA is also today making technical changes to the operating record requirements for units affected by today's rule at permitted and interim status facilities in §§ 264.73 and 265.73. These sections have been modified to reference recordkeeping requirements for permitted tank facilities (in §§ 264.191, 264.193, and 264.195) and interim status tank facilities (in §§ 265.191, 265.193, and 265.195).

E. Construction Quality Assurance

EPA today is promulgating construction quality assurance requirements (CQA) for all new landfills, surface impoundments, and waste piles, and replacements and lateral expansions of such units to the extent they are affected by the double-liner system and leak detection system requirements in today's rule. Today's CQA requirements also apply, to the extent they are relevant to units built under variances granted under §§ 264.221, 264.251, 264.301, 265.221, 265.254, and 265.301. The Agency has concluded that CQA is integral to ensure the proper construction, operation, and design of double-liner and leak detection systems and the closure of land disposal units. The CQA requirements being issued incorporate standard engineering practices and common hazardous waste management industry practices that have already been proven to ensure that the design and performance standards of today's final rule are met.

EPA is today promulgating CQA requirements applicable to foundations, dikes, low-permeability soil liners, geomembranes, leachate collection and removal systems, leak detection systems, and final covers.

The Agency has conducted a number of studies that outline the need for CQA. In 1983, EPA conducted a study assessing existing technology for liner installation at hazardous waste land disposal facilities ("Liner and Leak Detection Rule Background Document", 1987). The data base used in the study consisted of information from the literature supplemented by data collected through 40 interviews with technical experts in industry, State regulatory agencies, trade and professional associations, research organizations, and waste management companies. This study's conclusions were: (1) Construction-related problems during liner system installation constituted one of the major causes of liner system failure and (2) a rigorous CQA program could have identified and corrected many of the problems that contributed to such failure. The study also concluded that construction techniques that were available at that time could be used to install geomembrane and clay liner systems that met the Agency's performance standards for liner systems. However, the study noted that a comprehensive monitoring and audit program during construction would be needed to attain the Agency's performance standards for liner systems.

In 1985, EPA conducted another study to supplement existing information on liner performance ("Liner and Leak Detection Rule Background Document", 1987). This study was designed to evaluate the factors that contributed to successes and failures at 27 landfills and surface impoundments selected for case studies. The results of this study showed

that there were two main elements related to successful liner installation. The first element was a proper conceptual approach applied to all stages of unit construction, use, and closure, including design, material selection, contractor selection, liner system installation, facility operation, and final cover design and installation. The second element was the extensive use of formal CQA programs to ensure that the components of the unit were constructed properly in all stages of a unit's construction. The report stated that a CQA program resulted in a better constructed liner system.

EPA data show the performance of double liner systems and leachate collection and removal/leak detection systems is greatly enhanced when CQA procedures are implemented. The implementation of CQA procedures results in increased leachate collection efficiency and reduces leakage through both synthetic and compacted soil liners. For example, information compiled in a recent report ("Action Leakage Rates for Leak Detection Systems", January, 1992) showed that from a group of landfills with geomembrane only top liners, 8 of 11 landfill cells showed leakage rates below 20 gpad when good CQA was implemented, as opposed to only 1 of 5 landfill cells where CQA was not implemented.

With the improved, consistent, performance of the double liner and leachate collection and removal system come significant environmental and practical benefits. The resultant reduction in leakage rates through the top and bottom liners reduces the threat of migration of hazardous constituents to ground water, as is called for by section 3004(o) of RCRA. The use of CQA also may result in fewer costly repairs to land disposal units after waste has been received, fewer occasions when an action leakage rate is exceeded and implementation of response action plans is necessary, and a diminished long-term need for corrective action.

Today's requirements for CQA add a framework for requirements already established in the regulations for CQA for permitted landfill, surface impoundment, and waste pile construction. Current requlations for these units (§§ 264.226, 264.254, and 264.303) already specify that synthetic and soil liners be inspected for uniformity, damage, and imperfections during and immediately after installation. The CQA requirements being promulgated primarily add procedures to ensure that the existing general performance standards for CQA are met. Because the requirements of today's rule also apply to new units and lateral expansions and replacements of existing units at interim status facilities, today's CQA requirements also apply to these units. The requirements being promulgated in §§ 264.19 and 265.19 are in contrast to those in the May 29, 1987 proposal, which would have put in place a substantial CQA program. EPA has concluded that the proposal was, in fact, redundant with existing guidance manuals and also unduly prescriptive and detailed with respect to methods, approaches, and documentation to the Regional Administrator.

The Agency is today continuing to rely on available Agency guidance documents (instead of additional regulations) to implement the performance standards for construction quality assurance of today's final rule because EPA believes that newer technologies may be discouraged by detailed regulations. Agency guidance includes guidelines for selecting specific test methodologies and the number of tests that should be conducted during installation, both of which will vary significantly for different types of units, construction materials, and unit locations. A final guidance document, entitled "Construction Quality Assurance for Hazardous Waste Land Disposal Facilities" (EPA 530–SW–86–031, October 1986), includes detailed guidance on the components of the CQA requirements of today's final rule. Additional guidance is also available in the May 24, 1985 draft "Minimum Technology Guidance on Double Liner Systems for Landfills and Surface Impoundments—Design, Construction, and Operation." Guidance for the construction of clay liners is available in the November, 1988 document entitled "Design, Construction, and Evaluation of Clay Liners for Waste Management Facilities" (EPA 530–SW–86–007F).

In today's final rule, EPA is requiring a site-specific construction quality assurance plan to be prepared by the owner or operator of new landfills, surface impoundments, and waste piles, and replacements and lateral expansions of such units (§§ 264.19(b) and 265.19(b)). This requirement is the same as was proposed in the May 29, 1987 proposed rule. EPA has concluded that this plan is needed to ensure that a hazardous waste management unit is designed, constructed, operated, and closed in accordance with the CQA program for the unit. Owners or operators are required to prepare a CQA plan before constructing all new units, replacement units, and lateral expansions of existing units at both permitted and interim status facilities.

The Agency received several comments objecting to two requirements for interim status facilities to submit documentation under the CQA program. These commenters objected to the proposed requirement that the owner or operator submit, prior to construction, a CQA plan describing actions to be taken to implement the CQA program. The commenters also objected to an associated requirement to submit, prior to placing wastes in the unit, a CQA report documenting compliance with the CQA plan. Many of these commenters felt that these approval processes could result in unnecessary delays in construction of new units at interim status facilities. EPA agrees with the commenters and is eliminating the requirement for interim status facilities to submit a CQA plan for approval. EPA is instead requiring that interim status facilities prepare a CQA plan and maintain it onsite. By contrast, permitted facilities must submit a CQA plan as part of the Part B permit application; any changes to an approved plan at a permitted facility would require a permit modification. In addition, the Agency is dropping the requirement for these interim status facilities to submit a CQA report and has replaced this requirement with one to submit a CQA certification (§ 265.19(d)). EPA is, however, reserving the right to request supporting documentation for the certification. This certification will ensure that CQA procedures have been followed at the facility. The certification must be signed by a registered professional engineer serving as a CQA officer, and must state that the unit has been constructed in accordance with the CQA plan and meets the design specifications. For units at permitted facilities, this certification must be submitted by the owner or operator to the Regional Administrator and either approved or have approval waived by the Regional Administrator under § 270.30(l)(2)(ii) prior to the receipt of waste. For units at interim status facilities, the owner or operator must submit this certification at least 30 days prior to the receipt of waste; this will allow the Regional Administrator time to review the certification, and if necessary, request additional information from the owner or operator. The owner or operator may receive wastes in the unit after 30 days, unless (1) the Regional Administrator notifies the owner or operator in writing that the construction is unacceptable, (2) the Regional Administrator extends the review period (by a maximum of 30

days), or (3) the Regional Administrator requests additional information within the 30-day period from submission of the CQA certification. The certification of CQA activities for the final cover is already addressed in the overall certification required for closure activities under parts 264 and 265.

EPA is also specifically requiring the use of a test fill for compacted soil liners as proposed in the May 29, 1987, proposed rule. The test fill is an area developed using the actual materials of construction for the compacted soil component of the bottom composite liner to ensure that the liner is constructed to meet design requirements for field permeability (§§ 264.19(c)(2) and 265.19(c)(2)). The test fill will allow owners and operators, in many cases, to avoid the costs of failures of the full-scale unit by identifying problems during the test fill analysis.

EPA received several comments on the requirement for a test fill. Some commenters argued that a test fill was not necessary, claiming that it is expensive and does not provide any better data than laboratory tests. One commenter contended that field permeability tests may be less precise than laboratory tests, because the field testing is subjected to more uncontrolled variables (e.g., weather conditions) than laboratory tests, and therefore a test fill often cannot be made to precisely replicate the larger unit.

EPA disagrees, and is confident that, when functionally equivalent materials and equipment are used, a test fill can be constructed to provide more accurate indication of full-scale unit performance. Recent data compiled from permit applicants shows that laboratory studies have often not accurately predicted field permeability of the installed liner. The Agency has found that constructed soil liners will often test well in the laboratory because specimen preparation activities (e.g., root removal, visual selection of a uniform sample, additional compaction) have been conducted on the laboratory sample. These preparation activities are often not achieved to the same degree in a large, field-scale operation. EPA has found that test fill testing using large-scale field tests (e.g., sealed double ring infiltrometer) consistently provide a more accurate indicator of the performance of a full scale unit than do laboratory tests. For these reasons, EPA concludes that the information gained from field testing of test fills is a more reliable indicator of actual field conditions than laboratory tests, and so is stipulating the use of field testing for test fills in today's rule. However, to provide flexibility, today's final rule contains a provision allowing for an alternative demonstration where available data are sufficient to clearly show that a constructed soil liner will meet design specifications (e.g., test fill data from a soil liner constructed using functionally equivalent materials and methods of construction). The Agency believes that as more test fills are constructed, this variance will become more achievable because more data will be available. For units at permitted facilities, this variance must be obtained as part of the permitting process; for interim status units, this variance is self-implementing. EPA is, however, reserving the right to review during inspections documentation associated with variances claimed by owners or operators of units at interim status facilities.

F. Implementation of Permitting and Interim Status Requirements

Today's final rule amends the existing part B permit application requirements in §§ 270.17, 270.18 and 270.21 for surface impoundments, waste piles, and landfills at facilities seeking a RCRA permit. These new provisions require owners or operators of such units to provide information on how the liner and leak detection system will be designed, constructed, operated, and maintained to meet the requirements of part 264. Today's rule also requires owners or operators who propose alternative designs for double liner, leachate collection and removal systems, or leak detection systems to submit the appropriate detailed plans, and engineering and hydrogeologic reports describing the alternative designs and operating practices, including pertinent location aspects. In addition, today's rule requires the owner or operator to submit the proposed action leakage rate, the response action plan and the CQA plan for review in the permitting process. Sections 270.17, 270.18, and 270.21 also require owners or operators to provide a description of how the leak detection system will be inspected to meet the requirements in part 264. The unit design, action leakage rate, response action plan, CQA plan, monitoring provisions, and inspection schedule will become permit conditions that must be complied with over the life of the permit. The monitoring and inspection items become part of the inspection schedule under § 264.15(b).

Currently permitted facilities that are affected by today's rule must submit permit modifications to EPA under the procedures of § 270.42. Since the March 28, 1986 and May 29, 1987 proposals, EPA has promulgated amendments to the procedures for permit modifications for treatment, storage, and disposal facilities (53 FR 37912, September 28, 1988). EPA will implement the new double-liner and leak detection system requirements using the new permit modification procedures, consistent with EPA policy (53 FR 37912, September 28, 1988). Therefore, today's rule contains amendments to § 270.42 that categorize the amended part 264 requirements of today's rule as various classes of permit modifications.

Today's rule subjects owners and operators of interim status facilities to the same design and operating requirements as permitted facilities. However, procedural requirements for documentation or reporting have been structured to be more self-implementing for interim status facilities since these facilities have not yet been subjected to the site-specific tailored standards of a permit. In today's rule, owners or operators of interim status facilities that are subject to today's requirements will follow the same notification and approval procedures existing for interim status surface impoundments and landfills subjected to the minimum technological requirements in section 3015 of RCRA (§§ 265.221(b) and 265.301(b)).

Existing regulations require interim status facilities to submit a notice to the Regional Administrator at least 60 days prior to receiving hazardous waste in units affected by today's requirements. In today's rule, EPA is requiring that owners or operators submit their proposed action leakage rate and response action plan to the Regional Administrator at least 60 days prior to receiving hazardous waste in units affected by today's requirements. If no objection or extension of the review time is made by the Regional Administrator, the proposed action leakage rate and response action plan are effective. In addition, EPA is requiring owners or operators to submit a certification that the unit has been constructed in accordance with the CQA plan at least 30 days prior to receiving hazardous waste in units affected by today's standards. If no objection or extension to the review time is made by the Regional Administrator by the end of the 30-day period, the owner or operator may receive wastes in the unit.

Interim status facilities are required to prepare, but are not required to submit, their design and operating plans, monitoring plans, or CQA plans prior to receiving wastes. These documents must be retained on-site and be available for review by the Regional Administrator. EPA is not requiring submission and

advance approval of this information because such activities would be inconsistent with the goal of interim status to minimize review and approval by the Regional Administrator.

V. State Authority

A. Applicability of Rule in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program within the State. Following authorization, EPA retains enforcement authority under section 3008, 3013, and 7003 of RCRA, although authorized States have primary enforcement responsibility. The standards and requirements for authorization are found in 40 CFR part 271.

Prior to the Hazardous Solid Waste Amendments of 1984 (HSWA), a State with final authorization administered its hazardous waste program in lieu of EPA's administering the Federal program in that State. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities that the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obliged to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized State until the State adopted the requirements as State law and was authorized for the requirements.

In contrast, under RCRA section 3006(g), new requirements and prohibitions imposed by HSWA take effect in authorized States at the same time that they take effect in non-authorized States. EPA is directed to carry out these requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA-related provisions as State law to retain final authorization, HSWA-based requirements apply in authorized States in the interim.

B. Effect on State Authorizations

Most of today's final rule for liners and leak detection systems is finalized pursuant to RCRA sections 3004(o) and 3015 which were added by HSWA. The HSWA-based requirements are being added to Table 1 in 40 CFR 271.1(j), which identifies the Federal program requirements that are promulgated pursuant to HSWA and take effect in all States, regardless of their authorization status. As noted above, EPA will implement those HSWA-based sections of today's rule in authorized States until their programs are modified to adopt these rules and the modification is approved by EPA. Because these requirements are finalized pursuant to HSWA, a State submitting a program modification may apply to receive either interim or final authorization under RCRA section 3006(g)(2) or 3006(b), respectively, on the basis of state requirements that are equivalent or substantially equivalent to EPA's. The procedures and schedule for State program modifications for either interim or final authorization are described in 40 CFR 271.21. The deadline by which the States must modify their programs to adopt today's rule is July 1, 1993. It should be noted that HSWA interim authorization will expire on January 1, 1993 (see 40 CFR 271.24(c)).

Portions of today's rule at the time they were proposed on May 29, 1987 (52 FR 20220), were proposed to be adopted pursuant to RCRA. As non-HSWA rules, therefore, they would not be effective in authorized States until those States revised their programs to adopt equivalent requirements under State law. EPA has reconsidered this issue and now interprets the statute to allow more of the rule, including the CQA, with the exception of its application to final cover requirements, to be promulgated pursuant to HSWA.

EPA views today's CQA requirements to be vital for liner and leak detection systems to perform as intended by HSWA, in section 3004(o), by effectively preventing the migration of hazardous constituents into and through liners and for detecting leaks of hazardous constituents at the earliest practicable time. The Agency has determined that CQA at land disposal facilities improves the performance of liners and leak detection systems. Specifically, test fills have proven to be necessary for ensuring that compacted soil liners satisfy the permeability requirements set by the statute. The response action plans, based on detected leakage from land disposal units are also considered to be integral parts of the process established by section 3004(o) for early detection of liner breakthrough and prevention of migration of hazardous constituents into the ground and surface water. Consequently, the Agency views the CQA program and the response action plan (including the action leakage rate and monitoring to determine if the flow rate exceeds the action leakage rate) to be promulgated pursuant to HSWA for those units where the liner and leak detection standards are promulgated pursuant to HSWA

New and replacement surface impoundments and landfill units, and lateral expansions of such units at facilities for which a permit application was received before November 8, 1984, are not explicitly addressed by section 3004(o)(1)(A); however, these units are covered by existing liner requirements which today are being revised by the Agency to take into account improvements in control technology. Thus these revisions are HSWA rules pursuant to section 3004(o)(1). Although section 3004(o)(1)(A) does not require waste piles to meet the double liner and leachate collection system standards, existing regulations already contain liner standards for waste piles and, therefore, pursuant to section 3004(o)(1), the Agency is revising the existing waste pile regulations to take into account improvements in control technology. As a result, the Agency is also promulgating these double liner and leachate collection system standards for waste piles as HSWA requirements. In addition, the Agency views the liner requirements for new waste piles as mandated by the form of leak detection chosen for these regulations; and therefore the liners standards from this point of view are also HSWA requirements. Leak detection for replacement units and lateral expansions of existing units (landfills, surface impoundments, and waste piles) at permitted facilities and at interim status waste piles are also being issued as improvements in control and measurement technologies under section 3004(o)(1) of RCRA.

CQA requirements for final covers at both permitted and interim status facilities are promulgated pursuant to section 3004(a) of RCRA, since final covers is not a HSWA requirement. The CQA requirements for final covers, therefore, will not be effective in authorized states. They will be applicable only in those states that do not have authorization. In authorized states, the CQA requirements for final covers at permitted and interim status facilities will not be effective until the state revises its program to adopt equivalent requirements under state law and receives authorization by EPA for them.

Section 40 CFR 271.21(e)(2) requires States that have final authorization to modify their programs to reflect Federal program changes and to submit the modification to EPA for approval. The deadline by which the State must modify its program to adopt this regulation is determined by the promulgation date in accordance with 40 CFR 271.21(e). These deadlines can be extended in certain cases (40 CFR 271.21(e)(3)). Once EPA approves the

modification, the State requirements become subtitle C RCRA requirements.

Authorized States are only required to modify their programs when EPA promulgates Federal regulations that are more stringent or broader in scope than the existing Federal regulations. For those Federal program changes that are less stringent or reduce the scope of the Federal program, States are not required to modify their programs. This is a result of section 3009 of RCRA, which allows States to impose regulations in addition to those in the Federal program. EPA has determined that the liner and leak detection systems rule is more stringent than the existing Federal regulations. Therefore, authorized States are required to modify their programs to adopt regulations that are equivalent or substantially equivalent.

States with authorized RCRA programs may already have requirements similar to those in today's rule. These State regulations have not been assessed against the Federal regulations being finalized today to determine whether they meet the tests for authorization. Thus, a State is not authorized to implement these requirements in lieu of EPA until the State program modification is approved. Of course, States with existing standards may continue to administer and enforce their standards as a matter of State law. In implementing the Federal program, EPA will work with States under agreements to minimize duplication of efforts. In many cases, EPA will be able to defer to the States in their efforts to implement their programs rather than take separate actions under Federal authority.

States that submit official applications for final authorization less than 12 months after the effective date of these regulations are not required to include standards equivalent to these regulations in their application. States that submit official applications for final authorization 12 months after the effective date of these regulations must include standards equivalent to these regulations in their application. The requirements a State must meet when submitting its final authorization application are set forth in 40 CFR 271.3.

VI. Regulatory Requirements

A. Economic Impact Analysis

Executive Order No. 12291 requires that regulatory agencies determine whether a new regulation constitutes a major rulemaking and, if so, it requires that the agency conduct a Regulatory Impact Analysis (RIA). An RIA consists of the quantification of the potential benefits, costs, and economic impacts of a major rule. A major rule is defined in Executive Order No. 12291 as a regulation likely to result in:

- An annual effect on the economy of $100 million or more; or
- A major increase in costs or prices for consumers, individuals, industries, Federal, State, and local government agencies, or geographic regions; or
- 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.

EPA estimated the effects of this rule to determine if it is a major regulation as defined by Executive Order. The Agency's results indicate that the rule has an annual cost below $100 million. Furthermore, the Agency does not believe the rule will significantly increase costs for consumers, individuals, industries, Federal, State and local government agencies, or geographic regions, or have significant adverse effects on competition employment, investment, innovation, or international trade. Therefore, the Agency determines that the rule is not a major rule.

Because the rule is not a major rule, EPA has performed an Economic Impact Analysis (EIA), focusing its analyses on the costs and economic impacts of the rule only. The Agency's cost analysis indicates the annual incremental costs of the rule will be approximately $23 million per year (all costs are in 1990 dollars).

1. Estimated Cost of the Rule

a. *General approach.* EPA estimated incremental costs for provisions of the final rule which require new compliance activities. The incremental cost of each provision was estimated by computing the difference between the cost of complying with the provision and the cost of complying with current regulations (the baseline for measurement). The baseline created by current regulations includes requirements imposed on hazardous waste landfills, surface impoundments, and waste piles by the July 26, 1982 permitting requirements for land disposal facilities (47 FR 32274) and the July 15, 1985 Hazardous Waste Management System Final Codification Rule (50 FR 28702). These rules, taken together, create baseline landfills having synthetic membrane top liners over a clay bottom liner with leachate collection systems between the liners and on top of the membrane liner. Baseline surface impoundments are constructed similarly, but lack the leachate collection system over the top liner. Baseline waste piles are assumed to be built with a single clay liner beneath a leachate collection system.

In projecting the costs of today's provisions EPA developed estimates of affected populations, unit costs of compliance, and aggregate costs of compliance. Estimates of affected populations were based on the permitted land disposal universe as reported in the EPA Hazardous Waste Data Management System (HWDMS) and RCRIS National Oversight Data Base (October, 1991). Use of the permitted universe was based on the fact that by November 8, 1988, the Agency was required to permit all land disposal facilities that had submitted permit applications by November 8, 1984 (HSWA section 3005(c)(2)). This mandate has resulted in the permitting of nearly all of the land disposal universe. The data base does not, however, identify a very small future population that may be affected by the regulations being promulgated today (i.e., newly-regulated interim status facilities brought into the land disposal universe via new rulemakings). These new interim status facilities, however, are expected to be offset by facilities dropping out of the RCRA Subtitle C land disposal universe as a result of regulatory programs.

Unit costs of compliance, based on capital costs and operating and maintenance costs were developed using EPA's Liner Location and Cost Analysis Model. Both direct and indirect costs were included. Aggregate costs were then obtained by multiplying unit costs by the number of units in the affected population.

In the final rule, costs from the 1987 proposal have been adjusted for inflation and are expressed in terms of 1990 dollars. Also, cost estimates from the 1987 proposal have been adjusted to account for differences between the proposal and the final rule. Therefore, all costs related to permitted land treatment units have been removed. Costs associated with the implementation of response action plans have been incorporated in the final rule, although EPA expects that few facilities will exceed the action leakage rate which triggers response action. In addition, leak detection system unit costs for surface impoundments have been adjusted upward to account for the higher costs of higher-permeability (1×10^{-1} cm/sec) drainage material (this cost was not included in the cost analysis for the May 29, 1987 proposed rule). The CQA costs developed for the 1987 proposal have been incorporated in this final rule analysis with a few

modifications. First, costs used to calculate certain CQA activities for test fills were adjusted upward to reflect new cost information (See Section c. below). Second, an incremental cost of $400 per unit has been added to cover the cost of a professional engineer certifying that each unit was constructed according to the CQA plan. Finally, CQA costs related to closure have been deleted from the analysis. EPA believes owners and operators are routinely performing closure activities when complying with existing rules, which require certification of closure by a registered, professional engineer. Consequently, we do not believe these CQA requirements represent incremental costs attributable to this rulemaking.

EPA used discounted cash flow analysis to convert streams of costs over time to equivalent annual costs over the life of the facility. First, EPA converted cost streams to present values as follows:

$$PV = \sum_{i=0}^{n} \frac{(costs)}{(1+r)^n} \quad n$$

where the real rate of return (r) equals 3 percent and n is the number of periods in which costs are incurred. The cash flows do not include inflation, taxes, or depreciation. As such, the present value costs report the full pre-tax compliance costs in real terms assuming that an owner or operator can access capital at a real interest rate of 3 percent.

Second, in order to spread the costs evenly over the life of the facility, EPA annualized the present value costs by multiplying them by a capital recovery factor (CRF):

$$CRF = \frac{r(r+1)^{OL}}{(r+1)^{OL-1}}$$

where OL is the operating life of the facility. EPA assumed a 20-year operating life and a 3 percent real rate of return, which leads to a CRF of 0.0672. The annualized value represents the annual revenue required to cover the costs imposed by the provision. This value provides a consistent basis for presenting and comparing costs of different provisions. However, it implicitly assumes that facilities can predict future costs and access capital at a steady rate over the life of the facility.

b. *Double liner and leak detection system.* The final rule extends the requirements for double liners to waste piles. The rule also requires the bottom liners of landfills, surface impoundments, and waste piles to be a composite liner and a leak detection system to be installed above the bottom composite liner. The owner or operator is also required to propose an action leakage rate to serve as a trigger for response action and prepare a response action plan that would describe responses to be initiated by the owner or operator when leakage through the top liner exceeded the action leakage rate.

(1) Landfill cost analysis. In estimating the cost of complying with the composite bottom-liner and leak detection system provisions, EPA assumed that the number of landfills would remain equal to the current number in the affected population and that each unit would have a 20-year operating life and a 30-year post-closure care period. This simplifying assumption was necessary due to lack of data on the current and future number of new landfill units, replacement units, and lateral expansions. EPA also assumed that one cell would be opened and closed each year during the 20-year operating life of a unit. EPA also assumed that landfill owners or operators currently use double liners (but only a clay bottom liner) with leachate collection systems above and between the liners as required by the interim statutory design requirements, codified in §§ 264.301 and 265.301.

Based on facilities listed in the HWDMS and RCRIS National Oversight Data Base, the affected population was found to include 74 landfill facilities each with at least one unit, ranging in size from 500 MT/year to 150,000 MT/year. The affected population and the total incremental costs (above current statutory requirements) of the leak detection system provisions are shown in Table 1. This figure includes an annual allowance for repair costs similar to an insurance premium based on an assumption that 5 percent of units of all types and sizes will experience a leak at some time during their 20-year life large enough to require implementation of the response action plan. We believe the 5 percent rate is a reasonable upper limit for properly constructed units, based on an analysis of flow rates in leak detection systems at 82 landfill and surface impoundment units. Unit repair costs range from $28,000 for a 500 MT/year landfill to $6,100,000 for a 150,000 MT/year landfill (1990 dollars). EPA estimates that the incremental annualized costs for landfills required to comply with the liner and leak detection system provisions would be approximately $4,850,000.

TABLE 1.—COST OF COMPLIANCE WITH DOUBLE LINER AND LEAK DETECTIONS SYSTEM PROVISIONS FOR LANDFILL UNITS

[1990 Dollars]

Size	Number of active units	Incremental annualized present value unit cost ($1,000)	Incremental annualized present value total cost [1] ($1,000)	Allowance for repairs—Annualized present value total costs for all units [1] ($1,000)	Total costs per metric ton per year ($1,000)
500 mt/yr	28	11.1	310.5	39.2	25
1,000 mt/yr	8	14.6	116.5	22.4	17
2,000 mt/yr	5	19.9	99.7	28.0	13
6,000 mt/yr	12	37.2	446.2	168.0	9
15,000 mt/yr	13	55.4	720.8	436.7	5
35,000 mt/yr	4	98.0	392.0	302.4	5
60,000 mt/yr	1	134.7	134.7	126.0	4
100,000 mt/yr	1	194.3	194.3	207.2	4
150,000 mt/yr	2	247.7	495.3	610.3	4
Subtotal	74		2910.1	1940.1	
Total				4850.2	

[1] Totals may not compute exactly due to roundoff.

(2) Surface Impoundment Cost Analysis. To estimate the cost of the complete bottom-liner and leak detection system provisions, EPA assumed that the number of surface impoundment units would remain equal to the current number in the affected population (except that no new impoundments larger than 15 acres would be constructed) and that each unit would have a 20-year operating life. EPA also assumed that double liners (but only clay bottom liners) with a leachate collection system in between as required by the interim statutory design requirements, codified in §§ 264.221 and 265.221 are currently being used. We assumed that leachate collection drainage media having a permeability of 10^{-2} cm/sec are currently being used. Based on facilities identified in the data base, we estimated the affected population to include 329 surface impoundment units at 143 facilities. The units range in size from 0.25 acres to 15 acres. The affected population and the total incremental annualized costs (above current statutory requirements) of compliance with the leak detection system provisions are shown in Table 2. As with landfills, these costs include an allowance for repair costs based on an assumption that 5 percent will require repair during their 20-year life. Unit repair costs range from $28,000 for a 0.25-acre surface impoundment to $1,680,000 for a 15-acre unit (1990 dollars). EPA estimates that the incremental annualized costs of complying with the composite bottom-liner and leak detection system provisions would be approximately $2,650,000.

TABLE 2.—COST OF COMPLIANCE WITH DOUBLE LINER AND LEAK DETECTION SYSTEM PROVISIONS FOR SURFACE IMPOUNDMENT UNITS

[1990 Dollars]

Size	Number of active units [1]	Incremental annualized present value unit cost ($1,000)	Incremental annualized present value total cost [2] ($1,000)	Allowance for repairs—annualized present value total costs for all units ($1,000)[2]
0.25 AC	133	4.4	582.8	9.3
0.50 AC	81	5.2	422.7	11.3
1.00 AC	44	7.2	314.8	12.3
2.00 AC	46	10.8	494.8	25.8
5.00 AC	18	22.0	395.3	25.2
15.00 AC	7	47.0	329.1	29.4
Subtotal	329		2539.5	113.3
Total				2652.8

[1] Based on 2.3 impoundments per active facility.
[2] Totals may not compute exactly due to roundoff.

(3) Waste Pile Cost Analysis. EPA assumed that new, replacement, or expanded waste piles would have to add two geomembrane liners with a leak detection system in between. Current waste pile regulations require only a clay liner with a leachate collection system above. In estimating the cost of compliance with the double liner and leak detection system provisions, EPA assumed that the number of waste pile units would remain the same as the current number and that each unit would have an operating life of 20 years. Based on facilities identified in the data base, the affected population was found to include 35 waste pile facilities ranging in size from 250 cubic feet to 1,000,000 cubic feet.

The affected population and the total incremental costs (above current statutory requirements) of compliance with the double liner and leak detection system provisions are shown in Table 3. As with landfills and surface impoundments, this figure includes an allowance for repair costs based on an assumption that a maximum of 5 percent will require repair during their life. Unit repair costs range from $5,600 for a 250-cubic-foot waste pile to $450,000 for a 1 million-cubic-foot waste pile (1990 dollars). EPA estimates that the incremental annualized costs of compliance with the double liner and leak detection system requirements would be approximately $428,000.

TABLE 3.—COST OF COMPLIANCE WITH DOUBLE LINER AND LEAK DETECTION SYSTEM PROVISIONS FOR SURFACE WASTE PILE UNITS

[1990 Dollars]

Size	Number of active units [1]	Incremental annualized present value unit cost ($1,000)	Incremental annualized present value total cost [2] ($1,000)	Allowance for repairs—annualized present value total costs for all units ($1,000)[2]
250 cu. ft	3	5.2	15.5	<0.1
1,000 cu. ft	7	5.5	38.4	0.2
5,000 cu. ft	7	6.5	45.5	0.3
25,000 cu. ft	6	8.6	51.7	0.5
100,000 cu. ft	5	12.9	64.4	1.0
500,000 cu. ft	3	24.4	73.3	2.1
1,000,000 cu. ft	3	43.8	131.4	3.4
Subtotal	74		420.1	7.5
Total				427.6

[1] Outdoor (uncovered) waste piles.
[2] Total may not compute exactly due to roundoff error.

c. CQA. The final rule would require the owner/operator to complete a CQA plan, implement the plan during construction, and have a professional engineer certify that construction was completed in accordance with the CQA plan. As noted above, costs estimated for the 1987 proposal were used in this analysis except additional costs were added for test fills and certification of a professional engineer, and specific costs associated with closure were not included.

The proposed rule estimated that test fill costs would add about $10,000 (in 1987 dollars) to the cost of each facility. EPA has since determined that this figure is low and we have adjusted test fill costs upward to $50,000 (in 1990 dollars) for all types of units. Tables 4, 5, and 6 depict costs for implementing CQA (including test fills and construction certification) for landfills, surface impoundments, and waste piles, respectively.

d. Total Incremental Costs of the Leak Detection System, CQA, and Double-Liner Requirements. The total costs of the leak detection system, CQA, and double liner provisions are shown in Table 7 for landfills, surface impoundments, and waste piles. The total incremental annualized cost of the provisions would be approximately $7,930,000 for the leak detection system and double liner requirements and $13,400,000 for CQA, for a total of approximately $21,300,000. Table 8 compares the incremental costs from this rulemaking with costs from the July 15, 1985 codification rule and the July 26, 1982 permitting rule.

TABLE 4.—COST OF COMPLIANCE WITH CONSTRUCTION QUALITY ASSURANCE PROVISIONS FOR LANDFILL UNITS

[1990 Dollars]

Size	Number of active units	Incremental annualized present value unit cost ($1,000)	Incremental annualized present value total cost [1] ($1,000)	Total costs per metric ton per year ($1,000)
500 mt/yr	28	114.1	3195.7	230
1,000 mt/yr	8	114.1	913.1	114
2,000 mt/yr	5	114.1	570.7	57
6,000 mt/yr	12	114.1	1369.6	19
15,000 mt/yr	13	152.2	1979.2	8
35,000 mt/yr	4	154.7	618.9	4
60,000 mt/yr	1	209.9	209.9	3
100,000 mt/yr	1	209.9	209.9	2
150,000 mt/yr	2	209.9	419.8	1
Total	74		9486.6	

[1] Totals may not compute exactly due to roundoff.

TABLE 5.—COST OF COMPLIANCE WITH CONSTRUCTION QUALITY ASSURANCE PROVISIONS FOR SURFACE IMPOUNDMENT UNITS

[1990 Dollars]

Size	Number of active units [1]	Incremental annualized present value unit cost ($1,000)	Incremental annualized present value total cost [2] ($1,000)
0.25 AC	58	23.8	1377.7
0.50 AC	35	23.8	831.4
1.00 AC	19	23.8	451.3
2.00 AC	20	23.8	475.1
5.00 AC	8	29.4	235.6
15.00 AC	3	43.5	130.6
Total	143		3501.6

[1] Based on 2.3 impoundments per active facility.
[2] Totals may not compute exactly due to roundoff.

TABLE 6.—COST OF COMPLIANCE WITH CONSTRUCTION QUALITY ASSURANCE PROVISIONS FOR WASTE PILE UNITS

[1990 Dollars]

Size	Number of active units [1]	Incremental annualized present value unit cost ($1,000)	Incremental annualized present value total cost [2] ($1,000)
250 cu. ft	3	11.9	35.8
1,000 cu. ft	7	11.9	83.5
5,000 cu. ft	7	11.9	83.5
25,000 cu. ft	6	11.9	71.6
100,000 cu. ft	5	11.9	59.6
500,000 cu. ft	3	11.9	35.8
1,000,000 cu. ft	3	11.9	35.8
Total	35		405.5

[1] Outdoor (uncovered) waste piles.
[2] Totals may not compute exactly due to roundoff.

TABLE 7.—TOTAL COST OF COMPLIANCE WITH DOUBLE LINER, LEAK DETECTION SYSTEM, AND CQA PROVISIONS

[Incremental Annualized Present Value Cost in 1990 Dollars]

Facility type	Liner/leak detection system ($1,000)	Construction quality assurance ($1,000)	Total ($1,000)
Landfill	4850.2	9486.6	14336.8
Surface Impoundment	2652.8	3501.6	6154.5
Waste Pile	427.6	405.5	833.1
Total	7930.6	13393.7	21324.3

[1] Totals may not compute exactly due to roundoff.

TABLE 8.—INCREMENTAL COSTS OF DESIGN REQUIREMENTS

[In Millions of 1990 Dollars]

Facility type	1982 liner/ LCS require-ments [1,3]	1985 Double-liner require-ments [2,3]	Today's rule [4]
Landfill	13.8–27.0	4.5	14.3
Surface Impoundment	10.4–40.9	11.9	6.2
Waste Pile	0.5–0.9	.....	0.8
Total	24.7–68.8	16.4	21.3

[1] 47 FR 32274.
[2] 50 FR 28702.
[3] Incremental costs above previous Agency rules; costs adjusted to account for current number of units and 1990 dollars.
[4] Incremental costs above previous Agency rules. Costs do not consider potential savings due to use of 1% versus 2% minimum slope.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (Pub. L. 96–354) 5 U.S.C. 601 *et seq.*, which amends the Administrative Procedure Act, requires Federal regulatory agencies to consider small entities throughout the regulatory process. The purposes of the RFA are to describe the effects the regulations will have on small entities and to examine alternatives that may reduce these effects. As indicated at proposal, EPA has determined that today's rule will not have a significant impact on a substantial number of small entities. EPA conducted an evaluation of the impacts of this rule on small businesses. For purposes of this analysis, EPA used Small Business Administration criteria for identifying small businesses and evaluated the impact of today's rule using regulation-induced business closures as the key indicator of regulatory impact. The test assumed that any cost greater than 3 percent of total assets per year will result in forced closures. EPA also considered a second impact measure that compares increased annual compliance costs to total production costs with 5 percent of the threshold for significance. Using these tests, EPA has determined that the regulatory costs of today's rule will not have a significant impact on a substantial number of small entities.

C. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and assigned OMB control number ICR No. 995.06 as amended. These requirements are not effective until OMB approves them and a technical amendment to that effect is published in the **Federal Register.** An Information Collection Request document has been prepared by EPA (ICR No. 995.06) and a copy may be obtained from Sandy Farmer, Information Policy Branch, EPA, 401 M Street, SW. (PM–223Y), Washington, DC 20460 or by calling (202) 260–2740.

The public reporting burden for this collection of information is estimated to average 248 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the required data, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM–223Y, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Jonathan Gledhill."

VII. Supporting Documents

The following documents have been prepared in support of this rulemaking and placed in docket number F–92 LLDF–FFFFF.

1. U.S. EPA, "Liner and Leak Detection Rule Background Document", EPA/530–SW–87–015, May, 1987.
2. U.S. EPA, "Bottom Liner Performance in Double-Lined Landfills and Surface Impoundments Background Document", EPA/530–SW–87–013, April, 1987.
3. U.S. EPA, "Compilation of Current Practices at Land Disposal Facilities", January, 1992.
4. U.S. EPA, "Action Leakage Rate for Leak Detection Systems", January, 1992.
5. U.S. EPA, "Response to Public Comments on Final Double-Liner and Leak Detection Rule", January, 1992.
6. U.S. EPA Memorandum, "Revisions to Cost Analysis for the Final Rulemaking Entitled *Liners and Leak Detection Systems for Hazardous Waste Land Disposal Units,*" January, 1992.

List of Subjects in 40 CFR Parts 260, 264, 265, 270, and 271

Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indian lands, Intergovernmental relations, Penalties, Insurance, Packaging and containers, Reporting and recordkeeping requirements, Security measures, Surety

bonds, Water pollution control, Water supply.

Dated: January 15, 1992.

William K. Reilly,

Administrator.

For the reasons set out in the preamble, chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

1. The authority citation for part 260 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921–6927, 6930, 6934, 6935, 6937, 6938, 6939, and 6974.

2. Section 260.10 is amended by adding the definition of "replacement unit" in alphabetical order, and revising the definition of "sump" to read as follows:

§ 260.10 Definitions.

* * * * *

Replacement unit means a landfill, surface impoundment, or waste pile unit (1) from which all or substantially all of the waste is removed, and (2) that is subsequently reused to treat, store, or dispose of hazardous waste. "Replacement unit" does not apply to a unit from which waste is removed during closure, if the subsequent reuse solely involves the disposal of waste from that unit and other closing units or corrective action areas at the facility, in accordance with an approved closure plan or EPA or State approved corrective action.

* * * * *

Sump means any pit or reservoir that meets the definition of tank and those troughs/trenches connected to it that serve to collect hazardous waste for transport to hazardous waste storage, treatment, or disposal facilities; except that as used in the landfill, surface impoundment, and waste pile rules, "sump" means any lined pit or reservoir that serves to collect liquids drained from a leachate collection and removal system or leak detection system for subsequent removal from the system.

* * * * *

PART 264—STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

1. The authority citation for part 264 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6924, and 6925.

2. Section 264.15 is amended by revising paragraph (b)(4) to read as follows:

§ 264.15 General inspection requirements.

* * * * *

(b) * * *

(4) The frequency of inspection may vary for the items on the schedule. However, it should be based on the rate of deterioration of the equipment and the probability of an environmental or human health incident if the deterioration, malfunction, or any operator error goes undetected between inspections. Areas subject to spills, such as loading and unloading areas, must be inspected daily when in use. At a minimum, the inspection schedule must include the items and frequencies called for in §§ 264.174, 264.193, 264.195, 264.226, 264.254, 264.278, 264.303, 264.347, 264.602, 264.1033, 264.1052, 264.1053, and 264.1058, where applicable.

* * * * *

3. Subpart B is amended by adding § 264.19 as follows:

§ 264.19 Construction quality assurance program.

(a) *COA program.* (1) A construction quality assurance (CQA) program is required for all surface impoundment, waste pile, and landfill units that are required to comply with §§ 264.221 (c) and (d), 264.251 (c) and (d), and 264.301 (c) and (d). The program must ensure that the constructed unit meets or exceeds all design criteria and specifications in the permit. The program must be developed and implemented under the direction of a CQA officer who is a registered professional engineer.

(2) The CQA program must address the following physical components, where applicable:

(i) Foundations;

(ii) Dikes;

(iii) Low-permeability soil liners;

(iv) Geomembranes (flexible membrane liners);

(v) Leachate collection and removal systems and leak detection systems; and

(vi) Final cover systems.

(b) *Written CQA plan.* The owner or operator of units subject to the CQA program under paragraph (a) of this section must develop and implement a written CQA plan. The plan must identify steps that will be used to monitor and document the quality of materials and the condition and manner of their installation. The CQA plan must include:

(1) Identification of applicable units, and a description of how they will be constructed.

(2) Identification of key personnel in the development and implementation of the CQA plan, and CQA officer qualifications.

(3) A description of inspection and sampling activities for all unit components identified in paragraph (a)(2) of this section, including observations and tests that will be used before, during, and after construction to ensure that the construction materials and the installed unit components meet the design specifications. The description must cover: Sampling size and locations; frequency of testing; data evaluation procedures; acceptance and rejection criteria for construction materials; plans for implementing corrective measures; and data or other information to be recorded and retained in the operating record under § 264.73.

(c) *Contents of program.* (1) The CQA program must include observations, inspections, tests, and measurements sufficient to ensure:

(i) Structural stability and integrity of all components of the unit identified in paragraph (a)(2) of this section;

(ii) Proper construction of all components of the liners, leachate collection and removal system, leak detection system, and final cover system, according to permit specifications and good engineering practices, and proper installation of all components (e.g., pipes) according to design specifications;

(iii) Conformity of all materials used with design and other material specifications under §§ 264.221, 264.251, and 264.301.

(2) The CQA program shall include test fills for compacted soil liners, using the same compaction methods as in the full scale unit, to ensure that the liners are constructed to meet the hydraulic conductivity requirements of §§ 264.221(c)(1)(i)(B), 264.251(c)(1)(i)(B), and 264.301(c)(1)(i)(B) in the field. Compliance with the hydraulic conductivity requirements must be verified by using in-situ testing on the constructed test fill. The Regional Administrator may accept an alternative demonstration, in lieu of a test fill, where data are sufficient to show that a constructed soil liner will meet the hydraulic conductivity requirements of §§ 264.221(c)(1)(i)(B), 264.251(c)(1)(i)(B), and 264.301(c)(1)(i)(B) in the field.

(d) *Certification.* Waste shall not be received in a unit subject to § 264.19 until the owner or operator has submitted to the Regional Administrator by certified mail or hand delivery a certification signed by the CQA officer that the approved CQA plan has been successfully carried out and that the unit

meets the requirements of §§ 264.221 (c) or (d), 264.251 (c) or (d), or 264.301 (c) or (d); and the procedure in § 270.30(l)(2)(ii) of this chapter has been completed. Documentation supporting the CQA officer's certification must be furnished to the Regional Administrator upon request.

4. Section 264.73 is amended by revising paragraph (b)(6) to read as follows:

§ 264.73 Operating record.

* * * * *

(b) * * *

(6) Monitoring, testing or analytical data, and corrective action where required by subpart F and §§ 264.19, 264.191, 264.193, 264.195, 264.222, 264.223, 264.226, 264.252–264.254, 264.276, 264.278, 264.280, 264.302–264.304, 264.309, 264.347, 264.602, 264.1034(c)–264.1034(f), 264.1035, 264.1063(d)–264.1063(i), and 264.1064.

* * * * *

5. Section 264.221 is amended by redesignating paragraphs (f), (g), and (h) as paragraphs (g), (h), and (i), respectively; by revising paragraphs (c) and (d); and by adding new paragraph (f) to read as follows:

§ 264.221 Design and operating requirements.

* * * * *

(c) The owner or operator of each new surface impoundment unit on which construction commences after January 29, 1992, each lateral expansion of a surface impoundment unit on which construction commences after July 29, 1992 and each replacement of an existing surface impoundment unit that is to commence reuse after July 29, 1992 must install two or more liners and a leachate collection and removal system between such liners. "Construction commences" is as defined in § 260.10 of this chapter under "existing facility".

(1)(i) The *liner system* must include:

(A) A top liner designed and constructed of materials (e.g., a geomembrane) to prevent the migration of hazardous constituents into such liner during the active life and post-closure care period; and

(B) A composite bottom liner, consisting of at least two components. The upper component must be designed and constructed of materials (e.g., a geomembrane) to prevent the migration of hazardous constituents into this component during the active life and post-closure care period. The lower component must be designed and constructed of materials to minimize the migration of hazardous constituents if a breach in the upper component were to occur. The lower component must be constructed of at least 3 feet (91 cm) of compacted soil material with a hydraulic conductivity of no more than 1×10^{-7} cm/sec.

(ii) The liners must comply with paragraphs (a) (1), (2), and (3) of this section.

(2) The *leachate collection and removal system* between the liners, and immediately above the bottom composite liner in the case of multiple leachate collection and removal systems, is also a *leak detection system*. This leak detection system must be capable of detecting, collecting, and removing leaks of hazardous constituents at the earliest practicable time through all areas of the top liner likely to be exposed to waste or leachate during the active life and post-closure care period. The requirements for a leak detection system in this paragraph are satisfied by installation of a system that is, at a minimum:

(i) Constructed with a bottom slope of one percent or more;

(ii) Constructed of granular drainage materials with a hydraulic conductivity of 1×10^{-1} cm/sec or more and a thickness of 12 inches (30.5 cm) or more; or constructed of synthetic or geonet drainage materials with a transmissivity of 3×10^{-4} m^2sec or more;

(iii) Constructed of materials that are chemically resistant to the waste managed in the surface impoundment and the leachate expected to be generated, and of sufficient strength and thickness to prevent collapse under the pressures exerted by overlying wastes and any waste cover materials or equipment used at the surface impoundment;

(iv) Designed and operated to minimize clogging during the active life and post-closure care period; and

(v) Constructed with sumps and liquid removal methods (e.g., pumps) of sufficient size to collect and remove liquids from the sump and prevent liquids from backing up into the drainage layer. Each unit must have its own sump(s). The design of each sump and removal system must provide a method for measuring and recording the volume of liquids present in the sump and of liquids removed.

(3) The owner or operator shall collect and remove pumpable liquids in the sumps to minimize the head on the bottom liner.

(4) The owner or operator of a leak detection system that is not located completely above the seasonal high water table must demonstrate that the operation of the leak detection system will not be adversely affected by the presence of ground water.

(d) The Regional Administrator may approve alternative design or operating practices to those specified in paragraph (c) of this section if the owner or operator demonstrates to the Regional Administrator that such design and operating practices, together with location characteristics:

(1) Will prevent the migration of any hazardous constituent into the ground water or surface water at least as effectively as the liners and leachate collection and removal system specified in paragraph (c) of this section; and

(2) Will allow detection of leaks of hazardous constituents through the top liner at least as effectively.

* * * * *

(f) The owner or operator of any replacement surface impoundment unit is exempt from paragraph (c) of this section if:

(1) The existing unit was constructed in compliance with the design standards of sections 3004 (o)(1)(A)(i) and (o)(5) of the Resource Conservation and Recovery Act; and

(2) There is no reason to believe that the liner is not functioning as designed.

* * * * *

6. New §§ 264.222 and 264.223 are added to read as follows:

§ 264.222 Action leakage rate.

(a) The Regional Administrator shall approve an action leakage rate for surface impoundment units subject to § 264.221 (c) or (d). The action leakage rate is the maximum design flow rate that the leak detection system (LDS) can remove without the fluid head on the bottom liner exceeding 1 foot. The action leakage rate must include an adequate safety margin to allow for uncertainties in the design (e.g., slope, hydraulic conductivity, thickness of drainage material), construction, operation, and location of the LDS, waste and leachate characteristics, likelihood and amounts of other sources of liquids in the LDS, and proposed response actions (e.g., the action leakage rate must consider decreases in the flow capacity of the system over time resulting from siltation and clogging, rib layover and creep of synthetic components of the system, overburden pressures, etc.).

(b) To determine if the action leakage rate has been exceeded, the owner or operator must convert the weekly or monthly flow rate from the monitoring data obtained under § 264.226(d) to an average daily flow rate (gallons per acre per day) for each sump. Unless the Regional Administrator approves a different calculation, the average daily flow rate for each sump must be calculated weekly during the active life and closure period, and if the unit is

closed in accordance with § 264.228(b), monthly during the post-closure care period when monthly monitoring is required under § 264.226(d).

§ 264.223 Response actions.

(a) The owner or operator of surface impoundment units subject to § 264.221 (c) or (d) must have an approved response action plan before receipt of waste. The response action plan must set forth the actions to be taken if the action leakage rate has been exceeded. At a minimum, the response action plan must describe the actions specified in paragraph (b) of this section.

(b) If the flow rate into the leak detection system exceeds the action leakage rate for any sump, the owner or operator must:

(1) Notify the Regional Administrator in writing of the exceedence within 7 days of the determination;

(2) Submit a preliminary written assessment to the Regional Administrator within 14 days of the determination, as to the amount of liquids, likely sources of liquids, possible location, size, and cause of any leaks, and short-term actions taken and planned;

(3) Determine to the extent practicable the location, size, and cause of any leak;

(4) Determine whether waste receipt should cease or be curtailed, whether any waste should be removed from the unit for inspection, repairs, or controls, and whether or not the unit should be closed;

(5) Determine any other short-term and longer-term actions to be taken to mitigate or stop any leaks; and

(6) Within 30 days after the notification that the action leakage rate has been exceeded, submit to the Regional Administrator the results of the analyses specified in paragraphs (b) (3), (4), and (5) of this section, the results of actions taken, and actions planned. Monthly thereafter, as long as the flow rate in the leak detection system exceeds the action leakage rate, the owner or operator must submit to the Regional Administrator a report summarizing the results of any remedial actions taken and actions planned.

(c) To make the leak and/or remediation determinations in paragraphs (b) (3), (4), and (5) of this section, the owner or operator must:

(1)(i) Assess the source of liquids and amounts of liquids by source,

(ii) Conduct a fingerprint, hazardous constituent, or other analyses of the liquids in the leak detection system to identify the source of liquids and possible location of any leaks, and the hazard and mobility of the liquid; and

(iii) Assess the seriousness of any leaks in terms of potential for escaping into the environment; or

(2) Document why such assessments are not needed.

7. Section 264.226 is amended by adding new paragraph (d) to read as follows:

§ 264.226 Monitoring and inspection.

* * * * *

(d)(1) An owner or operator required to have a leak detection system under § 264.221 (c) or (d) must record the amount of liquids removed from each leak detection system sump at least once each week during the active life and closure period.

(2) After the final cover is installed, the amount of liquids removed from each leak detection system sump must be recorded at least monthly. If the liquid level in the sump stays below the pump operating level for two consecutive months, the amount of liquids in the sumps must be recorded at least quarterly. If the liquid level in the sump stays below the pump operating level for two consecutive quarters, the amount of liquids in the sumps must be recorded at least semi-annually. If at any time during the post-closure care period the pump operating level is exceeded at units on quarterly or semi-annual recording schedules, the owner or operator must return to monthly recording of amounts of liquids removed from each sump until the liquid level again stays below the pump operating level for two consecutive months.

(3) "Pump operating level" is a liquid level proposed by the owner or operator and approved by the Regional Administrator based on pump activation level, sump dimensions, and level that avoids backup into the drainage layer and minimizes head in the sump.

8. Section 264.228 is amended by redesignating paragraphs (b)(2) and (b)(3) as paragraphs (b)(3) and (b)(4) respectively, and by adding a new paragraph (b)(2) to read as follows:

§ 264.228 Closure and post-closure care.

* * * * *

(b) * * *

(2) Maintain and monitor the leak detection system in accordance with §§ 264.221(c)(2)(iv) and (3) and 264.226(d), and comply with all other applicable leak detection system requirements of this part;

* * * * *

9. Section 264.251 is amended by redesignating paragraphs (c), (d), (e), (f), and (g) as paragraphs (g), (h), (i), (j) and (k), respectively, and by adding new paragraphs (c), (d), (e), and (f) to read as follows:

§ 264.251 Design and operating requirements.

* * * * *

(c) The owner or operator of each new waste pile unit on which construction commences after January 29, 1992, each lateral expansion of a waste pile unit on which construction commences after July 29, 1992, and each replacement of an existing waste pile unit that is to commence reuse after July 29, 1992 must install two or more liners and a leachate collection and removal system above and between such liners. "Construction commences" is as defined in § 260.10 under "existing facility".

(1)(i) The liner system must include:

(A) A top liner designed and constructed of materials (e.g., a geomembrane) to prevent the migration of hazardous constituents into such liner during the active life and post-closure care period; and

(B) A composite bottom liner, consisting of at least two components. The upper component must be designed and constructed of materials (e.g., a geomembrane) to prevent the migration of hazardous constituents into this component during the active life and post-closure care period. The lower component must be designed and constructed of materials to minimize the migration of hazardous constituents if a breach in the upper component were to occur. The lower component must be constructed of at least 3 feet (91 cm) of compacted soil material with a hydraulic conductivity of no more than 1×10^{-7} cm/sec.

(ii) The liners must comply with paragraphs (a)(1)(i), (ii), and (iii) of this section.

(2) The *leachate collection and removal system* immediately above the top liner must be designed, constructed, operated, and maintained to collect and remove leachate from the waste pile during the active life and post-closure care period. The Regional Administrator will specify design and operating conditions in the permit to ensure that the leachate depth over the liner does not exceed 30 cm (one foot). The leachate collection and removal system must comply with paragraphs (c)(3)(iii) and (iv) of this section.

(3) The *leachate collection and removal system* between the liners, and immediately above the bottom composite liner in the case of multiple leachate collection and removal systems, is also a *leak detection system*. This leak detection system must be capable of detecting, collecting, and removing leaks of hazardous constituents at the earliest practicable time through all areas of the top liner

likely to be exposed to waste or leachate during the active life and post-closure care period. The requirements for a leak detection system in this paragraph are satisfied by installation of a system that is, at a minimum:

(i) Constructed with a bottom slope of one percent or more;

(ii) Constructed of granular drainage materials with a hydraulic conductivity of 1×10^{-2} cm/sec or more and a thickness of 12 inches (30.5 cm) or more; or constructed of synthetic or geonet drainage materials with a transmissivity of 3×10^{-5} m^2/sec or more;

(iii) Constructed of materials that are chemically resistant to the waste managed in the waste pile and the leachate expected to be generated, and of sufficient strength and thickness to prevent collapse under the pressures exerted by overlying wastes, waste cover materials, and equipment used at the waste pile;

(iv) Designed and operated to minimize clogging during the active life and post-closure care period; and

(v) Constructed with sumps and liquid removal methods (e.g., pumps) of sufficient size to collect and remove liquids from the sump and prevent liquids from backing up into the drainage layer. Each unit must have its own sump(s). The design of each sump and removal system must provide a method for measuring and recording the volume of liquids present in the sump and of liquids removed.

(4) The owner or operator shall collect and remove pumpable liquids in the leak detection system sumps to minimize the head on the bottom liner.

(5) The owner or operator of a leak detection system that is not located completely above the seasonal high water table must demonstrate that the operation of the leak detection system will not be adversely affected by the presence of ground water.

(d) The Regional Administrator may approve alternative design or operating practices to those specified in paragraph (c) of this section if the owner or operator demonstrates to the Regional Administrator that such design and operating practices, together with location characteristics:

(1) Will prevent the migration of any hazardous constituent into the ground water or surface water at least as effectively as the liners and leachate collection and removal systems specified in paragraph (c) of this section; and

(2) Will allow detection of leaks of hazardous constituents through the top liner at least as effectively.

(e) Paragraph (c) of this section does not apply to monofills that are granted a waiver by the Regional Administrator in accordance with § 264.221(e).

(f) The owner or operator of any replacement waste pile unit is exempt from paragraph (c) of this section if:

(1) The existing unit was constructed in compliance with the design standards of section 3004(o)(1)(A)(i) and (o)(5) of the Resource Conservation and Recovery Act; and

(2) There is no reason to believe that the liner is not functioning as designed.

* * * * *

10. New §§ 264.252 and 264.253 are added to read as follows:

§ 264.252 Action leakage rate.

(a) The Regional Administrator shall approve an action leakage rate for surface impoundment units subject to § 264.251(c) or (d). The action leakage rate is the maximum design flow rate that the leak detection system (LDS) can remove without the fluid head on the bottom liner exceeding 1 foot. The action leakage rate must include an adequate safety margin to allow for uncertainties in the design (e.g., slope, hydraulic conductivity, thickness of drainage material), construction, operation, and location of the LDS, waste and leachate characteristics, likelihood and amounts of other sources of liquids in the LDS, and proposed response actions (e.g., the action leakage rate must consider decreases in the flow capacity of the system over time resulting from siltation and clogging, rib layover and creep of synthetic components of the system, overburden pressures, etc.).

(b) To determine if the action leakage rate has been exceeded, the owner or operator must convert the weekly flow rate from the monitoring data obtained under § 264.254(c) to an average daily flow rate (gallons per acre per day) for each sump. Unless the Regional Administrator approves a different calculation, the average daily flow rate for each sump must be calculated weekly during the active life and closure period.

§ 264.253 Response actions.

(a) The owner or operator of waste pile units subject to § 264.251 (c) or (d) must have an approved response action plan before receipt of waste. The response action plan must set forth the actions to be taken if the action leakage rate has been exceeded. At a minimum, the response action plan must describe the actions specified in paragraph (b) of this section.

(b) If the flow rate into the leak detection system exceeds the action leakage rate for any sump, the owner or operator must:

(1) Notify the Regional Administrator in writing of the exceedance within 7 days of the determination;

(2) Submit a preliminary written assessment to the Regional Administrator within 14 days of the determination, as to the amount of liquids, likely sources of liquids, possible location, size, and cause of any leaks, and short-term actions taken and planned;

(3) Determine to the extent practicable the location, size, and cause of any leak;

(4) Determine whether waste receipt should cease or be curtailed, whether any waste should be removed from the unit for inspection, repairs, or controls, and whether or not the unit should be closed;

(5) Determine any other short-term and long-term actions to be taken to mitigate or stop any leaks; and

(6) Within 30 days after the notification that the action leakage rate has been exceeded, submit to the Regional Administrator the results of the analyses specified in paragraphs (b) (3), (4), and (5) of this section, the results of actions taken, and actions planned. Monthly thereafter, as long as the flow rate in the leak detection system exceeds the action leakage rate, the owner or operator must submit to the Regional Administrator a report summarizing the results of any remedial actions taken and actions planned.

(c) To make the leak and/or remediation determinations in paragraphs (b) (3), (4), and (5) of this section, the owner or operator must:

(1)(i) Assess the source of liquids and amounts of liquids by source,

(ii) Conduct a fingerprint, hazardous constituent, or other analyses of the liquids in the leak detection system to identify the source of liquids and possible location of any leaks, and the hazard and mobility of the liquid; and

(iii) Assess the seriousness of any leaks in terms of potential for escaping into the environment; or

(2) Document why such assessments are not needed.

11. Section 264.254 is amended by adding new paragraph (c) to read as follows:

§ 264.254 Monitoring and inspection.

* * * * *

(c) An owner or operator required to have a leak detection system under § 264.251(c) must record the amount of liquids removed from each leak detection system sump at least once each week during the active life and closure period.

12. Section 264.301 is amended by redesignating paragraphs (f), (g), (h), (i),

(j), and (k) as paragraphs (g), (h), (i), (j), (k), and (l), respectively, by revising paragraphs (c) and (d), and by adding new paragraph (f) to read as follows:

§ 264.301 Design and operating requirements.

* * * * *

(c) The owner or operator of each new landfill unit on which construction commences after January 29, 1992, each lateral expansion of a landfill unit on which construction commences after July 29, 1992, and each replacement of an existing landfill unit that is to commence reuse after July 29, 1992 must install two or more liners and a leachate collection and removal system above and between such liners. "Construction commences" is as defined in § 260.10 of this chapter under "existing facility".

(1)(i) The *liner system* must include:

(A) A top liner designed and constructed of materials (e.g., a geomembrane) to prevent the migration of hazardous constituents into such liner during the active life and post-closure care period; and

(B) A composite bottom liner, consisting of at least two components. The upper component must be designed and constructed of materials (e.g., a geomembrane) to prevent the migration of hazardous constituents into this component during the active life and post-closure care period. The lower component must be designed and constructed of materials to minimize the migration of hazardous constituents if a breach in the upper component were to occur. The lower component must be constructed of at least 3 feet (91 cm) of compacted soil material with a hydraulic conductivity of no more than 1×10^{-7} cm/sec.

(ii) The liners must comply with paragraphs (a)(1) (i), (ii), and (iii) of this section.

(2) The *leachate collection and removal system* immediately above the top liner must be designed, constructed, operated, and maintained to collect and remove leachate from the landfill during the active life and post-closure care period. The Regional Administrator will specify design and operating conditions in the permit to ensure that the leachate depth over the liner does not exceed 30 cm (one foot). The leachate collection and removal system must comply with paragraphs (3)(c) (iii) and (iv) of this section.

(3) The *leachate collection and removal system* between the liners, and immediately above the bottom composite liner in the case of multiple leachate collection and removal systems, is also a *leak detection system*. This leak detection system must be capable of detecting, collecting, and removing leaks of hazardous constituents at the earliest practicable time through all areas of the top liner likely to be exposed to waste or leachate during the active life and post-closure care period. The requirements for a leak detection system in this paragraph are satisfied by installation of a system that is, at a minimum:

(i) Constructed with a bottom slope of one percent or more;

(ii) Constructed of granular drainage materials with a hydraulic conductivity of 1×10^{-2} cm/sec or more and a thickness of 12 inches (30.5 cm) or more; or constructed of synthetic or geonet drainage materials with a transmissivity of 3×10^{-5} m^2/sec or more;

(iii) Constructed of materials that are chemically resistant to the waste managed in the landfill and the leachate expected to be generated, and of sufficient strength and thickness to prevent collapse under the pressures exerted by overlying wastes, waste cover materials, and equipment used at the landfill;

(iv) Designed and operated to minimize clogging during the active life and post-closure care period; and

(v) Constructed with sumps and liquid removal methods (e.g., pumps) of sufficient size to collect and remove liquids from the sump and prevent liquids from backing up into the drainage layer. Each unit must have its own sump(s). The design of each sump and removal system must provide a method for measuring and recording the volume of liquids present in the sump and of liquids removed.

(4) The owner or operator shall collect and remove pumpable liquids in the leak detection system sumps to minimize the head on the bottom liner.

(5) The owner or operator of a leak detection system that is not located completely above the seasonal high water table must demonstrate that the operation of the leak detection system will not be adversely affected by the presence of ground water.

(d) The Regional Administrator may approve alternative design or operating practices to those specified in paragraph (c) of this section if the owner or operator demonstrates to the Regional Administrator that such design and operating practices, together with location characteristics:

(1) Will prevent the migration of any hazardous constituent into the ground water or surface water at least as effectively as the liners and leachate collection and removal systems specified in paragraph (c) of this section; and

(2) Will allow detection of leaks of hazardous constituents through the top liner at least as effectively.

* * * * *

(f) The owner or operator of any replacement landfill unit is exempt from paragraph (c) of this section if:

(1) The existing unit was constructed in compliance with the design standards of section 3004(o)(1)(A)(i) and (o)(5) of the Resource Conservation and Recovery Act; and

(2) There is no reason to believe that the liner is not functioning as designed.

* * * * *

13. New § 264.302 is added to read as follows:

§ 264.302 Action leakage rate.

(a) The Regional Administrator shall approve an action leakage rate for surface impoundment units subject to § 264.301(c) or (d). The action leakage rate is the maximum design flow rate that the leak detection system (LDS) can remove without the fluid head on the bottom liner exceeding l foot. The action leakage rate must include an adequate safety margin to allow for uncertainties in the design (e.g., slope, hydraulic conductivity, thickness of drainage material), construction, operation, and location of the LDS, waste and leachate characteristics, likelihood and amounts of other sources of liquids in the LDS, and proposed response actions (e.g., the action leakage rate must consider decreases in the flow capacity of the system over time resulting from siltation and clogging, rib layover and creep of synthetic components of the system, overburden pressures, etc.).

(b) To determine if the action leakage rate has been exceeded, the owner or operator must convert the weekly or monthly flow rate from the monitoring data obtained under § 264.303(c), to an average daily flow rate (gallons per acre per day) for each sump. Unless the Regional Administrator approves a different calculation, the average daily flow rate for each sump must be calculated weekly during the active life and closure period, and monthly during the post-closure care period when monthly monitoring is required under § 264.303(c).

14. Section 264.303 is amended by adding new paragraph (c) to read as follows:

§ 264.303 Monitoring and inspection.

* * * * *

(c)(1) An owner or operator required to have a leak detection system under § 264.301(c) or (d) must record the amount of liquids removed from each leak detection system sump at least

once each week during the active life and closure period.

(2) After the final cover is installed, the amount of liquids removed from each leak detection system sump must be recorded at least monthly. If the liquid level in the sump stays below the pump operating level for two consecutive months, the amount of liquids in the sumps must be recorded at least quarterly. If the liquid level in the sump stays below the pump operating level for two consecutive quarters, the amount of liquids in the sumps must be recorded at least semi-annually. If at any time during the post-closure care period the pump operating level is exceeded at units on quarterly or semi-annual recording schedules, the owner or operator must return to monthly recording of amounts of liquids removed from each sump until the liquid level again stays below the pump operating level for two consecutive months.

(3) "Pump operating level" is a liquid level proposed by the owner or operator and approved by the Regional Administrator based on pump activation level, sump dimensions, and level that avoids backup into the drainage layer and minimizes head in the sump.

15. New § 264.304 is added to read as follows:

§ 264.304 Response actions.

(a) The owner or operator of landfill units subject to § 264.301(c) or (d) must have an approved response action plan before receipt of waste. The response action plan must set forth the actions to be taken if the action leakage rate has been exceeded. At a minimum, the response action plan must describe the actions specified in paragraph (b) of this section.

(b) If the flow rate into the leak detection system exceeds the action leakage rate for any sump, the owner or operator must:

(1) Notify the Regional Administrator in writing of the exceedence within 7 days of the determination;

(2) Submit a preliminary written assessment to the Regional Administrator within 14 days of the determination, as to the amount of liquids, likely sources of liquids, possible location, size, and cause of any leaks, and short-term actions taken and planned;

(3) Determine to the extent practicable the location, size, and cause of any leak;

(4) Determine whether waste receipt should cease or be curtailed, whether any waste should be removed from the unit for inspection, repairs, or controls, and whether or not the unit should be closed;

(5) Determine any other short-term and longer-term actions to be taken to mitigate or stop any leaks; and

(6) Within 30 days after the notification that the action leakage rate has been exceeded, submit to the Regional Administrator the results of the analyses specified in paragraphs (b)(3), (4), and (5) of this section, the results of actions taken, and actions planned. Monthly thereafter, as long as the flow rate in the leak detection system exceeds the action leakage rate, the owner or operator must submit to the Regional Administrator a report summarizing the results of any remedial actions taken and actions planned.

(c) To make the leak and/or remediation determinations in paragraphs (b)(3), (4), and (5) of this section, the owner or operator must:

(1)(i) Assess the source of liquids and amounts of liquids by source,

(ii) Conduct a fingerprint, hazardous constituent, or other analyses of the liquids in the leak detection system to identify the source of liquids and possible location of any leaks, and the hazard and mobility of the liquid; and

(iii) Assess the seriousness of any leaks in terms of potential for escaping into the environment; or

(2) Document why such assessments are not needed.

16. Section 264.310 is amended by redesignating paragraphs (b)(3), (4), and (5) as paragraphs (b)(4), (5), and (6) respectively, and by adding a new paragraph (b)(3) to read as follows:

§ 264.310 Closure and post-closure care.

* * * * *

(b) * * *

(3) Maintain and monitor the leak detection system in accordance with §§ 264.301(c)(3)(iv) and (4) and 264.303(c), and comply with all other applicable leak detection system requirements of this part;

* * * * *

PART 265—INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

1. The authority citation for Part 265 is revised to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6924, 6925, 6935, and 6936.

2. Section 265.15 is amended by revising paragraph (b)(4) to read as follows:

§ 265.15 General inspection requirements.

* * * * *

(b) * * *

(4) The frequency of inspection may vary for the items on the schedule. However, it should be based on the rate of deterioration of the equipment and the probability of an environmental or human health incident if the deterioration, malfunction, or any operator error goes undetected between inspections. Areas subject to spills, such as loading and unloading areas, must be inspected daily when in use. At a minimum, the inspection schedule must include the items and frequencies called for in §§ 265.174, 265.193, 265.195, 265.226, 265.260, 265.278, 265.304, 265.347, 265.377, 265.403, 265.1033, 265.1052, 265.1053, and 265.1058, where applicable.

* * * * *

3. Subpart B is amended by adding § 265.19 to read as follows:

§ 265.19 Construction quality assurance program.

(a) *CQA program.* (1) A construction quality assurance (CQA) program is required for all surface impoundment, waste pile, and landfill units that are required to comply with §§ 265.221(a), 265.254, and 265.301(a). The program must ensure that the constructed unit meets or exceeds all design criteria and specifications in the permit. The program must be developed and implemented under the direction of a CQA officer who is a registered professional engineer.

(2) The CQA program must address the following physical components, where applicable:

(i) Foundations;

(ii) Dikes;

(iii) Low-permeability soil liners;

(iv) Geomembranes (flexible membrane liners);

(v) Leachate collection and removal systems and leak detection systems; and

(vi) Final cover systems.

(b) *Written CQA plan.* Before construction begins on a unit subject to the CQA program under paragraph (a) of this section, the owner or operator must develop a written CQA plan. The plan must identify steps that will be used to monitor and document the quality of materials and the condition and manner of their installation. The CQA plan must include:

(1) Identification of applicable units, and a description of how they will be constructed.

(2) Identification of key personnel in the development and implementation of the CQA plan, and CQA officer qualifications.

(3) A description of inspection and sampling activities for all unit components identified in paragraph

(a)(2) of this section, including observations and tests that will be used before, during, and after construction to ensure that the construction materials and the installed unit components meet the design specifications. The description must cover: Sampling size and locations; frequency of testing; data evaluation procedures; acceptance and rejection criteria for construction materials; plans for implementing corrective measures; and data or other information to be recorded and retained in the operating record under § 265.73.

(c) *Contents of program.* (1) The CQA program must include observations, inspections, tests, and measurements sufficient to ensure:

(i) Structural stability and integrity of all components of the unit identified in paragraph (a)(2) of this section;

(ii) Proper construction of all components of the liners, leachate collection and removal system, leak detection system, and final cover system, according to permit specifications and good engineering practices, and proper installation of all components (e.g., pipes) according to design specifications;

(iii) Conformity of all materials used with design and other material specifications under §§ 264.221, 264.251, and 264.301 of this chapter.

(2) The CQA program shall include test fills for compacted soil liners, using the same compaction methods as in the full-scale unit, to ensure that the liners are constructed to meet the hydraulic conductivity requirements of §§ 264.221(c)(1), 264.251(c)(1), and 264.301(c)(1) of this chapter in the field. Compliance with the hydraulic conductivity requirements must be verified by using in-situ testing on the constructed test fill. The test fill requirement is waived where data are sufficient to show that a constructed soil liner meets the hydraulic conductivity requirements of § § 264.221(c)(1), 264.254(c)(1), and 264.301(c)(1) of this chapter in the field.

(d) *Certification.* The owner or operator of units subject to § 265.19 must submit to the Regional Administrator by certified mail or hand delivery, at least 30 days prior to receiving waste, a certification signed by the CQA officer that the CQA plan has been successfully carried out and that the unit meets the requirements of §§ 265.221(a), 265.254, or 265.301(a). The owner or operator may receive waste in the unit after 30 days from the Regional Administrator's receipt of the CQA certification unless the Regional Administrator determines in writing that the construction is not acceptable, or extends the review period for a maximum of 30 more days, or seeks additional information from the owner or operator during this period. Documentation supporting the CQA officer's certification must be furnished to the Regional Administrator upon request.

4. Section 265.73 is amended by revising paragraph (b)(6) to read as follows:

§ 265.73 Operating record.

* * * * *

(b) * * *

(6) Monitoring, testing, or analytical data, and corrective action where required by subpart F and §§ 265.19, 265.90, 265.94, 265.191, 265.193, 265.195, 265.222, 265.223, 265.226, 265.255, 265.259, 265.260, 265.276, 265.278, 265.280(d)(1), 265.302–265.304, 265.347, 265.377, 265.1034(c)–265.1034(f), 265.1035, 265.1063(d)–264.1063(i), and 265.1064.

* * * * *

5. Section 265.221 is amended by revising the section heading and by revising paragraphs (a) and (c) to read as follows:

§ 265.221 Design and operating requirements.

(a) The owner or operator of each new surface impoundment unit on which construction commences after January 29, 1992, each lateral expansion of a surface impoundment unit on which construction commences after July 29, 1992, and each replacement of an existing surface impoundment unit that is to commence reuse after July 29, 1992 must install two or more liners and a leachate collection and removal system between such liners, and operate the leachate collection and removal system, in accordance with § 264.221(c), unless exempted under § 264.221(d), (e), or (f), of this chapter. "Construction commences" is as defined in § 260.10 of this chapter under "existing facility."

* * * * *

(c) The owner or operator of any replacement surface impoundment unit is exempt from paragraph (a) of this section if:

(1) The existing unit was constructed in compliance with the design standards of § 3004(o)(1)(A)(i) and (o)(5) of the Resource Conservation and Recovery Act; and

(2) There is no reason to believe that the liner is not functioning as designed.

* * * * *

6. Paragraphs (a) and (b) of § 265.222 are transferred to § 265.221 and redesignated as paragraphs (f) and (g), respectively.

7. Section 265.222, is amended by revising, the section heading and adding paragraphs (a) through (c) and § 265.223 is added to read as follows:

§ 265.222 Action leakage rate.

(a) The owner or operator of surface impoundment units subject to § 265.221(a) must submit a proposed action leakage rate to the Regional Administrator when submitting the notice required under § 265.221(b). Within 60 days of receipt of the notification, the Regional Administrator will: Establish an action leakage rate, either as proposed by the owner or operator or modified using the criteria in this section; or extend the review period for up to 30 days. If no action is taken by the Regional Administrator before the original 60 or extended 90 day review periods, the action leakage rate will be approved as proposed by the owner or operator.

(b) The Regional Administrator shall approve an action leakage rate for surface impoundment units subject to § 265.221(a). The action leakage rate is the maximum design flow rate that the leak detection system (LDS) can remove without the fluid head on the bottom liner exceeding 1 foot. The action leakage rate must include an adequate safety margin to allow for uncertainties in the design (e.g., slope, hydraulic conductivity, thickness of drainage material), construction, operation, and location of the LDS, waste and leachate characteristics, likelihood and amounts of other sources of liquids in the LDS, and proposed response actions (e.g., the action leakage rate must consider decreases in the flow capacity of the system over time resulting from siltation and clogging, rib layover and creep of synthetic components of the system, overburden pressures, etc.).

(c) To determine if the action leakage rate has been exceeded, the owner or operator must convert the weekly or monthly flow rate from the monitoring data obtained under § 265.226(b), to an average daily flow rate (gallons per acre per day) for each sump. Unless the Regional Administrator approves a different calculation, the average daily flow rate for each sump must be calculated weekly during the active life and closure period, and if the unit closes in accordance with § 265.228(a)(2), monthly during the post-closure care period when monthly monitoring is required under § 265.226(b).

§ 265.223 Response actions.

(a) The owner or operator of surface impoundment units subject to § 265.221(a) must submit a response action plan to the Regional Administrator when submitting the

proposed action leakage rate under § 265.222. The response action plan must set forth the actions to be taken if the action leakage rate has been exceeded. At a minimum, the response action plan must describe the actions specified in paragraph (b) of this section.

(b) If the flow rate into the leak detection system exceeds the action leakage rate for any sump, the owner or operator must:

(1) Notify the Regional Administrator in writing of the exceedence within 7 days of the determination;

(2) Submit a preliminary written assessment to the Regional Administrator within 14 days of the determination, as to the amount of liquids, likely sources of liquids, possible location, size, and cause of any leaks, and short-term actions taken and planned;

(3) Determine to the extent practicable the location, size, and cause of any leak;

(4) Determine whether waste receipt should cease or be curtailed, whether any waste should be removed from the unit for inspection, repairs, or controls, and whether or not the unit should be closed;

(5) Determine any other short-term and longer-term actions to be taken to mitigate or stop any leaks; and

(6) Within 30 days after the notification that the action leakage rate has been exceeded, submit to the Regional Administrator the results of the analyses specified in paragraphs (b)(3), (4), and (5) of this section, the results of actions taken, and actions planned. Monthly thereafter, as long as the flow rate in the leak detection system exceeds the action leakage rate, the owner or operator must submit to the Regional Administrator a report summarizing the results of any remedial actions taken and actions planned.

(c) To make the leak and/or remediation determinations in paragraphs (b)(3), (4), and (5) of this section, the owner or operator must:

(1)(i) Assess the source of liquids and amounts of liquids by source,

(ii) Conduct a fingerprint, hazardous constituent, or other analyses of the liquids in the leak detection system to identify the source of liquids and possible location of any leaks, and the hazard and mobility of the liquid; and

(iii) Assess the seriousness of any leaks in terms of potential for escaping into the environment; or

(2) Document why such assessments are not needed.

8. Section 265.226 is amended by revising the section heading and adding new paragraph (b) to read as follows:

§ 265.226 Monitoring and inspection.

* * * * *

(b)(1) An owner or operator required to have a leak detection system under § 265.221(a) must record the amount of liquids removed from each leak detection system sump at least once each week during the active life and closure period.

(2) After the final cover is installed, the amount of liquids removed from each leak detection system sump must be recorded at least monthly. If the liquid level in the sump stays below the pump operating level for two consecutive months, the amount of liquids in the sumps must be recorded at least quarterly. If the liquid level in the sump stays below the pump operating level for two consecutive quarters, the amount of liquids in the sumps must be recorded at least semi-annually. If at any time during the post-closure care period the pump operating level is exceeded at units on quarterly or semi-annual recording schedules, the owner or operator must return to monthly recording of amounts of liquids removed from each sump until the liquid level again stays below the pump operating level for two consecutive months.

(3) "Pump operating level" is a liquid level proposed by the owner or operator and approved by the Regional Administrator based on pump activation level, sump dimensions, and level that avoids backup into the drainage layer and minimizes head in the sump. The timing for submission and approval of the proposed "pump operating level" will be in accordance with § 265.222(a).

9. Section 265.228 is amended by redesignating paragraphs (b)(2) and (3) as paragraphs (b)(3) and (4) respectively, and by adding a new paragraph (b)(2) to read as follows:

§ 265.228 Closure and post-closure care.

* * * * * * *

(b) * * *

(2) Maintain and monitor the leak detection system in accordance with §§ 265.221(c)(2)(iv) and (3) of this chapter and 265.226(b) and comply with all other applicable leak detection system requirements of this part;

* * * * * * *

10. Section 265.254 is revised, including the section heading, to read as follows:

§ 265.254 Design and operating requirements.

The owner or operator of each new waste pile on which construction commences after January 29, 1992, each lateral expansion of a waste pile unit on which construction commences after July 29, 1992, and each such replacement of an existing waste pile unit that is to commence reuse after July 29, 1992 must install two or more liners and a leachate collection and removal system above and between such liners, and operate the leachate collection and removal systems, in accordance with § 264.251(c), unless exempted under § 264.251(d), (e), or (f), of this chapter; and must comply with the procedures of § 265.221(b). "Construction commences" is as defined in § 260.10 of this chapter under "existing facility".

11. New §§ 265.255, 265.259, and 265.260 are added to read as follows:

§ 265.255 Action leakage rates

(a) The owner or operator of waste pile units subject to § 265.254 must submit a proposed action leakage rate to the Regional Administrator when submitting the notice required under § 265.254. Within 60 days of receipt of the notification, the Regional Administrator will: Establish an action leakage rate, either as proposed by the owner or operator or modified using the criteria in this section; or extend the review period for up to 30 days. If no action is taken by the Regional Administrator before the original 60 or extended 90 day review periods, the action leakage rate will be approved as proposed by the owner or operator.

(b) The Regional Administrator shall approve an action leakage rate for surface impoundment units subject to § 265.254. The action leakage rate is the maximum design flow rate that the leak detection system (LDS) can remove without the fluid head on the bottom liner exceeding 1 foot. The action leakage rate must include an adequate safety margin to allow for uncertainties in the design (e.g., slope, hydraulic conductivity, thickness of drainage material), construction, operation, and location of the LDS, waste and leachate characteristics, likelihood and amounts of other sources of liquids in the LDS, and proposed response actions (e.g., the action leakage rate must consider decreases in the flow capacity of the system over time resulting from siltation and clogging, rib layover and creep of synthetic components of the system, overburden pressures, etc.).

(c) To determine if the action leakage rate has been exceeded, the owner or operator must convert the weekly flow rate from the monitoring data obtained under § 265.260, to an average daily flow rate (gallons per acre per day) for each sump. Unless the Regional Administrator approves a different calculation, the average daily flow rate for each sump must be calculated

weekly during the active life and closure period.

§ 265.259 Response actions.

(a) The owner or operator of waste pile units subject to § 265.254 must submit a response action plan to the Regional Administrator when submitting the proposed action leakage rate under § 265.255. The response action plan must set forth the actions to be taken if the action leakage rate has been exceeded. At a minimum, the response action plan must describe the actions specified in paragraph (b) of this section.

(b) If the flow rate into the leak determination system exceeds the action leakage rate for any sump, the owner or operator must:

(1) Notify the Regional Administrator in writing of the exceedence within 7 days of the determination;

(2) Submit a preliminary written assessment to the Regional Administrator within 14 days of the determination, as to the amount of liquids, likely sources of liquids, possible location, size, and cause of any leaks, and short-term actions taken and planned;

(3) Determine to the extent practicable the location, size, and cause of any leak;

(4) Determine whether waste receipts should cease or be curtailed, whether any waste should be removed from the unit for inspection, repairs, or controls, and whether or not the unit should be closed;

(5) Determine any other short-term and longer-term actions to be taken to mitigate or stop any leaks; and

(6) Within 30 days after the notification that the action leakage rate has been exceeded, submit to the Regional Administrator the results of the analyses specified in paragraphs (b)(3), (4), and (5) of this section, the results of actions taken, and actions planned. Monthly thereafter, as long as the flow rate in the leak detection system exceeds the action leakage rate, the owner or operator must submit to the Regional Administrator a report summarizing the results of any remedial actions taken and actions planned.

(c) To make the leak and/or remediation determinations in paragraphs (b)(3), (4), and (5) of this section, the owner or operator must:

(1)(i) Assess the source of liquids and amounts of liquids by source,

(ii) Conduct a fingerprint, hazardous constituent, or other analyses of the liquids in the leak detection system to identify the source of liquids and possible location of any leaks, and the hazard and mobility of the liquid; and

(iii) Assess the seriousness of any leaks in terms of potential for escaping into the environment; or

(2) Document why such assessments are not needed.

§ 265.260 Monitoring and inspection.

An owner or operator required to have a leak detection system under § 265.254 must record the amount of liquids removed from each leak detection system sump at least once each week during the active life and closure period.

12. Section 265.301 is amended by revising the section heading and by revising paragraphs (a) and (c) to read as follows:

§ 265.301 Design and operating requirements.

(a) The owner or operator of each new landfill unit on which construction commences after January 29, 1992, each lateral expansion of a landfill unit on which construction commences after July 29, 1992, and each replacement of an existing landfill unit that is to commence reuse after July 29, 1992 must install two or more liners and a leachate collection and removal system above and between such liners, and operate the leachate collection and removal systems, in accordance with § 264.301(d), (e), or (f), of this chapter. "Construction commences" is as defined in § 260.10 of this chapter under "existing facility".

* * * * * * *

(c) The owner or operator of any replacement landfill unit is exempt from paragraph (a) of this section if:

(1) The existing unit was constructed in compliance with the design standards of section 3004(o)(1)(A)(i) and (o)(5) of the Resource Conservation and Recovery Act; and

(2) There is no reason to believe that the liner is not functioning as designed.

* * * * * * *

13. Paragraphs (a), (b), (c), and (d) of § 265.302 are transferred to § 265.301 and redesignated as paragraphs (f), (g), (h), and (i), respectively.

14. Section 265.302, is amended by revising the section heading and adding paragraphs (a) through (c) and new §§ 265.303 and 265.304 are added to read as follows:

§ 265.302 Action leakage rate.

(a) The owner or operator of landfill units subject to § 265.301(a) must submit a proposed action leakage rate to the Regional Administrator when submitting the notice required under § 265.301(b). Within 60 days of receipt of the notification, the Regional Administrator will: Establish an action leakage rate, either as proposed by the owner or operator or modified using the criteria in this section; or extend the review period for up to 30 days. If no action is taken by the Regional Administrator before the original 60 or extended 90 day review periods, the action leakage rate will be approved as proposed by the owner or operator.

(b) The Regional Administrator shall approve an action leakage rate for surface impoundment units subject to § 265.301(a). The action leakage rate is the maximum design flow rate that the leak detection system (LDS) can remove without the fluid head on the bottom liner exceeding 1 foot. The action leakage rate must include an adequate safety margin to allow for uncertainties in the design (e.g., slope, hydraulic conductivity, thickness of drainage material), construction, operation, and location of the LDS, waste and leachate characteristics, likelihood and amounts of other sources of liquids in the LDS, and proposed response actions (e.g., the action leakage rate must consider decreases in the flow capacity of the system over time resulting from siltation and clogging, rib layover and creep of synthetic components of the system, overburden pressures, etc.).

(c) To determine if the action leakage rate has been exceeded, the owner or operator must convert the weekly or monthly flow rate from the monitoring data obtained under § 265.304 to an average daily flow rate (gallons per acre per day) for each sump. Unless the Regional Administrator approves a different calculation, the average daily flow rate for each sump must be calculated weekly during the active life and closure period, and monthly during the post-closure care period when monthly monitoring is required under § 265.304(b).

§ 265.303 Response actions.

(a) The owner or operator of landfill units subject to § 265.301(a) must submit a response action plan to the Regional Administrator when submitting the proposed action leakage rate under § 265.302. The response action plan must set forth the actions to be taken if the action leakage rate has been exceeded. At a minimum, the response action plan must describe the actions specified in paragraph (b) of this section.

(b) If the flow rate into the leak detection system exceeds the action leakage rate for any sump, the owner or operator must:

(1) Notify the Regional Administrator in writing of the exceedence within 7 days of the determination;

(2) Submit a preliminary written assessment to the Regional Administrator within 14 days of the determination, as to the amount of liquids, likely sources of liquids, possible location, size, and cause of any leaks, and short-term actions taken and planned;

(3) Determine to the extent practicable the location, size, and cause of any leak;

(4) Determine whether waste receipt should cease or be curtailed, whether any waste should be removed from the unit for inspection, repairs, or controls, and whether or not the unit should be closed;

(5) Determine any other short-term and longer-term actions to be taken to mitigate or stop any leaks; and

(6) Within 30 days after the notification that the action leakage rate has been exceeded, submit to the Regional Administrator the results of the analyses specified in paragraphs (b)(3), (4), and (5) of this section, the results of actions taken, and actions planned. Monthly thereafter, as long as the flow rate in the leak detection system exceeds the action leakage rate, the owner or operator must submit to the Regional Administrator a report summarizing the results of any remedial actions taken and actions planned.

(c) To make the leak and/or remediation determinations in paragraphs (b)(3), (4), and (5) of this section, the owner or operator must:

(1)(i) Assess the source of liquids and amounts of liquids by source,

(ii) Conduct a fingerprint, hazardous constituent, or other analyses of the liquids in the leak detection system to identify the source of liquids and possible location of any leaks, and the hazard and mobility of the liquid; and

(iii) Assess the seriousness of any leaks in terms of potential for escaping into the environment; or

(2) Document why such assessments are not needed.

§ 265.304 Monitoring and inspection.

(a) An owner or operator required to have a leak detection system under § 265.301(a) must record the amount of liquids removed from each leak detection system sump at least once each week during the active life and closure period.

(b) After the final cover is installed, the amount of liquids removed from each leak detection system sump must be recorded at least monthly. If the liquid level in the sump stays below the pump operating level for two consecutive months, the amount of liquids in the sumps must be recorded at least quarterly. If the liquid level in the sump stays below the pump operating level for two consecutive quarters, the amount of liquids in the sumps must be recorded at least semi-annually. If at any time during the post-closure care period the pump operating level is exceeded at units on quarterly or semi-annual recording schedules, the owner or operator must return to monthly recording of amounts of liquids removed from each sump until the liquid level again stays below the pump operating level for two consecutive months.

(c) "Pump operating level" is a liquid level proposed by the owner or operator and approved by the Regional Administrator based on pump activation level, sump dimensions, and level that avoids backup into the drainage layer and minimizes head in the sump. The timing for submission and approval of the proposed "pump operating level" will be in accordance with § 265.302(a).

15. Section 265.310 is amended by redesignating paragraphs (b)(2), (3), and (4) as paragraphs (b)(3), (4), and (5), respectively, and by adding a new paragraph (b)(2) to read as follows:

§ 265.310 Closure and post-closure care.

* * * * *

(b) * * *

(2) Maintain and monitor the leak detection system in accordance with §§ 264.301(c)(3)(iv) and (4) of this chapter and 265.304(b), and comply with all other applicable leak detection system requirements of this part;

* * * * *

PART 270—EPA ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM

1. The authority citation for part 270 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912, 6924, 6925, 6927, 6939, and 6974.

2. Section 270.4 is amended by revising paragraph (a) to read as follows:

§ 270.4 Effect of a permit.

(a) Compliance with a RCRA permit during its term constitutes compliance, for purposes of enforcement, with subtitle C of RCRA except for those requirements not included in the permit which:

(1) Become effective by statute;

(2) Are promulgated under part 268 of this chapter restricting the placement of hazardous wastes in or on the land; or

(3) Are promulgated under part 264 of this chapter regarding leak detection systems for new and replacement surface impoundment, waste pile, and landfill units, and lateral expansions of surface impoundment, waste pile, and landfill units. The leak detection system requirements include double liners, CQA programs, monitoring, action leakage rates, and response action plans, and will be implemented through the procedures of § 270.42 Class 1* permit modifications.

* * * * *

(3) Section 270.17 is amended by redesignating paragraphs (b)(2) and (3) as (b)(6) and (7) respectively; revising paragraph (b); introductory text; adding paragraphs (b)(2) through (b)(5); and revising paragraph (c) to read as follows:

§ 270.17 Specific Part B information requirements for surface impoundments.

* * * * *

(b) Detailed plans and an engineering report describing how the surface impoundment is designed and is or will be constructed, operated, and maintained to meet the requirements of §§ 264.19, 264.221, 264.222, and 264.223 of this chapter, addressing the following items:

(1) * * *

(2) The double liner and leak (leachate) detection, collection, and removal system, if the surface impoundment must meet the requirements of § 264.221(c) of this chapter. If an exemption from the requirements for double liners and a leak detection, collection, and removal system or alternative design is sought as provided by § 264.221(d), (e), or (f) of this chapter, submit appropriate information;

(3) If the leak detection system is located in a saturated zone, submit detailed plans and an engineering report explaining the leak detection system design and operation, and the location of the saturated zone in relation to the leak detection system;

(4) The construction quality assurance (CQA) plan if required under § 264.19 of this chapter;

(5) Proposed action leakage rate, with rationale, if required under § 264.222 of this chapter, and response action plan, if required under § 264.223 of this chapter;

* * * * *

(c) A description of how each surface impoundment, including the double liner system, leak detection system, cover system, and appurtenances for control of overtopping, will be inspected in order to meet the requirements of § 264.226(a), (b), and (d) of this chapter. This information must be included in the inspection plan submitted under § 270.14(b)(5);

* * * * *

4. Section 270.18 is amended by revising paragraphs (c) introductory text, (c)(1) and (d) to read as follows:

§ 270.18 Specific Part B information for waste piles.

* * * * *

(c) Detailed plans and an engineering report describing how the waste pile is designed and is or will be constructed, operated, and maintained to meet the requirements of §§ 264.19, 264.251, 264.252, and 264.253 of this chapter, addressing the following items:

(1)(i) The liner system (except for an existing portion of a waste pile), if the waste pile must meet the requirements of § 264.251(a) of this chapter. If an exemption from the requirement for a liner is sought as provided by § 264.251(b) of this chapter, submit detailed plans, and engineering and hydrogeological reports, as appropriate, describing alternate designs and operating practices that will, in conjunction with location aspects, prevent the migration of any hazardous constituents into the ground water or surface water at any future time;

(ii) The double liner and leak (leachate) detection, collection, and removal system, if the waste pile must meet the requirements of § 264.251(c) of this chapter. If an exemption from the requirements for double liners and a leak detection, collection, and removal system or alternative design is sought as provided by § 264.251(d), (e), or (f) of this chapter, submit appropriate information;

(iii) If the leak detection system is located in a saturated zone, submit detailed plans and an engineering report explaining the leak detection system design and operation, and the location of the saturated zone in relation to the leak detection system;

(iv) The construction quality assurance (CQA) plan if required under § 264.19 of this chapter;

(v) Proposed action leakage rate, with rationale, if required under § 264.252 of this chapter, and response action plan, if required under § 264.253 of this chapter;

* * * * *

(d) A description of how each waste pile, including the double liner system, leachate collection and removal system, leak detection system, cover system, and appurtenances for control of run-on and run-off, will be inspected in order to meet the requirements of § 264.254(a), (b), and (c) of this chapter. This information must be included in the inspection plan submitted under § 270.14(b)(5);

* * * * *

5. Section 270.21 is amended by revising paragraphs (b) introductory text, (b)(1) and (c) to read as follows:

§ 270.21 Specific Part B information requirements for landfills.

* * * * *

(b) Detailed plans and an engineering report describing how the landfill is designed and is or will be constructed, operated, and maintained to meet the requirements of §§ 264.19, 264.301, 264.302, and 264.303 of this chapter, addressing the following items:

(1)(i) The liner system (except for an existing portion of a landfill), if the landfill must meet the requirements of § 264.301(a) of this chapter. If an exemption from the requirement for a liner is sought as provided by § 264.301(b) of this chapter, submit detailed plans, and engineering and hydrogeological reports, as appropriate, describing alternate designs and operating practices that will, in conjunction with location aspects, prevent the migration of any hazardous constituents into the ground water or surface water at any future time;

(ii) The double liner and leak (leachate) detection, collection, and removal system, if the landfill must meet the requirements of § 264.301(c) of this chapter. If an exemption from the requirements for double liners and a leak detection, collection, and removal system or alternative design is sought as provided by § 264.301(d), (e), or (f) of this chapter, submit appropriate information;

(iii) If the leak detection system is located in a saturated zone, submit detailed plans and an engineering report explaining the leak detection system design and operation, and the location of the saturated zone in relation to the leak detection system;

(iv) The construction quality assurance (CQA) plan if required under § 264.19 of this chapter;

(v) Proposed action leakage rate, with rationale, if required under § 264.302 of this chapter, and response action plan, if required under § 264.303 of this chapter;

* * * * *

(c) A description of how each landfill, including the double liner system, leachate collection and removal system, leak detection system, cover system, and appurtenances for control of run-on and run-off, will be inspected in order to meet the requirements of § 264.303(a), (b), and (c) of this chapter. This information must be included in the inspection plan submitted under § 270.14(b)(5);

* * * * *

6. Section 270.42 is amended by adding the following to Appendix I:

§ 270.42 Permit modification at the request of the permittee.

* * * * *

Appendix I To § 270.42.—Classification of Permit Modification

Modification	Class
* * * * *	
B. * * *	
7. Construction quality assurance plan:	
a. Changes that the CQA officer certifies in the operating record will provide equivalent or better certainty that the unit components meet the design specifications	1
b. Other changes	2
* * * * *	
H. * * *	
6. Modifications of unconstructed units to comply with §§ 264.221(c), 264.222, 264.223, and 264.226(d)	*1
7. Changes in response action plan:	
a. Increase in action leakage rate	3
b. Change in a specific response reducing its frequency or effectiveness	3
c. Other changes	2
* * * * *	
J. * * *	
7. Modifications of unconstructed units to comply with §§ 264.251(c), 264.252, 264.253, 264.254(c), 264.301(c), 264.302, 264.303(c), and 264.304	*1
8. Changes in response action plan:	
a. Increase in action leakage rate	3
b. Change in a specific response reducing its frequency or effectiveness	3
c. Other changes	2

* * * * *

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

1. The authority citation for part 271 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), and 6926.

2. Section 271.1(j) is amended by adding the following entry to Table 1 in chronological order by date of publication:

§ 271.1 Purpose and scope.

* * * * *

TABLE 1. REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Promulgation date	Title of regulation	Federal Register reference	Effective date
*	*	* *	*
January 29,1992.	Liners and Leak Detection for Hazardous Waste Land Disposal Units [2].	57FR [Insert FEDERAL REGISTER Page Numbers]..	July 29, 1992

[2] The following portions of this rule are not HSWA regulations: §§ 264.19 and 265.19 for final covers

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federal register

Wednesday
January 29, 1992

Part III

Environmental Protection Agency

Ethyl Parathion, Amendment of Cancellation Order; Notice

ENVIRONMENTAL PROTECTION AGENCY

[OPP-66157A; FRL 4044-9]

Ethyl Parathion, Amendment of Cancellation Order

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of issuance of amended cancellation order.

SUMMARY: On December 13, 1991, EPA published pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), an announcement of receipt of requests from a number of registrants to voluntarily cancel registrations of pesticide products containing ethyl parathion (*O,O*-diethyl-*O*-(*p*-nitrophenyl) phosphorothioate) ("parathion") and a cancellation order granting the requests. The cancellation order contained certain limitations upon the sale, distribution, and use of existing stocks of canceled pesticide products containing parathion. EPA has amended the cancellation order to permit limited additional use of existing stocks of certain canceled products containing parathion.

DATES: The amended cancellation order became effective on January 17, 1992.

FOR FURTHER INFORMATION CONTACT: Brian Steinwand, Office of Pesticide Programs (H7508W), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Special Review Branch, 3rd Floor 2800 Jefferson Davis Highway, Arlington, VA 703-308-8174.

SUPPLEMENTARY INFORMATION:

I. Amended Cancellation Order

On December 13, 1991, EPA published a notice in the **Federal Register**, (56 FR 65061), pursuant to section 6(f)(1) of FIFRA, which announced receipt of requests from a number of registrants to voluntarily cancel registrations of pesticide products containing parathion as an active ingredient. The requests were the result of an agreement between EPA and registrants of parathion products which limited the sites where, and the application practices by which, parathion could be used. In the same notice, EPA published an order granting the cancellation requests and placed certain restrictions on the sale, distribution, and use of existing stocks of canceled products containing parathion. In brief, those restrictions prohibited any distribution or sale after December 1, 1991, and use after December 31, 1991, of any canceled parathion product unless the product is aerially applied on one of a small number of retained field crop uses according to specific conditions referenced in the cancellation order.

In recent weeks, the Agency has become aware of information that has led to the reconsideration of the existing stocks provision of the cancellation order. The Agency had assumed during the negotiations that led to the agreement that although some canceled parathion products, particularly those of emulsifiable concentrate formulations, could be diverted to use on the retained field crops, other formulations, particularly the wettable powder ones, would not be well suited to aerial application on field crops. Discussions with registrants and others have subsequently confirmed that wettable powder product is not likely to be diverted to or reformulated for use on the retained field crops. At the time EPA entered the agreement with the parathion registrants, it was hoped that much of the wettable powder existing stocks in the end-users' hands would be used prior to the December 31st cutoff date (particularly in California, where a great deal of parathion was previously used during the last months of the year). It appears that a significant amount of wettable powder stocks was diverted to California (and perhaps other western states) after the agreement was signed, but unfavorable weather conditions resulted in much less use than was anticipated. Consequently, there now appears to be a large amount of wettable powder product remaining in the hands of end-users (commercial and private applicators), particularly in California (and perhaps in other western states). Although EPA does not have firm figures on the amount of product in the hands of end users around the country, there is evidence of sufficient stock to be concerned about its long term safety.

EPA has held discussions with registrants in an effort to persuade them to participate in a voluntary recall of canceled parathion product. Although this appears likely to occur for the great bulk of emulsifiable concentrate product, many registrants, distributors, and retail dealers of parathion products are refusing to take back non-emulsifiable concentrate product currently in the hands of end-users. Because these products were not suspended before they were canceled, EPA lacks the authority under FIFRA section 19 to mandate a recall by registrants of the products still in the hands of end-users. Further, it appears unlikely that state governments have the resources required to assume responsibility for the proper disposal of this material. As a result, the Agency is faced with a situation where it appears increasingly likely that end-users may have to bear the burden of proper storage and disposal of large quantities of non-emulsifiable parathion products.

The Agency has had discussions with grower groups and state officials, and is concerned that, because of the expense of proper disposal, holders of parathion products may either attempt to store the products indefinitely or use or dispose of them illegally. Many of the wettable powder products are packaged in paper containers, which further complicates the storage and transportation of the material. EPA has doubts at this point that many end-users have proper facilities for long-term storage of hazardous materials, and is concerned with the risks of such long-term storage even if users attempt to store the material properly (EPA will be proposing long-term storage requirements for canceled parathion products in the near future).

In light of the concerns identified above, EPA has determined that the risks associated with canceled wettable-powder parathion products remaining indefinitely in the hands of end-users may outweigh the risks associated with restricted use of such products currently in the physical possession of end users, and has therefore decided to allow some limited additional use of such canceled products. Accordingly, EPA is amending the cancellation order issued on December 13, 1991 to allow use through July 31, 1992 (in accord with label directions, restrictions and conditions), of non-emulsifiable concentrate canceled parathion product currently in the physical possession of end users. This Amended Cancellation Order applies only to use of certain canceled parathion products; no further distribution or sale of such products is permitted. In order to be lawful under FIFRA, any such use must be in accordance with the previously-approved labeling for the particular product used.

The products for which additional use through July 31, 1992 is allowed are identified in the following Table 1:

TABLE 1.—PRODUCTS APPROVED FOR EXTENDED USE

Company Registration Number	Company Name	Company Address	Product Registration Number	Product Name
279	FMC Corporation, Agricultural Chemical Group	1735 Market Street, Philadelphia, PA 19103	279-336	Phoskil Spray
			279-447	Phoskil 25 Spray
			279-464	Phoskil 2 Dust Insecticide
			279-1251	Aqua Phoskil 6
			279-1957	Niagara Parathion 2 Coated Granules
			279-2069	Parathion 10 Granular
			279-2770	Malathion Parathion Wettable
769	Sureco	P.O. Box 938, Fort Valley, GA 31030	769-77	Parthion 15% Wettable
			769-110	Parathion-Sulphur 2 Peach Spray 6
			769-241	Parathion-Captan Peach Spray
			769-442	10% Parathion Granulated
			769-518	Sure-Kote P Parathion-Sulphur Flowable Peach Spray
			769-557	Parathion 25-W
2935	Wilbur-Ellis	191 W. Shaw Avenue, Suite 107, Fresno, CA 93704	2935-329	Wilbur-Ellis Parathion 8 Flowable
5481	AMVAC Chemical Corp.	4100 E. Washington Blvd., Los Angeles, CA 90023	5481-99	Durham Durathion Granules 2
			5481-127	Durham Durathion Granules 5
			5481-185	Parathion 25W
			5481-243	Royal Brand 1% Parathion
			5481-244	Ferbam Parathion Dust
			5481-246	3.75% Parathion & 70% Sulfur
			5481-252	Parathion 4-G
			5481-260	Thiodan 3 Parathion 1 Tobacco Dust
			5481-263	Parathion 25 DB
			5481-265	Polyram 3.5 Dust With Parathion-1.0
			5481-277	Captan Parathion 25-7.5 Wettable
			5481-281	Parathion 15-W
			5481-290	Apple Dust No. 3
			5481-295	2% Parathion Dust
			5481-297	Cyprex, Parathion, Sulphur 2-2-20 Dust
			5481-299	Sulphur-Parathion Fungicide Insecticide For Apples
			5481-329	Parathion-Zinc-Sulfur 2.7-12-55 WP
5905	Helena Chemical Company	Suite 500, 6075 Poplar Avenue, Memphis, TN 38119	5905-284	Peach Spray
			5905-292	15% Parathion Wettable
9779	Riverside/Terra Corporation	P.O. Box 171376, Memphis, TN 38187	9779-205	Riverside 10% Parathion Granules
10163	Gowan Company	P.O. Box 5569, Yuma, AZ 85366	10163-54	Prokil Parathion 8 Flowable
			10163-62	Prokil Parathion 25 WP
11656	Western Farm Service	3705 W. Beechwood Ave., Suite 101, Fresno, CA 93711	11656-62	Parathion 25 Wettable
			11656-84	Parathion 25 Wettable
19713	Drexel Chemical Company	P.O. Box 9306, Memphis, TN 38109	19713-100	Drexel Parathion 10%G
			19713-280	Ida, Inc. Parathion 10%G
34704	Platte Chemical Company	419 18th Street, P.O. Box 667, Greeley, CO 80632	34704-56	Clean Crop Parathion 25W
			34704-85	Clean Crop Parathion 8-F
			34704-90	Parathion 25W
			34704-327	Kolo Phos Kil 3 Spray
			34704-334	Sulfur 6 Phos Kil 2 Spray
			34704-385	Captan 25 Parathion 7.5 W.P.
			34704-460	Parawet 25W
51036	Micro-Flo Company	P.O. Box 5948, Lakeland, FL 33807	51036-21	Parathion 15 WP
			51036-32	Parathion 15 WP
			51036-43	Parathion 10G
			51036-46	Peach Spray S-P-Z 6-2-3
			51036-47	Peach Spray S-P 6-2
			51036-86	Parathion 25 WP
			51036-155	Parathion 2% Bait
			51036-160	Parathion 10 Granular

The parathion section 24(c) special local need registrations that have been approved for extended use are list in the following Table 2:

TABLE 2.—PARATHION SECTION 24(C) (STATE) SPECIAL LOCAL NEED (SLN) REGISTRATIONS APPROVED FOR EXTENDED USE

Company Registration Number	Company Name	Company Address	Product Registration Number	Product Name
279	FMC Corporation, Agricultural Chemical Group	1735 Market Street, Philadelphia, PA 19103	CA780139	Niagara Phos Kil 25 Spray
			CA790084	Niagara Phos Kil 25 Spray
			CA800183	Niagara Phos Kil 25 Spray
			CA820064	Niagara Phos Kil 25 Spray
2935	Wilber-Ellis	191 W. Shaw Avenue, Suite 107, Fresno, CA 93704	OR760021	Niagara Phos Kil 25 Spray
			ID770020	Red Top Parathion 8 Flowable
			ID860010	Red Top Parathion 8 Flowable
			WA820073	Red Top Parathion 8 Flowable
4581	Pennwalt	Three Parkway, Room 619, Philadelphia, PA 19102	LA860005	Penncap-E Insecticide
			OK780015	Penncap-E

Products for which no additional use is allowed are identified in the following Table 3:

TABLE 3.—PRODUCTS NOT APPROVED FOR EXTENDED USE

Company Registration Number	Company Name	Company Address	Product Registration Number	Product Name
279	FMC Corporation, Agricultural Chemical Group	1735 Market Street, Philadelphia, PA 19103	279-1368	Parathion 4 Emusifiable
			279-1611	Aqua 8 Parathion
			279-2089	Parathion 1 Thiodan 2 EC
			279-2128	Methyl Parathion 3 Parathion 6 EC
769	Sureco	P.O. Box 938, Fort Valley, GA 31030	769-291	Parathion-EC4
2935	Wilbur-Ellis	191 W. Shaw Avenue, Suite 107, Fresno, CA 93704	2935-138	Wilbur-Ellis Parathion 4 Spray
			2935-360	Wilbur-Ellis Ethyl-Methyl Parathion 6-3
4787	Cheminova Holding A/S	1455 Broad Street, Bloomfield, NJ 07003	4787-12	Sure-Death Brand Airpara--Miscible
			4787-13	Sure Death Brand 4LB. Parathion Emusifiable Concentrate
5481	AMVAC Chemical Corp.	4100 E. Washington Blvd., Los Angeles, CA 90023	5481-151	Parathion 8
			5481-152	Parathion-Methyl Parathion 6-3
			5481-261	Parathion 1 Thiodan 2 EC
			5481-266	Parathion 800
			5481-287	Parathion 400
5905	Helena Chemical Company	Suite 500, 6075 Poplar Avenue, Memphis, TN 38119	5905-82	Helena Brand Parathion 4E Emulsifiable Insecticide Concentrate
			5905-86	Helena Brand Parathion 8E Emulsifiable Insecticide Concentrate
			5905-109	2 LB. Ethyl Parathion F/Mosquito Control
			5905-187	Ethyl Parathion 8 LB.
			5905-214	3 LB. Ethyl Parathion
			5905-215	Ethyl Parathion 4
			5905-225	Parathion-Methyl Parathion 6-3 Insecticide
			5905-334	Parathion 4 E.C.
7401	Voluntary Purchasing Group, Inc.	P.O. Box 460, Bonham, TX 75418	7401-156	Hi-Yield Brand 4 LB Ethyl Parathion
			7401-203	Hi-Yield 6-Ethyl 3-Methyl
			7401-297	Hi-Yield Brand 8 LB. Ethyl Parathion
9779	Riverside/Terra Corporation	P.O. Box 171376, Memphis, TN 38187	9779-26	Riverside Parathion 4
			9779-125	Riverside Dithon
			9779-136	Riverside Parathion 8
10107	Cornbelt Chemical Company	P.O. Box 410, McCook, NE 69001	10107-24	Parathion E8
10163	Gowan Company	P.O. Box 5569, Yuma, AZ 85366	10163-1	Prokil Parathion 4 LD.
			10163-3	Prokil Ethyl Methyl Parathion 6-3E
			10163-52	Prokil Parathion 8 EC
			10163-117	Gowan Parathion-Methyl Parathion 6-3E
11656	Western Farm Service	3705 W. Beechwood Ave., Suite 101, Fresno, CA 93711	11656-14	Parathion 8EC

TABLE 3.—PRODUCTS NOT APPROVED FOR EXTENDED USE—Continued

Company Registration Number	Company Name	Company Address	Product Registration Number	Product Name
			11656–15	Western Farm Service, Inc. Parathion 4
			116566–16	Western Farm Service, Inc. Ethyl-Methyl 6–3
19713	Drexel Chemical Company	P.O. Box 9306, Memphis, TN 38109	19713–38	Drexel Parathion 8
			19713–83	Drexel Seis-Tres 6-3
			19713–218	Parathion 4 Emulsifiable Concentrate
			19713–272	Ida. Inc. Seis-Tres 6–3
34704	Platte Chemical Company	419 18th Street, P.O. Box 667, Greeley, CO 80632	34704–2	Clean Crop Parathion 4–EC
			34704–9	Clean Crop Parathion 8–E
			34704–16	Clean Crop 6–3 Parathion-Methyl Parathion
			34704–88	Thionspray No. 84
			34704–455	Clean Crop Parathion 4EC
			34704–459	Parathion 8 Aquamul
			34704–570	Hopkins Parathion
42761	Red Panther Chemical Company	P.O. Box 550, Clarksdale, MS 38614	42761–10	Red Panther Parathion 8
			42761–44	Smith-Douglas Ethyl-Methyl 6–3 Emulsion Concentrate
			42761–65	Parathion 8 lb. E.C.
51036	Micro-Flo Company	P.O. Box 5948, Lakeland, FL 33807	51036–19	Ethyl-Methyl parathion 6–3 EC
			51036–22	Parathion 4 EC
			51036–35	Parathion Emulsion 4
			51036–38	Aqua 8 Parathion
			51036–59	Ethyl-Methyl 6–3 EC
			51036–74	Parathion 4EC
			51036–114	Parathion 8E
			51036–161	Parathion 8 Concentrate
			51036–162	Parathion 8E

Parathion section 24(c) special local need registrations that have not been approved for extended use are listed in the following Table 4:

TABLE 4.—PARATHION SECTION 24(C) (STATE) SPECIAL LOCAL NEED (SLN) REGISTRATIONS NOT APPROVED FOR EXTENDED USE

Company Registration Number	Company Name	Company Address	Product Registration Number	Product Name
279	FMC	1735 Market Street, Philadelphia PA 19103	ID770021	Niagara Aqua 8 Parathion Insecticide Code 701
			UT840006	Niagara Aqua 8 Parathion Insecticide Code 701
			WA790060	Niagara Aqua 8 Parathion Insecticide Code 701
5905	Helena Chemical Company	Suite 500, 6075 Poplar Avenue, Memphis, TN 38119	NC810037	Atlas Parathion 8–E An Emulsifiable Liquid
2935	Wilbur-Ellis	191 W. Shaw Avenue, Suite 107, Fresno, CA 93704	OR810023	Red-Top Parathion 4 Spray
			WA810039	Red-Top Parathion 4 Spray
34704	Platte Chemical Company	419 18th Street, P.O.Box 667, Greely, CO 80632	GA910001	Clean Crop Parathion 8–E Emulsifiable Concentrate
			ID910011	Clean Crop Parathion 8–E Emulsifiable Concentrate
			MS910003	Clean Crop Parathion 8–E
			ND790010	Parathion 8–E Emulsifiable Concentrate
			TX760012	Clean Crop Parathion 8–E Emulsifiable Concentrate
			WA910030	Clean Crop Parathion 8–E Emulsifiable Concentrate

For purposes of this Amended Cancellation Order, certified commercial applicators will be considered end-users if they use the canceled product by providing a service of controlling pests without delivering any unapplied pesticide to any person so served. The terms of this Amended Order are effective immediately.

Dated: January 17, 1992.

Victor J. Kimm,

Acting Assistant Administrator for Prevention, Pesticides and Toxic Substances.

[FR Doc. 92-1786 Filed 1-28-92; 8:45 am]

BILLING CODE 6560-50-F

federal register

Wednesday
January 29, 1992

Part IV

Department of Health and Human Services

Public Health Service

Availability of Grants for Adolescent Family Life Demonstration Projects; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

Announcement of Availability of Grants for Adolescent Family Life Demonstration Projects

AGENCY: Office of Adolescent Pregnancy Programs, Office of Population Affairs, PHS, HHS.

ACTION: Notice.

SUMMARY: The Office of Adolescent Pregnancy Programs (OAPP) requests applications for grants under the Adolescent Family Life (AFL) Demonstration Grants Program. These grants are for community-based and community-supported demonstration projects to find effective means of encouraging abstinence from adolescent premarital sexual activity, promoting adoption as an alternative to adolescent parenting, and establishing innovative, comprehensive and integrated approaches to the delivery of services to pregnant adolescents, adolescent parents and their children. Funds are available for approximately 25 projects, which may be located in any State, the District of Columbia, the territories of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, Commonwealth of the Northern Mariana Islands, Republic of Palau, Republic of the Marshall Islands and the Federated States of Micronesia.

DATES: To receive consideration grant applications must be received by the Grants Management Officer by April 3, 1992. Applications shall be considered as meeting the deadline if they are either (1) received on or before the deadline date or (2) postmarked on or before the deadline date and received in time for submission to the review committee. A legibly dated receipt from a commercial carrier or U.S. Postal Service will be accepted in lieu of a postmark. Private metered postmarks will not be accepted as proof of timely mailing. Applications which do not meet the deadline will be considered late applications and will be returned to the applicant.

ADDRESSES: Application kits may be obtained from and applications must be submitted to: Grants Management Office, OPA, room 736E, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Grants Management Office at 202–245–0146 or Program Office at 202–245–7473. Staff are available to answer questions and provide limited technical assistance in the preparation of grant applications.

SUPPLEMENTARY INFORMATION: Title XX of the Public Health Service Act, 42 U.S.C. 300z, *et seq.*, authorizes the Secretary of Health and Human Services to award grants for demonstration projects to provide services to pregnant and nonpregnant adolescents, adolescent parents and their families. (Catalog of Federal Domestic Assistance Number 93.995) Title XX authorizes grants for two types of demonstration projects: (1) projects which provide "care services" only (*i.e.*, services for the provision of care to pregnant adolescents, adolescent parents and their families), and (2) projects which provide "prevention services" only (*i.e.*, services to prevent adolescent premarital sexual relations).

The Office of Adolescent Pregnancy Programs intends to make available approximately $4 million to fund an estimated 25 new and competing renewal AFL demonstration projects. Two categories of projects will be supported: (1) Traditional demonstration projects with evaluation components as described and limited by the statute, and (2) *evaluation-intensive* projects specifically designed to produce research quality information bearing on the effectiveness of the demonstration intervention. An applicant may submit a proposal for a local care or local prevention project or for a national multi-site prevention project with at least two sites in different States. The average award for a local prevention project will be $90,000, with a range between $50,000 and $180,000, and between $120,000 and $300,000 for a national multi-site prevention project. The average award for a local care project will be $180,000, with a range between $60,000 and $240,000. In the case of evaluation-intensive proposals awards may range up to 20 percent higher than the levels indicated above. The award levels for evaluation-intensive projects will include both intervention and evaluation funding, and evaluation activities may account for up to 30 percent of the total award.

Grants may be approved for project periods of up to 3 years. Grantees who receive 3 years of funding may then apply for an additional 2 years of funding through a competitive process.

Competing grant renewal applications will be accepted under this announcement from the 11 current AFL grantees whose grants will end on September 30, 1992 and who will have received fewer than 5 years of funding.

Grants are funded in annual increments (budget periods). Funding for all approved budget periods beyond the first year of a grant is contingent upon the availability of funds, satisfactory progress of the project and adequate stewardship of Federal funds. A grant award may not exceed 70 percent of the total cost of the project for each of the first and second years, and 60 percent for the third year. For those grantees who are then funded for an additional 2 years, the grant award may not exceed 50 percent for the fourth year and 40 percent for the fifth and final year. The non-Federal share of the project costs may be provided in cash expenditures or fairly evaluated in-kind contributions, including plant, equipment and services.

The specific services which may be funded under Title XX are listed below under Care Programs and Prevention Programs.

The Public Health Service (PHS) is committed to achieving the health promotion and disease prevention objectives of Healthy People 2000, a PHS-led national activity for setting priority areas. This announcement is related to the priority area of Family Planning. Potential applicants may obtain a copy of Healthy People 2000 (Full Report; Stock No. 017–001–00474–0) or Healthy People 2000 (Summary Report; Stock No. 017–001–00473–01) through the Superintendent of Documents, Government Printing Office, Washington, DC 20402–9325. (Telephone (202) 783–3238).

Eligible Applicants

Any public or private nonprofit organization or agency is eligible to apply for a grant. Grants are awarded only to those organizations or agencies which the Office of Adolescent Pregnancy Programs determines demonstrate the capability of providing the proposed services and meet the statutory requirements.

Care Programs

Under this announcement, funds are available for local care demonstrations only and not for multi-site national projects. The project site must be identified in the application rather than selected after the grant is awarded.

Under the statute the purpose of care programs is to establish innovative, comprehensive, and integrated approaches to the delivery of care services for pregnant adolescents and adolescent parents under 19 years of age at program entry, with primary emphasis on unmarried adolescents who are 17 years old or younger and their families. This includes young fathers and their families. The Office encourages the submission of care applications which: (1) Propose to provide care services to minority populations, (2) propose innovative

ways of involving families, (3) propose to promote adoption as a positive option and (4) propose to stress self-sufficiency skills, such as school completion (in mainstream or alternative schools and GED programs) and/or job training, preparation and placement, that will assist pregnant adolescents and adolescent parents to become productive independent contributors to family and community life. Applicants should propose sound approaches to strengthening family commitment and addressing the underlying problems that lead adolescents into out-of-wedlock pregnancy as well as offering innovative approaches to presenting adoption as an option for pregnant adolescents. Applicants should base their approaches upon an assessment of existing programs and, where appropriate, upon efforts to establish better coordination, integration and linkages among such existing programs.

Applicants for care projects should attempt to address, through program objectives and activities, the following programmatic concerns, which are also national health objectives relating to family planning discussed in section 5 of the Public Health Service document, Healthy People 2000: reduction of repeat pregnancies among girls age 17 and younger; increase in the proportion of ever sexually-active adolescents 17 and under who have abstained from sexual activity for the previous three months; increase in the proportion of sexually active unmarried adolescents who use contraception, especially combined method contraception, to prevent repeat pregnancy and provide barrier protection against disease; increase in the proportion of people age 10 through 18 who have discussed human sexuality, including values surrounding sexuality, with their parents and/or have received information through another parentally-endorsed source, such as youth, school or religious programs; and increase in the proportion of pregnancy counselors who offer positive, accurate information about adoption to unmarried adolescents with unintended pregnancies.

Applicants for care programs are required to provide, either directly or by referral, the following 10 core services:

(1) Pregnancy testing and maternity counseling;

(2) Adoption counseling and referral services which present adoption as an option for pregnant adolescents, including referral to licensed adoption agencies in the community if the eligible grant recipient is not a licensed adoption agency;

(3) Primary and preventive health services, including prenatal and postnatal care;

(4) Nutrition information and counseling;

(5) Referral for screening and treatment of venereal disease;

(6) Referral to appropriate pediatric care;

(7) Educational services relating to family life and problems associated with adolescent premarital sexual relations including:

(a) Information about adoption,

(b) Education on the responsibilities of sexuality and parenting,

(c) The development of material to support the role of parents as the providers of sex education, and

(d) Assistance to parents, schools, youth agencies and health providers to educate adolescents and preadolescents concerning self-discipline and responsibility in human sexuality;

(8) Appropriate educational and vocational services;

(9) Mental health services and referral to mental health services and to other appropriate physical health services;

(10) Counseling and referral for family planning services.

Note: No funds provided under Title XX may be used for the provision of family planning services other than counseling and referral services unless appropriate family planning services are not otherwise available in the community.

In addition to the 10 required core services listed above, applicants for care projects may provide any of the following supplemental services:

(1) Referral to licensed residential care or maternity home services;

(2) Child care sufficient to enable the adolescent parent to continue education or to enter into employment;

(3) Consumer education and homemaking;

(4) Counseling for the immediate and extended family members of the eligible person;

(5) Transportation; and

(6) Outreach services to families of adolescents to discourage sexual relations among unemancipated minors.

Within the context of providing the required core plus any supplemental services and developing evaluation strategies, applicants should pay particular attention to the following aspects of Title XX:

- Provision of assistance to pregnant adolescents and adolescent parents to enable them to obtain proper care and to become productive contributors to family and community life.
- Continuation of services to clients after the delivery of the baby to enable them to acquire good parenting skills and to ensure that their children are developing normally physically, intellectually and emotionally. Ideally, this should extend for approximately 2 years after delivery.
- Involvement of the families of pregnant adolescents and adolescent parents, including the father of the baby, and provision of assistance to families and adolescents in understanding and resolving the societal causes which are associated with adolescent pregnancy.
- Promotion of adoption as an option for pregnant adolescents.
- Involvement of voluntary associations, religious and charitable organizations and other groups in the private sector in order to help adolescents and their families deal with the complex issues surrounding adolescent pregnancy.

Prevention Programs

Under this announcement, funds are available for both local and multi-site national projects. A multi-site national project must have at least two sites in different States.

The purpose of prevention programs is to find effective means within the context of the family of reaching adolescents, both male and female, before they become sexually active in order to maximize the guidance and support available to adolescents from parents and other family members in promoting abstinence from adolescent premarital sexual relations.

OAPP is soliciting applications for grants to provide innovative approaches to family life educational services that clearly and unequivocally promote abstinence for unmarried adolescents. Applicants must: (1) Already have educational materials/curricula available to test, (2) propose to use educational materials/curricula that comply with the purposes of Title XX, and (3) include a strong evaluation design which will address questions pertaining to program impact. Under this announcement, OAPP will not fund proposals to develop new prevention curricula.

In addition, the office encourages the submission of applications which: (1) propose to provide prevention services to minority populations, (2) propose to provide services in conjunction with prevention projects addressing substance abuse; and/or (3) propose to implement a prevention curriculum consisting of multiple exposures across grade levels.

Applicants for prevention projects should attempt to address, through program objectives and activities, the

following programmatic concerns, which are also national health objectives relating to family planning discussed in section 5 of the Public Health Service document, Healthy People 2000: reduction of pregnancies among girls aged 17 and under; reduction of the proportion of adolescents who have engaged in sexual intercourse; increase in the proportion of ever sexually active adolescents aged 17 and younger who have abstained from sexual activity for the previous three months; and increase in the proportion of people age 10 through 18 who have discussed human sexuality, including values surrounding sexuality, with their parents and/or have received information through another parentally endorsed source, such as youth, school or religious programs.

Applicants for prevention programs are not required to provide any specific number of services; a proposal may include any one or more of the following services as appropriate:

(1) Educational services relating to family life and problems associated with adolescent premarital sexual relations including:

(a) Information about adoption,

(b) Education on the responsibilities of sexuality and parenting,

(c) The development of material to support the role of parents as the providers of sex education, and

(d) Assistance to parents, schools, youth agencies and health providers to educate adolescents and preadolescents concerning self-discipline and responsibility in human sexuality;

(2) Appropriate educational and vocational services;

(3) Counseling for the immediate and extended family members of the eligible person;

(4) Transportation;

(5) Outreach services to families of adolescents to discourage sexual relations among unemancipated minors;

(6) Pregnancy testing and maternity counseling;

(7) Nutrition information and counseling; and

(8) Referral for screening and treatment of venereal disease.

The following application requirements contain information collections subject to OMB approval under the Paperwork Reduction Act of 1980 (Pub. L. 96–511). These information collections have been approved by OMB under control number 0937–0189.

Applications requesting support for prevention projects should propose innovative, value-based, family-centered approaches to promoting adolescent premarital abstinence. Applicants should promote parents as the primary sex educators of their children and emphasize the provision of support by other family members, voluntary associations, religious and charitable organizations and other groups in the private sector in order to help adolescents and their families deal with complex issues of adolescent premarital sexual relations. Prevention applicants are encouraged to propose innovative, value-based approaches which will improve our understanding of effective strategies, as opposed to duplicating approaches which focus merely on improving knowledge, communication and assertiveness skills.

Evaluation

Section 2006(b)(1) of Title XX requires each grantee to expend at least one percent but not more than five percent of the Federal funds received under Title XX of evaluation of the project. In some cases, waivers of the five percent limit on evaluation (see sec. 2006(b)(1)) may be granted.

As this is a demonstration program, all applications are required to have an evaluation component of high quality consistent with the scope of the proposed project and the funding. All project evaluations should monitor program processes to determine whether the program has been carried out as planned and measure the program's outcomes. Outcome variables should be consistent with the key purposes of Title XX, including but not limited to family involvement, adoption and adolescent premarital abstinence.

In addition to soliciting applications incorporating such traditional evaluation designs, the office also requests applications for evaluation-intensive projects. For applications funded under the evaluation-intensive category, the Office will waive the five percent limit up to a maximum of 30 percent of the Federal funds received under Title XX. Applicants who wish to compete under this category should propose a project with a strong evaluation design which, in addition to focusing on outcome variables consistent with the key purposes of Title XX, compares these program outcomes with those of relevant control or comparison groups. Emphasis should be placed on measuring variables which are integral to the project's proposed intervention and which are central to the purposes of the AFL program. Proposals should show serious attention to problems of data collection and verification, should demonstrate sample size sufficiency (emphasizing techniques for controlling for attrition) and utilize a strong evaluation design, using randomized control of matched-comparison groups for measurement where possible.

Evaluation-intensive applications should include a plan for long-term monitoring: (1) Beyond the pre- and post-test point for prevention projects (preferably 12 months at a minimum) and (2) until 24 months post-partum for care projects. Applications for evaluation-intensive awards will be reviewed with like applications.

Note: Competing renewals that are not already evaluation-intensive projects may request a waiver to increase their evaluation efforts beyond the five percent limit of Federal funds, but may not change to the evaluation-intensive category.

Section 2006(b)(2) requires that an organization or an entity independent of the grantee providing services assist the grantee in evaluating the project. Particularly in the case of evaluation-intensive proposals, the OAPP strongly recommends extensive collaboration between the applicant organization and the proposed evaluator in the development of the intervention, development of the evaluation hypothesis(es), identification of the variables to be measured and a timetable for initiation of the intervention, baseline measurement, and ongoing evaluation data collection and analysis.

Application Requirements

Applications must be submitted on the forms supplied (PHS–5161–1) and in the manner prescribed in the application kits provided by the OAPP. Applicants are required to submit an application signed by an individual authorized to act for the applicant agency or organization and to assume for the organization the obligations imposed by the terms and conditions of the grant award.

It should be noted that grantees may not teach or promote religion in their AFL project. Each grant project must be accessible to the public generally, not just to those of a particular religious affiliation.

Under section 2011(a) of the Act, AFL projects may not provide abortions or abortion counseling or referral and may not advocate, promote or encourage abortion. Only if both the adolescent and her parents request abortion counseling may a project provide referral for abortion counseling to a pregnant adolescent.

Additional Requirements

Applicants for grants must also meet the following requirements:

(a) *Requirements for Review of an Application by the Governor.* Section

2006(e) of Title XX requires that each applicant shall provide the Governor of the State in which the applicant is located a copy of each application submitted to OAPP for a grant for a demonstration project for services under this Title. The Governor has 60 days from the receipt date in which to provide comments to the applicant.

An applicant may comply with this requirement by submitting a copy of the application to the Governor of the State in which the applicant is located at the same time the application is submitted to OAPP. To inform the Governor's office of the reason for the submission, a copy of this notice should be attached to the application.

(2) *Review Under Executive Order 12372.* Applications under this announcement are subject to the review requirements of Executive Order 12372, State Review of Applications for Federal Financial Assistance, as implemented by 45 CFR part 100 (Intergovernmental Review of DHHS Programs and Activities). E.O. 12372 sets up a system for state and local government review of proposed Federal assistance applications.

As soon as possible, the applicant (other than federally-recognized Indian tribal governments) should contact the State Single Point of Contact (SPOC) in each State in the area to be served, to alert it to the prospective application, discuss the project, and receive any necessary instructions on the State process. For proposed projects serving more than one State, the applicant is advised to contact the SPOC of each affected State. The SPOC's comment(s) should be forwarded to the Grants Management Office, Office of Population Affairs, room 736E, H.H.H. Building, 200 Independence Avenue, SW., Washington, DC 20201. Such comments must be received by the Office of Population Affairs by June 3, 1992 to be considered.

The application kit contains information to guide applicants in fulfilling the above requirements.

Application Consideration and Assessment

Applications which are judged to be late or which do not conform to the requirements of this program announcement will not be accepted for review. Applicants will be so notified, and the applications will be returned. All other applications will be reviewed and assessed according to the following criteria:

(1) The capacity of the proposed applicant organization to provide the rapid and effective use of resources needed to conduct the project, collect data and evaluate it. This includes personnel, time and facilities. (15 points)

(2) The applicant's presentation of an appropriate project methodology, including a clear statement of goals and objectives consistent with Title XX, reasonable methods for achieving the objectives, a reasonable workplan and timetable and a clear statement of results or benefits expected. (20 points)

(3) The applicant's provision for complying with the legislation's requirements to involve families in the delivery of services; in the case of care programs to promote adoption as a positive alternative; and in the case of preventive programs to promote abstinence from adolescent premarital sexual activity. (20 points)

(4) The applicant's documentation of the innovativeness of the program approach and its worth for testing and replication. (15 points)

(5) The applicant's presentation of a detailed evaluation plan, indicating an understanding of program evaluation methods and reflecting a practical, technically sound approach to assessing the project's achievement of program objectives. (20 points)

Note: Applications will be reviewed in two separate categories according to whether they are demonstration proposals with standard evaluations or evaluation-intensive proposals.

(6) The applicant's provision for the requirements set forth in section 2006(a) of Title XX of the Public Health Service Act. (10 points)

In making grant award decisions, the Deputy Assistant Secretary for Population Affairs will take into account the extent to which grants approved for funding will provide an appropriate distribution of resources throughout the country, the priorities in section 2005(a) and the other factors in section 2005 of Title XX of the Public Health Service Act, focusing on:

(1) The nature of the organization applying;

(2) The applicant's capacity to administer funds responsibly;

(3) The incidence of adolescent pregnancy and the availability of services in the geographic area to be served;

(4) The population to be served;

(5) The community commitment to and involvement in planning and implementation of the demonstration project;

(6) The organizational model(s) for delivery of service;

(7) The usefulness for policymakers and service providers of the proposed project and its potential for complementing or building upon existing AFL demonstration models;

(8) The applicant's proposed plans to access continued community funding as Federal funds decrease and end; and

(9) The reasonableness of the estimated cost to the government considering the anticipated results.

OAPP does not release information about individual applications during the review process until final funding decisions have been made. When these decisions have been made, applicants will be notified by letter of the outcome of their applications. The official document notifying an applicant that an application has been approved for funding is the Notice of Grant Award, which specifies to the grantee the amount of money awarded, the purpose of the grant, the terms and conditions of the grant award, and the amount of funding to be contributed by the grantee to project costs.

Dated: January 21, 1992.

William R. Archer III,

Deputy Assistant Secretary for Population Affairs.

[FR Doc. 92-2120 Filed 1-28-92; 8:45 am]

BILLING CODE 4160-17-M

federal register

Wednesday
January 29, 1992

Part V

Department of Agriculture

Cooperative State Research Service

Rangeland Research Grants Program for Fiscal Year 1992; Solicitation of Applications

DEPARTMENT OF AGRICULTURE

Cooperative State Research Service

Rangeland Research Grants Program for Fiscal Year 1992; Solicitation of Applications

Notice is hereby given that under the authority in section 1480 of the National Agricultural Research, Extension, and Teaching Policy Act of 1977, as amended (7 U.S.C. 3333), the Cooperative State Research Service (CSRS) of the United States Department of Agriculture (USDA) anticipates awarding standard grants for basic studies in certain areas of rangeland research. No more than $80,000 will be awarded for the support of any one project, regardless of the amount requested. The total amount of funds available for grants under the Rangeland Research Grants Program during fiscal year 1992 is $454,991.

Under this program, the Secretary may award grants to land-grant colleges and universities, State agricultural experiment stations, and to colleges, universities, and Federal laboratories having a demonstrable capacity in rangeland research. Except in the case of Federal laboratories, each grant recipient shall match the Federal funds expended on a research project based on a formula of 50 percent Federal and 50 percent non-Federal funding. Proposals received from scientists at non-United States organizations or institutions will not be considered for support.

Applicable Regulations

This program is subject to the provisions found in 7 CFR part 3401 (51 FR 16152, April 30, 1986), in which reference is made to 7 CFR part 3400. The rules regarding incorporation by reference are contained in 1 CFR part 51. In pertinent part, 1 CFR 51.1(f) provides: "(I)ncorporation by reference of a publication is limited to the edition of the publication that is approved. Future amendments or revisions of the publication are not included." Accordingly, amendments to 7 CFR part 3400 promulgated after April 30, 1986, (53 FR 49640–49642, December 8, 1988, and 56 FR 58146–58152, November 15, 1991) do not apply to the fiscal year 1992 Rangeland Research Grants Program. The provisions in 7 CFR part 3401 set forth procedures to be followed when submitting grant proposals, rules governing the evaluation of proposals, processes regarding the awarding of grants, and regulations relating to the post-award administration of grant projects. Pursuant to section 1473 of the National Agricultural Research, Extension, and Teaching Policy Act of 1977, as amended (7 U.S.C. 3319), funds made available under this program to recipients other than Federal laboratories shall not be subject to reduction for indirect costs or for tuition remission costs. Since these costs are not allowable costs for purposes of this program, such costs incurred by a grant recipient may not be used to meet the matching funds requirement. In addition, USDA Uniform Federal Assistance Regulations, 7 CFR part 3015, as amended, and Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), 7 CFR part 3017, as amended, and New Restrictions on Lobbying, 7 CFR part 3018, apply to this program.

How to Obtain Application Materials

Copies of this solicitation, the Grant Application Kit, and the Administrative Provisions for this program (7 CFR part 3401) may be obtained by writing to the address or calling the telephone number which follows:

Proposal Services Branch, Awards Management Division, Office of Grants and Program Systems, Cooperative State Research Service, U.S. Department of Agriculture, Room 303, Aerospace Center, Washington, DC 20250–2200, Telephone: (202) 401–5048.

What to Submit

Each applicant shall include an original and nine copies of each proposal submitted under this program. This number of copies is necessary to permit thorough, objective merit evaluation of all proposals received before funding decisions are made. Each copy of each proposal must include a Form CSRS–661, "Grant Application." Applicants should note that one copy of this form, preferably the original, must contain pen-and-ink signatures of the principal investigator(s) and the authorized organizational representative. (Form CSRS–661 and the other required forms and certifications are contained in the Grant Application Kit).

Members of review committees and CSRS staff expect each project description to be complete in itself. Grant proposals shall be limited to 10 pages (single-spaced), exclusive of required forms, bibliography and vitae of the principal investigator(s), senior associate(s), and other professional personnel. Attachment of appendices is discouraged and should be included only if pertinent to an understanding of the proposal.

All copies of each proposal shall be mailed in one package. Please see that each copy of each proposal is stapled securely in the upper left-hand corner. DO NOT BIND. Information should be typed on one side of the page only.

Every effort should be made to ensure that the proposal contains all pertinent information when submitted. Prior to mailing, compare your proposal with the guidelines contained in the Administrative Provisions which govern the Rangeland Research Grants Program, 7 CFR part 3401. Proposals submitted by organizations other than Federal laboratories shall state that the 50 percent non-Federal funding requirement will be met.

Where and When to Submit Grant Applications

Each research grant application shall be submitted to:

Proposal Services Branch, Awards Management Division, Office of Grants and Program Systems, Cooperative State Research Service, U.S. Department of Agriculture, Room 303, Aerospace Center, Washington, DC 20250–2200.

Please note. Hand-delivered proposals or those delivered by overnight express services shall be brought to: Room 303, Aerospace Center, 901 D Street SW., Washington, DC 20024.

To be considered for funding during fiscal year 1992, proposals must be received in the Proposal Services Branch by close of business on March 20, 1992.

One copy of each proposal not selected for funding will be retained for one year. The remaining copies will be destroyed.

Specific Areas of Research to be Supported in Fiscal Year 1992

Standard grants will be awarded to support basic research in certain areas of rangeland research. Proposals will be considered in the following specific areas: (1) Management of rangelands and agricultural land as integrated systems for more efficient utilization of crops and waste products in the production of food and fiber; (2) methods of managing rangeland watersheds to maximize efficient use of water and improve water yield, water quality, and water conservation, to protect against onsite and offsite damage to rangeland resources from floods, erosion and other detrimental influences, and to remedy unsatisfactory and unstable rangeland conditions; and (3) revegetation and rehabilitation of rangelands including the control of undesirable species of plants.

If necessary, further information may be obtained by calling Dr. Wayne K. Murphey, CSRS–USDA; telephone: (202) 401–4089.

Supplementary Information

The Rangeland Research Grants Program is listed in the Catalog of Federal Domestic Assistance under No. 10.200. For reasons set forth in the Final Rule-related Notice to 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), this program is excluded from the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)), the collection of information requirements contained in this notice have been approved under OMB Document No. 0524–0022.

Done at Washington, DC, the 23rd day of January, 1992.

John Patrick Jordan,

Administrator, Cooperative State Research Service.

[FR Doc. 92–2138 Filed 1–28–92; 8:45 am]

BILLING CODE 3410–22–M

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Note: The List of Public Laws for the first session of the 102d Congress has been completed and will be resumed when bills are enacted into public law during the second session of the 102d Congress, which convenes on January 3, 1992. A cumulative list of Public Laws for the first session was published in Part II of the **Federal Register** on January 2, 1992.