AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

12–20–94
Vol. 59 No. 243

federal register

Tuesday
December 20, 1994

United States
Government
Printing Office
SUPERINTENDENT
OF DOCUMENTS
Washington, DC 20402

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SECOND CLASS NEWSPAPER

Postage and Fees Paid
U.S. Government Printing Office
(ISSN 0097–6326)

12–20–94
Vol. 59 No. 243
Pages 65473–65702

Federal Register

Tuesday
December 20, 1994

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RESERVATIONS: 202–523–4538

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FEDERAL RESERVE SYSTEM

12 CFR Part 225

[Regulation Y; Docket No. R–0843]

Revisions Regarding Tying Restrictions

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is adopting a final rule amending the anti-tying provisions of Regulation Y to permit a bank holding company or its nonbank subsidiary to offer a discount on its product or service on condition that a customer obtain any other product or service from that company or from any of its nonbank affiliates. Thus, the final rule would generally remove Board-imposed restrictions on tying when no bank is involved in the arrangement and the products are separately available for purchase by the customer. The Board believes that the amendment will relieve bank holding companies of a competitive disadvantage, promote efficiency in the delivery of services, and provide benefits for consumers.

EFFECTIVE DATE: January 23, 1995.

FOR FURTHER INFORMATION CONTACT: Gregory A. Baer, Managing Senior Counsel (202/452–3236), or David S. Simon, Attorney (202/452–3611), Legal Division; or Anthony Cyrnak, Economist (202/452–2917), Division of Research and Statistics, Board of Governors of the Federal Reserve System. For the hearing impaired *only*, Telecommunication Device for the Deaf (TDD), Dorothea Thompson (202/452–3544).

SUPPLEMENTARY INFORMATION:

Background

Section 106(b) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1972) generally prohibits a bank from tying a product or service to another product or service offered by the bank or by any of its affiliates. A bank engages in a tie for purposes of section 106 by: (1) Offering a discount on a product or service (the "tying product") on the condition that a customer obtain some additional product or service (the "tied product") from the bank or from any of its affiliates; or (2) allowing the purchase of a product or service only if a customer purchases another product from the bank or from any of its affiliates. Although section 106 applies only when a *bank* offers the tying product, the Board in 1971 extended section 106 to products offered by bank holding companies and their nonbank subsidiaries. 12 CFR 225.7(a).

On July 27, 1994, the Board proposed an amendment to conform the anti-tying provisions of Regulation Y more closely to section 106 and its focus on banks. 59 FR 39709 (August 4, 1994). The proposed amendment would permit bank holding companies and their nonbank subsidiaries to offer discounts on packaged products when: (1) Both the tying and tied products are offered by bank holding companies or their nonbank subsidiaries—in other words, when no affiliated bank was involved in the arrangement; and (2) both the tying and tied products are separately available for purchase at competitive prices. If the package arrangement included a product offered by an affiliated bank, the proposed amendment would not apply (although the arrangement might qualify for another exception adopted by the Board).

General Summary of Comments

The Board received 31 comments on its proposal. Those commenting included 17 banking organizations, eight trade associations, and five Reserve Banks. Commenters overwhelmingly supported the proposed amendment. One banking trade association opposed the Board's proposal because it believed that a blanket exception could have anti-competitive effects in small towns. This commenter recommended that the Board act on exemption requests on a case-by-case basis.

Discussion

The Board is adopting the amendment substantially as proposed. It is important to note that the amendment is not an exception to section 106, which applies only when a *bank* offers the tying product—that is, when a bank is varying the consideration or conditioning the availability of a product in order to create an incentive for the customer to purchase another product.[1] The amendment will apply only when *nonbanks* offer all of the packaged products—a case that would otherwise be covered by the Board's extension of section 106 to tying within a bank holding company organization.

The amendment will not permit the types of anti-competitive practices that the Board's regulatory extension was designed to prevent. Neither bank holding companies nor their nonbanking subsidiaries generally appear to possess sufficient market power in the products that they offer to impair competition.[2] Moreover, bank holding companies and their nonbank subsidiaries will continue to be restricted by the antitrust laws—the same restrictions that bind their non-bank holding company competitors—and the Board will retain the authority to terminate or modify any arrangement that resulted in anti-competitive practices. Section 106 will continue to restrict tying by banks, and Regulation Y will continue to restrict tying by a nonbank when the tied product is offered by an affiliated bank. Finally, the amendment will rescind Regulation Y's restrictions on tying between nonbanks only where discounting is involved and the products are separately available.

The final rule is further justified by the competitive environment in which bank holding companies and their nonbank subsidiaries operate

[1] The purpose of section 106 was to prevent banks from using their market power over certain products to gain an unfair competitive advantage in other products. *See, e.g.*, S. Rep. No. 1084, 91st Cong., 2d Sess., 16 (1970). Although banks, like their nonbank competitors, already were subject to general antitrust prohibitions on tying, Congress concluded that special restrictions were necessary given the unique role of banks in the economy. Section 106's restrictions on banks are broader than those of the antitrust laws, as no proof of economic power in the tying product or anti-competitive effects in the tied product market are required for a violation to occur.

[2] For example, the "laundry list" activities in which bank holding companies and their nonbanking subsidiaries are permitted to engage are generally conducted in competitive national or regional markets that are characterized by large numbers of actual or potential competitors and low barriers to entry. *See* 12 CFR 225.25.

nationwide. The amendment will relieve bank holding companies of a competitive disadvantage, promote efficiency in the delivery of services, and provide benefits for consumers. In particular, the amendment will provide customers with greater choices and potentially lower costs by allowing bank holding companies to offer the same types of discounts that their competitors already offer.

Other Issues

The Board sought public comment on several particulars of the proposed amendment, including: (1) The Board's requirement that all products offered in a package arrangement be separately available for purchase; (2) that these products be separately available "at competitive prices"; and (3) the Board's clarification that its authority to revoke an exception that is resulting in anti-competitive practices includes authority to halt such practices at an individual institution.

Commenters were split on the proposed requirement that all products in a package arrangement be separately available for purchase, with five in favor and seven opposed. The requirement of separate availability, like the requirement that the arrangement involve a discount, effectively prevents a bank holding company from conditioning the availability of one product on the purchase of another. In a competitive market, a company should be unable to profit from such an arrangement—as customers are free to purchase the desired, tying product from a competitor without having to purchase the less desired, tied product. Although, as noted, the markets for products offered by bank holding company affiliates are generally competitive, there may be a few markets that are less competitive, and the discounting and separate availability restrictions would therefore act as a further safeguard to protect against anti-competitive practices in such markets. Accordingly, these requirements will be retained.[3]

Commenters generally opposed the addition of a clarifying phrase providing that products be separately available "at competitive prices," with four in favor and seven opposed. The purpose of this clarification was to prevent evasion of the separate availability and discounting requirements. Such an evasion could occur by establishing the price of a product so far above its package price that customers would effectively be required to purchase the package in order to obtain the product. The effect would be the same as an explicit conditioning of the availability of the product, as described above.

Commenters expressed concern about the difficulties of determining what constitutes a competitive price, particularly in products that are unusual or unique. Because of these concerns, the Board has not adopted this clarification but will continue to interpret "separately available" to mean available at a price that would generally attract customers and therefore leaves customers desiring a product a meaningful choice between purchasing the product alone or through a package.

Commenters did not object to the Board's retained authority to revoke an exception that is resulting in anti-competitive practices or the Board's ability to halt such practices at an individual institution. The Board has retained such authority in the final rule.

Additional Relief Requested by the Commenters

Several commenters suggested that the Board grant additional relief from the tying restrictions of section 106 and Regulation Y. In particular, nine commenters recommended that the Board completely repeal the extension of section 106 to bank holding companies and their nonbank subsidiaries. Commenters also suggested that the Board extend the proposed amendment to allow a nonbank subsidiary of a bank holding company to offer a discount on a product or service to a customer who purchases a product or service from a bank affiliate.

Seven commenters recommended revisions to the regulatory traditional bank product exception recently adopted by the Board.[4] The commenters requested that the Board extend the regulatory traditional bank product exception beyond cases where only traditional bank products are part of the package. These commenters noted that the statutory traditional bank product exception permits a bank to tie any product (not just a traditional bank product) to a traditional bank product, and suggested that the same exception should apply to ties between affiliates. Finally, several commenters requested that the Board clarify the treatment of operating subsidiaries of banks under section 106 and further expand the definition of traditional bank products.

The Board continues to analyze all of these issues and will consider these proposals, and others, after the recent amendments have been implemented.

Paperwork Reduction Act

No collections of information pursuant to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) are contained in the proposed rule.

Regulatory Flexibility Act

It is hereby certified that this final rule will not have a significant economic impact on a substantial number of small entities that would be subject to the regulation.

List of Subjects in 12 CFR Part 225

Administrative practice and procedure, Banks, banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

For the reasons set forth in the preamble, the Board amends 12 CFR Part 225 as set forth below:

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

1. The authority citation for 12 CFR part 225 is revised to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1831i, 1831p–1, 1843(c)(8), 1844(b), 1972(l), 3106, 3108, 3310, 3331–3351, 3907, and 3909.

2. In § 225.7, a new paragraph (b)(3) is added and paragraph (c)(2) is revised to read as follows:

§ 225.7 Tying restrictions.

* * * * *

(b) * * *

(3) *Discounts on tie-in arrangements not involving banks.* A bank holding company or any nonbank subsidiary thereof may vary the consideration for any extension of credit, lease or sale of property of any kind, or service, on the condition or requirement that the customer obtain some additional credit, property, or service from itself or a nonbank affiliate.

(c) * * *

[3] The proposed rule contained specific language emphasizing that all products in a package arrangement must be separately available for purchase by the customer. Because all anti-tying exceptions granted by the Board already are subject to this requirement, this language has been deleted in the final rule to avoid redundancy. *See* 12 CFR 225.7(c)(1).

[4] *See* 12 CFR 225.7(b)(1). Section 106 contains an explicit exception (the "statutory traditional bank product exception") that permits a bank to tie any product or service to a loan, discount, deposit, or trust service (a traditional bank product) offered by that bank. The regulatory traditional bank product exception partially extends the statutory traditional bank product exception by permitting a bank or any of its affiliates to vary the consideration for a traditional bank product on condition that the customer obtain another traditional bank product from an affiliate. In other words, a bank may offer a customer a discount on one product (*e.g.*, a deposit account) if the customer obtains another product (*e.g.*, a loan) from an affiliate, so long as *both* products are traditional bank products.

(2) Any exception granted pursuant to this section shall terminate upon a finding by the Board that the arrangement is resulting in anti-competitive practices. The eligibility of a bank holding company or bank or nonbank subsidiary thereof to operate under any exception granted pursuant to this section shall terminate upon a finding by the Board that its exercise of this authority is resulting in anti-competitive practices.

* * * * *

By order of the Board of Governors of the Federal Reserve System, December 14, 1994.

William W. Wiles,

Secretary of the Board.

[FR Doc. 94–31186 Filed 12–19–94; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 872

[Docket No. 92N–0281]

Medical Devices; Classification of Temporomandibular Joint Implants

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is classifying four temporomandibular joint (TMJ) implants, the total temporomandibular joint prosthesis, the glenoid fossa prosthesis, the mandibular condyle prosthesis, and the interarticular disc prosthesis (interpositional implant), into class III (premarket approval). These actions are being taken under the Federal Food, Drug, and Cosmetic Act (the act), as amended by the Medical Device Amendments of 1976 (the 1976 amendments) and the Safe Medical Devices Act of 1990 (the SMDA).

EFFECTIVE DATE: January 19, 1995.

FOR FURTHER INFORMATION CONTACT: Joseph M. Sheehan, Center for Devices and Radiological Health (HFZ–84), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD 20850, 301–594–4765, ext. 157.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of September 18, 1992 (57 FR 43165), FDA issued a proposed rule to classify certain TMJ implants into class III. Initially, FDA provided for interested persons to submit written comments on the proposal by November 17, 1992. In response to a request for an extension of the comment period, in the **Federal Register** of December 1, 1992 (57 FR 56876), FDA extended the comment period until December 8, 1992.

Subsequently, in the **Federal Register** of February 14, 1994 (59 FR 6935), FDA reproposed to classify two TMJ implants, the mandibular condyle prosthesis and the glenoid fossa prosthesis, into class III (premarket approval) to reflect the recommendation of the Dental Products Panel (the panel) with respect to the classification of these devices.

II. Response to Comments

The agency received 54 comments responding to the proposed rule and one comment responding to the reproposed rule. These comments were submitted by a law firm, oral and maxillofacial surgeons who placed TMJ implants, manufacturers and distributors of TMJ implants, and TMJ implant recipients.

1. In the preamble to the proposed rule, FDA advised interested persons that the agency lacked evidence that the total TMJ prosthesis was legally in commercial distribution before May 28, 1976. If the device was first introduced into interstate commerce after May 28, 1976, it would be in class III in accordance with section 513 of the act (21 U.S.C. 360c). FDA specifically requested comments on this issue. In response, FDA received several comments stating that the total TMJ prosthesis was legally in commercial distribution in the United States before May 28, 1976, and one comment to the contrary.

FDA has determined, from information submitted in comments, that two firms, TMJ Implants, Inc., Golden, CO, and the Temporomandibular Joint Research Foundation, La Cresenta, CA, were commercially distributing the total TMJ prosthesis in the United States on or before May 28, 1976. Thus, the agency has concluded that the total TMJ prosthesis is, in fact, a preamendments device and should be classified along with the other TMJ implants.

2. Several comments stated that classification of TMJ implants into class III (premarket approval) might result in the unavailability of these devices for clinical use or in a movement to ban them. One manufacturer of total TMJ implants stated that, if the total TMJ implant is classified into class III, the expense of preparing a PMA would force that manufacturer to discontinue marketing the device.

Under the statute, FDA classifies a device into class III, and subsequently requires submission of PMA's for the device, when FDA has determined that premarket approval is necessary to provide reasonable assurance of the safety and effectiveness of the device. The classification of a device, therefore, is based on considerations related to the safety or effectiveness of the device.

FDA disagrees that classifying TMJ implants into class III will necessarily result in the unavailability and/or the banning of these devices because of the procedural safeguards contained in the statute. The effect of classifying a device into class III is to provide each manufacturer of the device with sufficient time to conduct necessary testing of the device (a minimum of 30 months) and then to submit a PMA to FDA by a date to be set in a future regulation under section 515(b) of the act (21 U.S.C. 360e(b)(1)). That regulation is promulgated using notice-and-comment rulemaking, in conjunction with which manufacturers are permitted to petition for reclassification. Moreover, pursuant to section 501(f) of the act (21 U.S.C. 351(f)(1)), a preamendments device may continue to be sold throughout this time period and while a PMA is pending.

FDA is not attempting to ban TMJ implants by classifying them into class III. In fact, by eventually requiring submission of PMA's for these devices, FDA will be giving manufacturers the opportunity to establish that the devices are safe and effective. The classification of a device into class III neither results in nor is it related to the banning of a device under section 516 of the act (21 U.S.C. 360f).

3. Several comments stated that, for reconstruction of the temporomandibular joint, non-Proplast™ TMJ implant devices are superior to autogenous materials. One comment stated that partial fossa protheses are safe and effective. Comments from patients and TMJ prostheses manufacturers stated that they experienced favorable results following implantation of the total TMJ prosthesis.

In classifying these devices, FDA is determining the level of regulatory control needed to provide reasonable assurance of their safety and effectiveness. Whether non-Proplast™ TMJ implants are superior in safety and effectiveness to autogenous materials, or whether partial fossa prostheses are perceived as safe and effective, is not relevant to this determination.

In accordance with section 513(a)(3) of the act, the agency relies on valid scientific evidence to determine the classification of a device. According to § 860.7(c)(2) (21 CFR 860.7(c)(2)), valid scientific evidence includes evidence

from well-controlled investigations, partially controlled studies, studies and objective trials without matched controls, well-documented case histories conducted by qualified experts, and reports of significant human experience with a marketed device. Valid scientific evidence does not include isolated case reports, random experience, reports lacking sufficient details to permit scientific evaluation, or unsubstantiated opinions. Thus, the isolated case reports, random testimonials, and unsubstantiated opinions received in response to the proposed rule cannot be regarded as valid scientific evidence upon which the classification of TMJ implants can be based.

4. One comment stated that the agency's failure to provide the panel information relating to TMJ devices made of materials other than Proplast™ limited the panel's consideration and should limit the scope of its classification recommendation accordingly.

FDA disagrees with this comment. As stated in the legislative history of the Medical Device Amendments of 1976:

> In requiring a panel's classification recommendation to include a summary of the reasons for the recommendation and a summary of the data upon which the recommendation is based, the objective is to assure that the record accurately reflects the basis for the panel's recommendations. The use of the term "data" is not intended to refer only to the results of scientific experiments but should also consist of less formal evidence, other scientific information, or judgments of experts when available. The requirement is not intended to imply that a panel must have received evidence with respect to safety and effectiveness of a device before it can make a classification recommendation. Under this premise, the burden of providing evidence substantiating the safety and effectiveness of a device rests on the manufacturers, and the absence of sufficient data may be referred to in a panel's recommendation as the reason for classification of a device into class III.

(See H. Rept. No. 94–853, 94th Cong., 2d sess. 40 (1976), p. 40).

5. One comment asserted that the references cited by FDA in the proposed rule classifying the total TMJ implant did not exist at the time of the panel meeting and, therefore, could not have been evaluated by the panel when making its recommendation.

FDA disagrees with this comment. It is true that some of the information cited by FDA in support of its proposed classification of the total TMJ implant did not exist at the time of the panel's April 21, 1989, meeting. However, the proposed rule reflected not only the panel's recommendations, but also FDA's determinations regarding the proper classification of these devices. The proposed rule did not state or imply that the panel relied on all the data cited by the agency in support of the proposed rule.

6. Several comments suggested that, when classifying these devices, FDA should distinguish TMJ prostheses containing Proplast™ from those not containing that material. These comments recommended that only devices containing Proplast™ should be classified. Some comments stated that the risks to health identified in the proposed rule are based only on data associated with the failure of TMJ prostheses containing Proplast™. One comment stated that Proplast™ implants and non-Proplast™ implants (specifically cobalt chrome and polymethylmethacrylate (PMMA) prostheses) should be classified separately because the difference in the material used in these implants significantly affects their safety and effectiveness. Several comments stated that surgeons and TMJ implant manufacturers had observed no specific cases of the risks to health identified in the proposed rule in several patients implanted with a non-Proplast™ total TMJ prosthesis. Some comments stated that these risks to health were not observed in patients implanted with TMJ prostheses manufactured by specific manufacturers. In contrast, several comments said that these risks were observed often in patients implanted with TMJ implants containing Proplast™.

According to § 860.5(c)(3), when FDA initially classifies a device, it may consider safety and effectiveness data developed for other devices of the same generic type. A generic type of device includes devices that do not differ significantly in purpose, design, material, energy source, function, or any other feature related to safety and effectiveness, and for which similar regulatory controls are sufficient to provide reasonable assurance of safety and effectiveness (see § 860.3(i)).

The transcript of the April 21, 1989, panel meeting demonstrates that the panel considered TMJ implants composed of various materials, i.e., silicone, Proplast™, dural grafts, fascia, vitallium, acrylic, meniscle and silastic, before making its recommendations with respect to classification. Evidence submitted during the panel meeting revealed that similar risks and similar safety and effectiveness concerns are associated with all TMJ implants, regardless of material composition. Based on the evidence provided, the panel concluded that TMJ devices composed of different materials raise the same safety and effectiveness questions. Thus, the panel concluded, and FDA agrees, that TMJ implants of all materials should be regulated within the four generic types of devices identified because the devices do not differ significantly in the safety and effectiveness questions raised and, consequently, similar regulatory controls will be needed to provide reasonable assurance of their safety and effectiveness.

7. Comments stated that one of the health risks identified in the proposed rule, loosening of the total TMJ prosthesis, is directly related to the health of the bone at the implant interface. These comments asserted that loosening of the device does not occur unless there is a void of suitable bone.

As stated in the preamble to the proposed rule, FDA has determined that the screws used to anchor the implant may loosen, resulting in implant loosening or displacement which may cause changes in bite, difficulty in chewing, limited joint function and unpredictable wear on implant components (see Refs. 2 through 5). The agency has not received any new information to cause FDA to change its opinion.

8. Some comments asserted that FDA should classify all the TMJ implants into class II because special controls would allow the agency to impose special conditions on these devices, such as postmarket surveillance. One of these comments, received from a TMJ implant manufacturer, recommended that FDA classify TMJ cobalt-chrome-PMMA implants into class II.

FDA disagrees with these comments. FDA believes that insufficient information exists to establish that special controls would provide reasonable assurance of the safety and effectiveness of these devices. FDA believes that a PMA is necessary to provide such assurance. Furthermore, postmarket surveillance is not limited to class II devices. Thus, at some future time, FDA may request that manufacturers of TMJ implants conduct postmarket surveillance of these devices.

9. One comment urged that the total temporomandibular joint prosthesis and the interarticular implant be given high priority in calling for PMA's. One comment disagreed, stating that FDA cannot give the total TMJ prosthesis high priority in calling for PMA's when the panel recommended low priority. Another comment expressed concern that manufacturers of these prostheses will not have to submit PMA's to FDA for at least 2½ years and will be

permitted to market the devices in the interim.

Pursuant to sections 501(f) and 515(b) of the act, TMJ implant manufacturers may continue to commercially distribute their devices without filing a PMA for 30 months after the effective date of the final rule classifying these implants into class III or until 90 days after FDA issues a final rule requiring premarket approval for the devices, whichever is later. Moreover, section 515(i) of the act shows a clear congressional intent that FDA move forward with requiring the submission of PMA's for all preamendments devices. Thus, regardless of the priority assigned for calling for PMA's, eventually PMA's will be required for all class III preamendments devices that are not reclassified. Furthermore, it should be noted that a panel recommendation is only a recommendation that FDA may adopt or reject. FDA believes that it is appropriate to require PMA's for all TMJ implants as soon as possible under the act.

10. Two comments objected that the glenoid fossa prosthesis and the mandibular condyle prosthesis should not be classified into class III because the panel did not recommend that they be classified into class III.

Subsequent to issuing the proposed rule, the panel reconvened on February 11, 1993, and recommended that the mandibular condyle prosthesis and the glenoid fossa prosthesis be classified into class III. Based on this recommendation, FDA issued a reproposed rule in the **Federal Register** of February 14, 1994 (59 FR 6935), to classify the devices into class III.

11. One comment stated that the classification process for the TMJ implants was flawed and should be reinitiated because of events which transpired between the April 1989 panel recommendation and the issuance of the proposed rule. During this time, the SMDA was passed. Among other things, the SMDA changed the classification definitions for medical devices.

FDA disagrees with this comment. It is the agency's position that the SMDA does not require the agency to obtain a new classification recommendation from a panel which had recommended classification under the previous standard.

As stated previously, the agency is not bound to adopt a panel's recommendation. Moreover, in light of the significant risks to health identified by the panel, FDA believes it is extremely unlikely that the panel would have recommended that the devices be classified into class II under the new definition.

12. On its own initiative, FDA has deleted the words, "naturally occurring" from the identifications of glenoid fossa prosthesis and mandibular condyle prosthesis because the standard of care now indicates that these devices may now interface not only with naturally occurring surfaces but also with artificial surfaces.

III. References

The following referencees have been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday

1 Transcripts of the Dental Products Panel meeting, April 21, 1989.

2. Transcripts of the Dental Products Panel meeting, February 11, 1993.

3. Fontenot, M. G , and J. N Kent, "In-vitro and In-Vivo Wear Performance of TMJ Implants," abstract, International Association of Dental Research, 1991

4. Kent, J. N , and M. S. Block, "Comparison of FEP and UPE Glenoid Fossa Prosthesis," abstract, International Association of Dental Research, 1991

5. "Clinical Information on the Vitek TMJ Interpositional (IPI) Implant and the Vitek-Kent (VK) and Vitek-Kent 1 (VK-1) TMJ Implants," and "Vitek Patient Notification Program," an FDA publication, 1991

6. Kent, J. N , "VK Partial and Total Joint Reconstruction," Current Concepts of TMJ Total Joint Replacement, University of Medicine and Dentistry of New Jersey, pp 1–8, March 1992

7 Primely, D., Jr "Histological and Radiological Evaluation of the Proplast™-Teflon Interpositional Implant in Temporomandibular Joint Reconstruction Following Meniscectomy," thesis, Master Degree in Oral Maxillofacial Surgery University of Iowa, May 1987

8. Westlund, K. J . "An Evaluation Using Computerized Tomography of Clinically Asymptomatic Patients Following Meniscectomy and Temporomandibular Joint Reconstruction Using the Proplast™-Teflon Interpositional Implant," thesis, Masters Degree in Oral and Maxillofacial Surgery University of Iowa,May 1989.

9. Wagner, J D , and E. L. Mosby. "Assessment of Proplast™-Teflon Disc Replacements," *Journal of Oral and Maxillofacial Surgery*, 48:1140–1144, 1990

10. Florine, B K., et al., "Tomographic Evaluation of Temporomandibular Joints Following Discoplasty or Placement of Polytetrafluoroethylene Implants," *Journal of Oral and Maxillofacial Surgery*, 48:183–188. 1988.

11 Heffez, L., et al., "CT Evaluation of TMJ Disc Replacement with a Proplast™ Teflon Laminate," *Journal of Oral and Maxillofacial Surgery*, 45:657–665, 1987

12 Ryan, D E., "Alloplastic Implants in the Temporomandibular Joint," *Oral and Maxillofacial Surgery Clinics of North America*. 1:427 1989.

13. Valentine, J. D., "Light and Electron Microscopic Evaluation of Proplast™ II TMJ Disc Implants," *Journal of Oral and Maxillofacial Surgery*, 47:689–696, 1989

14. Logrotteria, L., et. al., "Patient with Lymphadenopathy Following Temporomandibular Joint Arthroplasty with Proplast™," *The Hour of Craniomandibular Practice*, vol. 4, No. 2:172–178, 1986

15. Berarduci, J. P., et al., "Perforation into Middle Cranial Fossa as a Sequel to Use of a Proplast™-Teflon Implant for Temporomandibular Joint Reconstruction," *Journal of Oral and Maxillofacial Surgery* 46:496–498, 1990.

16. Berman, D. N., and S L. Pronstein. "Osteo Phytic Reaction to a Polytetrafluoroethylene Temporomandibular Joint Implant," Oral Surgery. Oral Medicine. Oral Pathology (continues the Oral Surgery Section of the *American Journal of Orthodontics and Oral Surgery*), 69:20–23. 1990

IV. Environmental Imapct

The agency has determined under 21 CFR 25.24(e)(2) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore. neither an environmental assessment nor an environmental impact statement is required.

V. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866 and the Regulatory Flexibility Act (Pub L. 96–54). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety and other advantages; distributive impacts; and equity). The agency believes that this final rule is consistent with the regulatory philosophy and principles identified in the Executive Order. In addition, the final rule is not a significant regulatory action as defined by the Executive Order and so is not subject to review under the Executive Order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this rule does not impose any new requirements, the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Therefore, under the Regulatory Flexibility Act, no further analysis is required.

List of Subjects in 21 CFR Part 872

Medical devices

Therefore, under the Federal Food, Drug, and Cosmetic Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 872 is amended as follows:

PART 872—DENTAL DEVICES

1. The authority citation for 21 CFR part 872 continues to read as follows:

Authority: Secs. 501, 510, 513, 515, 520, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 351, 360, 360c, 360e, 360j, 371).

2. New §§ 872.3940, 872.3950, 872.3960, and 872.3970 are added to subpart D to read as follows:

§ 872.3940 Total temporomandibular joint prosthesis.

(a) *Identification.* A total temporomandibular joint prosthesis is a device that is intended to be implanted in the human jaw to replace the mandibular condyle and augment the glenoid fossa to functionally reconstruct the temporomandibular joint.

(b) *Classification.* Class III.

(c) *Date PMA or notice of completion of a PDP is required.* The effective date of the requirement for premarket approval has not been established. See § 872.3.

§ 872.3950 Glenoid fossa prosthesis.

(a) *Identification.* A glenoid fossa prosthesis is a device that is intended to be implanted in the temporomandibular joint to augment a glenoid fossa or to provide an articulation surface for the head of a mandibular condyle.

(b) *Classification.* Class III.

(c) *Date PMA or notice of completion of a PDP is required.* The effective date of the requirement for premarket approval has not been established. See § 872.3.

§ 872.3960 Mandibular condyle prosthesis.

(a) *Identification.* A mandibular condyle prosthesis is a device that is intended to be implanted in the human jaw to replace the mandibular condyle and to articulate within a glenoid fossa.

(b) *Classification.* Class III.

(c) *Date PMA or notice of completion of a PDP is required.* The effective date of the requirement for premarket approval has not been established. See § 872.3.

§ 872.3970 Interarticular disc prosthesis (interpositional implant).

(a) *Identification.* An interarticular disc prosthesis (interpositional implant) is a device that is intended to be an interface between the natural articulating surface of the mandibular condyle and glenoid fossa.

(b) *Classification.* Class III.

(c) *Date PMA or notice of completion of a PDP is required.* The effective date of the requirement for premarket approval hasnot been established. See § 872.3.

Dated: November 25, 1994.

D. B. Burlington,

Director, Center for Devices and Radiological Health.

[FR Doc. 94–31161 Filed 12–19–94; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 62a

[DoD Instruction 1010.5]

Education and Training in Alcohol and Drug Abuse Prevention

AGENCY: Office of the Secretary of Defense, DoD.

ACTION: Final rule.

SUMMARY: The Department of Defense hereby removes 32 CFR part 62a concerning the Education and Training in Alcohol and Drug Abuse Prevention. This part has served the purpose for which it was intended and is no longer valid.

EFFECTIVE DATE: December 20, 1994.

FOR FURTHER INFORMATION CONTACT: L.M. Bynum, Correspondence and Directives Directorate, 1155 Defense Pentagon, Washington, DC 20301–1155, (703) 697–4111.

SUPPLEMENTARY INFORMATION: The part was issued to reflect the contents of DoD Instruction 1010.5 The Instruction was canceled on December 9, 1994.

List of Subjects in 32 CFR Part 62a

Alcohol abuse, Drug abuse, Education, Government employees, Military personnel

PART 62a—[REMOVED]

Accordingly, by the authority of 1 U.S.C. 301, 32 CFR part 62a is removed.

Dated: December 15, 1994.

L.M. Bynum,

ALternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94–31215 Filed 12–19–94; 8:45 am]

BILLING CODE 5000–04–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[FRL–5125–1]

RIN 2060–AD91

Protection of Stratospheric Ozone: Supplemental Rule To Amend Phaseout of Ozone-Depleting Substances To Include Potential Production Allowances for Methyl Bromide

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: With this action, EPA allocates potential production allowances to producers who have baseline allowances for the production of methyl bromide. These potential production allowances are intended solely for the production of methyl bromide for export to Article 5 countries, as defined under Article 5 of the Montreal Protocol on Substances that Deplete the Ozone Layer. In drafting the accelerated phaseout rule, which was published in the **Federal Register** on December 10, 1993, the Agency inadvertently omitted methyl bromide from the list of chemicals for which potential production allowances were granted. Today's action correctly allocates potential production allowances for all control periods beginning January 1, 1994, and ending before January 1, 2001, equal to 10 percent of a company's baseline production allowances. The Agency may propose potential production allowances for methyl bromide for control periods after January 1, 2001, at a later date. Today's action makes the above-mentioned correction while maintaining the goals of the accelerated phaseout to protect human health and the environment.

EFFECTIVE DATE: December 20, 1994. Potential production allowances for methyl bromide are granted for the 1994 control period (which began January 1, 1994) and for control periods until January 1, 2001.

ADDRESSES: Materials relevant to this amendment to the accelerated phaseout of ozone-depleting substances are contained in Air Docket No. A–92–13 at U.S. Environmental Protection Agency, 401 M St., SW, Washington, DC 20460. The public docket is located in room M–1500, Waterside Mall (Ground Floor). Material may be inspected from 8 a.m. to 5:30 p.m. Monday through Friday. A reasonable fee may be charged by EPA for copying docket materials.

Information on this amendment can also be obtained from the Stratospheric Protection Information Hotline at 1–800–296–1996.

FOR FURTHER INFORMATION CONTACT: The Stratospheric Protection Information Hotline at 1–800–296–1996 or Tom Land, Stratospheric Protection Division, Office of Atmospheric Programs, Office of Air and Radiation (6205J), 401 M Street SW., Washington, DC 20460, (202)–233–9185

I. Background

When Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (the Protocol) first met in 1987 they agreed in Article 2H to allow additional production of controlled substances beyond the levels being set for the developed countries for developing countries. The United States, as well as other Parties to the Protocol, recognized the need to continue to supply controlled substances to developing countries during the period of scheduled reductions and for a limited time after the phaseout of production of controlled substances. Under Article 5 of the Protocol, developing countries are defined as Parties to the Protocol consuming less than 0.3 kilograms per capita of class I, Group I and II controlled substances. These Article 5 countries have limited resources to adopt alternative technologies to replace the phased out controlled substances. To ensure that such countries do not purchase the technologies to produce controlled substances and otherwise bypass controls on controlled substances, the Parties to the Protocol agreed to provide a set-aside level of production for Article 5 countries. Article 5 countries must ensure that these imported controlled substances are used to meet basic domestic needs.

The Environmental Protection Agency (EPA) implements a program domestically that limits and monitors production and consumption of controlled substances, including methyl bromide. Production for Article 5 countries in the United States is monitored by allocating potential production allowances to those companies that have baseline production allowances. Since 1989, EPA has allocated potential production allowances equal to 10 percent of baseline production allowances for specific controlled substances. EPA grants authorization to producers to convert potential production allowances to production allowances once they have exported to an Article 5 country The July 30, 1992, **Federal Register** document (57 FR 3375), as well as the December 10, 1993, **Federal Register** document (58 FR 65018), explains these controls, as well as the recordkeeping and reporting required for such transactions. The specific provisions governing production for, and export to, Article 5 countries are in §§ 82.9 and 82.11 Appendix D of subpart A of 40 CFR part 82 contains a listing of Article 5 countries.[1]

II. Summary of Proposal

In the October 14, 1994 proposal to grant potential production allowances for methyl bromide, EPA discussed the inadvertent omission of the allocation of these allowances in the final rule published December 10, 1993 (58 FR 65018). In drafting the December 10, 1993 final rule, EPA focused on the level of control of methyl bromide and its phaseout, but inadvertently failed to allocate additional production allowances of methyl bromide for exports to Article 5 countries. Due to this oversight, EPA proposed on October 14 to allocate potential production allowances to methyl bromide producers equal to 10 percent of their baseline production allowances beginning in the current control period (which began January 1, 1994). Because section 82.11 indicates that authorizations to convert potential production allowances to production allowances are valid during the control period in which the controlled substance departed the United States, companies may use these potential production allowances for methyl bromide only for the control period in which the shipment departed the United States. The 10 percent level of additional production for Article 5 countries would continue until the effective date of the phaseout of production of methyl bromide, January 1, 2001 Section 602(d) of the Clean Air Act Amendments of 1990 establishes the phaseout date for methyl bromide by stating that production may not extend beyond "a date more than seven years after January 1 of the year after the year in which the substance is added to the list of class I substances." Methyl bromide was added to the list of class I substances in 1993. With this proposal, EPA is reserving action in allocating potential production allowances for control periods starting January 1, 2001, and beyond.

[1] EPA is drafting a final rule that amends the accelerated phaseout rule to adjust the dates relating to exports for Article 5 countries That final rule will also reflect today's amendments granting methyl bromide potential production allowances

III. Comments on the Proposal

a. General Comments

EPA received three comments on the proposed allocation of potential production allowances for methyl bromide. Two of these comments support the allocation of potential production allowances for methyl bromide for export to Article 5 countries.

The two supporting comments agree with EPA's proposal stating that: "(1) The Agency has the legal authority to adopt this amendment; (2) there is a serious need for this amendment; and (3) this amendment will have no adverse environmental consequences." The legal authority to grant potential production allowances for methyl bromide was discussed in the proposal published October 14, 1994 (59 FR 52126). One of the two supporting comments acknowledged that, "there is no contrary authority (within the Montreal Protocol or the Clean Air Act Amendments of 1990) to these provisions; therefore, EPA has the legal authority to promulgate this amendment to 40 CFR Part 82."

The two comments state, and EPA agrees, that the need for this amendment to allocate potential production allowances for methyl bromide stems from a need to maintain competitiveness in world markets for U.S. methyl bromide producers. Without the additional production allowances, U.S. companies are placed at a competitive disadvantage relative to other producers of methyl bromide in developed countries for the methyl bromide markets in Article 5 countries. The demand within Article 5 countries for methyl bromide is smaller than the potential global supply as currently allowed under the Montreal Protocol (100 percent of 1991 levels plus the 10 percent to meet basic domestic needs in Article 5 countries). Therefore, methyl bromide will be produced and exported to Article 5 countries, regardless of whether it is supplied by U.S. companies or another Party EPA believes that it is important for U.S. producers of methyl bromide to continue to maintain their position in these markets as international contacts will enable U.S. companies to lead the global transition to alternative pesticides other than methyl bromide.

The two comments state, and EPA agrees, that the allocation of potential production allowances to U.S. companies for the export of methyl bromide to Article 5 countries will not have a detrimental environmental impact. The allocation of potential production allowances for methyl

bromide to U.S. companies will not change global emissions; nor will global emissions increase if such additional allowances are granted. Because the demand for methyl bromide from Article 5 countries is limited, the percent of methyl bromide that will be emitted during the use and application of methyl bromide will be the same, regardless of the supplier.

The provisions in the Protocol for additional production to meet the basic domestic needs of Article 5 countries were included by the Parties for sound environmental policy reasons. The additional production provided in the U.S. by potential production allowances is designed to meet the basic domestic needs of Article 5 countries. The Parties felt it would be preferable to meet the basic domestic needs of Article 5 countries through production and exports from existing facilities than through construction of new production facilities in Article 5 countries. If Article 5 countries were to build new production facilities, the level of production would not be subject to the same controls as those in developed countries and more methyl bromide would potentially be produced over a longer time period because Article 5 countries have a 10-year grace period beyond the phaseout date for the various ozone-depleting substances.

The third comment EPA received on the October 14, 1994, proposal was from an environmental group that also expressed support for the Montreal Protocol and the potential production allowances for Article 5 countries. However, the commenter expressed concern about EPA's argument justifying the quantity of allowances allocated. EPA does not believe this is a valid concern as the quantity of allowances authorized to be allocated (the 10 percent additional production for export to Article 5 countries) is not set unilaterally by EPA, but is derived from provisions of the Protocol.

The commenter also expressed concern with EPA's argument that if U.S. companies do not produce methyl bromide for Article 5 countries, another Party will. The commenter indicated that if this view is adopted by other Parties, it would encourage increased use and dependence on methyl bromide by Article 5 countries. EPA disagrees with these comments. As stated above, the potential global supply of methyl bromide far exceeds current demand in Article 5 countries. Therefore, there is no environmental benefit in denying U.S. companies the 10 percent additional production which is granted under the Protocol Protecting stratospheric ozone can only be achieved through a cooperative global effort and EPA does not wish to put U.S. companies at a disadvantage in competing in the global methyl bromide market unless there is an environmental benefit. In this case, EPA does not believe an environmental benefit would accrue from a lesser allocation of potential production allowances for methyl bromide. Furthermore, denying the potential production allowances intended by the Parties to the Protocol to be allocated to all producers of class I substances at the 10 percent rate would be disadvantage producers without evidence of significant environmental detriment.

The third comment also urged EPA to revisit the issue and "to craft a more stringent regulation regarding the production of methyl bromide for export to Article 5 countries." EPA believes that the 10 percent allocation of potential production allowances for the export of methyl bromide to Article 5 countries in today's notice does not preclude future consideration of more stringent regulations for methyl bromide. In fact, EPA is continuing to analyze methyl bromide's role in stratospheric ozone depletion and the potential environmental and health benefits that could potentially be obtained through further regulatory controls.

b. Use of Allocation and Conversions During the Control Period

In the proposal of October 14, 1994, EPA stated that the allocation of potential production allowances for Article 5 countries may be retroactive to the beginning of the control period starting January 1, 1994. In this final action, EPA allocates potential production allowances for the control period starting January 1, 1994, to those companies with baseline production allowances for methyl bromide.

EPA received a comment that further clarification is needed that conversions of potential production allowances into production allowances should also be made retroactive for the 1994 control period. As noted earlier, authorizations to convert potential production allowances to production allowances are valid during the control period in which the controlled substance was exported. Thus, EPA agrees with this comment and will process requests to convert potential production allowances to production allowances for exports that occurred in the 1994 control period.

EPA will process authorizations to convert potential production allowances into production allowances for exports that occur within the 1994 control period (before midnight of December 31, 1994) as long as the paperwork is received by EPA before the final day of the first quarter of 1995. The current regulations refer to control periods and do not prohibit companies from seeking authorizations to convert for quantities of methyl bromide exported, as long as the export occurs in the same control period in which the production allowances are used. The export, conversion and use of the production allowances must all occur within the same control period. Therefore, a company that receives production allowances through a conversion during the first quarter of the year following the export will not be able to use these allowances for production, but may use them to ensure compliance for the control period in which the export occurred.

c. Production Levels

With this amendment, EPA allocates to companies that produced methyl bromide in 1991 production up to 10 percent of their baseline allowances for Article 5 countries for the control periods starting January 1, 1994, and ending before January 1, 2001. EPA is setting the level at 10 percent to be consistent with Article 2H of the Montreal Protocol, and to be consistent with the approach used for all Class I controlled substances except for Group VII, the hydrobromofluorocarbons (no additional production for Article 5 countries is granted under the Protocol for these chemicals.)

d. Use of 1994 Potential Production Allowances

EPA received a comment that requests a change in the procedures for the use of 1994 production allowances and/or consumption allowances for methyl bromide exports to Article 5 countries. The commenter makes two proposals to rectify the granting of potential production allowances late in the 1994 control period. The commenter requests that companies be able to use production allowances converted from 1994 potential production allowances for six months into 1995. As a less desirable alternative, the commenter suggests that, "production using the converted potential production allowances could occur in the 1994 control period without the requirement that consumption allowances be available at the time of production."

EPA disagrees with the suggestions for rectifying the late granting of potential production allowances in 1994 because the Protocol establishes strict limits on production for Parties to the Protocol for each control period. Therefore, EPA may not alter the

definition of a control period, nor exceed the limits on production for a control period. EPA's regulations lay out a system for allocating production and consumption allowances in accordance with the Protocol to limit production and importation within control periods. Both production allowances and consumption allowances are needed simultaneously, to be able to produce within a control period. To extend the use of allowances from one control period into the following control period would be a violation of the United States commitments under the Montreal Protocol to limit production. EPA will also not allow production without consumption allowances. This would set an unacceptable precedent that is contrary to existing regulatory requirements and the Protocol. EPA suggests that the companies continue to apply for consumption allowances for exports to Article 5 countries and use these to produce in conjunction with existing production allowances and those requested for conversion from potential production allowances.

A commenter added that the time taken to grant the conversion of potential production allowances to production allowances "requires at least 3 weeks after the documentation is submitted to EPA." EPA believes that the average time taken to process a request to convert is five days and almost never exceeds ten working days.

e. Allocation After the Phaseout

In the October 14, 1994 proposal, EPA reserved the right to allocate potential production allowances after the phaseout date for methyl bromide, starting January 1, 2001, and beyond. One comment was received suggesting EPA state an intention to allocate potential production allowance, at some level, after the U.S. phaseout date. EPA intends to analyze the role of methyl bromide in the depletion of stratospheric ozone as more scientific information is gathered over the next few years. EPA also intends to monitor global and U.S. production of methyl bromide and its use. At this time, EPA cannot predict the future actions relative to the post-phaseout period for methyl bromide. Based on the monitoring and analysis activities, EPA will continue to consider proposing an allocation of potential production allowances after the U.S. phaseout date for methyl bromide.

IV. Summary of Supporting Analysis

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether this regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant" regulatory action as one that is likely to lead to a rule that may:

(1) have an annual effect on the economy of $100 million or more, or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined by OMB and EPA that this amendment to the final rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–602, requires that Federal agencies examine the impacts of their regulations on small entities. Under 5 U.S.C. 604(a), whenever an agency is required to publish a general notice of proposed rulemaking, it must prepare and make available for public comment an initial regulatory flexibility analysis (RFA). Such an analysis is not required if the head of an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, pursuant to 5 U.S.C. 605(b).

EPA believes that any impact that this amendment will have on the regulated community will serve only to provide relief from otherwise applicable regulations, and will therefore limit the negative economic impact associated with the regulations previously promulgated under Section 604 and 606. An examination of the impacts on small entities was discussed in the final rule (58 FR 65018 and 58 FR 69235). That final rule assessed the impact the rule may have on small entities. A separate regulatory impact analysis accompanied the final rule and is contained in Docket A–92–01. I certify that this amendment to the accelerated phaseout rule will not have any additional negative economic impacts on any small entities.

C. Paperwork Reduction Act

Any information collection requirements in a rule must be submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Because no additional informational collection requirements are required by this amendment, EPA has determined that the Paperwork Reduction Act does not apply to this rulemaking and no new Information Collection Request document has been prepared.

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Chemicals, Chlorofluorocarbons, Exports, Reporting and recordkeeping requirements, Stratospheric ozone layer.

Dated: December 13, 1994.

Carol Browner,

Administrator.

40 CFR Part 82 is amended as follows:

PART 82—PROTECTION OF STRATOSPHERIC OZONE

1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601, 7671–7671q.

Subpart A—Production and Consumption Controls

2. Section 82.9 is amended by revising paragraphs (a) introductory text, (a)(1) and (a)(2) to read as follows:

§ 82.9 Availability of production allowances in addition to baseline production allowances.

(a) Every person apportioned baseline production allowances for class I controlled substances under § 82.5 (a) through (f) is also granted potential production allowances equal to:

(1) 10 percent of his apportionment under § 82.5 for each control period ending before January 1, 2000 (January 1, 2001 for methyl bromide); and

(2) 15 percent of his apportionment under § 82.5 for each control period beginning after December 31, 1999, and ending before January 1, 2011 (January 1, 2013 in the case of methyl chloroform; except for methyl bromide which is reserved).

* * * * *

[FR Doc. 94–31232 Filed 12–19–94; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 409, 413, 418 and 484

[BPD–469–F]

RIN 0938–AD78

Medicare Program; Medicare Coverage of Home Health Services, Medicare Conditions of Participation, and Home Health Aide Supervision

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule.

SUMMARY: This regulation specifies home health aide supervision and duty requirements applicable to all home health agencies (HHAs) and hospices that furnish home health aide services under the Medicare program. It also specifies limitations and exclusions applicable to home health services covered under Medicare. The purpose of this regulation is to clarify Medicare home health policy and to promote consistent administration of the home health benefit.

EFFECTIVE DATE: These regulations are effective on February 21, 1995.

ADDRESSES: For comments that relate to information collection requirements, mail a copy of comments to: Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Allison Herron Eydt, HCFA Desk Officer.

FOR FURTHER INFORMATION CONTACT: John J. Thomas, (410) 966–4623.

SUPPLEMENTARY INFORMATION:

Background

Home health services are furnished to the elderly and disabled under the Hospital Insurance (Part A) and Supplemental Medical Insurance (Part B) benefits of the Medicare program. These services generally must be furnished by a home health agency (HHA) that participates in the Medicare program, be provided on a visiting basis in the beneficiary's home and include the following:

- Part-time or intermittent nursing care furnished by or under the supervision of a registered nurse.
- Physical, occupational, or speech therapy.
- Medical social services under the direction of a physician.
- Part-time or intermittent home health aide services.
- Medical supplies (other than drugs and biologicals) and durable medical equipment.
- Services of interns and residents if the HHA is owned by or affiliated with a hospital that has an approved medical education program.

The exception to the requirement that services be furnished in the home includes those services that require the kinds of equipment that cannot be brought to the home and are provided under arrangement with an HHA in a hospital, skilled nursing facility, or rehabilitation agency.

In order for any home health services to be covered under Medicare, specific requirements contained in the Social Security Act (the Act) must be met. Section 1861(m) of the Act requires that the services be furnished under a plan of care established and periodically reviewed by a physician. Sections 1814(a)(2)(C) and 1835(a)(2)(A) of the Act provide requirements for coverage under Part A and Part B, respectively. Both sections require that a physician certify that the beneficiary is: Under a physician's care; under a plan of care established and periodically reviewed by a physician; confined to the home; and is in need of skilled nursing care on an intermittent basis, physical therapy or speech pathology services, or has a continued need for occupational therapy when eligibility for home health services has been established because of a prior need for intermittent skilled nursing care, speech pathology services, or physical therapy in the current or prior certification period.

Section 1861(m)(4) of the Act provides that before Medicare will cover home health aide services, the home health aides must successfully complete a training and competency evaluation program approved by the Secretary.

Section 1861(dd) of the Act defines hospice care and sets forth the Medicare hospice care provisions. Under section 1861(dd)(1)(D)(i) of the Act, the services of a home health aide are covered as a hospice service only if the aide has successfully completed a training and competency evaluation program that meets the requirements established by the Secretary.

Medicare Home Health Care Initiative

In response to the challenges facing the delivery of home health care, HCFA has recently undertaken the Medicare Home Health Initiative to identify opportunities for improvement in the Medicare home health benefit. In our effort to identify, develop and implement improvements, the initiative takes an integrated approach to the policy, quality assurance, and operational elements of the benefit. To ensure that recommendations for improvement reflect the everyday experience of individuals and organizations involved in home health care, we will include representatives of home health consumers and providers as well as professional organizations, intermediaries, and States (including State Medicaid agencies) in the ongoing development and implementation of improvements to the Medicare home health benefit. The initial meeting between HCFA and these representatives was held on May 16, 17, and 18, 1994. Additional meetings are planned in the coming months.

Although we proposed this rule before the Home Health Initiative began and so developed it independent of the initiative, we consider the rule's provisions to be consistent with the goals of the initiative. A major goal of the initiative is to enhance the effectiveness and efficiency of Medicare home health benefit operational and administrative activities. By clarifying several aspects of Medicare home health policy, this final rule promotes the consistent administration of the home health benefit and therefore constitutes a significant effort to meet this goal.

Provisions of the Proposed Regulations

On September 27, 1991 (56 FR 49154), we proposed to revise home health services regulations contained in 42 CFR part 409, subpart E; part 418, subpart D; and part 484, subpart C. The reader can find all of the details of our proposal in that document. The proposed revisions involved a reorganization of the existing provisions, technical and editorial changes, and the following substantive additions or revisions to the regulations.

A. Home Health Aide Duties and Supervision

- We proposed to define the duties of the home health aide as including, but not limited to, hands-on personal care, simple procedures that are an extension of therapy or nursing services, assistance in ambulation or exercise, and assistance in administering medications that are ordinarily self-administered. We also proposed that written patient care instructions for the home health aide had to be prepared by the registered nurse or other appropriate professional responsible for the supervision of the aide.
- We proposed to modify the requirements governing supervision of home health aide services to require the following:

+ If the patient is receiving skilled care as well as aide services, the

registered nurse or other appropriate professional must make a supervisory visit to the patient's home at least once every 2 weeks. If the aide is an employee of the HHA or hospice, at least one of these visits each month must be made while the aide is providing care to the patient. If the aide is not an employee of the HHA or hospice, the HHA or hospice must perform all supervisory visits of that aide while the aide is providing care to the patient.

+ If the patient is receiving home health aide services but is not receiving skilled care, the supervisory visit must occur not less than once every 62 days.

• We proposed to identify the responsibilities of an HHA or hospice that chooses to provide home health aide services under arrangements with another organization as ensuring the overall quality of care provided by the aide, supervising the aide, and ensuring the aide has met the training requirements.

B. Conditions for Payment

Generally, we proposed the following requirements for payment of home health services:

• A requirement that the services must be furnished to an eligible beneficiary by, or under arrangements with, an HHA that meets the HHA conditions of participation and has in effect a Medicare provider agreement.

• The physician certification and recertification requirements for home health services described in 42 CFR 424.22.

• The coverage requirements discussed below.

C. Beneficiary Qualifications for Coverage of Services

We proposed that the beneficiary must be under the care of a physician who establishes the plan of care and that a doctor of podiatric medicine may establish a plan of care under certain circumstances.

D. Requirements for the Plan of Care

We set forth the criteria that would have to be met in order for the plan of care to be considered acceptable. We addressed:

• Those items that must be contained in the plan of care.

• The specificity of the physician's orders for services.

• The timing of review of the plan of care.

• The termination of the plan of care.

E. Requirements for Qualifying Skilled Services To Be Covered and Billable

We described the overall nature of the services that must be furnished for the care to be considered skilled care and the general concepts under which a decision regarding whether the services are reasonable and necessary should be made.

F Dependent Services Requirements

We proposed that the services listed below would be covered only if the beneficiary had a need for at least one of the qualifying skilled services. We also proposed requirements, based on the statute or long-standing policy, that these services must meet in order to be covered by Medicare.

• Home health aide services.
• Medical social services.
• Occupational therapy.
• Durable medical equipment.
• Medical supplies.
• Services of interns and residents.

G. Allowable Administrative Costs

We proposed that, in general, payment for certain services would be made as an administrative cost.

H. Place of Service Requirements

We proposed, for purposes of Medicare coverage of home health services, that a beneficiary's home is any place in which a beneficiary resides that does not meet the definition of a hospital, skilled nursing facility (SNF), or nursing facility as defined in sections 1861(e)(1), 1819(a)(1), or 1919(a)(1) of the Act, respectively.

We proposed that for services to be covered in an outpatient setting, they had to require equipment that could not be made available in the beneficiary's home or were services that were furnished while the beneficiary was at the facility to receive services requiring equipment that could not be made available in his or her home. We proposed that an outpatient setting might include a hospital, SNF, rehabilitation center, or outpatient department affiliated with a medical school, with which the HHA has an arrangement to provide services.

I. Number of Visits

We proposed that all Medicare home health services would be covered under Part A if the beneficiary had Part A entitlement and, if the beneficiary had only Part B entitlement, under Part B. We proposed that, if all coverage requirements were met, payment could be made for an unlimited number of covered visits.

J. Excluded Services

We specified that certain items would be excluded from coverage as Medicare home health services:

• Drugs and biologicals.
• Transportation.
• Services that would not be covered as inpatient hospital services. (Note: Although we discussed this proposed provision in the preamble of the proposed rule, it was inadvertently omitted from the proposed regulation text).
• Housekeeping services.
• Services covered as end stage renal disease services.
• Prosthetic devices.
• Medical social services provided to family members.

K. Condition of Participation: Clinical Records

We proposed that the discharge summary, including the patient's medical and health status at discharge, must be sent to the attending physician.

Summary of Responses to Comments on the September 27, 1991 Proposed Rule

We received items of correspondence from 144 commenters, including professional organizations and associations, HHAs, public health departments and other State governmental agencies, universities, and individuals. A summary of those comments and our responses follow.

Requirements for Payment (§ 409.41)

Comment: One commenter stated that Medicare should provide coverage of home health aide and other services furnished by organizations other than Medicare-approved HHAs.

Response: We are unable to accept this comment. The Act at section 1861(m) defines home health services as specific items and services that are furnished by (or under arrangements with) an HHA (as defined in section 1861(o) of the Act). Therefore, Medicare has no statutory authority to cover any home health service that is not furnished by or under arrangements with a Medicare-approved HHA.

Beneficiary Qualifications for Coverage of Services (§ 409.42)

Comment: One commenter stated that the first sentence of § 409.42(b), "the beneficiary must be under the care of a physician who establishes the plan of care", should be changed to allow for a patient's treatment by a staff physician.

Response: We do not believe that such a revision is necessary The requirement that a patient be under the care of a physician who establishes the plan of care does not preclude the patient's treatment by other physicians in addition to the one who establishes the plan of care.

Comment: Several commenters stated that the need for dietician services

should be included in § 409.42(c) (which lists the skilled services necessary to qualify the beneficiary for home health services) and therefore added to those needed skilled services that qualify a beneficiary for coverage of Medicare home health services. (Other commenters wanted this service added to § 409.44 as a covered skilled service.)

Response: Sections 1814(a)(2)(C) and 1835(a)(2)(A) of the Act establish the eligibility criteria for Medicare coverage of home health services. Because these sections of the Act do not include the need for dietician services with the need for intermittent skilled nursing care, physical therapy, speech pathology services, and continuing occupational therapy as necessary to establish eligibility for Medicare coverage of home health services, we cannot accept these comments.

Comment: One commenter requested we change the terms "speech therapy" and "speech therapist" to "speech-language pathology" and "speech-language pathologist" throughout the rule.

Response: We have replaced the term "speech therapy" with "speech-language pathology services" and the term "speech therapist" with "speech-language pathologist" throughout this rule. As indicated by the commenter, this revision will ensure that this rule more closely reflects current standards in this area. It is also important to note that the term "skilled therapist" in this rule includes speech-language pathologists.

Plan of Care Requirements (§ 409.43)

Comment: One commenter requested we clarify that certain services furnished by an HHA that are not related to the treatment of the patient's illness or injury do not require a physician's order.

Response: Section 409.43 establishes plan of care requirements which must be met to obtain Medicare coverage of home health services. Section 409.43 requires all Medicare covered home health services to be furnished under a plan of care established and periodically reviewed by a physician. Noncovered services, such as those that are not related to the treatment of the patient's illness or injury, are not subject to the coverage requirements of this section.

Comment: One commenter requested clarification of the required content of the physician's orders. The commenter was concerned that the intent of the section was to require the physician's order to include a long, narrative description of the services ordered. Another commenter requested clarification of the required specificity of physician's orders for home health aide services.

Response: Section 409.43 does not require that the plan of care include a narrative description of the services ordered. As part of our ongoing efforts to reduce unnecessary paperwork, we have revised this section of the rule to clarify that the plan of care need specify only the medical treatments to be furnished, the discipline that will furnish them, and the frequency at which they will be furnished. Appropriate specificity of medical treatments in the physician's orders would include such orders as "observe and evaluate surgical site", "perform sterile dressing changes", and, for home health aide services, "assistance in personal care." As practice acts and other laws and regulations govern the actual methods by which these services are performed, it is not necessary to include a description of how to furnish the service in the physician's order. It is also important to note that certain additional plan of care requirements are contained in the Medicare HHA conditions of participation at 42 CFR 484.18.

Comment: One commenter requested that § 409.43(b) be revised to require that orders for therapy services be developed in consultation with the qualified therapist.

Response: Although we believe that the therapist should have input into the development of the physician's orders for therapy services, this would not be an appropriate revision to the coverage criteria contained in this section as monitoring and compliance efforts would create an additional paperwork burden. This issue is already adequately addressed in the Medicare HHA conditions of participation at 42 CFR 484.18, which requires that "the therapist and other agency personnel participate in developing the plan of care."

Comment: One commenter stated that the physician should not be required to order a specific number of visits before care is actually furnished.

Response: Although the physician's order is generally required to specify the number of visits ordered, we recognize that this is not possible in all situations. Therefore, this section allows the physician to order a specific range in the frequency of visits or visits "as needed" or "PRN" when necessary. We believe that this policy provides the needed flexibility in those cases where a physician cannot anticipate the specific number of visits that will be necessary to meet a patient's needs.

Comment: One commenter suggested that, when a physician orders a range of visits, the lower end of the range should be used as the specific frequency when determining coverage.

Response: We disagree. If the lower end of a range of visits was used as the specific frequency, any services exceeding the lower end, even though they may fall within the range, would not be covered. We believe use of the upper end of the range as the specific frequency affords an HHA the needed flexibility to provide covered services anywhere within the ordered range.

Comment: One commenter stated that it was not practical to require a description of the patient's medical signs and symptoms that would occasion a visit as needed ("PRN") as well as a specific limit on the number of allowable PRN visits. Another commenter stated that this requirement did not provide HHAs with sufficient flexibility to respond to patient needs.

Response: We disagree with both comments. As we stated in the preamble of the proposed rule, we believe that removing these requirements would allow unreasonable "open- ended" orders for care. The intent of this requirement is to allow physicians and HHAs the flexibility needed to effectively serve patients whose need for care cannot be easily predicted, not to give HHAs "carte blanche" to provide an unlimited number of visits with no restrictions. The requirement that a physician must describe the medical signs and symptoms that would occasion a visit ensures that the PRN visits are provided only in specific circumstances, such as a plugged urinary catheter or a leaking heparin lock for an IV antibiotic patient. The requirement that the physician impose a specific limit on the number of PRN visits ensures that he or she will remain informed if the patient's need for visits is greater than anticipated. We believe that, by establishing strict parameters in which PRN visits may be furnished, these requirements protect the patient's health and safety while also guarding against Medicare coverage of unreasonable visits.

Comment: One commenter suggested that § 409.43(c) be revised to require the plan of care to be signed by "a physician" instead of "the physician" to allow for cases in which multiple physicians are providing patient care.

Response: Section 409.43(c) requires only that the plan of care be signed by a physician who meets the certification and recertification requirements of § 424.22, before the bill for services is submitted. This requirement effectively precludes from signing the plan of care a physician who has a significant ownership interest in, or a significant

financial or contractual relationship with, the HHA. We do not believe that this requirement restricts the ability of HHA patients to receive care from multiple physicians.

Comment: One commenter suggested that § 409.43(d) be revised to clarify that oral (verbal) orders must be signed and dated by a registered nurse or qualified therapist but need not actually be transcribed by them.

Response: We agree that it would be allowable for a designated member of the HHA staff to receive oral orders over the phone as long as the orders are reviewed, signed, and dated with the date of receipt by a registered nurse or qualified therapist before the services are furnished. We have revised paragraph (d) to require that the "orders must be put in writing and be signed and dated with the date of receipt by the registered nurse or qualified therapist (as defined in § 484.4 of this chapter) responsible for furnishing or supervising the ordered services." This revision closely reflects the current policy governing the use of oral orders in the hospital setting (see 42 CFR 482.23(c)(2)). It is also important to note that other Federal or State laws or regulations may restrict the personnel allowed to receive oral orders. To ensure consistency with the Medicare HHA conditions of participation, we have also revised § 484.18(c).

Comment: One commenter stated that the physician should not be required to sign the oral order before the bill for services is submitted to the intermediary. Several commenters complained that physicians are slow to sign these orders in a timely manner because they have no motivation to do so.

Response: We have not revised this requirement. This is a longstanding Medicare requirement that is intended to ensure that the HHA obtains the physician's signature on the oral orders (which confirms that the services were furnished under a physician's order) in a timely manner. We believe that the removal of this requirement would ensure that neither the physician nor the HHA have any motivation to obtain the physician's signature in a timely manner.

Comment: One commenter asked for clarification of whether a plan of care or oral order may be transmitted by facsimile machine.

Response: Yes. The plan of care or oral order may be transmitted by facsimile machine. However, the hard copy of the order with the original signature must be retained and made available to the intermediary, State surveyor, or other authorized personnel upon request.

Comment: One commenter asked that we allow the use of computer-generated "alternative signatures" for the physician's signature on the plan of care.

Response: We do not believe that this rule is the appropriate place to establish criteria for the acceptance of computer-generated alternative signatures. However, we do generally support the use of this technology and intend to make revisions to the Medicare HHA and Intermediary Manuals to specify the conditions under which these signatures may be used.

Comment: One commenter stated that the physician should not be required to review the plan of care at least every 62 days. The commenter believed that some patients' need for care can be predicted for more than 62 days, and so the physician's review should only be required when necessary

Response: We have not accepted this comment. We believe that requiring the physician's review of the plan of care at least once every 62 days protects patient health and safety by ensuring a minimum level of physician oversight. Although it is true that some patients' needs for services are relatively stable, this requirement ensures regular physician review of all patients' care and minimizes the chance of a patient receiving long periods of inappropriate or ineffective care. This requirement is also intended to coordinate with similar physician review requirements contained in §§ 424.22 and 484.18, thus allowing the HHA to meet the requirements of three regulations with a single document.

Comment: One commenter stated that the plan of care should not be terminated just because a beneficiary does not receive at least one covered skilled service in a 62 day period.

Response: As explained in this rule, a beneficiary must be in need of either intermittent skilled nursing care or physical therapy, speech-language pathology services, or continuing occupational therapy to qualify for Medicare coverage of home health services. If the physician's plan of care does not order any of these services, we presume that the beneficiary no longer needs any of these skilled services and therefore does not qualify for Medicare home health coverage. However, we understand that some individuals need skilled care at intervals of more than 62 days and so therefore allow coverage of services furnished to beneficiaries who do not require at least one qualifying skilled service in a 62 day period if the physician documents that such an interval without skilled care is appropriate to the treatment of the beneficiary's illness or injury. We do not agree that the beneficiary should be able to continue to receive nonskilled services indefinitely when there is no documented need for a skilled service.

Skilled Service Requirements (§ 409.44)

Comment: Several commenters stated that the statement contained in the preamble of the proposed rule regarding the necessity of basing coverage decisions on objective clinical evidence should be included in the text of the final rule.

Response: We agree. We have added a new paragraph (a) to § 409.44 (and redesignated subsequent paragraphs) to include this general statement concerning coverage determinations. We also believe it is important to note that this principle has been explicitly stated in the Medicare HHA Manual as Medicare policy since 1989 and so does not represent a change in the current process of Medicare coverage determinations.

Comment: One commenter stated that the proposed requirements governing skilled nursing care contradict the current principles contained in the Medicare HHA Manual.

Response: We disagree. The requirements of this section are based on section 205.1(A) of the Medicare HHA Manual, which is entitled "General Principles Governing Reasonable and Necessary Skilled Nursing Care." The requirements of this rule closely reflect the manual provisions and in many ways are identical.

Comment: One commenter suggested that this section be revised to include a reference to the skilled nursing requirements of 42 CFR 409.33, which provides examples of skilled nursing care for purposes of Medicare coverage of posthospital skilled nursing facility care.

Response: We agree and have added a cross-reference to paragraphs (a) and (b) of § 409.33.

Comment: One commenter stated that this section should specify that teaching and training are covered skilled nursing services. Another commenter stated that this section should specifically note that the management and evaluation of a care plan is a covered skilled nursing service.

Response: By adding the cross-reference explained in the previous response, § 409.44 now incorporates the description of skilled nursing care contained in § 409.33. Section 409.33 includes patient education services and the management and evaluation of a

care plan as examples of skilled nursing care.

Comment: Several commenters expressed concern about Medicare's policy that a service that can safely and effectively be performed by the average nonmedical person without the supervision of a licensed nurse cannot be considered a skilled nursing service. The commenters specifically disagreed with the preamble's example of a nonskilled service that described a patient who could not self-administer eye drops that are normally self-administrable. The commenters believed that the absence of a caregiver to administer the eyedrops made the administration of the eyedrops a skilled service.

Response: Our policy that a nonskilled service does not become a skilled service simply because there is no competent person to perform it is intended to protect Medicare from paying skilled personnel (at a skilled rate) for furnishing nonskilled services. In the example described above, the absence of a caregiver to administer the eyedrops does not make their administration a skilled service. Therefore, this rule at § 409.44(b)(1)(iv) states that "if the service could be performed by the average nonmedical person, the absence of a competent person to perform it does not cause it to be a skilled nursing service." This clear statement represents no change from the longstanding Medicare policy that is currently contained in the Medicare HHA Manual at § 205.1(A)(2) and (B)(4)(c).

Comment: Several commenters requested clarification of Medicare coverage of skilled nursing care following cataract surgery.

Response: Medicare coverage of skilled nursing care furnished to beneficiaries who have recently undergone cataract surgery is based on the same policies governing Medicare home health coverage of skilled nursing care furnished to any beneficiary. If, for example, the patient's unique medical condition is such that the skills of a nurse are required to observe and assess his or her condition or furnish additional teaching of a medication regimen or safety precautions, these services would be covered. It is important to note, however, that the routine initial teaching of post-cataract medication administration and post-operative safety precautions that is needed by any individual having cataract surgery is routinely furnished by ophthalmologists as part of their care of cataract patients. Therefore, it is not considered reasonable and necessary for a HHA to duplicate such services.

Comment: One commenter requested that we remove the current requirement that psychiatric nursing services be furnished under a plan of care established and periodically reviewed by a psychiatrist (see section 205.1(B)(15) of the Medicare HHA Manual). The commenter believed that this requirement made it difficult for some beneficiaries who do not have access to a psychiatrist to receive needed care from a psychiatrically trained nurse. The commenter also requested that we include several examples of covered psychiatric nursing care.

Response: With regard to the requirement that a psychiatrist establish and review plans of care for psychiatric nursing services, we agree with the commenter's concerns. We have not included a similar requirement in this rule and intend to revise the requirements contained in the HHA Manual. We do not believe that this rule is the appropriate place to include specific examples of skilled nursing care. However, we do intend to include several examples of covered psychiatric nursing services in the revisions to the Medicare HHA Manual that will follow the publication of this rule.

Comment: One commenter requested that the phrase "standards of medical practice" in proposed § 409.44(b)(2)(i) of this section be revised to read "standards of practice" to recognize the standards that have been developed by therapy professionals.

Response: We have not accepted this comment. We do not believe that the phrase "standards of medical practice" excludes those standards developed by therapy professionals. We require covered therapy services also to be considered specific, safe, and effective treatment under the appropriate therapy standards of practice.

Comment: One commenter stated that the coverage requirements of proposed § 409.44(b)(2)(ii) (which describes the level of complexity and sophistication of covered services) are too restrictive. The commenter believed that Medicare should cover any services that "fall within the scope of the licensed professional."

Response: We do not agree with the commenter. We believe that such a vague and general policy would result in Medicare paying for many services that do not necessarily require the skills of a licensed therapist to be performed safely and effectively. For example, assisting a patient with simple transfers could be performed safely and effectively by a physical therapist, but it should not be covered as a skilled therapy service because it could also be furnished safely and effectively by a home health aide. We believe that the provisions of this paragraph ensure that Medicare will pay only for those services which require the skills of a licensed therapist to be performed safely and effectively.

Comment: One commenter stated that the requirement of § 409.44(c)(2)(iii) that "there must be an expectation that the beneficiary's condition will improve materially in a reasonable (and generally predictable) period of time * * *" is too vague. The commenter specifically recommended that we delete the word "materially" from the paragraph.

Response: We have not accepted this comment. We consider "material" improvement to be improvement to a significant degree or extent. This requirement ensures that Medicare will cover only those therapy services that are actually contributing to the treatment of the patient's illness or injury. Such a requirement cannot be completely precise in its application to all possible situations and its application does depend somewhat on the discretion of the intermediary. However, we believe that the requirement of this paragraph is reasonable and understandable. We also point out that this is a longstanding policy that is currently contained in the Medicare HHA Manual at section 205.2(A)(5).

Comment: One commenter stated that paragraph (b) of proposed § 409.44 should be revised to recognize the medical necessity of extended therapy in certain cases and of active therapy furnished to patients whose health is declining in certain cases.

Response: We do not believe that such a revision is necessary. Paragraph (c) (paragraph (b) in the proposed rule) states that Medicare will pay for the services of a therapist when his or her skills are necessary for the safe and effective performance of a maintenance program. This policy clearly recognizes that, in certain cases, an extended maintenance program can be considered medically necessary.

We also believe that active therapy for a beneficiary whose health is declining can be covered. The new paragraph (a) of this section that we have added in this final rule specifies that the intermediary's decision on whether care is reasonable and necessary must be based on objective clinical evidence and the beneficiary's unique need for care. Therefore, this rule specifically prohibits claims decisions based on general inferences about patients with similar diagnoses, which means that it would be inappropriate for an intermediary to deny therapy services

solely on the basis that they were furnished over a long period of time or to a patient whose general health status is in decline.

Comment: One commenter stated that we should require that the expectation that the beneficiary's condition will materially improve be based on the therapist's assessment of the patient's rehabilitation potential and the physician's assessment of the patient's unique medical condition. (We proposed only to require the physician's assessment.)

Response: We believe that such a revision would not be appropriate. Our policy concerning the physician's role in determining the patient's need for care is based on section 1861(m) of the Act, which requires covered home health services to be furnished under a plan of care established and periodically reviewed by a physician, and sections 1814(a)(2)(C) and 1835(a)(2)(A), which require qualified Medicare home health beneficiaries to be under the care of a physician and receiving services under a plan of care established and periodically reviewed by a physician. Because the law specifically assigns these responsibilities to the physician, we do not believe that it would be appropriate to shift the responsibility for assessment of the patient to an individual other than the physician. In addition, we believe that the therapist's role in establishing the plan of care is adequately protected by the Medicare HHA conditions of participation at 42 CFR 484.18(a), which specifically requires the consultation and participation of the therapist (as well as other HHA staff) in the development of the plan of care.

Dependent Services Requirements (§ 409.45)

Comment: Several commenters stated that Medicare should cover home health aide and medical social services furnished after the final qualifying skilled visit.

Response: The Act at sections 1814(a)(2)(C) and 1835(a)(2)(A) specifically requires that a beneficiary be in need of physical therapy, speech pathology services, continuing occupational therapy, or intermittent skilled nursing care to be eligible for Medicare coverage of home health services. Because a patient who has received his or her last qualifying service can no longer be considered in need of that service, Medicare cannot pay for any home health aide or medical social services furnished that patient after the final qualifying visit. We have revised paragraph (a) of § 409.45 to clarify that dependent services furnished after the final qualifying service are not covered, except when the dependent service was not followed by a qualifying service due to an unanticipated event such as the unexpected inpatient admission or death of the beneficiary.

Comment: One commenter stated that the phrase "repetitive speech routines to support speech therapy" in § 409.45(b)(1)(iv) should be replaced with "functional communication skills and opportunities to support speech-language pathology services."

Response: We have revised this phrase to refer to "repetitive practice of functional communication skills to support speech-language pathology services." We believe that this revision addresses the commenter's concern and will be readily understood by providers, intermediaries, and others.

Comment: One commenter stated that § 409.45 should be revised to include respite care for a beneficiary's caregiver as a covered home health aide service.

Response: We have not accepted this comment. An individual who requires covered services—such as skilled nursing care—may receive them when the need for the services arises because a caregiver who ordinarily provides them is temporarily unavailable. In this context, the services are covered home health services even though one result may be respite for the caregiver. On the other hand, the Act at section 1862(a)(1)(A) excludes any service that is not "reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member" from Medicare coverage. "Respite care" that does not represent actual treatment of the beneficiary's illness or injury, but primarily consists of noncovered care provided in order to relieve the beneficiary's caregiver, would fall under the statutory exclusion. We have no statutory authority to cover respite care as a home health aide service. To make this long-standing Medicare policy clear, § 409.45(b)(1) of this section specifically states that a covered home health aide visit must be for the provision of hands-on personal care to the beneficiary or for services that are needed to maintain the beneficiary's health or to facilitate treatment of the beneficiary's illness or injury.

Comment: One commenter objected to § 409.45(b)(3)(iii), which requires that covered home health aide services "be of a type that there is no willing or able caregiver to provide, or, if there is a potential caregiver, the beneficiary is unwilling to use the services of that individual." The commenter believes that this could lead to abuse of the Medicare program by beneficiaries who seek to receive home health aide services by refusing to accept the services of an able caregiver.

Response: We have not revised this requirement. It has long been Medicare policy to cover services without regard to whether there is someone in the home who could furnish them. This policy is described in section 203.2 of the HHA Manual, which states:

> Where the Medicare criteria for coverage of home health services are met, beneficiaries are entitled by law to coverage of reasonable and necessary home health services. Therefore, a beneficiary is entitled to have the costs of reasonable and necessary services reimbursed by Medicare without regard to whether there is someone in the home available to furnish them.

In those cases in which the beneficiary refuses to accept the services of an available caregiver, or when a caregiver refuses to furnish needed care, it is not appropriate for Medicare to coerce those individuals into providing or receiving the services under circumstances to which they object. Of course, if a caregiver is furnishing necessary services, Medicare will not pay for a home health aide to furnish duplicative services. In addition, although we appreciate the commenter's concern, we have no evidence of widespread abuse of this long-standing policy.

Comment: One commenter suggested that we not require medical social services to be furnished under physician orders. The commenter believes that physicians are not qualified to determine a patient's need for medical social services.

Response: Section 1861(m) of the Act requires that all covered home health services be furnished under a plan of care established and periodically reviewed by a physician. In addition, this section of the Act specifically defines "medical social services under the direction of a physician" as a covered home health service. Therefore, we cannot accept the commenter's suggestion.

Comment: One commenter requested that we clarify what constitutes a social or emotional problem that is an impediment to the effective treatment of the beneficiary's medical condition or to his or her rate of recovery.

Response: A social or emotional problem that impedes (or is expected to impede) a beneficiary's medical treatment is a problem which may obstruct or inhibit the effective treatment of the beneficiary's medical condition. Examples are an emotional problem that causes the beneficiary to neglect his or her medication regimen and a social problem, such as a hostile

family situation or an extremely limited income, that results in the beneficiary receiving inadequate nutrition or personal assistance. The Medicare HHA Manual at § 206.3 provides several examples of covered medical social services provided to beneficiaries with such problems.

Comment: Several commenters stated that this section should be revised to allow Medicare coverage of medical social services furnished to a beneficiary's family when such services are necessary to resolve an impediment to the beneficiary's medical treatment.

Response: We agree with the commenters and have revised § 409.45(c)(2) accordingly to allow for Medicare coverage of medical social services furnished on a short-term basis to a beneficiary's family member or caregiver when it can be demonstrated that a brief intervention (that is, two or three visits) by the medical social worker is necessary to remove a clear and direct impediment to the effective treatment of the beneficiary's medical condition or to his or her rate of recovery.

We believe that medical social services furnished to a beneficiary's family member or caregiver in these circumstances will enhance the effectiveness of the treatment of the beneficiary's illness or injury. In those cases where a family member or caregiver is directly impeding the beneficiary's medical treatment or rate of recovery (for example, by failing to provide necessary care or by engaging in abusive neglectful behavior), we believe that short-term medical social services furnished to the caregiver or family member for the purpose of removing that impediment will greatly benefit the home health patient by enhancing the effectiveness of his or her medical treatment and, ultimately, the rate and level of his or her recovery. We also expect that, in these circumstances, the effective use of short-term medical social services will result in a reduction in the beneficiary's need for other home health services (such as skilled nursing care to observe and assess the patient's treatment and progress). In some cases, these services may also prevent a costly inpatient stay by the beneficiary necessitated by his or her unhealthy or unsafe home environment.

We also note that Medicare currently covers family counseling services furnished by a physician to a beneficiary's family when the primary purpose is the treatment of the beneficiary's condition and not the treatment of the family member's problems (see § 35–14 of the Medicare Coverage Issues Manual). We believe that the services of a medical social worker furnished to a beneficiary's family member under similar circumstances would also be of value.

In addition, this coverage is consistent with our long-standing policy regarding the coverage of home health skilled nursing visits for purposes of teaching and training family members or caregivers. Medicare has long covered a limited number of skilled nursing visits for teaching and training family members where the teaching and training is appropriate to prepare the family member to furnish treatment or support for the beneficiary's functional loss, illness or injury. Again, as with the physician counseling, Medicare covers these visits.

It is important to emphasize that this revision is intended to cover medical social services furnished to a family member or caregiver only when a brief intervention will resolve a problem which clearly and directly impedes the beneficiary's medical treatment. To be considered "clear and direct" the behavior or actions of the family member or caregiver must plainly obstruct, contravene, or prevent the patient's medical treatment or rate of recovery. The HHA is responsible for demonstrating in its documentation that the problem is a clear and direct impediment to the treatment of the beneficiary's medical condition or rate of recovery. Medical social services furnished to address general problems that do not clearly and directly impede the beneficiary's treatment or rate of recovery as well as long-term social services furnished to family members, such as ongoing alcohol counseling, are not covered. Because we have limited coverage to medical social services to address only clear and direct impediments on a short-term basis, it is our expectation that medical social services furnished to family members or caregivers should require only a brief intervention on the part of the social worker, which should rarely exceed two or three visits. We intend to include an example of covered medical social services furnished to a family member in the Medicare HHA Manual. We have also revised in this final rule the paragraph (g) that we had proposed to add to § 409.49. That paragraph will now exclude from Medicare coverage medical social services furnished to family members, except as provided in § 409.45(c)(2).

Comment: One commenter objected to this section's requirement that covered medical social services must be necessary to resolve social or emotional problems that are expected to be an impediment to the treatment of the beneficiary's medical condition or to his or her rate of recovery. The commenter stated that the services of a social worker may address a wide range of difficulties in addition to those that present an impediment to the treatment of the beneficiary's medical condition.

Response: The Act at section 1861(m) specifically defines *medical* social services as a covered home health service. In addition, section 1862(a)(1)(A) of the Act excludes from Medicare coverage any service that is not reasonable and necessary for the diagnosis or treatment of the patient's illness or injury. Therefore, Medicare is limited to covering those social services that are provided to treat the patient's *medical* condition; that is, they are directed at resolving impediments to the treatment of the patient's illness or injury. Although we agree that professional social workers are qualified to address a wide range of problems beyond those that may affect the treatment of the patient's medical condition, we do not agree that Medicare should cover such services.

Comment: Several commenters objected to the provision that covered medical social services must require the skills of a social worker or a social work assistant to be performed safely and effectively.

Response: We do not believe that this requirement is unreasonable. It would not be proper for Medicare to pay a social worker to perform services that do not require his or her unique skills. It is important to note that this is a longstanding coverage requirement that also applies to skilled nursing and therapy services (see §§ 409.44(b)(1)(ii) and (c)(2)(ii)). This longstanding requirement is intended to protect Medicare from making payment to a skilled professional for services that could have been furnished by the average nonmedical person.

Comment: One commenter suggested that paragraph (e) be revised to describe Medicare coverage of certain intravenous pump supplies specifically as it is described in section 3113.4 of the Medicare Intermediary Manual.

Response: The manual section to which the commenter refers describes Medicare Part B coverage of durable medical equipment (DME) and related supplies. We do not believe that the suggested revision is necessary because paragraph (e) of this section specifically provides for Medicare coverage of DME under the home health benefit identical to its coverage under Part B. Therefore, all policy relating to Part B coverage of DME applies to home health DME coverage, not just the policy contained in section 3113.4 of the Intermediary

Manual. We have chosen not to include the extensive manual provisions on Part B DME coverage in this rule, but we have cross-referenced paragraph (e) with 42 CFR 410.38, which contains the regulations describing the scope and conditions of payment for DME under Part B. We have not included the manual provisions in this rule because we believe that § 410.38 (to which this section refers) provides an adequate description of Medicare DME coverage and because the extensive and detailed nature of the manual provisions on DME coverage make them best suited for inclusion in the appropriate manuals but inappropriate for inclusion in this rule. We also note that § 220 of the Medicare HHA Manual describes this coverage in depth.

Comment: One commenter stated that HCFA should issue a list of Medicare-covered medical supplies.

Response: We do not issue a list of covered medical supplies because it is not feasible to compile and maintain such a list in a timely and comprehensive manner. Also, in some cases, Medicare coverage of a certain item may depend on the circumstances in which it is used (such as skin lotion or shampoo), and so a list would not adequately provide for all possible coverage. Therefore, we define (in both this rule and in the Medicare HHA Manual) the criteria for Medicare coverage of medical supplies and rely on the intermediary to apply those criteria on a case-by-case basis.

Comment: One commenter informed us that the Council on Medical Education of the American Medical Association, to which we referred in § 409.45(g), is now known as the Accreditation Council for Graduate Medical Education.

Response: We have made the appropriate revision to paragraph (g).

Allowable Administrative Costs (§ 409.46)

Comment: One commenter stated that § 409.46(a) should be revised to allow for Medicare coverage of skilled nursing services furnished without a physician's orders during the initial evaluation visit.

Response: In addition to establishing other requirements, section 1861(m) of the Act defines covered home health services as items and services furnished under a plan of care established and periodically reviewed by a physician. Therefore, there is no statutory authority for Medicare coverage of services that have not been ordered by a physician. If the nurse performing the evaluation visit finds the beneficiary to be in need of immediate care, he or she may obtain verbal orders for care from a physician at that time and then proceed to furnish the ordered care. In this circumstance, the initial evaluation visit would then become a Medicare-covered skilled nursing visit.

Comment: One commenter stated that visits by registered nurses or other qualified professionals for the supervision of home health aides should be considered a home health aide cost rather than an allowable administrative cost.

Response: Because the cost of the supervisory visit is associated with providing an administrative service (that is, compliance with the requirements of the Medicare HHA conditions of participation at 42 CFR 484.36) and not a home health aide service, the costs associated with the provision of the required supervisory visits is an allowable administrative cost. We have also added a new § 413.125 in this final rule to refer to the rules on the allowability of certain costs in this section as well as § 409.49(b).

Comment: One commenter suggested that § 409.46(c) be revised to specify that only skilled nurses or physical therapists with special training in respiratory care be allowed to furnish respiratory therapy services.

Response: We have not accepted this comment for two reasons. First, the purpose of this section is to describe certain services that are allowable administrative costs, not to establish requirements for coverage of skilled nursing or physical therapy services; therefore, such a revision would not be appropriate to this section. Second, we do not believe that such a revision is necessary because State practice acts and professional standards of practice generally regulate the services that can be provided by nurses and therapists, thus preventing nurses or therapists from furnishing services they are not qualified to provide.

Place of Service Requirements (§ 409.47)

Comment: One commenter suggested that this section be revised to reflect the place of service provisions formerly at § 409.42(e)(1).

Response: We have accepted this comment. We have revised this section to reflect the specific provisions of section 1861(m)(7) of the Act and previous regulations at § 409.42(e) more closely. As stated in the revised § 409.47(b), an outpatient setting may include a hospital, a SNF or a rehabilitation center with which the HHA has an arrangement in accordance with § 484.14(h) of this chapter. We believe that this revised requirement, by duplicating the provisions of section 1861(m) of the Act, more closely reflects the original congressional intent to restrict home health coverage of outpatient services to only a few specific outpatient facilities and thus ensure that home health services would be primarily provided in the homes of the beneficiaries.

It has also been brought to our attention that the definition of a beneficiary's home at proposed § 409.47(a) and the definition of "confined to the home" at proposed § 409.42(a) were not entirely consistent. We have revised § 409.42(a) so that both sections define a beneficiary's home for purposes of Medicare home health coverage as any place in which the beneficiary resides that is not a hospital, SNF, or nursing facility as defined in sections 1861(e)(1), 1819(a)(1), or 1919(a)(1) of the Act, respectively.

Comment: One commenter suggested that the place of service requirements contained in § 409.47(b) be expanded to allow Medicare home health coverage of outpatient services furnished in a variety of settings, such as general outpatient clinics and adult day care facilities.

Response: As we explained in the previous response, the Act specifically allows Medicare coverage of outpatient home health services furnished in a hospital, SNF, or rehabilitation center. We have revised paragraph (b) to reflect the statutory provision. We have not expanded the list of allowable outpatient settings because such a revision would not be consistent with the plain language of the statute. Also, it is important to note that section 1861(m)(7)(A) of the Act provides for coverage of outpatient home health services only when the beneficiary requires a service which "involves the use of equipment of such a nature that the items and services cannot readily be made available to the individual" in his or her home. This means that Medicare coverage of outpatient home health services is available only when the primary service cannot be furnished in the home, not merely when it is more convenient to the HHA or beneficiary to provide the service in an outpatient setting. Because coverage of outpatient home health services is available only in such specific circumstances, we believe that the statutory limitation of the services to certain specific facilities is appropriate and does not restrict a beneficiary's access to covered home health outpatient care.

Visits (§ 409.48)

Comment: One commenter requested clarification of Medicare coverage when a nurse provides a skilled nursing

service and a home health aide service in the course of a single visit. The commenter suggested that the HHA should receive two payments for this visit: one payment for a skilled nursing visit and one for a home health aide visit.

Response: If a nurse furnishes several services that fall within the normal scope of a nurse's practice in the course of a single visit, that constitutes only one visit. Because the visit involved only a single nurse providing home health services during the course of a single visit, the fact that the nurse also provided incidental unskilled services (which can be safely and effectively provided by a licensed nurse) in addition to the skilled nursing care does not mean that the service could be covered as two visits. We consider this situation to involve only a single episode of personal contact between the HHA staff and the beneficiary and, therefore, covered only as a single visit under the requirements of § 409.48(c).

Comment: One commenter requested clarification of Medicare coverage when two individuals are needed to provide a service. The commenter specifically cited a situation in which a nurse and a home health aide are required to furnish a service.

Response: As stated in § 409.48(c)(3) of this section, Medicare will pay for two visits when two individuals are needed to furnish a service (e.g., a bath, wound care, or a certain exercise). Because each patient's situation is unique, we have not established a specific guideline for which combinations of HHA personnel can furnish services that are covered as two visits. The personnel, however, must be appropriate for the service to be performed (for example, it would not require the services of two licensed nurses to give a routine bath to a heavy beneficiary). Although coverage of these services does not require the HHA to submit any additional documentation, the clinical notes should describe why it is necessary for two individuals to furnish the service (patient's weight, nature of required equipment, etc.).

Comment: One commenter opposed the coverage of two visits when the HHA staff cannot provide the reasonable and necessary care in the course of a single visit but remain in the beneficiary's home between the provision of the services. The commenter stated that claims for coverage in this situation would be too difficult for the intermediary to review. Another commenter requested that we rescind this coverage until its impact can be studied.

Response: We have not accepted either of these comments. We believe that, in those situations in which the HHA cannot provide the necessary services in the course of a single visit (e.g., wound dressing changes), it is fair and reasonable to cover two separate visits even though the individual furnishing the care has remained in the home between visits (e.g., to provide companionship or other non-covered care). Abandonment of this policy would simply result in HHA staff leaving the home for a token period of time or having a different HHA staff member provide the second service to create an artificial "second visit." Although coverage of these visits may be more demanding for the intermediary to review, the removal of this coverage would inevitably result in HHAs allocating staff less efficiently to secure coverage of two visits. In summary, if the two services cannot feasibly be provided in a single visit, we do not believe what the provider does between those services is relevant to the coverage decision. With regard to delaying implementation of this coverage, Medicare has covered two visits in this situation for some time without discernible effect. This rule codifies current coverage.

Excluded Services (§ 409.49)

Comment: One commenter stated that the Medicare home health benefit should cover drugs and biologicals furnished in the home.

Response: We cannot accept this comment because section 1861(m)(5) of the Act specifically excludes drugs and biologicals from Medicare home health coverage.

Comment: One commenter noted that the regulations text in the proposed rule omitted paragraph (c) of § 409.49.

Response: The proposed rule did inadvertently omit paragraph (c) of this section from the regulations text, although the provisions of paragraph (c) were described in the preamble. This final rule includes paragraph (c), which excludes from home health coverage services which would not be covered if furnished as hospital inpatient services. We have specified this exclusion because the unnumbered material in section 1861(m) of the Act following paragraph (m)(7) specifically precludes home health coverage of any service that would not be covered as an inpatient hospital service.

Comment: One commenter stated that exclusion from coverage of housekeeping services is too restrictive.

Response: We do not agree. It is important to note that § 409.49(d) excludes only those services whose sole purpose is to allow the beneficiary to continue to reside in his or her home. If a home health aide performs some light housekeeping incidental to providing a covered home health aide service, that visit would not be excluded from coverage. However, a visit for the sole purpose of providing housekeeping services would not be covered, as these services are not related to the treatment of the beneficiary's illness or injury. As we stated in the preamble of the proposed rule, this does not represent any change from current Medicare policy and would not affect the coverage of home health aide services that are essential for healthcare, such as bathroom disinfection and the cleaning of soiled sheets. Also, it is important to note that this exclusion applies to Medicare coverage of aide services under the home health benefit and has no impact on coverage of "homemaker" services furnished under the Medicare hospice benefit. "Homemaker" services, which we consider to be identical to housekeeping services, are specifically mentioned as a covered hospice service in 42 CFR 418.202(g).

Comment: Several commenters asked that we clarify Medicare coverage of home health services furnished to end stage renal disease (ESRD) patients. One commenter specifically requested clarification of Medicare coverage of a home health nursing visit to furnish wound care related to an abandoned shunt site.

Response: Because Medicare's composite rate payment to an ESRD facility is intended to subsume payment for all dialysis-related services, any service directly related to a beneficiary's dialysis is covered as a dialysis service and not as a home health service. Home health services that are not related to an ESRD beneficiary's dialysis, however, can be covered under the home health benefit if all requirements are met (for example, the beneficiary is homebound). Only those services which are directly related to the beneficiary's dialysis (and not to other aspects of renal disease) are excluded by this paragraph. Because wound care for an abandoned shunt site is not directly related to the beneficiary's dialysis, a nursing visit to furnish such care to a qualified Medicare home health beneficiary would be covered.

Comment: One commenter stated that the reference to § 410.36 in paragraph (f) appears to exclude coverage of wound supplies and intravenous maintenance supplies.

Response: Paragraph (f) excludes from coverage only those items which meet the requirements of § 410.36(b) for prosthetic devices. That is, prosthetic

devices that replace all or part of a body organ (with the exception of catheters, catheter supplies, ostomy bags, and bags relating to ostomy care) are excluded from coverage under the home health benefit. Section 1861(m) of the Act indicates that medical supplies and durable medical equipment are covered home health services. Since prosthetic devices are not also listed in section 1861(m), they cannot be covered as home health services. Items described in § 410.36(a), such as surgical dressings, are not excluded by this paragraph. Any item that meets the requirements for coverage contained in § 409.45(f) of this rule as medical supplies may be covered as a home health service.

Condition of Participation: Home Health Aide Services (§ 484.36)

Comment: Several commenters stated that the current requirement that home health aides must receive at least 12 hours of in-service training each calendar year is overly burdensome. The commenters did not protest the required number of training hours but found the requirement that the training be furnished within each calendar year to present burdensome scheduling problems. The commenters said these scheduling problems were particularly difficult in the cases of home health aides who were hired late in the calendar year and therefore were obligated to complete the 12 hours of training in a relatively short period of time.

Response: We agree with the commenters that this requirement would be overly burdensome and have revised proposed § 484.36(b)(2)(iii) to require each aide to receive at least 12 hours of in-service training per 12 month period. Without the requirement that the training be received in each calendar year, this provision will allow HHAs a full 12 months to provide the required in-service training to newly hired home health aides. The revised requirement will also allow HHAs greater flexibility in scheduling in-service training programs.

Comment: One commenter stated that the provision of § 484.36(c) requiring the registered nurse to assign the home health aide to a specific patient reduces the HHA's scheduling flexibility and ability to send a substitute aide in the event of sickness or other unforeseen circumstances.

Response: This requirement represents no change from the current requirements of this section. Although we understand that this requirement may slightly reduce the HHA's scheduling flexibility, we believe that the benefits to be gained by its encouragement of consistency in care and familiarity between patient and home health aide far outweighs any reduction in scheduling flexibility. This requirement does not prevent the assignment of more than one aide to a patient, and we certainly do not intend it to preclude the use of a substitute aide when illness or other unforseen circumstances prevents the regularly scheduled aide from providing services.

Comment: One commenter stated that a licensed practical nurse (LPN) should be allowed to perform the required home health aide supervisory visit.

Response: We do not agree. We believe that the more extensive educational background of a registered nurse (RN) makes the RN better equipped to assess the care provided by the home health aide as well as the total effect of the care on the patient's condition. Therefore, we believe that it is in the best interest of the patient's health and safety to require that supervisory visits be performed by an RN. It has long been Medicare policy that the RN's extensive professional training uniquely qualifies him or her to perform evaluation and supervisory functions. This recognition of the RN's qualifications is represented not only in this section but in § 484.30, which describes skilled nursing services, § 484.16, which describes the group of professional personnel, and § 484.14(d), which requires therapeutic services to be furnished under the supervision of a physician or RN.

Comment: One commenter opposed the requirement that a supervisory visit be performed no less frequently than every two weeks as costly to the HHA and unnecessary because these patients are regularly seen by a nurse or therapist who likely performs a basic assessment of the care furnished by the home health aide anyway.

Response: We disagree with the commenter. If the patient is receiving skilled care from a registered nurse or therapist on a biweekly basis, then the professional can easily perform the required supervisory visit during the course of his or her visit to furnish covered skilled care. Therefore, we believe that patients in the situation described by the commenter present little cost or difficulty to an HHA scheduling supervisory visits. Not all patients, however, receive skilled nursing or therapy services on such a regular basis. When a patient is receiving skilled nursing or therapy services, we believe that it is in the best interest of the patient to require the registered nurse or appropriate therapist to supervise and assess the care furnished by the home health aide on a biweekly basis. This supervisory visit ensures that the aide services will be regularly assessed to ensure that they are furnished properly and of benefit to the treatment of the patient's illness or injury.

Comment: Many commenters oppose the proposed provision in § 484.36(d)(2)(i), which would have required at least one supervisory visit per month to occur while the aide is furnishing services if the patient is receiving one or more skilled services. Many commenters also oppose the proposed provision in paragraph (d)(2)(ii), which would have required all supervisory visits to occur while the aide is furnishing services when the aide is not employed directly by the HHA.

Response: We have accepted these comments and are not including these proposed supervisory requirements contained in § 484.36(d)(2)(i) and (ii) in the final rule. We have concluded that the improvement in the quality of home health aide services that has occurred as a result of the home health aide training and competency evaluation requirements implemented in 1990, as well as the increase in patient participation in care that has resulted from the recently implemented patient rights requirements of § 484.10, make the proposed requirements for direct aide supervision unnecessary. These requirements were proposed in response to a study published by the Office of the Inspector General in September 1987. ("Home Health Aide Services for Medicare Patients", OA1–02–86–00010, September 1987.) Since the time this study was completed, however, we have instituted the training and evaluation requirements referred to above as well as annual in-service training and performance review requirements. We believe that these requirements have significantly improved the quality and oversight of home health aide services. In addition, the institution of patient rights requirements has given home health patients a more comprehensive knowledge of their rights regarding care planning and provision. This, in effect, lets the patient play a greater role in the oversight of the care he or she receives.

Many commenters stated that arranging for the provision of the proposed supervisory requirements would impose significant burdens and costs associated with scheduling, travel, and the inefficient allocation of nursing resources. Many commenters also stated that the joint visits would be of limited value because many patients are reluctant to voice concerns or complaints in the presence of the home health aide (preferring to speak with the

nurse privately in person or by telephone). These legitimate and practical concerns have persuaded us that the value to be gained by the proposed requirements does not merit the burden which they would impose on HHAs. Because of the progress we have already made in our efforts to ensure the high quality of home health aide services furnished by Medicare-approved HHAs, we do not believe that the advantages of the proposed requirements justify their associated cost and burden. Therefore, this final rule does not contain the requirements.

Comment: Two commenters stated that the required supervisory visit by a registered nurse every 62 days when the non-Medicare patient is receiving home health aide services but no skilled nursing care or physical, speech, or occupational therapy is too infrequent. One commenter believes that the required frequency of supervisory visits does not provide adequate oversight of home health aide services.

Response: We disagree. We believe that these non-Medicare patients who are not receiving skilled nursing care, physical or occupational therapy, or speech-language pathology services are not as ill as those who are receiving skilled services and therefore are at less risk of medical problems or complications that could occur during the course of receiving home health aide services. Because these patients are less ill, and therefore receiving home health aide care that is likely to be more custodial in nature, we believe that it is appropriate to require a lower frequency of supervision. Due to the lower frequency of these visits, we have specifically required them to occur while the aide is furnishing services so that the nurse can assess the aide's actual provision of care as well as the general condition of the patient. Also, we are requiring the on-site supervisory visit (which applies only to non-Medicare patients) at this frequency to conform Federal requirements that apply to HHAs that participate in Medicare with the licensure requirements of many States, thus enabling many HHAs to meet the administrative requirements of two bodies with a single visit.

Condition of Participation: Clinical Records (§ 409.48)

Comment: Several commenters expressed concern that the proposed requirement that discharge summaries be sent to the attending physician will increase the flow of unwanted paperwork into physicians' offices. One commenter suggested that we require HHAs to inform the attending physician of the availability of the discharge summary.

Response: We understand the commenters' concern and have accepted the suggestion. We have revised § 484.48 to require the HHA to inform the attending physician of the availability of a discharge summary and send it to him or her upon request. This requirement will allow physicians to remain informed of the care furnished to their patients while minimizing the amount of unwanted paperwork being sent to physicians' offices. We would also like to clarify that the discharge summary need not be a separate piece of paper and could be incorporated into the routine summary reports already furnished to the physician.

Comment: One commenter stated that the discharge summary requirement could not be implemented without clearance under the Paperwork Reduction Act.

Response: We do not agree with the commenter. The requirement that HHAs maintain a discharge summary for each patient is not new. Section 484.48 has long required the HHA to include a discharge summary in the patient's clinical record. This rule does not impose any additional paperwork requirements. It only requires the HHA to make the discharge summary (already required under the existing conditions of participation) available to the patient's attending physician upon request. Also, as stated above, we are not requiring that the discharge summary be a separate piece of paper that is not part of the routine summary reports already being submitted to the physician.

Comment: One commenter requested that we specify the required contents of the discharge summary.

Response: We are specifically requiring only that the discharge summary include the patient's medical and health status at discharge. We are otherwise providing the HHAs the flexibility to include whatever additional information they consider to be relevant and necessary.

Hospice Care

Covered Services (§ 418.202)

Comment: One commenter expressed concern that this section would increase a hospice's operating costs because the commenter believed it would require that homemaker services be furnished by home health aides.

Response: The commenter misinterpreted the requirements of the paragraph. Although a home health aide can furnish homemaker services, Medicare does not require homemaker services furnished under the Medicare hospice benefit to be provided by home health aides. This section specifically distinguishes between home health aide services, which must be provided by an individual who meets the home health aide training and competency evaluation requirements of § 484.36, and homemaker services, which can be provided by individuals who are not required to have completed any specific training or competency evaluation.

Changes From the Proposed Rule Made by This Final Rule

Following is a summary listing of provisions in this final rule that differ from those in the proposed rule. Additional minor clarifying or editorial changes have also been made.

- We have revised proposed § 409.43(b) to clarify the required content of physician orders.
- We have revised proposed § 409.43(c) to correct a printing error in the physician signature requirements.
- We have revised proposed § 409.43(d) to require the registered nurse or therapist who is responsible for furnishing or supervising the ordered services to sign verbal orders received by the HHA.
- We have revised proposed § 409.44 to include general requirements for coverage determinations.
- We have revised proposed § 409.42, § 409.44, and § 409.45 to replace the term "speech therapist" with "speech-language pathologist" and the term "speech therapy" with "speech-language pathology services."
- We have revised proposed § 409.45(a) to clarify that no dependent services may be covered after the final qualifying service has been furnished.
- We have revised proposed § 409.45(c)(2) to allow the provision of medical social services on a short-term basis to a beneficiary's family member or caregiver.
- We have revised proposed § 409.45(g)(1) to replace "Council on Medical Education of the American Medical Association" with "Accreditation Council for Graduate Medical Education."
- We have revised proposed § 409.47(b) to include the allowable home health outpatient settings specified in the Act.
- We have added § 409.49(c), which excludes Medicare home health coverage of services that would not be covered as inpatient services. This was inadvertently omitted from the proposed rule.
- We have revised proposed § 409.49(g) to exclude Medicare home health coverage of medical social

services provided to family members except as provided in § 409.45(c)(2).

- We have revised § 484.36(b)(2)(iii) to require a home health aide to receive at least 12 hours of in-service training during each 12-month period.
- We are not including the proposed home health aide supervision requirements that had been located in proposed §§ 484.36(d)(2) (i) and (ii).
- We have revised the introductory paragraph of proposed § 484.48 to require the HHA to inform the attending physician of the availability of the discharge summary and to send it to him or her upon request.
- We have added a new § 413.125 to refer to the rules on allowability of certain costs in §§ 409.49(b) and 409.46.

Regulatory Impact Statement

We generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612) unless the Secretary certifies that a rule will not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, all HHAs are considered to be small entities.

Also, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 50 beds.

The provisions in this final rule clarify existing policy and represent minor changes to the proposed rule published September 27, 1991 (56 FR 49154). We have revised § 409.45(a) to clarify that we do not cover dependent services after the final qualifying service has been furnished except under certain circumstances. Though we are not able to estimate the magnitude, we believe this change will result in Medicare program savings.

We have revised § 409.45(c)(2) to allow provision of medical social services on a short-term basis to a beneficiary's family member or caregiver if it can be demonstrated that the service is necessary to resolve a clear and direct impediment to the treatment of the beneficiary's medical condition or to his or her rate of recovery. Though this change could increase program expenditures, we believe the additional cost will be negligible because of the low volume of these services and offsetting savings if the beneficiary's rate of recovery is improved.

Several changes made to the proposed rule will benefit HHAs' administration and utilization of home health aides. We have revised § 484.36(b)(2)(iii) to allow a home health aide to receive the required 12 hours of in-service training during a 12-month period instead of each calendar year. This change allows HHAs some flexibility in scheduling training.

Many commenters opposed the requirements of proposed § 484.36(d)(2)(i) and (ii). We agreed and are deleting those sections from the final rule. Therefore, we are not mandating supervisory visits once a month while the home health aide is providing patient care, or mandating supervisory visits while the aide is furnishing services in all instances if the home health aide services are provided by an individual not employed directly by the HHA. These changes allow HHAs additional flexibility.

For these reasons, we are not preparing analyses for either the RFA or section 1102(b) of the Act since we have determined, and the Secretary certifies, that this final rule will not result in a significant economic impact on a substantial number of small entities and will not have a significant impact on the operations of a substantial number of small rural hospitals.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

Collection of Information Requirements

Sections 409.43, 484.18, 484.36, and 484.48 of this document contain information collection requirements. As required by section 3504(h) of the Paperwork Reduction Act of 1980 (44 U.S.C. 3504), we have submitted a copy of this document to OMB for its review of these information collection requirements.

However, these information collection requirements have been previously approved under the information collection requirements contained in the conditions of participation for home health agencies. These information collection requirements implement patient rights provisions and set forth home health aide criteria; they were approved under the OMB approval number 0938–0365 on June 24, 1991 through December 31, 1993 by OMB in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). We are requesting reapproval of the collection requirements in those sections. Public reporting burden for these collections of information is estimated to be six hours per home health agency per year.

Organizations and individuals desiring to submit comments on the information collection and recordkeeping requirements should direct them to the OMB official whose name appears in the "ADDRESSES" section of this preamble.

List of Subjects

42 CFR Part 409

Health facilities, Medicare.

42 CFR Part 413

Health facilities, Kidney diseases, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

42 CFR Part.418

Health facilities, Hospice care, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 484

Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR chapter IV is amended as follows:

A. Part 409 is amended as set forth below:

PART 409—HOSPITAL INSURANCE BENEFITS

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

Authority: Secs. 1102, 1812, 1813, 1814 1835, 1861, 1862 (a), (f), and (h), 1871 and 1881 of the Social Security Act (42 U.S.C. 1302, 1395d, 1395e, 1395f, 1395n, 1395x, 1395y(a), (f), and (h), 1395hh and 1395qq).

2. Section 409.32(a) is revised to read as follows:

§ 409.32 Criteria for skilled services and the need for skilled services.

(a) To be considered a skilled service, the service must be so inherently complex that it can be safely and effectively performed only by, or under the supervision of, professional or technical personnel.

* * * * *

3. Section 409.40 is revised to read as follows:

§ 409.40 Basis, purpose, and scope.

This subpart implements sections 1814(a)(2)(C), 1835(a)(2)(A), and 1861(m) of the Act with respect to the requirements that must be met for Medicare payment to be made for home health services furnished to eligible beneficiaries.

4. Section 409.41 is revised to read as follows:

§ 409.41 Requirement for payment.

In order for home health services to qualify for payment under the Medicare program the following requirements must be met:

(a) The services must be furnished to an eligible beneficiary by, or under arrangements with, an HHA that—

(1) Meets the conditions of participation for HHAs at part 484 of this chapter; and

(2) Has in effect a Medicare provider agreement as described in part 489, subparts A, B, C, D, and E of this chapter.

(b) The physician certification and recertification requirements for home health services described in § 424.22.

(c) All requirements contained in §§ 409.42 through 409.47.

5. Section 409.42 is revised to read as follows:

§ 409.42 Beneficiary qualifications for coverage of services.

To qualify for Medicare coverage of home health services, a beneficiary must meet each of the following requirements:

(a) *Confined to the home.* The beneficiary must be confined to the home or in an institution that is not a hospital, SNF or nursing facility as defined in section 1861(e)(1), 1819(a)(1) or 1919(a)(1) of the Act, respectively.

(b) *Under the care of a physician.* The beneficiary must be under the care of a physician who establishes the plan of care. A doctor of podiatric medicine may establish a plan of care only if that is consistent with the HHA's policy and with the functions he or she is authorized to perform under State law.

(c) *In need of skilled services.* The beneficiary must need at least one of the following skilled services as certified by a physician in accordance with the physician certification and recertification requirements for home health services under § 424.22 of this chapter.

(1) Intermittent skilled nursing services that meet the criteria for skilled services and the need for skilled services found in § 409.32. (Also see § 409.33 (a) and (b) for a description of examples of skilled nursing and rehabilitation services.)

(2) Physical therapy services that meet the requirements of § 409.44(b).

(3) Speech-language pathology services that meet the requirements of § 409.44(b).

(4) Continuing occupational therapy services that meet the requirements of § 409.44(b) if the beneficiary's eligibility for home health services has been established by virtue of a prior need for intermittent skilled nursing care, speech-language pathology services, or physical therapy in the current or prior certification period.

(d) *Under a plan of care.* The beneficiary must be under a plan of care that meets the requirements for plans of care specified in § 409.43.

(e) *By whom the services must be furnished.* The home health services must be furnished by, or under arrangements made by, a participating HHA.

6. Section 409.43 is revised to read as follows:

§ 409.43 Plan of care requirements.

(a) *Contents.* The plan of care must contain those items listed in § 484.18(a) of this chapter that specify the standards relating to a plan of care that an HHA must meet in order to participate in the Medicare program.

(b) *Physician's orders.* The physician's orders for services in the plan of care must specify the medical treatments to be furnished as well as the type of home health discipline that will furnish the ordered services and at what frequency the services will be furnished. Orders for services to be provided "as needed" or "PRN" must be accompanied by a description of the beneficiary's medical signs and symptoms that would occasion the visit and a specific limit on the number of those visits to be made under the order before an additional physician order would have to be obtained. Orders for care may indicate a specific range in frequency of visits to ensure that the most appropriate level of services is furnished. If a range of visits is ordered, the upper limit of the range is considered the specific frequency.

(c) *Physician signature.* The plan of care must be signed and dated by a physician who meets the certification and recertification requirements of § 424.22 of this chapter. The plan of care must be signed by the physician before the bill for services is submitted. Any changes in the plan must be signed and dated by the physician.

(d) *Oral (verbal) orders.* If any services are provided based on a physician's oral orders, the orders must be put in writing and be signed and dated with the date of receipt by the registered nurse or qualified therapist (as defined in § 484.4 of this chapter) responsible for furnishing or supervising the ordered services. Oral orders may only be accepted by personnel authorized to do so by applicable State and Federal laws and regulations as well as by the HHA's internal policies. The oral orders must also be countersigned and dated by the physician before the HHA bills for the care.

(e) *Frequency of review.* The plan of care must be reviewed by the physician (as specified in § 409.42(b)) in consultation with agency professional personnel at least every 62 days. Each review of a beneficiary's plan of care must contain the signature of the physician who reviewed it and the date of review.

(f) *Termination of the plan of care.* The plan of care is considered to be terminated if the beneficiary does not receive at least one covered skilled nursing, physical therapy, speech-language pathology services, or occupational therapy visit in a 62-day period unless the physician documents that the interval without such care is appropriate to the treatment of the beneficiary's illness or injury.

7. Section 409.44 is revised to read as follows:

§ 409.44 Skilled services requirements.

(a) *General.* The intermediary's decision on whether care is reasonable and necessary is based on information provided on the forms and in the medical record concerning the unique medical condition of the individual beneficiary. A coverage denial is not made solely on the basis of the reviewer's general inferences about patients with similar diagnoses or on data related to utilization generally but is based upon objective clinical evidence regarding the beneficiary's individual need for care.

(b) *Skilled nursing care.* (1) Skilled nursing care consists of those services that must, under State law, be performed by a registered nurse, or practical (vocational) nurse, as defined in § 484.4 of this chapter, and meet the criteria for skilled nursing services specified in § 409.32. See § 409.33 (a) and (b) for a description of skilled nursing services and examples of them.

(i) In determining whether a service requires the skill of a licensed nurse, consideration must be given to the inherent complexity of the service, the condition of the beneficiary, and accepted standards of medical and nursing practice.

(ii) If the nature of a service is such that it can safely and effectively be performed by the average nonmedical person without direct supervision of a licensed nurse, the service cannot be regarded as a skilled nursing service.

(iii) The fact that a skilled nursing service can be or is taught to the beneficiary or to the beneficiary's family or friends does not negate the skilled aspect of the service when performed by the nurse.

(iv) If the service could be performed by the average nonmedical person, the

absence of a competent person to perform it does not cause it to be a skilled nursing service.

(2) The skilled nursing care must be provided on a part-time or intermittent basis.

(3) The skilled nursing services must be reasonable and necessary for the treatment of the illness or injury.

(i) To be considered reasonable and necessary, the services must be consistent with the nature and severity of the beneficiary's illness or injury, his or her particular medical needs, and accepted standards of medical and nursing practice.

(ii) The skilled nursing care provided to the beneficiary must be reasonable within the context of the beneficiary's condition.

(iii) The determination of whether skilled nursing care is reasonable and necessary must be based solely upon the beneficiary's unique condition and individual needs, without regard to whether the illness or injury is acute, chronic, terminal, or expected to last a long time.

(c) *Physical therapy, speech-language pathology services, and occupational therapy.* To be covered, physical therapy, speech-language pathology services, and occupational therapy must satisfy the criteria in paragraphs (c)(1) through (4) of this section. Occupational therapy services initially qualify for home health coverage only if they are part of a plan of care that also includes intermittent skilled nursing care, physical therapy, or speech-language pathology services as follows:

(1) Speech-language pathology services and physical or occupational therapy services must relate directly and specifically to a treatment regimen (established by the physician, after any needed consultation with the qualified therapist) that is designed to treat the beneficiary's illness or injury. Services related to activities for the general physical welfare of beneficiaries (for example, exercises to promote overall fitness) do not constitute physical therapy, occupational therapy, or speech-language pathology services for Medicare purposes.

(2) Physical and occupational therapy and speech-language pathology services must be reasonable and necessary. To be considered reasonable and necessary, the following conditions must be met:

(i) The services must be considered under accepted standards of medical practice to be a specific, safe, and effective treatment for the beneficiary's condition.

(ii) The services must be of such a level of complexity and sophistication or the condition of the beneficiary must be such that the services required can safely and effectively be performed only by a qualified physical therapist or by a qualified physical therapy assistant under the supervision of a qualified physical therapist, by a qualified speech-language pathologist, or by a qualified occupational therapist or a qualified occupational therapy assistant under the supervision of a qualified occupational therapist (as defined in § 484.4 of this chapter). Services that do not require the performance or supervision of a physical therapist or an occupational therapist are not considered reasonable or necessary physical therapy or occupational therapy services, even if they are performed by or supervised by a physical therapist or occupational therapist. Services that do not require the skills of a speech-language pathologist are not considered to be reasonable and necessary speech-language pathology services even if they are performed by or supervised by a speech-language pathologist .

(iii) There must be an expectation that the beneficiary's condition will improve materially in a reasonable (and generally predictable) period of time based on the physician's assessment of the beneficiary's restoration potential and unique medical condition, or the services must be necessary to establish a safe and effective maintenance program required in connection with a specific disease, or the skills of a therapist must be necessary to perform a safe and effective maintenance program. If the services are for the establishment of a maintenance program, they may include the design of the program, the instruction of the beneficiary, family, or home health aides, and the necessary infrequent reevaluations of the beneficiary and the program to the degree that the specialized knowledge and judgment of a physical therapist, speech-language pathologist, or occupational therapist is required.

(iv) The amount, frequency, and duration of the services must be reasonable.

8. A new § 409.45 is added to read as follows:

§ 409.45 Dependent services requirements.

(a) *General.* Services discussed in paragraphs (b) through (g) of this section may be covered only if the beneficiary needs skilled nursing care on an intermittent basis, as described in § 409.44(a); physical therapy or speech-language pathology services as described in § 409.44(b); or has a continuing need for occupational therapy services as described in § 409.44(c) if the beneficiary's eligibility for home health services has been established by virtue of a prior need for intermittent skilled nursing care, speech-language pathology services, or physical therapy in the current or prior certification period; and otherwise meets the qualifying criteria (confined to the home, under the care of a physician, in need of skilled services, and under a plan of care) specified in § 409.42. Home health coverage is not available for services furnished to a beneficiary who is no longer in need of one of the qualifying skilled services specified in this paragraph. Therefore, dependent services furnished after the final qualifying skilled service are not covered, except when the dependent service was not followed by a qualifying skilled service as a result of the unexpected inpatient admission or death of the beneficiary, or due to some other unanticipated event.

(b) *Home health aide services.* To be covered, home health aide services must meet each of the following requirements:

(1) The reason for the visits by the home health aide must be to provide hands-on personal care to the beneficiary or services that are needed to maintain the beneficiary's health or to facilitate treatment of the beneficiary's illness or injury. The physician's order must indicate the frequency of the home health aide services required by the beneficiary. These services may include but are not limited to:

(i) Personal care services such as bathing, dressing, grooming, caring for hair, nail and oral hygiene that are needed to facilitate treatment or to prevent deterioration of the beneficiary's health, changing the bed linens of an incontinent beneficiary, shaving, deodorant application, skin care with lotions and/or powder, foot care, ear care, feeding, assistance with elimination (including enemas unless the skills of a licensed nurse are required due to the beneficiary's condition, routine catheter care, and routine colostomy care), assistance with ambulation, changing position in bed, and assistance with transfers.

(ii) Simple dressing changes that do not require the skills of a licensed nurse.

(iii) Assistance with medications that are ordinarily self-administered and that do not require the skills of a licensed nurse to be provided safely and effectively.

(iv) Assistance with activities that are directly supportive of skilled therapy services but do not require the skills of a therapist to be safely and effectively performed, such as routine maintenance

exercises and repetitive practice of functional communication skills to support speech-language pathology services.

(v) Routine care of prosthetic and orthotic devices.

(2) The services to be provided by the home health aide must be—

(i) Ordered by a physician in the plan of care; and

(ii) Provided by the home health aide on a part-time or intermittent basis.

(3) The services provided by the home health aide must be reasonable and necessary. To be considered reasonable and necessary, the services must—

(i) Meet the requirement for home health aide services in paragraph (b)(1) of this section;

(ii) Be of a type the beneficiary cannot perform for himself or herself; and

(iii) Be of a type that there is no able or willing caregiver to provide, or, if there is a potential caregiver, the beneficiary is unwilling to use the services of that individual.

(4) The home health aide also may perform services incidental to a visit that was for the provision of care as described in paragraphs (b)(3)(i) through (iii) of this section. For example, these incidental services may include changing bed linens, personal laundry, or preparing a light meal.

(c) *Medical social services.* Medical social services may be covered if the following requirements are met:

(1) The services are ordered by a physician and included in the plan of care.

(2)(i) The services are necessary to resolve social or emotional problems that are expected to be an impediment to the effective treatment of the beneficiary's medical condition or to his or her rate of recovery.

(ii) If these services are furnished to a beneficiary's family member or caregiver, they are furnished on a short-term basis and it can be demonstrated that the service is necessary to resolve a clear and direct impediment to the effective treatment of the beneficiary's medical condition or to his or her rate of recovery.

(3) The frequency and nature of the medical social services are reasonable and necessary to the treatment of the beneficiary's condition.

(4) The medical social services are furnished by a qualified social worker or qualified social work assistant under the supervision of a social worker as defined in § 484.4 of this chapter.

(5) The services needed to resolve the problems that are impeding the beneficiary's recovery require the skills of a social worker or a social work assistant under the supervision of a social worker to be performed safely and effectively.

(d) *Occupational therapy.* Occupational therapy services that are not qualifying services under § 409.44(c) are nevertheless covered as dependent services if the requirements of § 409.44(c)(2)(i) through (iv), as to reasonableness and necessity, are met.

(e) *Durable medical equipment.* Durable medical equipment in accordance with § 410.38 of this chapter, which describes the scope and conditions of payment for durable medical equipment under Part B, may be covered under the home health benefit as either a Part A or Part B service. Durable medical equipment furnished by an HHA as a home health service is always covered by Part A if the beneficiary is entitled to Part A.

(f) *Medical supplies.* Medical supplies (including catheters, catheter supplies, ostomy bags, and supplies relating to ostomy care but excluding drugs and biologicals) may be covered as a home health benefit. For medical supplies to be covered as a Medicare home health benefit, the medical supplies must be needed to treat the beneficiary's illness or injury that occasioned the home health care.

(g) *Intern and resident services.* The medical services of interns and residents in training under an approved hospital teaching program are covered if the services are ordered by the physician who is responsible for the plan of care and the HHA is affiliated with or under the common control of the hospital furnishing the medical services.

Approved means—

(1) Approved by the Accreditation Council for Graduate Medical Education;

(2) In the case of an osteopathic hospital, approved by the Committee on Hospitals of the Bureau of Professional Education of the American Osteopathic Association;

(3) In the case of an intern or resident-in-training in the field of dentistry, approved by the Council on Dental Education of the American Dental Association; or

(4) In the case of an intern or resident-in-training in the field of podiatry, approved by the Council on Podiatry Education of the American Podiatric Association.

§ 409.46 Coinsurance for durable medical equipment (DME) furnished as a home health service [Redesignated as § 409.50]

9. Section 409.46 is redesignated as § 409.50.

10. New §§ 409.46 through 409.49 are added to read as follows:

§ 409.46 Allowable administrative costs.

Services that are allowable as administrative costs but are not separately billable include, but are not limited to, the following:

(a) *Registered nurse initial evaluation visits.* Initial evaluation visits by a registered nurse for the purpose of assessing a beneficiary's health needs, determining if the agency can meet those health needs, and formulating a plan of care for the beneficiary are allowable administrative costs. If a physician specifically orders that a particular skilled service be furnished during the evaluation in which the agency accepts the beneficiary for treatment and all other coverage criteria are met, the visit is billable as a skilled nursing visit. Otherwise it is considered to be an administrative cost.

(b) *Visits by registered nurses or qualified professionals for the supervision of home health aides.* Visits by registered nurses or qualified professionals for the purpose of supervising home health aides as required at § 484.36(d) of this chapter are allowable administrative costs. Only if the registered nurse or qualified professional visits the beneficiary for the purpose of furnishing care that meets the coverage criteria at § 409.44, and the supervisory visit occurs simultaneously with the provision of covered care, is the visit billable as a skilled nursing or therapist's visit.

(c) *Respiratory care services.* If a respiratory therapist is used to furnish overall training or consultative advice to an HHA's staff and incidentally provides respiratory therapy services to beneficiaries in their homes, the costs of the respiratory therapist's services are allowable as administrative costs. Visits by a respiratory therapist to a beneficiary's home are not separately billable. However, respiratory therapy services that are furnished as part of a plan of care by a skilled nurse or physical therapist and that constitute skilled care may be separately billed as skilled visits.

(d) *Dietary and nutrition personnel.* If dieticians or nutritionists are used to provide overall training or consultative advice to HHA staff and incidentally provide dietetic or nutritional services to beneficiaries in their homes, the costs of these professional services are allowable as administrative costs. Visits by a dietician or nutritionist to a beneficiary's home are not separately billable.

§ 409.47 Place of service requirements.

To be covered, home health services must be furnished in either the

beneficiary's home or an outpatient setting as defined in this section.

(a) *Beneficiary's home.* A beneficiary's home is any place in which a beneficiary resides that is not a hospital, SNF, or nursing facility as defined in sections 1861(e)(1), 1819(a)(1), of 1919(a)(1) of the Act, respectively.

(b) *Outpatient setting.* For purposes of coverage of home health services, an outpatient setting may include a hospital, SNF or a rehabilitation center with which the HHA has an arrangement in accordance with the requirements of § 484.14(h) of this chapter and that is used by the HHA to provide services that either—

(1) Require equipment that cannot be made available at the beneficiary's home; or

(2) Are furnished while the beneficiary is at the facility to receive services requiring equipment described in paragraph (b)(1) of this section.

§ 409.48 Visits.

(a) *Number of allowable visits under Part A.* To the extent that all coverage requirements specified in this subpart are met, payment may be made on behalf of eligible beneficiaries under Part A for an unlimited number of covered home health visits. All Medicare home health services are covered under hospital insurance unless there is no Part A entitlement.

(b) *Number of visits under Part B.* To the extent that all coverage requirements specified in this subpart are met, payment may be made on behalf of eligible beneficiaries under Part B for an unlimited number of covered home health visits. Medicare home health services are covered under Part B only when the beneficiary is not entitled to coverage under Part A.

(c) *Definition of visit.* A visit is an episode of personal contact with the beneficiary by staff of the HHA or others under arrangements with the HHA, for the purpose of providing a covered service.

(1) Generally, one visit may be covered each time an HHA employee or someone providing home health services under arrangements enters the beneficiary's home and provides a covered service to a beneficiary who meets the criteria of § 409.42 (confined to the home, under the care of a physician, in need of skilled services, and under a plan of care).

(2) If the HHA furnishes services in an outpatient facility under arrangements with the facility, one visit may be covered for each type of service provided.

(3) If two individuals are needed to provide a service, two visits may be covered. If two individuals are present, but only one is needed to provide the care, only one visit may be covered.

(4) A visit is initiated with the delivery of covered home health services and ends at the conclusion of delivery of covered home health services. In those circumstances in which all reasonable and necessary home health services cannot be provided in the course of a single visit, HHA staff or others providing services under arrangements with the HHA may remain at the beneficiary's residence between visits (for example, to provide non-covered services). However, if all covered services could be provided in the course of one visit, only one visit may be covered.

§ 409.49 Excluded services.

(a) *Drugs and biologicals.* Drugs and biologicals are excluded from payment under the Medicare home health benefit.

(1) A drug is any chemical compound that may be used on or administered to humans or animals as an aid in the diagnosis, treatment or prevention of disease or other condition or for the relief of pain or suffering or to control or improve any physiological pathologic condition.

(2) A biological is any medicinal preparation made from living organisms and their products including, but not limited to, serums, vaccines, antigens, and antitoxins.

(b) *Transportation.* The transportation of beneficiaries, whether to receive covered care or for other purposes, is excluded from home health coverage. Costs of transportation of equipment, materials, supplies, or staff may be allowable as administrative costs, but no separate payment is made for them.

(c) *Services that would not be covered as inpatient services.* Services that would not be covered if furnished as inpatient hospital services are excluded from home health coverage.

(d) *Housekeeping services.* Services whose sole purpose is to enable the beneficiary to continue residing in his or her home (for example, cooking, shopping, Meals on Wheels, cleaning, laundry) are excluded from home health coverage.

(e) *Services covered under the End Stage Renal Disease (ESRD) program.* Services that are covered under the ESRD program and are contained in the composite rate reimbursement methodology, including any service furnished to a Medicare ESRD beneficiary that is directly related to that individual's dialysis, are excluded from coverage under the Medicare home health benefit.

(f) *Prosthetic devices.* Items that meet the requirements of § 410.36(b) of this chapter for prosthetic devices covered under Part B are excluded from home health coverage. Catheters, catheter supplies, ostomy bags, and supplies relating to ostomy care are not considered prosthetic devices if furnished under a home health plan of care and are not subject to this exclusion from coverage.

(g) *Medical social services provided to family members.* Except as provided in § 409.45(c)(2), medical social services provided solely to members of the beneficiary's family and that are not incidental to covered medical social services being provided to the beneficiary are not covered.

B. Part 413 is amended as set forth below:

PART 413—PRINCIPLES OF REASONABLE COST REIMBURSEMENT; PAYMENT FOR END-STAGE RENAL DISEASE SERVICES

1. The authority citation for part 413 continues to read as follows:

Authority: Secs. 1102, 1814(b), 1815, 1833 (a), (i), and (n), 1861(v), 1871, 1881, 1883, and 1886 of the Social Security Act (42 U.S.C. 1302, 1395f(b), 1395g, 1395l (a), (i), and (n), 1395x(v), 1395hh, 1395rr, 1395tt, and 1395ww); sec. 104 of Public Law 100–360 as amended by sec. 608(d)(3) of Public Law 100–485 (42 U.S.C. 1395ww (note)); and sec. 101(c) of Public Law 101–234 (42 U.S.C. 1395ww (note)).

2. Section 413.125 is added to subpart F to read as follows:

§ 413.125 Payment for home health services.

For additional rules on the allowability of certain costs incurred by home health agencies, see §§ 409.46 and 409.49(b) of this chapter.

C. Part 418 is amended as set forth below:

PART 418—HOSPICE CARE

1. The authority citation for part 418 is revised to read as follows:

Authority: Secs. 1102, 1812(a)(4), 1812(d), 1813(a)(4), 1814(a)(7), 1814(i), 1816(e)(5), 1861(dd), 1862(a) (1), (6) and (9) and 1871 of the Social Security Act (42 U.S.C. 1302, 1395d(a)(4), 1395d(d), 1395e(a)(4), 1395f(a)(7), 1396f(i), 1395h(e)(5), 1395x(dd), 1395y(a) (1), (6) and (9) and 1395hh) and sec. 353 of the Public Health Service Act (42 U.S.C. 263a).

2. Section 418.202 is amended by revising paragraph (g) to read as follows:

§ 418.202 Covered services.

* * * * *

(g) *Home health aide services furnished by qualified aides as designated in § 418.94 and homemaker services.* Home health aides may provide personal care services as defined in § 409.45(b) of this chapter. Aides may perform household services to maintain a safe and sanitary environment in areas of the home used by the patient, such as changing bed linens or light cleaning and laundering essential to the comfort and cleanliness of the patient. Aide services must be provided under the general supervision of a registered nurse. Homemaker services may include assistance in maintenance of a safe and healthy environment and services to enable the individual to carry out the treatment plan.

* * * * *

D. Part 484 is amended as set forth below:

PART 484—CONDITIONS OF PARTICIPATION: HOME HEALTH AGENCIES

1. The authority citation for part 484 is revised to read as follows:

Authority: Secs. 1102, 1814(a)(2)(C), 1835(a)(2)(A), 1861, 1871, and 1891 of the Social Security Act (42 U.S.C. 1302, 1395f(a)(2)(C), 1395n(a)(2)(A), 1395x, 1395hh, and 1395bbb).

2. Section 484.18(c) is revised to read as follows:

§ 484.18 Condition of participation: Acceptance of patients, plan of care, and medical supervision.

* * * * *

(c) *Standard: Conformance with physician orders.* Drugs and treatments are administered by agency staff only as ordered by the physician. Oral orders are put in writing and signed and dated with the date of receipt by the registered nurse or qualified therapist (as defined in § 484.4 of this chapter) responsible for furnishing or supervising the ordered services. Oral orders are only accepted by personnel authorized to do so by applicable State and Federal laws and regulations as well as by the HHA's internal policies. Agency staff check all medicines a patient may be taking to identify possible ineffective drug therapy or adverse reactions, significant side effects, drug allergies, and contraindicated medication, and promptly report any problem to the physician.

3. In § 484.36, paragraphs (b)(2)(iii), (c) and (d) are revised to read as follows:

§ 484.36 Condition of participation: Home health aide services.

* * * * *

(b) * * *

(2) * * *

(iii) The home health aide must receive at least 12 hours of in-service training during each 12-month period. The in-service training may be furnished while the aide is furnishing care to the patient.

* * * * *

(c) *Standard: Assignment and duties of the home health aide.*

(1) *Assignment.* The home health aide is assigned to a specific patient by the registered nurse. Written patient care instructions for the home health aide must be prepared by the registered nurse or other appropriate professional who is responsible for the supervision of the home health aide under paragraph (d) of this section.

(2) *Duties.* The home health aide provides services that are ordered by the physician in the plan of care and that the aide is permitted to perform under State law. The duties of a home health aide include the provision of hands-on personal care, performance of simple procedures as an extension of therapy or nursing services, assistance in ambulation or exercises, and assistance in administering medications that are ordinarily self-administered. Any home health aide services offered by an HHA must be provided by a qualified home health aide.

(d) *Standard: Supervision.*

(1) If the patient receives skilled nursing care, the registered nurse must perform the supervisory visit required by paragraph (d)(2) of this section. If the patient is not receiving skilled nursing care, but is receiving another skilled service (that is, physical therapy, occupational therapy, or speech-language pathology services), supervision may be provided by the appropriate therapist.

(2) The registered nurse (or another professional described in paragraph (d)(1) of this section) must make an on-site visit to the patient's home no less frequently than every 2 weeks.

(3) If home health aide services are provided to a patient who is not receiving skilled nursing care, physical or occupational therapy or speech-language pathology services, the registered nurse must make a supervisory visit to the patient's home no less frequently than every 62 days. In these cases, to ensure that the aide is properly caring for the patient, each supervisory visit must occur while the home health aide is providing patient care.

(4) If home health aide services are provided by an individual who is not employed directly by the HHA (or hospice), the services of the home health aide must be provided under arrangements, as defined in section 1861(w)(1) of the Act. If the HHA (or hospice) chooses to provide home health aide services under arrangements with another organization, the HHA's (or hospice's) responsibilities include, but are not limited to— (i) Ensuring the overall quality of the care provided by the aide;

(ii) Supervision of the aide's services as described in paragraphs (d)(1) and (d)(2) of this section; and

(iii) Ensuring that home health aides providing services under arrangements have met the training requirements of paragraph (a) of this section.

* * * * *

5. In § 484.48, the introductory paragraph is revised to read as follows:

§ 484.48 Condition of participation: Clinical records.

A clinical record containing pertinent past and current findings in accordance with accepted professional standards is maintained for every patient receiving home health services. In addition to the plan of care, the record contains appropriate identifying information; name of physician; drug, dietary, treatment, and activity orders; signed and dated clinical and progress notes; copies of summary reports sent to the attending physician; and a discharge summary. The HHA must inform the attending physician of the availability of a discharge summary. The discharge summary must be sent to the attending physician upon request and must include the patient's medical and health status at discharge.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: May 31, 1994.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

Dated: June 24, 1994.

Donna E. Shalala,

Secretary.

[FR Doc. 94–31065 Filed 12–19–94; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 12

RIN 1090–AA48

Administrative and Audit Requirements and Cost Principles for Assistance Programs

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: This final rule is in response to the "Department of the Interior and Related Agencies Appropriations Act, 1995," and the "Energy and Water Development Appropriations Act, 1995." Section 307(a) of Public Law 103–332 required that no funds made available in the Act may be expended by an entity unless the entity agrees that in expending the funds they will comply with the "Buy American Act." As it did in FY 1994, the Department continues to interpret this requirement to apply to assistance programs. Section 501 of Public Law 103–316 only states that it is the sense of Congress that, to the greatest extent practicable, all equipment and products purchased with funds made available in the Act should be American-made. Therefore, the Department is taking the position that Congressional intent was different for awards made by the Bureau of Reclamation. As such, only the provisions in the regulation addressing the sense of Congress (§ 12.700) and the notice requirements (§ 12.710) will apply to awards made by the Bureau of Reclamation using appropriated funds for FY 1995.

EFFECTIVE DATE: December 20, 1994.

FOR FURTHER INFORMATION CONTACT: Dean A. Titcomb, (Chief, Acquisition and Assistance Division), (202) 208–6431.

SUPPLEMENTARY INFORMATION: On September 30, 1994, the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1995 ("the Act") was signed into law. Section 307(a) of the Act was entitled "Compliance with Buy American Act." The section applied to funds appropriated or transferred pursuant to the Act for the purchase of any equipment or product that may be authorized to be purchased with financial assistance. Section 307(b) expressed the "sense of the Congress" that entities receiving the assistance, purchase only American-made equipment and products.

Section 307(b)(2) required that in providing the financial assistance under the Act, the Secretary shall provide to each recipient of the assistance a notice describing the requirement. No other specific guidance was given regarding the implementation of this requirement.

The Department is revising Subpart E of 43 CFR Part 12, to implement these requirements for awards made using appropriated funds for FY 1995. No specific guidance was provided by Congress, so the Department decided to continue its implementation of these requirements based upon the final rule published in the **Federal Register** on July 19, 1994 (59 FR 36713).

Because of the applicability of different appropriation acts and the fact that the requirements are different, the notice in paragraph (b) of § 12.710 has been changed to account for the reference to language in Pub. L. 103–332. A separate notice included in paragraph (c) of § 12.710 has been amended to account for the reference to language in Pub. L. 103–316 and its use only for awards made by the Bureau of Reclamation.

Finding of Good Cause for Waiver of Proposed Rulemaking and for Making Rule Effective Upon Publication

In accordance with the Administrative Procedure Act (5 U.S.C. 553), it is usually the practice of the Department to offer interested parties the opportunity to comment on proposed regulations. However, the Department waives notice and comment on these regulations under section 553(b)(B) of the Administrative Procedure Act (5 U.S.C. 553(b)(B)). This section provides that notice and comment for rulemaking is not required when the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. The Department believes further public comment on the revision of this regulation is unnecessary because the substance of these provisions is based on statutory requirements governing the award of assistance with appropriated funds for FY 1995, that the Department is unable to change.

The Administrative Procedure Act provides that rules be published at least 30 days prior to their effective date, except as otherwise provided by an agency on a finding of good cause (5 U.S.C. 553(d)(3)). In this case, because this requirement is a statutory condition of expenditure of appropriated funds in this fiscal year, the Department has determined that the rule must be effective upon publication.

Executive Order 12866, Paperwork Reduction Act, and Regulatory Flexibility Act

This rule was not subject to Office of Management and Budget review under Executive Order 12866.

The Department has determined that this rule will not have a significant economic impact on a substantial number of small entities since it is anticipated that no additional costs will be imposed on a substantial number of small entities as a result of the rule. This rule does not contain a collection of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Environmental Effects

The Department has determined that this rule does not constitute a major Federal action having a significant impact on the human environment under the National Environmental Policy Act of 1969.

Executive Order No. 12778

The Department has certified to the Office of Management and Budget that this rule meets the applicable standards provided in sections 2(a) and 2(b)(2) of Executive Order No. 12778.

List of Subjects in 43 CFR Part 12

Cooperative agreements, Grants administration, Grant program.

Dated: December 6, 1994.

Bonnie R. Cohen,

Assistant Secretary-Policy, Management and Budget.

Title 43, part 12 of the Code of Federal Regulations is amended as set forth below:

PART 12—ADMINISTRATIVE AND AUDIT REQUIREMENTS AND COST PRINCIPLES FOR ASSISTANCE PROGRAMS

1. The authority citation for part 12 is revised to read as follows:

Authority: 5 U.S.C. 301; 31 U.S.C. 7501; 41 U.S.C. 701 *et seq.*; sec. 307, Pub. L. 103–332, 108 Stat. 2499; section 501, Pub. L. 103–316, 108 Stat. 1723; E.O. 12549, 3 CFR, 1986 Comp. p. 189; E.O. 12674, 3 CFR, 1989 Comp. p. 215; E.O. 12731, 3 CFR, 1990 Comp. p. 306; OMB Circular A–102; OMB Circular A–110; OMB Circular A–128; and OMB Circular A–133.

2. Section 12.700 is revised to read as follows:

§ 12.700 Scope.

This subpart implements section 307 of the Department of the Interior and Related Appropriations Act for Fiscal Year 1995 (Public Law 103–332, 108

Stat. 2499) and section 501 of the Energy and Water Development Appropriations Act, 1995 (Public Law 103–316, 108 Stat. 1723). For awards made under the authority of section 307, this subpart requires that no funds made available in the Act may be expended by an entity unless the entity agrees that in expending the funds the entity will comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 10a–10c; popularly known as the "Buy American Act"). It applies to procurement contracts under grants and cooperative agreements which provide for the purchase of equipment and products. Section 501 of Public Law 103–316, 108 Stat. 1723, only applies to awards made by the Bureau of Reclamation. In addition, for these awards, there is only a requirement that in providing financial assistance to, or entering into any contract with, any entity using funds made available in this Act, the Secretary, to the greatest extent practicable, will provide to the entity a notice describing a statement within the Act made by Congress. This statement concerns the sense of the Congress that to the greatest extent practicable, all equipment and products purchased with funds made available in the Act, should be American-made. Therefore, for Fiscal Year 1995 awards, only the requirements in §§ 12.700 and 12.710 will apply to awards made by the Bureau of Reclamation.

3. Paragraphs (a), (b), and (c) of § 12.710 are revised to read as follows:

§ 12.710 Policy.

(a) In the case of any equipment or product that may be authorized to be purchased with financial assistance provided using funds made available under Public Law 103–332, it is the sense of Congress that entities receiving the assistance should, in expending the assistance, purchase only American-made equipment and products.

(b) In awarding financial assistance under Public Law 103–332, bureaus and offices excluding the Bureau of Reclamation will provide to each recipient of the assistance the following notice:

Notice

Pursuant to Sec. 307 of the Department of the Interior and Related Agencies Appropriations Act, 1995, Public Law 103–332, 108 Stat. 2499, please be advised of the following:

In the case of any equipment or product that may be authorized to be purchased with financial assistance provided using funds made available in this Act, it is the sense of the Congress that entities receiving the assistance should, in expending the assistance, purchase only American-made equipment and products.

(c) In awarding financial assistance using funds made available under Public Law 103–316, to the greatest extent practicable, the Bureau of Reclamation will provide to each recipient of the assistance the following notice:

Notice

Pursuant to Sec. 501 of the Energy and Water Development Appropriations Act, 1995, Public Law 103–316, 108 Stat. 1723, please be advise of the following:

It is the sense of the Congress that, to the greatest extent practicable, all equipment and products purchased with funds made available in this Act should be American-made.

* * * * *

[FR Doc. 94–31218 Filed 12–19–94; 8:45 am]

BILLING CODE 4310–RF–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Part 16

[CGD 94–106]

RIN 2115–AE95

Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel; Delay of Implementation Dates

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard announces a delay in the effective date of regulations governing drug testing, insofar as those regulations would require testing of persons onboard U.S. vessels in waters that are subject to the jurisdiction of a foreign government. Under this final rule, employees would become subject to testing no later than January 2, 1996, unless the Coast Guard, in the meantime, publishes regulations indicating otherwise.

EFFECTIVE DATE: This rule is effective on December 20, 1994.

ADDRESSES: Unless otherwise indicated, documents referred to in this preamble are available for inspection or copying at the Office of the Executive Secretary, Marine Safety Council (G–LRA/3406), U.S. Coast Guard Headquarters, 2100 Second Street SW., room 3406, Washington, DC 20593–0001 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 267–1477.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Mark Grossetti, Project Manager, Marine Investigation Division (G–MMI), Office of Marine Safety, Security and Environmental Protection, (202) 267–1421.

SUPPLEMENTARY INFORMATION:

Drafting Information

The principal persons involved in drafting this document are LCDR Mark Grossetti, Project Manager, Office of Marine Safety, Security and Environmental Protection, and Helen Boutrous, Project Counsel, Office of Chief Counsel.

Background and Purpose

On November 21, 1988, the Coast Guard, along with other agencies of the Department of Transportation (DOT), adopted regulations requiring pre-employment, post-accident, reasonable cause, and random drug testing. Those individuals required under Federal law or regulation to have periodic medical examinations were also required to undergo a drug test at the same time. The drug testing required by the rule applies to some persons located outside of the United States. However, the rules provided that they would not apply outside the United States in any situation in which application of the rules violated foreign local laws or policies.

At the same time, the Coast Guard stated that the DOT and other elements of the government would enter into discussions with foreign governments to attempt to resolve any conflict between our rules and foreign government laws or policies. The Coast Guard stated that if, as a result of those discussions, it was found that amendments to the rule were necessary, timely amendments would be issued. An amendment was issued on December 21, 1989, and published on December 27, 1989 (54 FR 53286). Under that amendment, drug testing for persons onboard U.S. vessels in waters subject to the jurisdiction of a foreign government was scheduled to begin by January 2, 1992. A Final Rule was published on April 24, 1991, delaying the implementation date to January 2, 1993 (56 FR 18982), and another Final Rule was published on July 14, 1992, delaying the implementation date to January 2, 1995 (57 FR 31274).

During the past few years, discussions with other countries have been held, and the difficulty of achieving effective bilateral agreements has become clear. Although the Coast Guard could allow its regulations to take effect in foreign waters, the Coast Guard continues to recognize that: (1) It would be difficult for U.S. carriers to effectively implement the regulations without cooperation from foreign governments; (2) in response, foreign governments

could impose restrictions on U.S. operations; and, perhaps most importantly, (3) there are distinct advantages to be gained in aligning foreign measures and U.S. measures, especially as they relate to international transportation operations. For these reasons, the Coast Guard is continuing to consider whether it would be appropriate to apply the requirements of part 16 to operations in waters subject to the jurisdiction of a foreign government in the event that agreements with other countries are not reached.

In order to allow time to further consider these issues and formulate a decision, the Coast Guard has again determined that additional time is necessary. Another additional delay of approximately one year should provide sufficient time. Accordingly, the Coast Guard has determined to postpone again the date by which testing programs would commence for persons onboard U.S. vessels in waters that are subject to the jurisdiction of a foreign government.

The change in this final rule will delay the applicability of the regulations where they may conflict with foreign law or policy. This rule imposes no additional burdens on the regulated industry. Without this delay in the implementation date, persons onboard U.S. vessels in waters that are subject to the jurisdiction of a foreign government would become subject to the requirements of part 16 on January 2, 1995. Delaying the implementation date ensures that the applicability of part 16 will continue unchanged. Accordingly, the Coast Guard finds that good cause exists under 5 U.S.C. 553(b) to publish this rule without notice and comment and to make this rule effective less than 30 days after publication in the **Federal Register.**

Regulatory Evaluation

This final rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6 (a)(3) of that order. It has not been reviewed by the Office of Management and Budget under that order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11034; February 26, 1979). The economic impact of these changes is so minimal that further evaluation is not necessary. This final rule modifies the effective date for compliance with Coast Guard regulations governing drug testing, insofar as those regulations would require testing of persons onboard U.S. vessels that are subject to the jurisdiction of a foreign government. It does not change the basic regulatory structure of that rule.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider whether this proposal will have a significant economic impact on a substantial number of small entities. "Small entities" include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as "small business concerns" under section 3 of the Small Business Act (15 U.S.C. 632). This rule does not require a general notice of proposed rulemaking and, therefore, is exempt from the regulatory flexibility requirements. Although exempt, the Coast Guard has reviewed this rule for potential impact on small entities.

The amendment in this final rule only extends a compliance date, and imposes no costs on affected entities. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This rule contains no collection of information requirements under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Federalism

The Coast Guard has analyzed this rule in accordance with the principles and criteria contained in Executive Order 12612 and has determined that it does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The authority to require programs for chemical drug and alcohol testing of commercial vessel personnel has been committed to the Coast Guard by Federal statutes. This final rule does, therefore, preempt State and local regulations regarding drug testing programs requiring the testing of persons onboard U.S. vessels in waters that are subject to the jurisdiction of a foreign government.

Environment

The Coast Guard has considered the environmental impact of this final rule, and has concluded that, under section 2.B.2.1 of Commandant Instruction M16475.1B, it is categorically excluded from further environmental documentation. This final rule merely extends an implementation date and clearly has no environmental impact.

List of Subjects in 46 CFR part 16

Drug testing, Marine safety, Reporting and recordkeeping requirements, Safety, Transportation.

For the reasons set forth in the preamble, the Coast Guard amends 46 CFR part 16 as follows:

PART 16—CHEMICAL TESTING

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

Authority: 46 U.S.C. 2103, 3306, 7101, 7301 and 7701; 49CFR 1.46.

2. In § 16.207, paragraph (b) is revised to read as follows:

§ 16.207 Conflict with foreign laws.

* * * * *

(b) This part is not effective until January 2, 1996, with respect to any person onboard U.S. vessels in waters that are subject to the jurisdiction of a foreign government. On or before December 1, 1995, the Commandant shall issue any necessary amendment resolving the applicability of this part to such person on and after January 2, 1996.

Dated: December 2, 1994.

Joseph J. Angelo,

Acting Chief, Office of Marine Safety Security and Environmental Protection.

[FR Doc. 94–31239 Filed 12–19–94; 8:45 am]

BILLING CODE 4910–14–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 94

[ET Docket No. 92–9; FCC 94–303]

Redevelopment of Spectrum To Encourage Innovation in the Use of New Telecommunications Technologies

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: By this *Second Memorandum Opinion and Order* (*Second MO&O*) the Commission refines and clarifies the rules and policies adopted to make spectrum available for emerging telecommunications technologies. The *Second MO&O* adopts rules to complete a regulatory framework for relocating fixed microwave operations where necessary to implement services using emerging technologies in the 2 GHz bands. This action is necessary to provide 2 GHz spectrum for future wireless communications services while preventing disruption to incumbent 2 GHz fixed microwave licensees. This

action facilitates future authorizations of a broad range of new wireless communications services that employ emerging technologies.

EFFECTIVE DATE: January 19, 1995.

FOR FURTHER INFORMATION CONTACT: Fred Lee Thomas, Office of Engineering and Technology, (202) 653–6204.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Second Memorandum Opinion and Order* (*Second MO&O*) adopted November 28, 1994, and released December 2, 1994. A summary of the *Memorandum Opinion and Order* (*MO&O*) that is reconsidered in the *Second MO&O* may be found at 59 FR 19642 (April 25, 1994). This action will not add to or decrease the public reporting burden. The full text of this Commission decision is available for inspection and copying during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision also may be purchased from the Commission's duplication contractor, International Transcription Service, (202) 857–3800, 2100 M Street, NW., Washington, DC 20037.

Summary of the Second Memorandum Opinion and Order

1. The *Second MO&O* responded to a Petition for Reconsideration filed jointly by the Public Safety Microwave Committee (PSMC), the Association of Public-Safety Communications Officials-International, Inc. (APCO), the County of Los Angeles (LA County), and the Forestry-Conservation Communication Association (FCCA) (collectively "Petitioners"). Petitioners requested that the Commission not subject incumbent public safety facilities to mandatory relocation.

2. The *Second MO&O* effected changes to the rules to further the Commission's goals of providing for the fair and equitable sharing of 2 GHz spectrum by new services and the existing fixed microwave services that currently use these frequencies, and for the relocation of existing 2 GHz facilities to other spectrum where necessary. The rules provide licensees of services using emerging technologies with access to 2 GHz frequencies in a reasonable timeframe, while at the same time preventing disruption to existing 2 GHz operations and minimizing the economic impact on the existing licensees.

3. Specifically, the Commission amended the negotiation procedures for mandatory relocation of existing microwave facilities to provide for use of independent estimates of the cost to replace an existing facility in resolving disputes between licensees of existing facilities and new service providers. The Commission also modified the relocation plan to extend the mandatory negotiation period for public safety entities to two years. The relocation plan for public safety facilities will now provide a three-year period for voluntary negotiations followed by a two-year period for mandatory negotiations.

4. In the *First Report and Order* in this proceeding 57 FR 49020, October 29, 1992, the Commission exempted licensees of incumbent public safety facilities from involuntary relocation. In the *Third Report and Order*, 58 FR 46547, September 1993, it clarified the definition of public safety. The Commission's purpose in each decision was to ensure that essential safety of life and property communications are not disrupted or otherwise disadvantaged.

5. In the *MO&O* the Commission concluded on its own motion that it would be in the public interest to subject all incumbent facilities, including public safety, to mandatory relocation if an emerging technology provider requires the spectrum. Of particular concern was providing adequate spectrum for operation of new licensed personal communications services (PCS) services, and operation of unlicensed PCS devices, in major urban areas where there are a large number of incumbent public safety fixed microwave facilities. It has been recognized by incumbent fixed microwave users and PCS interests alike that it will not be possible for PCS and fixed microwave to operate in the same geographic area on the same frequency without interfering with each other. Upon review of the record, the Commission concluded that PCS service may be precluded or severely limited in some areas unless public safety licensees relocate when necessary. Allowing all public safety facilities to remain in the band indefinitely would defeat the Commission's primary goal of providing usable spectrum for the implementation of emerging technologies.

6. In the *Second MO&O* the Commission stated that it continues to believe that it is in the public interest to subject all incumbent 2 GHz fixed microwave facilities, including public safety licensees, to mandatory relocation if an emerging technology provider requires the spectrum they are using. The Commission concluded that its decision is supported by the record in this proceeding. Further, the Commission stated that this decision, along with the associated transition adopted in previous decisions, as modified in the *MO&O*, provides a fair balance between the interests of the incumbent fixed microwave service and those services that will use new emerging technologies, such as PCS. Specifically, the transition policy for mandatory relocation of incumbent public safety operations required to relocate, summarized below, will not disadvantage public safety incumbents.

—All relocation costs will be paid entirely by the emerging technology licensee. These costs include all engineering, equipment, and site costs and FCC fees, as well as any reasonable additional costs.
—Relocation facilities must be fully comparable to those being replaced.
—All activities necessary for placing the new facilities into operation including engineering and frequency coordination must be completed before relocation, including engineering and frequency coordination.
—The new communications system must be fully built and tested before the relocation itself commences.
—Should the new facilities in practice prove not to be equivalent in every respect, within one year the public safety operation may relocate back to its original facilities and stay there until complete equivalency (or better) is attained.

7. When disputes do arise in relocation negotiations, the Commission stated that they can be resolved best through individual mediation and arbitration efforts rather than adjudication by the Commission. Thus, the Commission emphasized its intent to use alternative dispute resolution ("ADR") techniques to expedite and improve the relocation process whenever feasible. Resolution of such disputes entirely by the Commission's adjudication processes would be time consuming and costly to all parties. Therefore, the Commission continued to encourage parties unable to voluntarily conclude relocation agreements to employ ADR techniques during both the voluntary and mandatory negotiation periods.

8. Nevertheless, the Commission stated that it is cognizant of Petitioners' concern that public safety entities with limited resources not be placed in situations in which they would have to accept less favorable terms if disputes arise in the negotiation and relocation process. In considering this issue, in addition to or as a supplement to ADR, the Commission stated that it believes an effective way to expedite the negotiation process and minimize the

burden on all parties in these situations is to encourage parties to utilize independent, impartial estimates of the costs to relocate the existing operation to a comparable facility. In order to be fair to all parties, the independent estimates would need to include both the specifications for a comparable new facility and the costs associated with providing that facility to the incumbent licensee. The Commission stated that it believes that in most cases the availability of the option of choosing to resolve disputes through the use of independent estimates will provide an incentive for both sides in a negotiation to work quickly towards a mutually agreeable solution. In cases in which such estimates are obtained, they will provide a benchmark for an agreement that could avoid the need for the parties bringing the dispute to the Commission. However, where such disputes come before the Commission, it will expect the incumbent to have obtained *bona fide* independent estimates of its relocation costs and to present those estimates to the Commission for consideration.

9. Accordingly, the Commission modified its mandatory relocation procedures to provide for consideration of independent estimates by third parties not associated or otherwise affiliated with either the incumbent licensee or the new service provider. Under this new provision, the Commission will consider the independent estimates of the cost of replacement facilities obtained by incumbent licensees in deciding any relocation disputes that are brought before it. The Commission stated that it believes that the responsibility for obtaining independent estimates should rest with the incumbent licensee, as the licensee will be in the best position to describe to parties preparing estimates the operating requirements for the new facility. Incumbent licensees are encouraged to present two separately prepared estimates obtained from qualified professional third parties.

10. The Commission stated that independent estimates presented in disputes brought to it for resolution must include a specification for the comparable facility and a statement of costs of providing that facility to the incumbent licensee. The specification should describe the design and technical parameters of the new facility, the equipment to be used in its construction, a statement attesting to the comparability of the proposed new facility to the facility it would replace, and a testing and transition plan. The cost statement should include individual estimates for the design of the new facility, equipment, and testing, as well as the transition. Where the two estimates are substantially different, the Commission expects the participating parties to choose the most reliable and reasonable estimate, average the two estimates, or obtain a third estimate by a mutually agreeable party. If a dispute is brought to the Commission, it will consider the two estimates as evidence of the relocation cost but retain discretion to make its own determination based upon the facts presented to the Commission. In deciding such cases, the Commission stated that it intends to be guided by the principle of ensuring that the incumbent is provided a comparable facility at the minimum cost to the new service provider.

11. The Commission stated that it encouraged public safety licensees to obtain two independent estimates of the cost to relocate with comparable facilities early in the relocation process. The Commission believes that such estimates will be very helpful in the negotiation process, including those cases that employ ADR techniques. Moreover, having such estimates at its disposal, should Commission intervention become necessary, will expedite a relocation process that is fair to all parties.

12. The Commission also shared Petitioners' concern that public safety systems, especially those in rural areas, must have adequate time to negotiate relocation agreements. Previously, the Commission recognized that the demand for the new technology spectrum will vary from market to market and from one area to another and that in some areas, incumbent 2 GHz facilities may not need to relocate as quickly as in areas where spectrum is needed more quickly for emerging technologies. In the *MO&O*, the Commission adopted a bifurcated four-year voluntary/one-year mandatory negotiation period to accommodate these variations in demand. However, the Commission agreed with Petitioners that public safety licensees may need more than one year to negotiate agreements where the negotiations do not start until sometime after the voluntary period has expired. Accordingly, the Commission modified the relocation plan to extend the mandatory negotiation period for public safety entities to two years. However, the Commission concluded that it would not serve the public interest in implementing broadband PCS to extend to six years the current five year period of protection for public safety facilities. As stated previously in this proceeding, the Commission's primary goal is to provide usable spectrum for the implementation of emerging technologies in an expeditious manner Therefore, the Commission maintained the current five year period for public safety facilities by shortening the four-year voluntary period to three-years. The relocation plan for public safety facilities will thus provide a three-year period for voluntary negotiations followed by a two-year period for mandatory negotiations. This will provide public safety entities, especially those with facilities in rural areas, ample time to negotiate and conclude agreements.

13. *Ordering Clauses.* Accordingly, *it is ordered,* That the petition for reconsideration filed jointly by the Public Safety Microwave Committee, the Association of Public-Safety Communications Officials-International, Inc., the County of Los Angeles, and the Forestry-Conservation Communication Association IS GRANTED to the extent described above and is denied in all other respects. Further, *it is ordered,* That Part 94 of the Commission's Rules and Regulations is amended as specified in the Appendix, effective 30 days after publication in the **Federal Register**. This action is taken pursuant to Sections 4(i), 7(a), 303(c), 303(g), and 303(r), of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(c), 303(g), and 303(r).

List of Subjects in 47 CFR Part 94

Radio.

Amendatory Text

Title 47 of the Code of Federal Regulations, Part 94, is amended as follows:

PART 94—PRIVATE OPERATIONAL-FIXED MICROWAVE SERVICE

1. The authority citation in Part 94 continues to read:

Authority: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. Sections 94.59(b) and 94.59(f) are revised to read as follows:

§ 94.59 Transition of the 1.85–1.99, 2.13–2.15, and 2.18–2.20 GHz bands from Private Operational-Fixed Microwave Service to emerging technologies.

* * * * *

(b) Private Operational-Fixed Microwave Service licensees, with the exception of public safety facilities defined in paragraph (f) of this section, in bands allocated for licensed emerging technology services will maintain primary status in these bands until two years after the Commission commences

acceptance of applications for an emerging technology service (two-year voluntary negotiation period), and until one year after an emerging technology service licensee initiates negotiations for relocation of the fixed microwave licensee's operations (one-year mandatory negotiation period) or, in bands allocated for unlicensed emerging technology services, until one year after an emerging technology unlicensed equipment supplier or representative initiates negotiations for relocation of the fixed microwave licensee's operations (one-year mandatory negotiation period). When it is necessary for an emerging technology provider or representative of unlicensed device manufacturers to negotiate with a fixed microwave licensee with operations in spectrum adjacent to that of the emerging technology provider, the transition schedule of the entity requesting the move will apply. Public safety facilities defined in paragraph (f) of this section will maintain primary status in these bands until three years after the Commission commences acceptance of applications for an emerging technology service (three-year voluntary negotiation period), and until two years after an emerging technology service licensee or an emerging technology unlicensed equipment supplier or representative initiates negotiations for relocation of the fixed microwave licensee's operations (two-year mandatory negotiation period).

* * * * *

(f) Public safety facilitates subject to the three-year voluntary and two-year mandatory negotiation periods, are those in which the majority of communications carried are used for police, fire, or emergency medical services operations involving safety of life and property. The facilities within this exception are those Part 94 facilities currently licensed on a primary basis pursuant to the eligibility requirements of Section 90.19, Police Radio Service; Section 90.21, Fire Radio Service; Section 90.27, Emergency Medical Radio Service; and Subpart C of Part 90, Special Emergency Radio Services. Licensees of other Part 94 facilities licensed on a primary basis under the eligibility requirements of Part 90, Subparts B and C, are permitted to request similar treatment upon demonstrating that the majority of the communications carried on those facilities are used for operations involving safety of life and property.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 94–30753 Filed 12–19–94; 8:45 am]

BILLING CODE 6712–01–M

INTERSTATE COMMERCE COMMISSION

49 CFR Parts 1011 and 1130

[Ex Parte No. MC–222 (Sub-No. 1)]

Procedures for Shippers To Contest or Carriers To Rebill Motor Common Carrier Freight Charges Under Section 206 of the Trucking Industry Regulatory Reform Act of 1994

AGENCY: Interstate Commerce Commission.

ACTION: Final rule.

SUMMARY: The Commission explains how it intends to handle any disputes that may arise concerning the applicability or reasonableness of motor common carrier rates under Section 206 of TIRRA.

EFFECTIVE DATE: The final rule is effective on December 20, 1994.

FOR FURTHER INFORMATION CONTACT: Lawrence C. Herzig, (202) 927–5536. [TDD for the hearing impaired: (202) 927–5721.]

SUPPLEMENTARY INFORMATION: Section 206 of The Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103–311 (August 26, 1994), (TIRRA), creates new procedures for shippers seeking to contest motor carrier freight charges and for carriers seeking to rebill customers to collect additional freight charges.[1] We addressed this provision in our recent policy statement observing,

> We do not foresee a great need for rate dispute resolution once carriers and their customers develop appropriate systems for quoting and confirming unfiled rates. Based on the economics of truck transportation there is little incentive for carriers or their customers to become involved in rate disputes.
>
> Under TIRRA, the future of motor carrier pricing is no different from pricing by other businesses in our economy. Industrial concerns, large and small, have devised systems for quoting, agreeing upon and billing prices for their products and services. We are confident that comparable methods will be devised for the trucking industry.[2]

Recently, we have received inquiries about various aspects of Section 206. In order to avoid confusion, we will explain in greater detail how we interpret Section 206 and how we intend to handle Section 206 disputes that may arise. We will consider taking further action if the need develops for establishing more formal rules and procedures.

Section 206 provides an uncomplicated way to resolve any disputes concerning the applicability or reasonableness of rates charged by motor carriers of property (other than household goods or those providing transportation in noncontiguous domestic trade). First, it entitles the shipper to request and receive a written or electronic copy of the basis for the agreed-upon charges. If the shipper is not satisfied with the documentation provided by the carrier, it must contest the original bill with the carrier. Section 206 also allows the carrier to rebill the shipper for additional charges. The law allots a 180 day period from the date the carrier issues the original freight bill for the shipper to contest the rate or the carrier to rebill. The 180 day period is not the time to come to the Commission, although either party may do so if the carrier has already responded to the shipper's contest or the shipper has resisted the rebilling. In other words, shippers and carriers should file with us only to resolve disputes, not to satisfy the 180 day statutory period. The satisfaction of the 180 day statutory period is accomplished by the shipper contesting the rate with the carrier or the carrier rebilling the shipper. There is no explicit time limit for a shipper to contest rebilled charges. However we would urge shippers to do so promptly, and in any event no later than 180 days

[1] As pertinent here, Section 206 provides:

> (3) A motor common carrier of property (other than a motor common carrier providing transportation of household goods or in noncontiguous domestic trade) shall provide to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices, upon which any rate agreed to between the shipper and carrier may have been based. When the applicability or reasonableness of the rates and related provisions billed by a motor common carrier is challenged by the person paying the freight charges, the Commission shall determine whether such rates and provisions are reasonable or applicable based on the record before it. In those cases where a motor common carrier (other than a motor common carrier providing transportation of household goods or in noncontiguous domestic trade) seeks to collect charges in addition to those billed and collected which are contested by the payor, the carrier may request that the Commission determine whether any additional charges over those billed and collected must be paid. A carrier must issue any bill for charges in addition to those originally billed within 180 days of the original bill in order to have the right to collect such charges.
>
> (4) If a shipper seeks to contest the charges originally billed, the shipper may request that the Commission determine whether the charges originally billed must be paid. A shipper must contest the original bill within 180 days in order to have the right to contest such charges.

[2] *Policy Statement on Regulatory Reform Act of 1994*, 10 I.C.C.2d 251, 257 (1994).

after rebilling, in order to permit carriers to obtain a determination from us as to whether any additional charges must be paid before going to court.

In the event the shipper and carrier cannot resolve their dispute, the complaining party should file an informal complaint with us that documents the dispute. We intend to handle such cases informally under the rules at 49 CFR 1130. Filings with us must include either a copy of whatever the shipper submitted to the carrier to contest the charges and any response by the carrier or the carrier rebilling and any response by the shipper. We are delegating authority to the Suspension/Special Permission Board to handle these complaints.

If our handling of the dispute does not terminate it, the aggrieved party must be mindful of the statute of limitations for filing court actions which is now 2 years from the date the claim accrues but is reduced to 18 months on December 3, 1994, 49 U.S.C. 11706(a)&(b). Congress has given the Commission the jurisdiction to adjudicate these disputes, but only a court can order the payment of monies that may be owed. In other words, a court action must be filed within the statute of limitations period. Filing with the Commission does not toll the statute of limitations for bringing court action.

Environmental And Energy Considerations

We conclude that the rule adopted here will not significantly affect either the quality of the human environment or the conservation of energy resources.

Regulatory Flexibility Analysis

We conclude that our action will not have a significant economic impact on a substantial number of small entities. This action only involves delegation of responsibilities to the Suspension/Special Permission Board to handle these complaints.

List of Subjects

49 CFR Part 1011

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

49 CFR Part 1130

Administrative practice and procedure.

Decided: December 8, 1994.

By the Commission, Chairman McDonald, Vice Chairman Morgan, and Commissioners Simmons and Owen.

Vernon A. Williams,

Secretary.

For the reasons set forth in the preamble, title 49, chapter X, part 1011 is amended as set forth below:

PART 1011—COMMISSION ORGANIZATION; DELEGATIONS OF AUTHORITY

1. The authority citation for part 1011 is revised to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 49 U.S.C. 10301, 10302, 10304, 10305, 10321, 10762.

2. In § 1011.6 a new paragraph (a)(1)(iv) is added to read as follows:

§ 1011.6 Employee boards.

* * * * *

(a) ***

(1) ***

(iv) To handle any disputes that may arise concerning the applicability or reasonableness of motor common carrier rates under 49 U.S.C. 10762(a) (3) and (4).

* * * * *

[FR Doc. 94–31152 Filed 12–19–94; 8:45 am]

BILLING CODE 7035–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AC01

Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Cherokee Darter and Endangered Status for the Etowah Darter

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Fish and Wildlife Service (Service) determines threatened status for the Cherokee darter (*Etheostoma* (*Ulocentra*) sp.) and endangered status for the Etowah darter (*Etheostoma etowahae*) under the Endangered Species Act of 1973 (Act), as amended. The Cherokee darter and Etowah darter are recently discovered species of fish that are endemic to the Etowah River system in north Georgia.

The Cherokee darter is now known from approximately 20 small tributary systems of the Etowah River, but healthy populations are known from only a few sites. The Etowah darter is known from the upper Etowah River mainstem and two tributary systems. Impoundments and deteriorating water and benthic habitat quality resulting from siltation, agricultural runoff, other pollutants, poor land use practices, increased urbanization, and waste discharges have resulted in the restriction and fragmentation of these species' current ranges. These factors continue to impact the species and their habitat.

EFFECTIVE DATE: January 19, 1995.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, 6620 Southpoint Drive South, Suite 310, Jacksonville, Florida 32216.

FOR FURTHER INFORMATION CONTACT: Mr Robert S. Butler at the above address (904/232–2580).

SUPPLEMENTARY INFORMATION:

Background

The Etowah River is one of three major upper Coosa River system tributaries, the others being the Conasauga and Oostanaula Rivers. The Etowah joins the Oostanaula River in Rome, Georgia, to form the Coosa River The Coosa River itself is the major eastern tributary of the Mobile Basin and empties into the Gulf of Mexico in southwest Alabama. The Etowah River system drains portions of the Blue Ridge, Piedmont, and Valley and Ridge physiographic provinces. All streams in the drainage are upland in nature and characterized by high gradients and rocky substrates. Land use patterns of the Etowah system are largely of a rural agrarian economy, with scattered municipalities, including the encroaching Atlanta metropolitan area.

The diversity of the aquatic fauna is commensurate with the diversity of physiographic provinces comprising the basin. Many of the aquatic organisms reported from the Etowah system are rare. Records of federally protected species are known for an endangered fish (amber darter, *Percina antesella*), four endangered mussels (upland combshell, *Epioblasma metastriata*, southern clubshell, *Pleurobema decisum;* ovate clubshell, *P. perovatum*, and triangular kidneyshell, *Ptychobranchus greeni*), and a threatened mussel (Alabama moccasinshell, *Medionidus acutissimus*). In addition, several Category 2 candidate species from the Service's animal notice of review published in the **Federal Register** of November 21, 1991 (56 FR 58804) are also known from the Etowah River system. These include a mussel (Tennessee heelsplitter, *Lasmigona*

holstonia), five fishes (rock darter, *Etheostoma rupestre*; freckled darter, *Percina lenticula*; bronze darter, *P palmaris*; lined chub, *Hybopsis lineapunctata*; and frecklebelly madtom, *Noturus munitus*), and at least three aquatic snails (spindle elimia, *Elimia capillaris*; coldwater elimia, *E. gerhardti*; and rough hornsnail, *Pleurocera foremani*). It is estimated that 35 of the potentially 50 freshwater mussel species that once inhabited the Etowah River system have been extirpated (Burkhead *et al.* 1992); several of these species are now considered extinct. The Etowah River system at one time contained a significant portion of the aquatic biodiversity of the upper Mobile Basin.

Cherokee Darter

A small percid fish, the Cherokee darter is subcylindrical in shape, and has a relatively blunt snout with a subterminal mouth. The body shade is white to pale yellow. The side of adults is pigmented with usually eight small dark olive black blotches that develop into vertically elongate, slightly oblique bars in breeding adults, especially in males. The back usually has eight small dark saddles and intervening pale areas. The Cherokee darter has proven to be distinct from the Coosa darter, *E. coosae*, a species with which it was previously confused, by peak nuptial males never having five discrete color bands in the spinous dorsal fin.

Cherokee darters inhabit small to medium size warm-water creeks of moderate gradient, with predominately rocky bottoms. It is usually found in shallow water in sections of reduced current, typically in runs above and below riffles and at the ecotones of riffles and backwaters. The Cherokee darter is associated with large gravel, cobble, and small boulder substrates, and is uncommonly or rarely found over bedrock, fine gravel, or sand. It is most abundant in stream sections with relatively clear water and clean substrates (little silt deposition). The Cherokee darter is intolerant of heavy to moderate silt deposition. The Cherokee darter, like other members of the subgenus *Ulocentra*, is intolerant of impoundment.

The Cherokee darter is endemic to the Etowah River system in north Georgia, where it is primarily restricted to streams draining the Piedmont physiographic province, and to a lesser extent, the Blue Ridge physiographic province. The Cherokee darter occurs in about 20 small to moderately large tributary systems of the middle and upper Etowah River system. However, only a few sites contain healthy populations of this species. The largest populations occur in northern tributaries upstream of Allatoona Reservoir. Populations are smaller in tributaries draining the southern portion of the system. The southern tributary systems tend to drain areas exhibiting less relief and are on the average much more degraded. Cherokee darter populations are found primarily above Allatoona Reservoir. Downstream of Allatoona Dam, populations are restricted to two tributary systems.

The Cherokee darter exhibits a disjunct and discontinuous distribution pattern indicating fragmentation and isolation of populations. The placement of Allatoona Reservoir in the middle Etowah River system has caused much of the fragmentation of this species' populations. One major tributary system in the upper Etowah system, Amicalola Creek, apparently naturally lacks populations of Cherokee darters, but contains a relatively close relative and also a narrow endemic, the holiday darter, *E. brevirostrum*. The Cherokee darter is allopatric (i.e., the ranges of the species do not overlap) with the other two *Ulocentra* species in the watershed, the holiday darter and Coosa darter. A formal description of the Cherokee darter is awaiting publication (Bauer *et al.* in press).

Etowah Darter

The Etowah darter is a small-sized percid fish that is moderately compressed laterally, and has a moderately pointed snout with a terminal, obliquely angled mouth. The body ground shade is brown or grayish-olive. The side is usually pigmented with 13 or 14 small dark blotches just below the lateral line. The breast in nuptial males is dark greenish-blue. The Etowah darter has proven distinct from the greenbreast darter, *E. jordani*, a species with which it has previously been confused, by the absence of red marks on the sides and anal fins of male specimens.

The Etowah darter inhabits warm and cool, medium and large creeks or small rivers that are moderate or high gradient with rocky bottoms. It is found in relatively shallow riffles, with large gravel, cobble, and small boulder substrates. The Etowah darter is typically associated with the swiftest portions of shallow riffles, but occasionally adults are taken at the tails of riffles. The sites having the greatest abundance of Etowah darters had clear water and relatively little silt in the riffles. The Etowah darter, like other members of the subgenus *Nothonotus*, shuns pool habitats and is intolerant of impoundment.

The Etowah darter is endemic to the upper Etowah River system in north Georgia, where it is restricted to the upper Etowah River mainstem and two tributaries, Long Swamp and Amicalola Creeks. These streams drain both the Blue Ridge and Piedmont physiographic provinces. This distribution suggests habitat specialization; all streams inhabited by this species are geographically adjacent in the most upland portion of the river system. For a fish of moderate to large creeks or small rivers, the Etowah darter has one of the most restricted distributions in the southeast (Lee *et al.* 1980). The Etowah darter has been formally described by Wood and Mayden (1993).

The Cherokee darter appeared as a category 2 species in the Service's notice of review for animal candidates published in the **Federal Register** of January 6, 1989 (54 FR 554) and November 21, 1991 (56 FR 58804). Category 2 species are taxa under review for listing, but for which conclusive data on biological vulnerability and threat(s) are not currently available to support proposed rules.

The Service commenced funding a status survey in 1989 to better determine the status of the recently discovered Cherokee darter. After field work had commenced, another undescribed fish was discovered in the Etowah River system, the Etowah darter. The survey was modified to address the population status of both these undescribed darters. A final report was received on March 30, 1993 (Burkhead 1993), providing sufficient information on biological vulnerability and threats to support a proposed rule to classify the Cherokee darter as threatened and the Etowah darter as endangered.

On April 6, 1993, the Service notified potentially affected Federal and State agencies by mail that a status review was being conducted for the Cherokee darter and Etowah darter. Two comments were received concerning this notification. The U.S. Forest Service stated that it was unlikely Forest Service lands harbored suitable habitat for the two darter species. They also noted that future Forest Service activities in the Etowah River watershed were expected to decrease, and that it was unlikely these activities would produce any noticeable siltation effects on downstream populations of the Cherokee darter and Etowah darter. The Environmental Protection Agency commented on locating specific watersheds having high cumulative non-point source stream impacts for potential restoration work. This information would be useful in the recovery of the Cherokee darter and

Etowah darter. Neither agency had objections to the potential listing of these species.

Summary of Comments and Recommendations

In the October 18, 1993, proposed rule (58 FR 53696), and through associated notifications, all interested parties were requested to submit factual reports and information that might contribute to the development of a final rule for the Cherokee darter and Etowah darter. Appropriate Federal and State agencies, county governments, scientific organizations, and interested parties were contacted by letter dated November 1, 1993, and were requested to comment. Legal notices were published in *The Atlanta Journal/The Atlanta Constitution*, Atlanta, Georgia, on October 31, 1993, and in *The Marietta Daily Journal*, Marietta, Georgia, on November 5, 1993.

In response to a formal request by the Cherokee County Board of Commissioners, a public hearing on the Service's proposal to list the Cherokee darter and the Etowah darter as threatened and endangered, respectively, was held on January 12, 1994, at the Cherokee County Administrative Building, Canton, Georgia. The comment period was extended until January 24, 1994. A notice of the hearing and comment period extension was published in the **Federal Register** on December 16, 1993 (58 FR 65696) and in the *Cherokee Citizen*, Canton, Georgia, on December 29, 1993.

Seven written and 17 oral comments (fourteen at the public hearing) were received regarding the proposed listing. Federal agencies providing written comments included two agencies in the U.S. Department of Agriculture, Animal Damage Control and Soil Conservation Service, and the U.S. Army Corps of Engineers (Corps). The Animal Damage Control, Coosa River Basin Initiative, and Georgia Environmental Organization supported the listing; most of the other commenters did not. Following is a summary of the comments, concerns, and questions (referred to as "Issues" for the purpose of this summary) expressed in writing and orally. Issues of similar content have been grouped together. These issues and the Service's response to each are presented below.

Issue 1: Several commenters questioned the validity of both the Cherokee darter and Etowah darter as taxonomically distinct species.

Response: These two fishes were recently recognized as species new to science by prominent ichthyologists highly knowledgeable of fish in southeastern United States streams. A few years prior to the status survey for these species in the Etowah River system (see response to *Issue 5* below), the Cherokee darter had been considered the Coosa darter (*Etheostoma coosae*) and the Etowah darter had been considered the greenbreast darter (*E. jordani*). Status survey collections in the Etowah River system provided material sufficient for ichthyologists to determine that the Cherokee darter and Etowah darter were indeed valid biological entities distinct from the species they had heretofore been confused with. Specifically, unique color differences in nuptial (breeding) males of both species were discovered. Publication of a species description in scientific journal and peer review by the scientific community is the primary safeguard to ensure that species descriptions are based on sound scientific information. Therefore, the Service accepts the biological basis of species validity provided in the forthcoming scientific description and distinction of the Cherokee darter from the Coosa darter (Bauer *et al.* in press), and the published scientific description and distinction of the Etowah darter from the greenbreast darter (Wood and Mayden, 1993).

Issue 2: One commenter wanted clarification as to the timing of the determination of the Cherokee darter as a valid species in relation to the impoundment of Allatoona Reservoir, and insinuated that since the Cherokee darter was not formally recognized as a species at the time of reservoir construction, the preimpoundment records for populations of the Cherokee darter alluded to in the proposed rule referred actually to the Coosa darter.

Response: As stated in the response to *Issue 1* above, these two species were recognized as new species within the past few years, and decades after Allatoona Reservoir was completed in the 1950's. However, the Service is not indicating that these two fishes evolved into separate species since construction of this reservoir. The evolution of new species is a slow process that takes thousands or millions of years. There is no scientific basis to suggest the Cherokee darter or the Etowah darter evolved since the construction of Allatoona Reservoir, or that this reservoir played any part in the evolution of these species. Therefore, the preimpoundment records of Cherokee darters stated in the proposed rule pertain to that species, and do not refer to populations of the Coosa darter.

Issue 3: Some commenters thought that since the Cherokee County Water and Sewerage Authority (County) had taken the habitat requirements of the federally threatened amber darter (*Percina antesella*) into consideration in the design of the proposed dam impounding the Yellow Creek Reservoir, that the habitat requirements of the Cherokee darter or Etowah darter could also be considered having been addressed.

Response: There are over 150 recognized species of darters in 4 genera and approximately two dozen subgenera. Darters occupy a wide variety of habitats in rivers, lakes, and swamps from the Appalachian Mountains to near sea level throughout much of eastern North America. The Etowah River system alone harbors at least 11 species of darters. Each species inhabits discreet portions of the drainage and specific habitats within its streams. The habitat requirements of the Cherokee darter differ significantly from those of the amber darter. However, the habitat requirements of the amber darter are similar, but not identical, to that of the Etowah darter. The habitat requirements of the Cherokee darter have therefore not been taken into consideration during the design of the proposed dam.

Issue 4: Numerous commenters questioned the timing of the proposed rule to provide protection for the Cherokee darter and Etowah darter in relation to the proposed Yellow Creek Reservoir project, and one commenter made the same assertion concerning a proposed regional connector highway (Atlanta beltway).

Response: The Service is required by the Act to protect any species that is in danger of extinction. This determination is based upon the best available biological information. When the Service first learned of the occurrence of the undescribed Cherokee darter, a narrowly distributed and potentially imperilled fish in the Etowah River system, a survey was funded to determine its status. That survey was initiated during the fall of 1989. The following summer, the Etowah darter was determined to be a distinct and highly localized species, and the survey continued for both darters until 1992. When information was obtained on the population status and distribution of the Cherokee darter and Etowah darter sufficient to support federal listing of these species, a rule was proposed to afford them protection under the Act. The timing of the proposed rule to list these two fishes was therefore coincidental with any proposed construction projects.

Issue 5: Several commenters questioned the extent of the status

survey for the Cherokee darter and Etowah darter and the possibility that other area streams may harbor populations of these species.

Response: From the fall of 1989 to summer 1992, a survey of the Etowah River system was funded by the Service to determine the population status and total distribution of the Cherokee darter and Etowah darter (see response to *Issue 4* above). A total of 146 collections at 141 sites throughout the Etowah River system were made for these two fish. Although sites outside the Etowah River system were not surveyed for the Cherokee darter and Etowah darter, the Service believes that the fish faunas in surrounding drainages are adequately known to assure that these two darters are not present. The discovery of additional populations of one or both species within the Etowah River system is possible. However, based on the extensive status survey conducted for the Cherokee darter and Etowah darter, the Service believes no further surveys are warranted before listing these species.

Issue 6: Numerous commenters were concerned with the potential economic impact that this listing proposal might have on completion of the proposed Yellow Creek Reservoir project, and one commenter had the same concerns regarding the proposed Atlanta beltway.

Response: The Service is required by the Act to use the best available biological information in the assessment of determining whether Federal protection under the Act is warranted for a species. The economic impacts resulting from endangered species protection are not to be considered when proposing to list a species under the Act.

Section 7 of the Act requires Federal agencies to ensure that their actions are not likely to jeopardize the continued existence of any listed species (see the "Available Conservation Measures" section of this rule and the response to *Issue 7* below). The Corps has consulted with the Service regarding the potential effects this federally permitted reservoir project might have on the amber darter, which occurs in the Etowah River mainstem both upstream and downstream of the Yellow Creek confluence. The County conducted a study addressing issues pertaining to the amber darter and its habitat and has made modifications to the dam that should minimize any impacts upon this federally endangered fish. The Service is currently in conference with the Corps regarding the dam's potential impacts upon the Cherokee darter and Etowah darter. As mentioned elsewhere (see response to *Issue 3* above), the habitat requirements of the Etowah darter are similar to that of the amber darter. The design changes of the proposed dam that addressed the amber darter may possibly also protect the Etowah darter and its habitat. However, the Cherokee darter, which has a population in Yellow Creek very near the dam site, has different environmental requirements. The County has proven that it was willing to work with the Corps and the Service in addressing issues related to the amber darter. The Service commends these efforts by the County, and is confident that a similar agreement can be reached for Cherokee darter issues. The Service's Brunswick, Georgia, Field Office is currently working with the Corps and County to resolve specific issues relating to the Cherokee darter. Additionally, for the proposed Atlanta beltway project, the Federal Highway Administration must consult with the Service's Brunswick Field Office regarding potential impacts to the Cherokee darter and Etowah darter during the planning and construction phases.

Issue 7: One commenter requested the Service prepare a "takings analysis" under Executive Order 12630 that assesses the impacts of the listing of the Cherokee darter and the Etowah darter on private property rights.

Response: The Attorney General has issued guidelines to the Department of the Interior (Department) on the implementation of Executive Order 12630: Governmental Actions and Interference with Constitutionally Protected Property Rights. Under these guidelines, a special rule applies when an agency within the Department is required by law to act solely upon specified criteria that leave the agency no discretion. In enacting the Act, Congress required the Department to list species based solely upon scientific and commercial data indicating whether they are in danger of extinction. The Service is prohibited by law from withholding a listing based on concerns regarding economic impact and is required to act, with appropriate public notice, under strict time tables. Any failure to comply may subject the agency to legal action. Accordingly, the provisions of the Attorney General's guidelines relating to nondiscretionary actions clearly are applicable to the determination of threatened status for the Cherokee darter and endangered status for the Etowah darter, and Taking Implication Assessments under Executive Order 12630 cannot be considered in making this administrative decision. Since the Act precludes consideration of economic factors during the listing process, the Service's policy is to not consider taking implications at this time.

Issue 8: Several commenters were concerned with potential impacts the listing of the Cherokee darter and the Etowah darter might have on normal agricultural activities and those of other private property owners in the watershed.

Response: Based on the results of listing other aquatic organisms in north Georgia streams, the Service does not believe there will be any major impact to these activities as a result of listing these two fishes. Concerning the use of agricultural chemicals, the Service consults with the Environmental Protection Agency to determine if pesticides they register are likely to jeopardize the continued existence of listed species. When the use of a particular chemical is likely to jeopardize a listed species, the use of that chemical is restricted. Thus, it is possible that the use of a pesticide could be restricted to avoid jeopardizing either of these darters. Any other new restrictions that might be placed on farmers or other local landowners would be due to activities involving Federal agencies, which must review their actions and determine, under Section 7 of the Act, if such actions would adversely affect these species (see the "Available Conservation Measures" section of this rule and the response to *Issue 6* above). The Service stresses to landowners the importance of maintaining development-free streamside buffer zones to protect stream habitat and water quality upon which the Cherokee darter and Etowah darter depend. Maintaining such buffers should avoid many potential impacts to these two fishes.

Issue 9: One commenter stated that reservoirs act as sediment traps, and suggested that dams may actually improve habitat conditions in downstream areas.

Response: The Service concurs that dams may act as traps of alluvial sediments that are conducted down stream beds and overbank areas during flood conditions. However, conditions below Allatoona Reservoir, despite an obvious reduction in the bed load and other transported sediments, have deteriorated since reservoir construction several decades ago. Riverine habitat has been altered due primarily to the disruption of the normal flow and temperature regime in the lower Etowah River below Allatoona Dam. Dams should not be perceived as beneficial sediment traps; rather efforts should be made on a watershed-wide basis to abate sources of silt and other sediments

resulting from poor landuse practices from entering streams in the first place.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that the Cherokee darter and Etowah darter should be classified as threatened and endangered, respectively. Procedures found at Section 4(a)(1) of the Act (16 U.S.C. 1531 *et seq.*) and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act were followed. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in Section 4(a)(1). These factors and their application to the Cherokee darter (*Etheostoma* (*Ulocentra*) sp.) and the Etowah darter (*Etheostoma etowahae*) are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* The Cherokee darter and Etowah darter are both endemic to the Etowah River system in north Georgia (Burkhead 1993). These species have been rendered vulnerable to extinction by significant loss of habitat within their restricted range in the Etowah River system. The primary causes of habitat loss in the Etowah River system result from impoundments, siltation, point source and nonpoint source pollution which includes, but is not limited to, municipal and industrial waste discharges, agricultural runoff from crop monoculture and poultry farms, poultry processing plants, and silvicultural activities. Much non-agricultural and non-silvicultural habitat degradation in the watershed can be attributed to increased urbanization in the Atlanta metropolitan area. All such forms of habitat degradation and pollution disrupt the aquatic ecosystem, particularly impacting benthic (bottom) habitat. Certain pollutants may be particularly harmful in cumulative concentrations or if synergistic interactions with other pollutants or chemicals occur.

Impoundments have destroyed a significant portion of the free-flowing stream habitat in which the Cherokee darter lives, and to a lesser extent they have impacted the Etowah darter as well. Based on museum records, at least five preimpoundment populations of the Cherokee darter were extirpated by the inundation of the 4,800 hectare (11,856 acre) Allatoona Reservoir, which was completed in 1955. Undoubtedly other, undocumented, Cherokee darter populations were destroyed by the filling of Allatoona Reservoir. The lower portions of some of the tributary systems that harbor populations of the Cherokee darter are inundated by Allatoona Reservoir, isolating these populations from other populations in adjacent tributaries. These tributaries include Butler, Shoal, and Stamp Creeks.

Besides Allatoona Reservoir, numerous small impoundments and ponds are scattered throughout the range of the Cherokee darter and Etowah darter. Impoundments directly destroy stream habitat by converting free-flowing streams to man-made lakes and ponds and by causing population isolation. Furthermore, small impoundments are numerous enough in the Etowah system to have a negative effect on both these species by causing population fragmentation and isolation, thereby blocking genetic interchange. Impoundments also alter the thermal regimen of the stream sections immediately below the dam and can cause community shifts favoring centrarchid fishes (Brim 1991), potential predators on both Cherokee darters and Etowah darters. The Yellow Creek population of the Cherokee darter is directly threatened by a proposed water supply impoundment planned by the Cherokee County government. During low flow periods, 30 percent of the flow in the Etowah River above a known Etowah darter site will be comprised of water from Yellow Creek reservoir. Although the effects of this flow augmentation in the Etowah River are not known, the change in water quality and temperature could potentially have a negative impact on the Etowah darter.

Erosion from poor land use practices causes extensive topsoil erosion and subsequent siltation of stream bottoms. Sources of siltation include timber clearcutting, clearing of riparian vegetation, and those construction, mining, and agricultural practices that allow exposed earth to enter streams. Light to moderate levels of siltation are ubiquitous in many streams of the Etowah River system which have populations of the Cherokee darter and Etowah darter. Siltation problems are severe in many tributaries that have or probably had populations of the Cherokee darter, including Allatoona Creek, the Little River system, Settingdown Creek, Pumpkinvine Creek, and portions of Shoal Creek (Cherokee County), Sharp Mountain Creek, Long Swamp Creek, and Raccoon Creek. Siltation and dust from marble quarries in Pickens County are also major problems in Long Swamp Creek, the only known site where the Cherokee darter and Etowah darter are found together. A rock quarry has been proposed for Stamp Creek in Bartow County. If permitted, this quarry may have an adverse effect on the Stamp Creek Cherokee darter population.

The extreme isolation or absence of populations of the Cherokee darter in Settingdown, Allatoona, and Raccoon Creeks and the Little River also strongly suggests localized extirpation of populations. These intermediate streams probably once supported populations of the fish. Much of the Little River system is heavily affected by large silt and bed loads; the remaining fish fauna is depauperate and at many sites dominated by species tolerant of degraded habitats.

The Cherokee darter and Etowah darter are obligate benthic species living, foraging, and spawning on the stream bottom. Hence, their well-being is directly tied to benthic habitat quality. Negative effects of silt on benthic fishes were summarized by Burkhead and Jenkins (1991). Silt reduces or destroys habitat heterogeneity and primary productivity, increases fish egg and larval mortality, abrades organisms, and alters, degrades, and entombs macrobenthic communities. The geological strata drained by the Etowah River, particularly in the middle and upper portion of the system, contain micaceous schist. The erosion of this substrata adds an extremely abrasive mica component to the silt which must render this silt even more noxious to benthic organisms. Current State and Federal regulations preventing silt from entering streams are lacking, inadequate, or not rigorously enforced.

The current rate of development in the counties surrounding Atlanta is very high. The most rapid development appears to be in Gwinnett, Cobb and Fulton Counties, but it is also high in Cherokee County, which is in the heart of the Cherokee darter's current range. The effects of creeping urbanization may be seen as far away as Dawson County, where the majority of Etowah darter populations, as well as some Cherokee darter populations, are known. One of the principal concerns to the continued existence of the Cherokee darter and Etowah darter is the trend of converting farmland into localized subdivisions in areas relatively remote from Atlanta. Associated with increased development and land clearing is increased siltation from erosion, accelerated runoff, and transport of pollutants into the Etowah River system.

The tributaries harboring the Cherokee darter and Etowah darter are crossed by numerous road and railroad bridges. These stream crossings are

potential sites for accidents which could spill toxic material into streams. Spills of toxic chemicals at such crossings could cause catastrophic fish kills and local extirpation of these species. The high number of bridge crossings over Cherokee darter and Etowah darter streams increases the probability that such an accident will occur in the future.

Attending the urbanization associated with the growth of the Atlanta metropolitan area is a proposed bypass that would circumnavigate Atlanta to the northwest, connecting Interstate 75 with Georgia State Route 371. The bypass would cross several Cherokee darter streams in portions of Forsyth, Cherokee, and Bartow Counties. It will also traverse the Etowah River at the lower portion of the Etowah darter's range. Bridge construction sites, some located in the upper Etowah River watershed, would be potential sources of sedimentation to Cherokee and Etowah darter habitat. In addition, since this roadway is not being planned as a limited access highway, the project will foster development not just at major road intersections, as occurs with interstate highways, but along the entire corridor.

It has been reported that 75 percent of Georgia's landfills will reach capacity in five years (*The Atlanta Journal/The Atlanta Constitution*, February 23, 1992). Several landfill sites have been proposed within the range of the Cherokee darter; one such site occurs between two Cherokee darter streams: Riggins and Edward Creeks, Cherokee County. On the banks of the upper Etowah River, within the known limited range of the Etowah darter, the Sanitfill Pine Bluff landfill is being constructed. Refuse may ultimately be received from as far away as New York. When this facility reaches its full potential, it will purportedly be the largest landfill in the eastern United States. While modern landfills are purportedly designed to contain runoff, it seems doubtful that such landfills would actually retain barrier integrity for decades to come.

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* In general, small species of fish, such as the Cherokee darter and Etowah darter, which are not utilized for either sport or bait purposes, are unknown to the general public. Therefore, take of these species by the general public has not been a problem. Publication of this rule will inform the general public as to the presence of these two darters in the Etowah River system. Considering the restricted distribution and small populations of the Etowah and Cherokee darters, it would be easy for vandals or unscrupulous collectors to eliminate or seriously impact populations in specific stream reaches if their exact location were known. The distribution of these species has therefore been described only in general terms for the purposes of this rule. Federal protection will serve to minimize adverse population impacts from illegal take, but the Act's penalties are not likely to act as a complete deterrent to such actions.

C. *Disease or predation.* Predation upon the Cherokee darter and Etowah darter undoubtedly occurs. However, there is no evidence to suggest that predation threatens these species, except possibly in altered stream reaches immediately below dams.

D. *The inadequacy of existing regulatory mechanisms.* The Official Code of Georgia Annotated 27–2–12 prohibits the taking of these fish without a state collecting permit. Federal listing provides protection under Section 9 of the Act by requiring Federal permits for taking the Cherokee darter and Etowah darter. Additional protection is gained under Section 7 of the Act by requiring Federal agencies to consult with the Service when projects they fund, authorize, or conduct may affect these species.

E. *Other natural or manmade factors affecting its continued existence.* The range of the Cherokee darter has been fragmented, and a significant portion of the middle Etowah River system has been permanently altered by Allatoona Reservoir. The streams inhabited by the Cherokee darter and Etowah darter exhibit, on average, moderate to heavy degradation from poor land use practices and small impoundments. These strong negative forces have caused local extirpation of both Cherokee darter and Etowah darter populations and have induced range fragmentation and subsequent isolation of the Cherokee darter into small populations. Genetic diversity has subsequently been lost due to these population losses. The genetic diversity of all populations may be needed to provide the species enough genetic variability to adapt to environmental change and thus assure long-term viability. The restricted distribution of both the Cherokee darter and Etowah darter also makes populations vulnerable to extirpation from catastrophic events, such as an accidental toxic chemical spill. Range fragmentation and loss of genetic diversity, independently and in concert, clearly threaten the continued existence of these species.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by both darters in determining to make this rule final. Based on this evaluation, the preferred action is to list the Cherokee darter and Etowah darter as threatened and endangered species, respectively. The Cherokee darter is now known from approximately 20 tributary systems of the Etowah River, but healthy populations are known from just a few sites. The Etowah darter is known from only the upper Etowah River mainstem and two tributary systems. Both species are restricted to the Etowah River system in north Georgia. These fish and their benthic habitat have been, and continue to be, impacted by range reduction, isolation by impoundment, and general habitat destruction. Despite its wider distribution and greater number of known populations, the Cherokee darter appears to have more of its habitat threatened by these factors, which have already resulted in a higher level of population fragmentation and isolation relative to the Etowah darter. The restricted distribution of these two species also makes localized populations susceptible to catastrophic events. Because of these factors, endangered appears the most appropriate status for the Etowah darter and threatened appears most appropriate for the Cherokee darter.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that, to the maximum extent prudent and determinable, the Secretary propose critical habitat at the time a species is determined to be endangered or threatened. The Service's regulations (50 CFR 424.12(a)(1)) state that designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species or (2) such designation of critical habitat would not be beneficial to the species. The Service finds that designation of critical habitat is not prudent for these species. Such a determination would result in no known benefit to these species, and designation of critical habitat could further threaten them.

Section 7(a)(2) and regulations codified at 50 CFR part 402 require Federal agencies to ensure, in consultation with and with the assistance of the Service, that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat, if designated. (See "Available

Conservation Measures" section for a further discussion of Section 7.) As part of the development of this final rule, Federal and State agencies were notified of the darters' general distribution, and they were requested to provide data on proposed Federal actions that might adversely affect the two species.

Should any future projects be proposed in areas inhabited by these fishes, the involved Federal agency will already have the general distributional data needed to determine if the species may be impacted by their action; and if needed more specific distributional information would be provided.

Regulations promulgated for implementing Section 7, referenced above, provide for both a jeopardy standard, based on listing alone, and for a destruction or adverse modification standard, in cases where critical habitat has been designated. The Cherokee and Etowah darters occupy very restricted stream reaches. Any significant adverse modification or destruction of their habitat would likely jeopardize their continued existence. Under these conditions the two standards are essentially equivalent. Therefore, no additional protection for the species would accrue from critical habitat designation that would not also accrue from listing these species. Once listed, the Service believes that protection of their habitat can be accomplished through the Section 7 jeopardy standard, and through Section 9 prohibitions against take.

These two fish are very rare. Therefore, taking for scientific purposes and private collections could pose a threat to their continued existence if site specific information were released to the general public. The publication of critical habitat maps in the **Federal Register** and local newspapers and other publicity accompanying critical habitat designation could increase the collection threat and also increase the potential for vandalism during the often controversial critical habitat designation process. The potential for future habitat disruption within one or both of these species' ranges resulting from the rapidly expanding Atlanta metropolitan area makes designation of critical habitat potentially more contentious and controversial, increasing the possibility for vandalism to occur. The locations of these species' populations have consequently been described only in general terms in this rule. Any existing precise locality data would be available to appropriate Federal, State, and local governmental agencies from the Service office described in the **ADDRESSES** section; from the Service's Brunswick Field Office, Federal Building, Room 334, 801 Gloucester Street, Brunswick, Georgia 31520; and from the Georgia Department of Natural Resources, and Georgia Natural Heritage Program.

For the foregoing reasons the Service believes that critical habitat designation is not prudent for these species, and that their protection can be adequately accomplished through the Section 7 jeopardy standard and Section 9 prohibitions against take.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal involvement is expected to include the Environmental Protection Agency through the Clean Water Act's provisions for pesticide registration and waste management actions. The Corps of Engineers will consider these species in project planning and operation, and during the permit review process. The Federal Highway Administration will consider impacts of federally funded bridge and road construction projects when known habitat may be impacted. Continuing urban development within the Etowah River system may involve the Farmers Home Administration and their loan programs. The Soil Conservation Service will consider the species during project planning and under their farmer's assistance programs. The Forest Service will consider downstream impacts to habitat of the Etowah darter when planning or implementing silvicultural, recreational, or other programs in the headwaters of Amicalola Creek and the extreme upper portion of the Etowah River mainstem occurring in the Chattahoochee National Forest. It has been the experience of the Service that nearly all Section 7 consultations can be resolved so that the species is protected and the project objectives are met.

The Act and implementing regulations found at 50 CFR 17.21 for endangered species, and 17.21 and 17.31 for threatened species set forth a series of general prohibitions and exceptions that apply to all endangered and threatened wildlife. These prohibitions, in part, make it illegal for any person subject to jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, or collect; or attempt any of these), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered or threatened wildlife species under certain circumstances. Regulations governing permits are at 50 CFR 17.22, 17.23, and 17.32. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in connection with otherwise lawful activities. For threatened species, there are also permits for zoological exhibition, educational purposes, or special purposes consistent with the purpose of the Act. In some instances, permits may be issued for a specified time to relieve undue economic hardship that would be suffered if such relief were not available. Since these species are not in trade, such permit requests are not expected.

It is the policy of the Service (59 FR 34272) to identify to the maximum extent practicable at the time a species is listed those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of the listing on proposed and ongoing activities within a species' range. The Service is not aware of any

otherwise lawful activities being conducted by the public that will be affected by this listing and result in a violation of section 9.

Questions regarding whether specific activities will constitute a violation of section 9 should be directed to the Field Supervisor of the Service's Jacksonville Office (see ADDRESSES section). Requests for copies of the regulations concerning listed animals and general inquiries regarding prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Southeast Regional Office, Ecological Services Division, Threatened and Endangered Species, 1875 Century Boulevard, Atlanta, Georgia 30345–3301 (Telephone 404/679–7099, Facsimile 404/679–7081).

National Environmental Policy Act

The Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the Federal Register on October 25, 1983 (48 FR 49244).

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Author

The primary author of this final rule is Robert S. Butler (see ADDRESSES section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Regulation Promulgation

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for Part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11(h) by adding the following, in alphabetical order under "FISHES", to the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
FISHES							
*	*	*	*	*	*		*
Darter, Cherokee	*Etheostoma (Ulocentra)* sp.	U.S.A. (GA)	Entire	T	569	NA	NA
*	*	*	*	*	*		*
Darter, Etowah	*Etheostoma etowahae.*	U.S.A. (GA)	Entire	E	569	NA	NA
*	*	*	*	*	*		*

Dated: November 23, 1994.

Mollie H. Beattie,

Director, Fish and Wildlife Service.

[FR Doc. 94–31195 Filed 12–19–94; 8:45 am]

BILLING CODE 4310–55–P

Proposed Rules

Federal Register
Vol. 59, No. 243
Tuesday, December 20, 1994

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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 94–ANE–37]

Airworthiness Directives; General Electric Company CF6 Series Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to General Electric Company (GE) CF6–45/-50 series turbofan engines. This proposal would require a reduction of the low cycle fatigue (LCF) retirement lives for certain high pressure turbine rotor (HPTR) stage 2 disks, and would provide a drawdown schedule for those affected parts with reduced LCF retirement lives. This proposal is prompted by the results of a refined life analysis performed by the manufacturer which revealed minimum calculated LCF lives significantly lower than published LCF retirement lives. The actions specified by the proposed AD are intended to prevent a LCF failure of the HPTR stage 2 disk, which could result in an uncontained engine failure and damage to the aircraft.

DATES: Comments must be received by February 21, 1995.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 94–ANE–37, 12 New England Executive Park, Burlington, MA 01803–5299. Comments may be inspected at this location between 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from General Electric Aircraft Engines, CF6 Distribution Clerk, Room 132, 111 Merchant Street, Cincinnati, OH 45246. This information may be examined at the FAA, New England Region, Office of the Assistant Chief Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: Robert J. Ganley, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (617) 238–7138; fax (617) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 94–ANE–37." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, New England Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 94–ANE–37, 12 New England Executive Park, Burlington, MA 01803–5299.

Discussion

This proposed airworthiness directive (AD) is applicable to General Electric Company (GE) CF6–45/-50 series turbofan engines. A study performed by the manufacturer using updated life analyses for the high pressure turbine rotor (HPTR) stage 2 disk has revealed minimum calculated low cycle fatigue (LCF) lives which are significantly lower than published LCF retirement lives. This condition, if not corrected, could result in a LCF failure of the HPTR stage 2 disk, which could result in an uncontained engine failure and damage to the aircraft.

The FAA has reviewed and approved the technical contents of GE CF6–50 Service Bulletin (SB) No. 72–1069, dated September 12, 1994, that describes a reduction in the published LCF retirement lives for affected HPTR stage 2 disks, and an FAA-approved rework procedure for the affected disks to increase the FAA-approved LCF retirement life to 8,750 or 9,700 cycles since new (CSN), depending on the CSN of the disk when the rework is performed.

Since an unsafe condition has been identified that is likely to exist or develop on other engines of this same type design, the proposed AD would require a reduction of the published LCF retirement lives for certain HPTR stage 2 disks, and would provide a drawdown schedule for those affected disks with reduced LCF retirement lives. If the FAA-approved rework is accomplished, the LCF retirement life may be increased to 8,750 or 9,700 cycles, depending on the CSN of the disk when the rework is performed. The actions would be required to be accomplished in accordance with the service bulletin described previously.

The FAA estimates that 280 engines installed on aircraft of U.S. registry would be affected by this proposed AD, that it would take approximately 194 work hours per engine to accomplish the proposed actions, and that the average labor rate is $55 per work hour Required parts would cost approximately $16,383 per engine. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $7,574,840.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and

the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

General Electric Company: Docket No. 94–ANE–37.

Applicability: General Electric Company (GE) CF6–45/-50 series turbofan engines installed on but not limited to Airbus A300 series, Boeing 747 series, and McDonnell Douglas DC–10 series aircraft.

Compliance: Required as indicated, unless accomplished previously.

To prevent a low cycle fatigue (LCF) failure of the high pressure turbine rotor (HPTR) stage 2 disk, which could result in an uncontained engine failure and damage to the aircraft, accomplish the following:

(a) Remove from service HPTR stage 2 disks Part Numbers (P/N) 1474M49P04, 1474M49P05, 1474M49P06, 9045M35P15, 9045M35P17, and 9045M35P18, in accordance with the following:

(1) For disks that have accumulated less than 3,500 cycles since new (CSN) on the effective date of this airworthiness directive (AD), remove disk from service prior to accumulating 7,080 CSN.

(2) For disks that have accumulated 3,500 CSN or more, but less than 7,080 CSN on the effective date of this AD, remove disk from service prior to accumulating 7,080 CSN, or prior to accumulating 3,100 cycles in service (CIS) after the effective date of this AD, whichever occurs later, but not to exceed 9,700 CSN.

(3) For disks which have accumulated 7,080 CSN or more on the effective date of this AD, remove disk from service at the next piece-part exposure, but not to exceed 9,700 CSN.

(b) Remove from service HPTR stage 2 disks P/N 9264M58P01, 9264M58P02, and 9264M58P03 prior to accumulating 7,080 CSN.

(c) This AD establishes the following new LCF retirement lives which will be published in Chapter 5 of the CF6–50 Engine Task Numbered Shop Manual, GEK 50481: 7,080 cycles for HPTR stage 2 disk P/N 1474M49P04, 1474M49P05, 1474M49P06, 9045M35P15, 9045M35P17, 9045M35P18, 9264M58P01, 9264M58P02, and 9264M58P03.

(d) GE CF6–50 Service Bulletin (SB) No. 72–1069, dated September 12, 1994, describes an FAA-approved rework procedure for the affected disks. Accomplishment of this rework increases the FAA-approved LCF retirement life to 8,750 or 9,700 cycles, depending on the CSN of the disk when the rework is performed.

(e) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Engine Certification Office. The request should be forwarded through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Engine Certification Office.

Note: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the Engine Certification Office.

(f) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the aircraft to a location where the requirements of this AD can be accomplished.

Issued in Burlington, Massachusetts, on December 14, 1994.

Kirk E. Gustafson,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 94–31181 Filed 12–19–94; 8:45 am]

BILLING CODE 4910–13–P

14 CFR Part 39

[Docket No. 94–NM–215–AD]

Airworthiness Directives; Fokker Model F28 Mark 0100 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to all Fokker Model F28 Mark 0100 series airplanes. This proposal would require an inspection to detect the presence of a drain hole in certain mounting frames of the auxiliary power unit (APU). If a drain hole is present, the proposed AD would also require an inspection to detect corrosion of the mounting frame, and eventual replacement of the mounting frame. This proposal is prompted by a report indicating that corrosion was found on a number of mounting frames of the APU. The actions specified by the proposed AD are intended to prevent such corrosion, which could render the APU inoperative and may lead to a potential fire hazard.

DATES: Comments must be received by January 31, 1995.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 94–NM–215–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Fokker Aircraft USA, Inc., 1199 North Fairfax Street, Alexandria, Virginia 22314. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Tim Dulin, Aerospace Engineer, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–2141; fax (206) 227–1320.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall

identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 94–NM–215–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 94–NM–215–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Rijksluchtvaartdienst (RLD), which is the airworthiness authority for the Netherlands, recently notified the FAA that an unsafe condition may exist on all Fokker Model F28 Mark 0100 series airplanes. The RLD advises that corrosion has been found on a number of mounting frames, having part number (P/N) D67050–407, of the auxiliary power unit (APU). Investigation revealed that the existing design of the drain hole in frame member M allows the accumulation of moisture and corrosion on the mounting frame of the APU. Such corrosion could render the APU inoperative and may lead to a potential fire hazard.

Fokker has issued Service Bulletin SBF100–49–022, dated August 27, 1992, which describes procedures for:

1. Performing a one-time detailed visual inspection to detect the presence of a drain hole in frame member M of the mounting frames, having part number (P/N) D67050–407, of the APU;

2. If a drain hole is present, performing a detailed visual inspection to detect corrosion on the mounting frame of the APU; and

3. Replacing the mounting frame with a new mounting frame. The RLD classified this service bulletin as mandatory and issued Netherlands airworthiness directive (BLA) 92–103, dated October 5, 1992, in order to assure the continued airworthiness of these airplanes in the Netherlands.

This airplane model is manufactured in the Netherlands and is type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the RLD has kept the FAA informed of the situation described above. The FAA has examined the findings of the RLD, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require a one-time visual inspection to detect the presence of a drain hole in frame member M of certain mounting frames of the APU. If a drain hole is present, the proposed AD would also require an inspection to detect corrosion of the mounting frame; and eventual replacement of the mounting frame with a new mounting frame. The actions would be required to be accomplished in accordance with the service bulletin described previously.

As a result of recent communications with the Air Transport Association (ATA) of America, the FAA has learned that, in general, some operators may misunderstand the legal effect of AD's on airplanes that are identified in the applicability provision of the AD, but that have been altered or repaired in the area addressed by the AD. The FAA points out that all airplanes identified in the applicability provision of an AD are legally subject to the AD. If an airplane has been altered or repaired in the affected area in such a way as to affect compliance with the AD, the owner or operator is required to obtain FAA approval for an alternative method of compliance with the AD, in accordance with the paragraph of each AD that provides for such approvals. A note has been included in this notice to clarify this requirement.

The FAA estimates that 119 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 13 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $92,820, or $780 per airplane.

The total cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Fokker: Docket 94–NM–215–AD.

Applicability: All Model F28 Mark 0100 series airplanes, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must use the authority provided in paragraph (c) to request approval from the FAA. This approval may address either no action, if the current configuration eliminates the unsafe condition; or different actions necessary to address the unsafe condition described in this AD. Such a request should include an assessment of the effect of the changed configuration on the unsafe condition addressed by this AD. In no case does the presence of any modification, alteration, or repair remove any airplane from the applicability of this AD.

Compliance: Required as indicated, unless accomplished previously.

To prevent corrosion of certain mounting frames of the auxiliary power unit (APU), which could render the APU inoperative and may lead to a potential fire hazard, accomplish the following:

(a) Within 30 days after the effective date of this AD, perform a detailed visual inspection to detect the presence of a drain hole in frame member M of the mounting frames, having part number (P/N) D67050–407, of the auxiliary power unit (APU), in accordance with Fokker Service Bulletin SBF100–49–022, dated August 27, 1992.

(1) If no drain hole(s) is present, no further action is required by this AD.

(2) If any drain hole is present, prior to further flight, perform a detailed visual inspection to detect corrosion on the mounting frame of the APU, in accordance with the service bulletin.

(i) If no corrosion is detected, within 90 days after accomplishing the visual inspection, replace the mounting frame with a new mounting frame in accordance with the service bulletin.

(ii) If any corrosion is detected, within 30 days after accomplishing the visual inspection, replace the mounting frame with a new mounting frame in accordance with the service bulletin.

(b) As of the effective date of this AD, no person shall install on any airplane a mounting frame, having P/N D67050–407, that has a drain hole in frame member M.

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM–113.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

(d) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on December 14, 1994.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–31180 Filed 12–19–94; 8:45 am]

BILLING CODE 4910–13–U

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14 CFR Part 39

[Docket No. 94–NM–168–AD]

Airworthiness Directives; Jetstream Model ATP Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Jetstream Model ATP airplanes. This proposal would require installation of modified engine de-ice timers, modification of the electrical wiring for the duct heat of the engine air intake, and installation of a time delay for the de-ice system in the air intake duct of the right engine. This proposal would also require associated revisions to the Airplane Flight Manual. This proposal is prompted by reports of ice that accreted in the engine air intake ducts and was ingested into the engine; this resulted in engine power rollback (loss of engine power). The actions specified by the proposed AD are intended to prevent loss of multiple engine power during flight in icing conditions.

DATES: Comments must be received by January 31, 1995.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 94–NM–168–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Jetstream Aircraft, Inc., P.O. Box 16029, Dulles International Airport, Washington, DC 20041–6029. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: William Schroeder, Aerospace Engineer, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–2148; fax (206) 227–1320.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 94–NM–168–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 94–NM–168–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, recently notified the FAA that an unsafe condition may exist on certain Jetstream Model ATP airplanes. The CAA advises that probable ingestion of accreted ice, shed from the inner surfaces of the engine air

intake ducts, has resulted in engine power rollbacks (loss of engine power) during flight in icing conditions. Five reports have been received: three reports of power rollback on two engines simultaneously, and two reports of power rollback on one engine. Ingestion of accreted ice, if not prevented, could result in multiple engine power rollback during flight in freezing precipitation conditions.

Jetstream has issued Service Bulletin ATP–30–39–30146A (Modification 30146A), dated July 29, 1994, which describes procedures for installing modified de-ice timers for the left and right engines. The modified de-ice timers will provide additional electric power directly to the engine air intake flange heater. This additional electric load requires revision of electric load shedding procedures in the event of electrical system failure. These procedures are included in the Jetstream Aircraft ATP Airplane Flight Manual (AFM), Temporary Revision T/41, Issue 1, dated November 15, 1994.

Jetstream has also issued Service Bulletin ATP–30–37–30143A (Modification 30143A), dated August 1, 1994, and Revision 1, dated September 5, 1994, which describe procedures for installation of modified electrical wiring for flexible ducts and lips of the engine air intake. This modification automates turning on the de-ice heaters in the flexible duct of the engine air intake when the lip heat is on. The modification continues to allow pilots to select the de-ice systems of the engine air intake manually, via the "All On" switch of the anti-ice system.

The CAA classified these service bulletins as mandatory, in order to assure the continued airworthiness of these airplanes in the United Kingdom.

Jetstream has also issued Service Bulletin ATP–30–30–35285A, dated July 15, 1994, which describes procedures for installation of a system that automates a 20-second delay between the time that the left engine intake de-ice systems are turned on and the time that the right engine intake de-ice systems are turned on. This modification also reduces pilot workload by automatically turning on the engine de-ice system at an interval 20 seconds apart for the left and right engines when the engine intake de-ice is selected to "on." The automated 20-second time delay ensures that the de-ice system for the left and right engine intakes will be turned on in such a way as to prevent simultaneous rollbacks of the engines in icing conditions. The CAA has not classified this service bulletin as mandatory. However, the FAA has determined that the pilot could easily neglect to heed the necessary 20-second delay if manually turning on the second flexible duct de-ice system; this could cause accumulated ice in the air intake ducts of both engines to dislodge simultaneously and be ingested into the engines, which then could result in rollback of both engines at the same time. In light of this, the FAA considers that the modification described in this service bulletin is necessary.

This airplane model is manufactured in the United Kingdom and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAA has kept the FAA informed of the situation described above. The FAA has examined the findings of the CAA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require installation of new de-ice timers and an associated revision to the AFM; installation of a system that automates a 20-second delay between turning on the left engine intake de-ice system and turning on the right engine intake de-ice system; and installation of modified electrical wiring for the flexible ducts and lips of the engine air intake. These actions would be required to be accomplished in accordance with the service bulletins described previously.

As a result of recent communications with the Air Transport Association (ATA) of America, the FAA has learned that, in general, some operators may misunderstand the legal effect of AD's on airplanes that are identified in the applicability provision of the AD, but that have been altered or repaired in the area addressed by the AD. The FAA points out that all airplanes identified in the applicability provision of an AD are legally subject to the AD. If an airplane has been altered or repaired in the affected area in such a way as to affect compliance with the AD, the owner or operator is required to obtain FAA approval for an alternative method of compliance with the AD, in accordance with the paragraph of each AD that provides for such approvals. A note has been included in this notice to clarify this requirement.

The FAA estimates that 10 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 72 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Required parts would be provided by the manufacturer at no cost to the operators. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $43,200, or $4,320 per airplane.

The total cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Jetstream Aircraft Limited (Formerly British Aerospace Commercial Aircraft, Limited) Docket 94–NM–158–AD

Applicability: Model ATP airplanes; having constructor numbers 2002 through 2063, inclusive; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must use the authority provided in paragraph (c) to request approval from the FAA. This approval may address either no action, if the current configuration eliminates the unsafe condition; or different actions necessary to address the unsafe condition described in this AD. Such a request should include an assessment of the effect of the changed configuration on the unsafe condition addressed by this AD. In no case does the presence of any modification, alteration, or repair remove any airplane from the applicability of this AD.

Compliance: Required as indicated, unless accomplished previously.

To prevent engine power rollback during flight in icing conditions, due to ingestion of accreted ice, accomplish the following:

(a) For airplanes having constructor numbers 2002 through 2056, inclusive: Within 90 days after the effective date of this AD, install modified de-ice timers for the left and right engines (Modification 30146A), in accordance with Jetstream Aircraft Limited Service Bulletin ATP–30–39–30146A, dated July 29, 1994; and revise the FAA-approved Airplane Flight Manual (AFM) to include the information specified in Temporary Revision T/41, Issue 1, dated November 15, 1994.

Note 2: The revision of the AFM required by this paragraph may be accomplished by inserting a copy of Temporary Revision T/41 in the AFM. When this temporary revision has been incorporated into general revisions of the AFM, the general revisions may be inserted in the AFM, provided that the information contained in the general revision is identical to that specified in Temporary Revision T/41.

(b) For airplanes having constructor numbers 2002 through 2063, inclusive: Within 90 days after the effective date of this AD, accomplish paragraphs (b)(1) and (b)(2) of this AD:

(1) Install the modified electrical wiring for the flexible ducts and lips of the engine air intake (Modification 30143A) in accordance with Jetstream Aircraft Limited Service Bulletin ATP–30–37–30143A, dated August 1, 1994, or Revision 1 dated September 5, 1994.

(2) Install the automated 20-second delay system (Modification 35285A), to ensure that the left engine de-ice systems are turned on prior to turning on the right engine de-ice systems, in accordance with Jetstream Aircraft Limited Service Bulletin ATP–30–30–35285A, dated July 15, 1994; and revise the FAA-approved AFM to include the information specified in Temporary Revision T/40, Issue 1, dated August 3, 1994.

Note 3: The revision of the AFM required by this paragraph may be accomplished by inserting a copy of Temporary Revision T/40 in the AFM. When this temporary revision has been incorporated into general revisions of the AFM, the general revisions may be inserted in the AFM, provided the information contained in the general revision is identical to that specified in Temporary Revision T/40.

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM–113.

Note 4: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

(d) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on December 14, 1994.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–31182 Filed 12–19–94; 8:45 am]

BILLING CODE 4910–13–U

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14 CFR Part 39

[Docket No. 94–NM–194–AD]

Airworthiness Directives; McDonnell Douglas Model DC–9, DC–9–80, and C–9 (Military) Series Airplanes, and Model MD–88 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain McDonnell Douglas Model DC–9, DC–9–80, and C–9 (Military) series airplanes, and Model MD–88 airplanes. This proposal would require repetitive replacement of the emergency power switch in the overhead switch panel with a new switch. This proposal is prompted by a report of heavy smoke in the cockpit coming from the overhead switch panel on a Model DC–9–81 series airplane. The actions specified by the proposed AD are intended to ensure replacement of the emergency power switch when it has reached its maximum life limit; an emergency power switch that is not replaced could fail and lead to a short in the electrical circuit, which could result in a fire in the overhead switch panel and smoke in the cockpit.

DATES: Comments must be received by January 31, 1995.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 94–NM–194–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from McDonnell Douglas Corporation, P.O. Box 1771, Long Beach, California 90801–1771, Attention: Business Unit Manager, Technical Administrative Support, Dept. L51, M.C. 2–98. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712.

FOR FURTHER INFORMATION CONTACT: Elvin Wheeler, Aerospace Engineer, Systems and Equipment Branch, ANM–132L, FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712; telephone (310) 988–5344; fax (310) 988–5210.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments

submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 94–NM–194–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 94–NM–194–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The FAA has received a report of heavy smoke in the cockpit coming from the overhead switch panel on a McDonnell Douglas Model DC–9–81 (MD–81) series airplane. Investigation revealed that the fire had originated in the area of the emergency power switch in the overhead switch panel. Further investigation, conducted by Mason Electric Company (the manufacturer of the emergency power switch), revealed that the emergency power switch, upon exceeding 10,000 switch cycles (off-to-on-to-off) can fail due to wear or overstress. If not replaced in a timely manner, the emergency power switch could fail and lead to a short in the electrical circuit, which could result in a fire in the overhead switch panel and smoke in the cockpit.

The FAA has reviewed and approved McDonnell Douglas DC–9 Service Bulletin 24–150, dated March 28, 1994, which describes procedures for repetitively replacing the emergency power switch in the overhead switch panel with a new switch at regular intervals.

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require repetitively replacing the emergency power switch in the overhead switch panel with a new switch at regular intervals. The actions would be required to be accomplished in accordance with the service bulletin described previously.

As a result of recent communications with the Air Transport Association (ATA) of America, the FAA has learned that, in general, some operators may misunderstand the legal effect of AD's on airplanes that are identified in the applicability provision of the AD, but that have been altered or repaired in the area addressed by the AD. The FAA points out that all airplanes identified in the applicability provision of an AD are legally subject to the AD. If an airplane has been altered or repaired in the affected area in such a way as to affect compliance with the AD, the owner or operator is required to obtain FAA approval for an alternative method of compliance with the AD, in accordance with the paragraph of each AD that provides for such approvals. A note has been included in this notice to clarify this requirement.

There are approximately 1,990 Model DC–9, DC–9–80, and C–9 (Military) series airplanes and Model MD–88 airplanes of the affected design in the worldwide fleet. The FAA estimates that 992 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 2 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Required parts would cost approximately $1,434 per airplane. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $1,541,568, or $1,554 per airplane, per replacement cycle.

The total cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

McDonnell Douglas: Docket 94–NM–194–AD.

Applicability: Model DC–9–10, –20, –30, –40, and –50 series airplanes; Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), and DC–9–87 (MD–87) series airplanes; Model MD–88 airplanes; and C–9 (Military) series airplanes; as listed in McDonnell Douglas DC–9 Service Bulletin 24–150, dated March 28, 1994; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must use the authority provided in paragraph (b) to request approval from the FAA. This approval may address either no action, if the current configuration eliminates the unsafe condition; or different actions necessary to address the unsafe condition described in this AD. Such a request should include an assessment of the effect of the changed configuration on the unsafe condition addressed by this AD. In no case does the presence of any modification, alteration, or repair remove any airplane from the applicability of this AD.

Compliance: Required as indicated, unless accomplished previously

To ensure replacement of the emergency power switch that have reached the maximum life limit, accomplish the following:

(a) Prior to the accumulation of 3 years time-in-service on the emergency power switch in the overhead switch panel, or within 12 months after the effective date of this AD, whichever occurs later, replace the

emergency power switch with a new switch, in accordance with McDonnell Douglas DC–9 Service Bulletin 24–150, dated March 28, 1994. Thereafter, replace the emergency power switch at intervals not to exceed the accumulation of 3 years time-in-service on the switch.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Los Angeles ACO.

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on December 14, 1994.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–31183 Filed 12–19–94; 8:45 am]

BILLING CODE 4910–13–U

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14 CFR Part 39

[Docket No. 94–CE–17–AD]

Airworthiness Directives; Schempp-Hirth Cirrus and Cirrus VTC Sailplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to adopt a new airworthiness directive (AD) that would apply to Schempp-Hirth Cirrus and Cirrus VTC sailplanes. The proposed action would require modifying the airbrake actuating lever and replacing the airbrake system coupling balls. Reports of the coupling balls on the airbrake actuating lever breaking at the threaded end on several of the above-referenced sailplanes prompted the proposed action. The actions specified by the proposed AD are intended to prevent airbrake system failure caused by the above condition, which, if not detected and corrected, could result in sailplane controllability problems.

DATES: Comments must be received on or before February 28, 1995.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Central Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 94–CE–17–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

Service information that applies to the proposed AD may be obtained from Schempp-Hirth Flugzeubau GmbH, Krebenstr. 25, D–7312 Kirchheim/Teck, Germany. This information may also be examined at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Mr. Herman C. Belderok, Project Officer, Small Airplane Directorate, Airplane Certification Service, FAA, 1201 Walnut, suite 900, Kansas City, Missouri 64106; telephone (816) 426–6932; facsimile (816) 426–2169.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 94–CE–17–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Central Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 94–CE–17–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Discussion

The Luftfahrt-Bundesamt (LBA), which is the airworthiness authority for Germany, recently notified the FAA that an unsafe condition may exist on Schempp-Hirth Cirrus and Cirrus VTC sailplanes. The LBA advises that the coupling balls on the airbrake actuating lever located inside the fuselage have broken at the threaded end on several of the above referenced sailplanes. This condition, if not detected and corrected, could result in sailplane controllability problems.

Schempp-Hirth has issued Technical Note 265–10, dated November 5, 1992, which specifies procedures for modifying the airbrake actuating lever and replacing the airbrake system coupling balls. The LBA classified this technical note as urgent in order to assure the continued airworthiness of these airplanes in Germany.

This airplane model is manufactured in Germany and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the LBA has kept the FAA informed of the situation described above. The FAA has examined the findings of the LBA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop in other Schempp-Hirth Cirrus and Cirrus VTC sailplanes of the same type design, the proposed AD would require modifying the airbrake actuating lever and replacing the airbrake system coupling balls. The proposed actions would be accomplished in accordance with the service information referenced above.

The FAA estimates that 21 sailplanes in the U.S. registry would be affected by the proposed AD, that it would take approximately 1 workhour per sailplane to accomplish the proposed action, and that the average labor rate is approximately $60 an hour. Parts cost approximately $25 per airplane. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $1,785. This figure is based on the assumption that no affected sailplane owner/operator has accomplished the proposed modification and replacement. The FAA believes that several of the 21 affected sailplane owners/operators have already accomplished the proposed action,

which would reduce the FAA's proposed cost impact upon the public.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action has been placed in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new AD to read as follows:

Schempp-Hirth: Docket No. 94–CE–17–AD.

Applicability: Cirrus and Cirrus VTC Sailplanes, certificated in any category.

Compliance: Required upon the accumulation of 500 hours time-in-service (TIS) or within the next 20 hours TIS after the effective date of this AD, whichever occurs later, unless already accomplished.

To prevent airbrake system failure caused by broken coupling balls on the airbrake actuating lever, which, if not detected and corrected, could result in sailplane controllability problems, accomplish the following:

(a) Modify the airbrake actuating lever and replace the airbrake system coupling balls (located on the actuating lever) in accordance with Schempp-Hirth Technical Note No. 265–10, dated November 5, 1992.

(b) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(c) An alternative method of compliance or adjustment of the initial or repetitive compliance times that provides an equivalent level of safety may be approved by the Manager, Small Airplane Directorate, Aircraft Certification Service, FAA, 1201 Walnut, suite 900, Kansas City, Missouri 64106. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Small Airplane Directorate.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Small Airplane Directorate.

(d) All persons affected by this directive may obtain copies of the document referred to herein upon request to Schempp-Hirth Flugzeubau GmbH, Krebenstr. 25, D–7312 Kirchheim/Teck, Germany; or may examine this document at the FAA, Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Issued in Kansas City, Missouri, on December 14, 1994.

Barry D. Clements,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–31184 Filed 12–19–94; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[DEA—126P]

21 CFR Part 1308

Schedules of Controlled Substances; Proposed Placement of 4-Bromo-2,5-dimethoxyphenethylamine Into Schedule I

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice of proposed rulemaking is issued by the Deputy Administrator of the Drug Enforcement Administration (DEA) to place 4-bromo-2,5-dimethoxyphenethylamine (4-bromo-2,5-DMPEA) into Schedule I of the Controlled Substances Act (CSA). This proposed action by the DEA Deputy Administrator is based on data gathered and reviewed by the DEA. If finalized, this proposed action would impose the regulatory control mechanisms and criminal sanctions of Schedule I on the manufacture, distribution, and possession of 4-bromo-2,5-DMPEA.

DATES: Comments must be submitted on or before January 19, 1995.

ADDRESSES: Comments and objections should be submitted to the Deputy Administrator, Drug Enforcement Administration, Washington, D.C. 20537, Attention: DEA Federal Register Representative.

FOR FURTHER INFORMATION CONTACT: Howard McGlain, Jr., Chief, Drug and Chemical Evaluation Section, Drug Enforcement Administration, Washington, D.C. 20537, Telephone: (202) 307–7183.

SUPPLEMENTARY INFORMATION: On January 6, 1994, the Acting Administrator of the DEA published a final rule in the **Federal Register** (59 FR 671) amending § 1308.11(g) of Title 21 of the Code of Federal Regulations to temporarily place 4-bromo-2,5-DMPEA into Schedule I of the CSA pursuant to the temporary scheduling provisions of 21 U.S.C. 811(h). This final rule, which became effective on the date of publication, was based on findings by the Acting Administrator that the temporary scheduling of 4-bromo-2,5-DMPEA was necessary to avoid an imminent hazard to the public safety. Section 201(h)(2) of the CSA (21 U.S.C. 811(h)(2)) requires that the temporary scheduling of a substance expires at the end of one year from the effective date of the order. However, if proceedings to schedule a substance pursuant to 21 U.S.C. 811(a)(1) have been initiated and are pending, the temporary scheduling of a substance may be extended for up to six months. Under this provision, the temporary scheduling of 4-bromo-2,5-DMPEA which would expire on January 6, 1995, may be extended to July 6, 1995. This extension is being ordered by the DEA Deputy Administrator in a separate action.

The DEA has gathered and reviewed the available information regarding the trafficking, actual abuse and the relative potential for abuse for 4-bromo-2,5-DMPEA. The Deputy Administrator has submitted this data to the Assistant Secretary for Health, Department of Health and Human Services. In accordance with 21 U.S.C. 811(b), the Deputy Administrator also requested a scientific and medical evaluation and a scheduling recommendation for 4-bromo-2,5-DMPEA from the Assistant Secretary for Health.

The Food and Drug Administration (FDA) has notified the DEA that there are no exemptions or approvals in effect

under Section 505 of the Federal Food, Drug, and Cosmetic Act for 4-bromo-2,5-DMPEA. A search of the scientific and medical literature revealed no indications of current medical use of 4-bromo-2,5-DMPEA in the United States.

4-bromo-2,5-DMPEA is structurally similar to the Schedule I phenylisopropylamine hallucinogens, 4-bromo-2,5-dimethoxyphenethylamine (DOB). Like DOM and DOB, 4-bromo-2,5-DMPEA displays high affinity for central serotonin receptors and is capable of substituting for DOM or DOB in drug discrimination studies conducted in rats. These data suggest that 4-bromo-2,5-DMPEA is a psychoactive substance capable of producing effects similar, though not identical, to DOM and DOB. Data from human studies indicate that 4-bromo-2,5-DMPEA is orally active at 0.1–0.2 mg/kg producing an intoxication with considerable euphoria and sensory enhancement which lasts for 6 to 8 hours. Higher doses have been reported to produce intense and frightening hallucinations.

The DEA first encountered 4-bromo-2,5-DMPEA in 1979. Since that time, several exhibits of 4-bromo-2,5-DMPEA have been analyzed by Federal and state forensic laboratories in Arizona, California, Colorado, Georgia, Illinois, Iowa, Kentucky, Oregon, Pennsylvania and Texas. Clandestine laboratories producing 4-bromo-2,5-DMPEA were seized in California in 1986 and 1994 and in Arizona in 1992. It has been represented as 3,4-methylenedioxy-methamphetamine (MDMA) and has been sold in sugar cubes as LSD. Recently, 4-bromo-2,5-DMPEA has been promoted as an aphrodisiac and distributed under the product name of Nexus. DEA has seized several thousand dosage units of this product.

The Deputy Administrator, based on the information gathered and reviewed by his staff and after consideration of the factors in 21 U.S.C. 811(c), believes that sufficient data exist to propose and to support that 4-bromo-2,5-DMPEA be placed into Schedule I of the CSA pursuant to 21 U.S.C. 811(a). The specific findings required pursuant to 21 U.S.C. 811 and 812 for a substance to be placed into Schedule I are as follows:

(1) The drug or other substance has a high potential for abuse.

(2) The drug or other substance has no currently accepted medical use in treatment in the United States.

(3) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

Before issuing a final rule in this matter, the DEA Deputy Administrator will take into consideration the scientific and medical evaluation and scheduling recommendation of the Secretary of the Department of Health and Human Services in accordance with 21 U.S.C. 811(b). The Deputy Administrator will also consider relevant comments from other concerned parties.

Interested persons are invited to submit their comments, objections, or requests for a hearing in writing with regard to this proposal. Requests for a hearing should state with particularity the issues concerning which the person desires to be heard. All correspondence regarding this matter should be submitted to the Deputy Administrator, Drug Enforcement Administration, Washington, D.C. 20537, Attention: DEA Federal Register Representative. In the event that comments, objections, or requests for a hearing raise one or more issues which the Deputy Administrator finds warrants a hearing, the Deputy Administrator shall order a public hearing by notice in the **Federal Register**, summarizing the issues to be heard and setting the time for the hearing.

The Deputy Administrator of the DEA hereby certifies that proposed placement of 4-bromo-2,5-DMPEA into Schedule I of the CSA will have no significant impact upon entities whose interests must be considered under the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. This action involves the control of a substance with no currently accepted medical use in the United States.

This proposed rulemaking is not a significant regulatory action for the purposes of Executive Order (E.O.) 12866 of September 30, 1993. Drug scheduling matters are not subject to review by the Office of Management and Budget (OMB) pursuant to provisions of E.O. 12866, Section 3(d)(1).

This action has been analyzed in accordance with the principles and criteria in E.O. 12612, and it has been determined that this proposed rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Narcotics, Prescription drugs.

Under the authority vested in the Attorney General by Section 201(a) of the CSA (21 U.S.C. 811(a)), and delegated to the Administrator of the DEA by the Department of Justice regulations (28 CFR 0.100) and redelegated to the Deputy Administrator pursuant to 28 CFR 0.104, the Deputy Administrator hereby proposes that 21 CFR Part 1308 be amended as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

1. The authority citation for 21 CFR part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871b, unless otherwise noted.

2. Section 1308.11 is amended by redesignating the existing paragraphs (d)(3) through (d)(30) as (d)(4) through (d)(31) and adding a new paragraph (d)(3) to read as follows:

§ 1308.11 Schedule I.

* * * * *

(d) * * *

(3) 4-Bromo-2,5-dimethoxyphenethylamine—7392

Some trade or other names: 2-(4-bromo-2,5-dimethoxyphenyl)-1-aminoethane; alpha-desmethyl DOB; 2C–B, Nexus.

3. Section 1308.11 is further amended by removing paragraph (g)(3).

Dated: December 13, 1994.

Stephen H. Greene,

Deputy Administrator.

[FR Doc. 94–31162 Filed 12–19–94; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 151

46 CFR Part 4

[CGD 91–216]

RIN 2115–AD98

Reporting Marine Casualties

AGENCY: Coast Guard, DOT.

ACTION: Notice of meeting; request for comments.

SUMMARY: The Coast Guard announces an open meeting to hear the public's opinions on how best to implement amendments contained in the Oil Pollution Act of 1990 (OPA 90) that relate to the statutory obligation of certain U.S. and foreign flag vessels to report to the Coast Guard specific "marine casualties." Following the public meeting, the Coast Guard will decide whether to propose changes to existing regulations, to propose new regulations, or to implement the statutory changes through non-regulatory means.

DATES: The meeting will be held January 20, 1995, from 9 a.m. to 12 a.m. Written

comments must be received not later than February 20, 1995.

ADDRESSES: The meeting wll be held in room 2415, Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593–0001. Written comments may be mailed to the Executive Secretary, Marine Safety Council (G–LRA), U.S. Coast Guard, 2100 Second Street SW., Washington, DC 20593–0001, or may be delivered to room 3406 at the same address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments become part of this docket (CGD 91–216) and are available for inspection or copying at room 3406, Coast Guard Headquarters, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Pamela M. Pelcovits, Oil Pollution Act (OPA 90) Staff (G–MS–A), U.S. Coast Guard, 2100 Second Street SW., Washington, DC 20593, telephone (202) 267–6740. This telephone is equipped to record messages on a 24-hour basis.

SUPPLEMENTARY INFORMATION: Current Coast Guard regulations in part 4 of title 46 of the Code of Federal Regulations (CFR) meet the requirements of 46 U.S.C. 6101 for reporting of the following marine casualties: (1) Death of an individual; (2) serious injury to an individual; (3) material loss of property; and (4) material damage affecting the seaworthiness or efficiency of the vessel. Part 4 covers submittal of timely reports and investigation by the Coast Guard.

In addition, under the current regulations, U.S. flag vessels are required to report a marine casualty, to the Coast Guard, regardless of the jurisdiction in which the casualty occurs. However, current Coast Guard regulations do not require foreign flag vessels to report any marine casualty, such as a non-operational discharge of oil, when operating in waters beyond the navigable waters of the United States.

The Oil Pollution Act of 1990 (OPA 90) (Pub. L. 101–380) amends 46 U.S.C. 6101 by adding the term "significant harm to the environment" to the list of reportable marine casualties. The amendment also provides that foreign flag tank vessels operating in waters subject to U.S. jurisdiction beyond the navigable waters of the United States (i.e., within the exclusive economic zone (EEZ)) must report to the extent consistent with generally recognized principles of international law, two categories of marine casualties, those resulting in—(1) material damage affecting the seaworthiness or efficiency of a vessel; and (2) significant harm to the environment.

The Coast Guard is interested in information and opinions concerning how the Coast Guard should respond to the following major issues raised by the amendments to 46 U.S.C. 6101 as set forth in OPA 90.

1. Should regulatory changes be made to define and secure reporting of "significant harm to the environment" casualties in the U.S. navigable waters (foreign flag and U.S. flag vessels)? Do the provisions in 46 CFR 4.03–2 (b) and (c) adequately define incidents which include those having a potential to cause "significant harm to the environment?"

2. How should the Coast Guard define and implement the requirement for reporting of "significant harm to the environment" and "material damage" casualties for foreign flag tank vessels in waters subject to U.S. jurisdiction, including the EEZ, consistent with "generally recognized principles of international law?" Do the provisions of 46 CFR 4.05–1(b) and (c) adequately define incidents which include "material damage?"

3. How should the Coast Guard impose any reporting requirements for foreign tank vessels in the EEZ—on inbound, outbound, or transiting vessels?

4. Should any regulations be located as amendments to the existing regulations under 46 U.S.C. 6101 at 46 CFR part 4 or in the pollution prevention regulations implementing international pollution control agreements (33 CFR part 151)?

Attendance at the January 20, 1995 meeting is open to the public. With advance notice, and as time permits, members of the public may make oral presentations during the meeting. Persons wishing to make oral presentations should call the number listed in **FOR FURTHER INFORMATION CONTACT** no later than the day before the meeting. Written comments may be submitted prior to, during, or after the meeting.

Dated: December 14, 1994.

Norman W. Lemley,

Acting Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 94–31240 Filed 12–19–94; 8:45 am]

BILLING CODE 4910–14–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA82–1–6509; FRL–5125–4]

Monterey Bay Ozone Nonattainment Area; Clean Air Act Section 182(f) Exemption Petition

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The EPA is proposing to approve a petition submitted by the Monterey Bay Unified Air Pollution Control District (MBUAPCD) requesting that the Monterey Bay ozone nonattainment area (Monterey Bay Area) be exempted from the requirement to implement oxides of nitrogen (NO_X) Reasonably Available Control Technology (RACT). In accordance with the requirements of the Clean Air Act, as amended in 1990 (the Act or CAA), the Monterey Bay Area may be exempted from the NO_X reduction requirements where the Administrator determines that the net air quality benefits are greater in the absence of NO_X reductions from the sources concerned or that additional NO_X reductions would not contribute to attainment of the national ambient air quality standard (NAAQS) for ozone in areas outside the ozone transport region (OTR). The MBUAPCD is using three years of ambient monitoring data to demonstrate that additional NO_X reductions in the Monterey Bay Area would not contribute to attainment of the ozone NAAQS. The EPA is proposing to exempt the Monterey Bay Area from the requirement to implement NO_X RACT and the applicable NO_X general and transportation conformity requirements. The EPA is proposing approval of this action under provisions of the CAA regarding plan requirements for nonattainment areas.

DATES: Comments on this proposed action must be received in writing on or before January 19, 1995.

ADDRESSES: Comments may be mailed to: Daniel A. Meer, Chief, Stationary Source Rulemaking (A–5–3), Air & Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

Copies of the exemption petition are available for public inspection at EPA's Region IX office during normal business hours. Copies of the submitted petition may be obtained from the following locations:

Rulemaking Section (A–5–3), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

Monterey Bay Unified Air Pollution Control District, Rule Development Section, 24580 Silver Cloud Court, Monterey, CA 93940.

FOR FURTHER INFORMATION CONTACT: Wendy Colombo, Rulemaking Section (A–5–3), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105 Telephone: (415) 744–1202.

SUPPLEMENTARY INFORMATION:

Applicability

The MBUAPCD submitted the NO_X exemption petition to EPA on April 26, 1994. Final approval of the petition exempts the Monterey Bay Area from implementing the NO_X RACT and the NO_X general and transportation conformity requirements of the CAA.

Background

On November 15, 1990, the Clean Air Act Amendments of 1990 were enacted. Public Law 101–549, 104 Stat. 2399, codified at 42 U.S.C. 7401–7671q. The air quality planning requirements for the reduction of NO_X emissions are set out in section 182(f) of the CAA. On November 25, 1992, EPA published a NPRM (57 FR 55620) entitled, "State Implementation Plans; Nitrogen Oxides Supplement to the General Preamble; Clean Air Act Amendments of 1990 Implementation of Title I; Proposed Rule," (the NO_X Supplement) which describes the requirements of section 182(f). The November 25, 1992, notice should be referred to for further information on the NO_X requirements and is incorporated into this document by reference.

Section 182(f) of the Act requires States to apply the same requirements to major stationary sources of NO_X ("major" as defined in section 302 and section 182 (c), (d), and (e)) as are applied to major stationary sources of volatile organic compounds (VOCs). These requirements are RACT and New Source Review (NSR) for major stationary sources in certain ozone nonattainment areas.

The RACT requirements for major stationary sources of VOCs are contained in section 182(b)(2), while the NSR requirements are contained in section 182(a)(2)(C) and other provisions of section 182. Section 182(b)(2) requires submittal of RACT rules for major stationary sources of VOC emissions (not covered by a pre-enactment control technologies guidelines (CTG) document or a post-enactment CTG document). There were no NO_X CTGs issued before enactment, and EPA has not issued a CTG document for any NO_X sources since enactment of the CAA. Section 182(a)(2)(C) requires submittal of NSR rules incorporating the new preconstruction permitting requirements for new or modified sources. The RACT and NSR rules were required to be submitted by November 15, 1992.

The Monterey Bay Area is classified as a moderate [1] nonattainment area for ozone; therefore this area is subject to the RACT and NSR requirements cited above and the November 15, 1992 deadline. On April 21, 1993 the State of California was issued a finding of nonsubmittal for MBUAPCD for the section 182(f) NO_X RACT requirements.

The MBUAPCD identified two categories for which major stationary sources of NO_X exist and rules are required. These categories apply to NO_X emissions from utility power boilers and minerals processing kilns. The MBUAPCD submitted Rule 431, Emissions from Utility Power Boilers on November 18, 1993, and Rule 435, Control of Nitrogen Oxides from Kilns on September 28, 1994. The rules were found complete by EPA on December 27, 1993 and October 21, 1994, respectively, and EPA stopped the 18-month sanctions clock for the NO_X RACT requirements on October 21, 1994.

On April 26, 1994, the MBUAPCD submitted a petition to the EPA requesting that the Monterey Bay Area be exempted from the requirement to implement the NO_X RACT measures pursuant to section 182(f) of the CAA. On July 21, 1994, the Association of Monterey Bay Area Governments requested that EPA also grant an exemption from the NO_X conformity requirements, also pursuant to section 182(f) of the CAA. The exemption request is based on three years of clean monitoring data from 1991 through 1993.

Criteria for Evaluation of Section 182(f) Exemption Requests

The NO_X RACT petition was submitted in accordance with the EPA guidance document entitled, *Guideline for Determining the Applicability of Nitrogen Oxides Requirements Under Section 182(f)* issued on December 16, 1993 (exemption guidance). In addition to the exemption guidance, EPA's NO_X exemption policy is contained in two memoranda [2] providing that under section 182(f)(1)(A), an exemption from the NO_X requirements may be granted for nonattainment areas outside the OTR if EPA determines that additional reductions of NO_X would not contribute to attainment of the NAAQS for those areas. In cases where a nonattainment area is demonstrating attainment with three consecutive years of air quality monitoring data, without having implemented the section 182(f) NO_X provisions, it is clear that the contribute to attainment test is met, although additional reductions of NO_X might contribute to maintenance.

Thus, a State may submit a petition for a section 182(f) exemption based on air quality monitoring data. The EPA's approval of the exemption, if warranted, would be granted on a contingent basis (i.e., the exemption would last for only as long as the area's monitoring data continue to demonstrate attainment).

EPA's exemption guidance provides that, pursuant to the requirements of section 110(a)(2), States should consider evidence, such as photochemical grid modeling, which shows that granting the NO_X exemption would interfere with attainment or maintenance in downwind areas. The MBUAPCD has not yet implemented NO_X RACT, and at the time of this notice, EPA has not received evidence from the State or any downwind areas that shows that granting the NO_X exemption for the Monterey Bay Area would interfere with attainment or maintenance in downwind areas.

EPA's conformity rules [3,4] also reference the section 182(f) exemption process as a means for exempting affected areas from NO_X conformity requirements.[5] Therefore, ozone

[1] The Monterey Bay Area was redesignated nonattainment and was classified by operation of law pursuant to sections 107(d) and 181(a) upon the date of enactment of the CAA. See 55 FR 56694 (November 6, 1991).

[2] Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation, dated September 17, 1993, entitled "State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) on or after November 15, 1992", and a subsequent revision to this memorandum from John S. Seitz, Director of EPA's Office of Air Quality Planning and Standards, issued on May 27, 1994, entitled, "Section 182(f) Nitrogen Oxides (NO_X) Exemptions—Revised Process and Criteria"

[3] "Criteria and Procedures for Determining Conformity to State or Federal Implementation Plans or Transportation Plans, Programs, and Projects Funded or Approved under Title 23 U.S.C. of the Federal Transit Act", November 24, 1993 (58 FR 62188).

[4] "Determining Conformity of General Federal Actions to State or Federal Implementation Plans; Final Rule", November 30, 1993 (58 FR 63214).

[5] The section 182(f) exemption is explicitly referred to and is described in similar language in

nonattainment areas that are granted areawide section 182(f) exemptions will also be exempt from the NO_X conformity requirements.

EPA Evaluation

Attainment of the ozone NAAQS is determined based on the expected number of exceedances in a calendar year. Ozone attainment must rely on three complete, consecutive calendar years of quality-assured air quality monitoring data, collected in accordance with 40 CFR parts 50 and 58, including Appendices. The method for determining attainment of the ozone NAAQS is contained in 40 CFR part 50, § 50.9 and appendix H to that Section.[6] appendix H of 40 CFR part 50 explains how to determine when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 ppm ozone is equal to or less than 1. This section also discusses how to account for incomplete data sets. The EPA "Guideline for the Interpretation of Ozone Air Quality Standards" elaborates on Appendix H. In general, expected exceedances are calculated by averaging actual exceedances at each monitoring site over a three year period. An area is in attainment of the standard if this average results in expected exceedances for each monitoring site of 1.0 or less per calendar year.

At the monitoring sites used to evaluate the attainment status of Monterey County, there has been only one exceedance of the ozone NAAQS. This exceedance was monitored in 1991 at the Pinnacles site. There have been no violations of the ozone NAAQS during the 1991–1993 period. Based on ambient air monitoring data for the years 1991–1993 (including data from the Pinnacles site which helped form the basis for the Monterey County nonattainment designation of 1990), it is clear that additional reductions of NO_X would not contribute to attainment of the ozone standard. For further information regarding the monitoring sites data, please see attachments 1 and 2 to the Technical Support Document, dated October 1994.

The EPA is proposing to approve the Monterey Bay Area section 182(f) NO_X RACT exemption request based upon the evidence provided by the MBUAPCD and the MBUAPCD's compliance with the requirements outlined in the EPA guidance. Continuation of the section 182(f) exemption, once granted, is contingent upon the continued monitoring and continued attainment and maintenance of the ozone NAAQS in the affected area in accordance with 40 CFR part 58. If a violation of the ozone NAAQS is monitored in the Monterey Bay Area (consistent with the requirements contained in 40 CFR part 58 and recorded in AIRS), EPA will provide notice in the **Federal Register**. A determination that the NO_X exemption no longer applies would mean that the NO_X general and transportation conformity provisions would again be applicable (see 58 FR 63214; 58 FR 62188; 59 FR 31238) to the affected area. The NO_X RACT requirements would also re-apply, although some reasonable time period after the EPA determination may be provided for sources to meet the RACT limits. EPA expects this time period to be as expeditious as practicable, taking into account any current and applicable State or Federal regulations. If a nonattainment area is redesignated to attainment of the ozone NAAQS, NO_X RACT is to be implemented as provided for in the EPA-approved maintenance plan.

This action proposes to exempt the Monterey Bay ozone nonattainment area from implementing the NO_X RACT and the applicable general and transportation conformity requirements for NO_X. The final action on this proposal serves as a final determination that the finding of nonsubmittal for the NO_X RACT requirements has been corrected, and that on the effective date of the final action on this proposal, the 24-month Federal Implementation Plan (FIP) clock is stopped. The 18-month sanctions clock was stopped on October 21, 1994 when EPA made a completeness determination for the second of two rules submitted to meet the NO_X RACT requirements. Upon EPA's final approval of the NO_X exemption, MBUAPCD will recind the two NO_X RACT rules previously submitted to meet the CAA requirements.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future implementation plan. Each request for a section 182(f) exemption shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Regulatory Process

Under the Regulatory Flexibility Act, 5 U.S.C. 600 et. seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises and government entities with jurisdiction over population of less than 50,000.

This exemption action does not create any new requirements, but allows suspension of the indicated requirements for the life of the exemption. Therefore, because the proposed approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-state relationship under the CAA, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. E.P.A.*, 427 U.S. 246, 256–66 (S. Ct. 1976); 42 U.S.C. 7410 (a)(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 19, 1995. Filing a petition for reconsideration by the Administrator of this rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such a rule. This action may not be challenged in later proceedings to enforce its requirements. Section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

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40 CFR 51.394(b)(3)(i), the "Applicability" section of the transportation conformity rule, and in the preamble (see 58 FR 62197, November 24, 1993). The language is repeated in the provisions of the rule regarding the motor vehicle emissions budget test [section 51.428(a)(1)(ii)] and the "build/no-build" test [sections 51.436(e), 51.438(e)], although section 182(f) of the Act is not specifically mentioned. In the general conformity rule, the section 182(f) NO_X exemption is referred to in section 51.852 (definition of "Precursors of a criteria pollutant") and is discussed in the preamble (see 58 FR 63240, November 30, 1993).

[6] See EPA Guidance "Procedures for Processing Requests to Redesignate Areas to Attainment," John Calcagni, Director, Air Quality Management Division, September 4, 1992, p. 2.

Dated: December 9, 1994.

Felicia Marcus,

Regional Administrator.

Part 52, chapter I, title 40 of the Code of Federal Regulations is proposed to be amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart F—California

2. Subpart F is proposed to be amended by adding new § 52.235 to read as follows:

§ 52.235 Control strategy for ozone: Oxides of nitrogen.

EPA is approving a Section 182(f) exemption request submitted by the Monterey Bay Unified Air Pollution Control District on April 21, 1994. The approval exempts the Monterey Bay ozone nonattainment area from the oxides of nitrogen (NO_X) control requirements contained in Section 182(f) of the Clean Air Act. This approval exempts the area from implementing reasonably available control technology (RACT) for major stationary sources of NO_X and the NO_X related requirements of general and transportation conformity regulations. If a violation of the ozone NAAQS occurs in the Monterey Bay area, the exemption shall no longer apply.

[FR Doc. 94–31230 Filed 12–19–94; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 59, No. 243
Tuesday, December 20, 1994

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

Grain Inspection, Packers, and Stockyards Administration

Designation of Minnesota

AGENCY: Grain Inspection, Packers and Stockyards Administration (GIPSA).

ACTION: Notice.

SUMMARY: GIPSA announces the designation of Minnesota Department of Agriculture to provide official inspection and Class X and Class Y weighing services under the United States Grain Standards Act, as amended (Act).

EFFECTIVE DATE: January 1, 1995.

ADDRESSES: Janet M. Hart, Chief, Review Branch, Compliance Division, GIPSA, USDA, Room 1647 South Building, P.O. Box 96454, Washington, DC 20090–6454.

FOR FURTHER INFORMATION CONTACT: Janet M. Hart, telephone 202–720–8525.

SUPPLEMENTARY INFORMATION: THIS ACTION HAS BEEN REVIEWED AND DETERMINED NOT TO BE A RULE OR REGULATION AS DEFINED IN EXECUTIVE ORDER 12866 AND DEPARTMENTAL REGULATION 1512–1; THEREFORE, THE EXECUTIVE ORDER AND DEPARTMENTAL REGULATION DO NOT APPLY TO THIS ACTION.

In the July 1, 1994, **Federal Register** (59 FR 33950), GIPSA announced that the designation of Minnesota would expire on December 31, 1994, and asked persons interested in providing official services in the geographic area assigned to Minnesota to submit an application for designation. Applications were due by August 1, 1994. There were five applicants for the Minnesota area: Minnesota applied for the entire area currently assigned to them; Southern Minnesota Grain Inspection, Inc., applied for all or part of the Minnesota area; Mid-Iowa Grain Inspection, Inc., applied for the Minnesota counties of Fillmore, Houston, Olmsted, Winona, Wabasha, Goodhue, and Dakota, or any area inclusive of the city of Winona; D. R. Schaal Agency applied for all or any part of the Minnesota counties of Faribault, Freeborn, and Mower; and Sioux City Inspection and Weighing Service Company applied for the Minnesota counties of Murray, Nobles, Pipestone, and Rock.

GIPSA requested comments on the applicants in the September 1, 1994, **Federal Register** (59 FR 45295). Comments were due by September 30, 1994. GIPSA received 51 comments by the deadline. One comment was about two of the applicants. There were no comments on Mid-Iowa. There were 14 comments on Minnesota. Two grain firms currently served by Minnesota and one official grain inspection agency supported Minnesota. There also were 11 comments from various State government officials and groups representing State employees, all supporting Minnesota's redesignation. There were 3 comments on Schaal. Three grain firms, in the area Schaal applied for and currently served by Minnesota, submitted comments supporting Schaal. There were no comments on Sioux City. There were 29 comments on Southern Minnesota. Twenty-three grain firms in the area currently served by Minnesota and 6 non-grain businesses supported Southern Minnesota. Four trade organizations and 2 grain firms also submitted comments with no specific recommendations. These groups urge FGIS to carefully consider all options, with a special view towards the quality and cost of service, and ability to provide service in the State of Minnesota.

GIPSA evaluated all available information regarding the designation criteria in Section 7(f)(1)(A) of the Act; and according to Section 7(f)(1)(B), determined that Minnesota is better able to provide official services in the geographic area for which they applied.

Effective January 1, 1995, and ending December 31, 1997, Minnesota is designated to provide official inspection and Class X and Class Y weighing services in the geographic area specified in the July 1, 1994, **Federal Register**.

Interested persons may obtain official services by contacting Minnesota at 612–341–7190.

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

Dated: December 13, 1994.

Janet M. Hart,

Acting Director, Compliance Division.

[FR Doc. 94–31130 Filed 12–19–94; 8:45 am]

BILLING CODE 3410–EN–F

DEPARTMENT OF COMMERCE

Agency Form Under Review by the Office of Management and Budget

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of the Census.

Title: Survey of Building or Zoning Permits Issued and Local Public Construction.

Form Number(s): C–404, C–404(TDR).

Agency Approval Number: 0607–0094.

Type of Request: Extension of the expiration date of a currently approved collection without any change in the substance or in the method of collection.

Burden: 31,508 hours.

Number of Respondents: 19,200.

Avg Hours Per Response: 16 minutes.

Needs and Uses: The Census Bureau conducts the Survey of Building or Zoning Permits Issued and Local Public Construction to gather information from state and local building permit officials on the number and value of new building permits issued. The Census Bureau uses this information to produce monthly estimates and annual totals of residential and nonresidential construction and demolitions authorized by building permits. This survey provides policymakers, planners, businesspersons, and others with detailed geographic data for formulating economic policy, controlling growth and planning for local services, and developing production and marketing plans. This survey also provides widely used measures of construction activity, including the key economic indicator, Housing Units Authorized by Building Permits.

Affected Public: State or local governments.

Frequency: Monthly and annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Maria Gonzalez, (202) 395–7313.

Copies of the above information collection proposal can be obtained by calling or writing Gerald Taché, DOC Forms Clearance Officer, (202) 482–3271, 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 Maria Gonzalez, OMB Desk Officer, room 10201, New Executive Office Building, Washington, DC 20503.

Dated: December 13, 1994.

Gerald Taché,

Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 94–31194 Filed 12–19–94; 8:45 am]

BILLING CODE 3510–07–F

National Institute of Standards and Technology

Announcment of Meeting of National Conference on Weights and Measures

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given that the Interim Meeting of the National Conference on Weights and Measures will be held January 9 through 12, 1995, at the Westin South Coast Plaza Hotel, Costa Mesa, CA. The meeting is open to the public.

The National Conference on Weights and Measures is an organization of weights and measures enforcement officials of the States, counties, and cities of the United States, and private sector representatives. The interim of the conference, as well as the annual meeting to be held next July (a notice will be published in the Federal Register prior to such meeting), brings together enforcement officials, other government officials, and representatives of business, industry, trade associations, and consumer organizations to discuss subjects that relate to the field of weights and measures technology and administration.

The National Institute of Standards and Technology acts as a sponsor of the National Conference on Weights and Measures in order to promote uniformity among the States in the complex of laws, regulations, methods, and testing equipment that comprises regulatory control by the States of commercial weighing and measuring.

DATES: The meeting will be held January 8–12, 1995.

LOCATION OF MEETING: Westin South Coast Plaza Hotel, Costa Mesa, California.

FOR FURTHER INFORMATION CONTACT: Dr. Carroll Brickenkamp, Executive Secretary, National Conference on Weights and Measures, P.O. Box 4025, Gaithersburg, Maryland 20885. Telephone (301) 975–4005.

Dated: December 14, 1994.

Samuel Kramer,

Associate Director.

[FR Doc. 94–31236 Filed 12–19–94; 8:45 am]

BILLING CODE 3510–13–M

Prospective Grant of Exclusive Patent

AGENCY: National Institute of Standards and Technology Commerce.

ACTION: Notice of Prospective Grant of Exclusive Patent License.

SUMMARY: This is a notice in accordance with 35 USC 209(c)(1) and 37 CFR 404.7(a)(1)(i) that the National Institute of Standards and Technology ("NIST"), U.S. Department of commerce, is contemplating the grant of a field of use exclusive license in the United States to practice the invention embodied in U.S. Patent Application 08/189,709, titled, "A Method and Composition For Promoting Improved Adhesion To Substrates" to the American Dental Association Health Foundation, having a place of business in Chicago, Illinois. This invention was co-developed by the employees of the American Dental Association Health Foundation and NIST. The inventors' respective patent rights in this invention have been assigned to the American Dental Association Health Foundation and the United States of America.

FOR FURTHER INFORMATION CONTACT: Bruce E. Mattson, National Institute of Standards and Technology, Technology Development and Small Business Program, Building 221, Room B–256, Gaithersburg, MD 20899.

SUPPLEMENTARY INFORMATION: The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7 The prospective exclusive license may be granted unless, within sixty days from the date of this published Notice, NIST receives written evidence and argument which establish that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

U.S. Patent Application 08/189,709 is directed to methods and compostions for the improvement of adhesive bonding of acrylic resins to substrates found in industrial, natural and dental environments, such as those involved in dental restorations and for protective sealants.

NIST may enter into a Cooperative Research and Development Agreement ("CRADA") to perform further research on the invention for purposes of commercialization. The CRADA may be conducted by NIST without any additional charge to any party that licenses the patent. NIST may grant the licensee an option to negotiate for royalty-free exclusive licenses to any jointly owned inventions which arise from the CRADA as well as an option to negotiate for exclusive royalty-bearing licenses for NIST employee inventions which arise from the CRADA.

The availability of the invention for licensing was published in the **Federal Register**, Vol. 59, No. 218 (November 14, 1994). A copy of the patent application may be obtained from NIST at the foregoing address.

Dated: December 14, 1994.

Samuel Kramer,

Associate Director.

[FR Doc. 94–31237 Filed 12–19–94; 8:45 am]

BILLING CODE 3510–13–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Establishment, Amendment and Adjustment of Import Limits, Amendment of Restraint Periods and Visa Requirements for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Pakistan

December 15, 1994.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing, amending and adjusting limits and amending restraint periods and visa requirements.

EFFECTIVE DATE: December 20, 1994.

FOR FURTHER INFORMATION CONTACT: Anne Novak, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927–6714. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The Governments of the United States and Pakistan agreed to amend further

their Bilateral Cotton, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textile Agreement, effected by exchange of notes dated May 20, 1987 and June 11, 1987, as amended and extended. The two governments agreed, among other things, to establish new specific limits for merged Categories 317/617, 342/642 and 625/626/627/628/629, merge Categories 369–F and 369–P at the sum of the 1994 specific limits, and increase the base level for Categories 347/348 and the 1994 Designated Consultation Levels (DCLs) for Category 666 and the Aggregate. As a result, the Aggregate DCL and the limits for Categories 339 and 666, which are currently filled, will re-open.

In the letter published below, the Chairman of CITA directs the Commissioner of Customs to establish and amend limits pursuant to the bilateral agreement, as amended. In addition, the current limits for certain categories are being adjusted, variously, for carryover, swing and special shift. The existing visa requirements are being amended to include coverage of the newly merged categories.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 58 FR 62645, published on November 29, 1993). Also see 48 FR 25257, published on June 6, 1983; 59 FR 5756, published on February 8, 1994; 59 FR 26212, published on May 19, 1994; 59 FR 36741, published on July 19, 1994; 59 FR 48421, published on September 21, 1994; and 59 FR 48861, published on September 23, 1994.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 15, 1994.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directives issued to you on February 1, 1994, May 13, 1994, July 13, 1994, September 14, 1994 and September 16, 1994, by the Chairman, Committee for the Implementation of Textile Agreements. Those directives concern imports of certain cotton and man-made fiber textile products, produced or manufactured in Pakistan and exported during the periods April 29, 1994 through July 27, 1994 and July 28, 1994 through December 31, 1994, in the case of Categories 342/642; June 29, 1994 through September 26, 1994 and September 27, 1994 through December 31, 1994, in the case of Category 628; and January 1, 1994 through December 31, 1994, in the case of the remaining categories.

Effective on December 20, 1994, you are directed, pursuant to the Bilateral Cotton, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textile Agreement, effected by exchange of notes dated May 20, 1987 and June 11, 1987, as amended and extended, between the Governments of the United States and Pakistan to combine the April 29, 1994 through July 27, 1994 and July 28, 1994 through December 31, 1994 restraint periods for Categories 342/642. The limit for Categories 342/642 shall be increased to a level of 172,562 dozen [1].

Import charges made to the 1994 Aggregate Designated Consultation Level (DCL) for Category 342 for the period January 1, 1994 through April 28, 1994 shall remain in the Aggregate DCL. For the import period April 29, 1994 through May 19, 1994, you are directed to deduct 568 dozen from the charges made to the Aggregate DCL for Category 342 and charge this same amount to Category 342 for the April 29, 1994 through December 31, 1994 restraint period. For the import period July 28, 1994 through September 21, 1994, you are directed to charge 151 dozen to Category 642 for the April 29, 1994 through December 31, 1994 restraint period.

Further, you are directed to remove Category 317, along with its charges, from the Aggregate DCL coverage. The June 29, 1994 through September 26, 1994 and September 27, 1994 through December 31, 1994 restraint periods for Category 628 shall be combined. You are directed to establish merged Categories 317/617 and 369–F/369–P, for the restraint period January 1, 1994 through December 31, 1994; and Categories 625/626/627/628/629, for the restraint period June 29, 1994 through December 31, 1994, at the levels listed below. Import charges already made to Categories 317, 617, 369–F, 369–P and 628 shall be retained and applied to the newly established merged categories.

Category	New Level [a]
317/617	23,000,000 square meters.
369–F/369–P [b]	1,854,684 kilograms.
625/626/627/628/629.	29,556,164 square meters of which not more than 14,778,082 square meters shall be in Category 625, not more than 14,778,082 square meters shall be in Category 626, not more than 14,778,082 square meters shall be in Category 627, not more than 3,057,534 square meters shall be in Category 628, and not more than 14,778,082 square meters shall be in Category 629.

[a] The limits have not been adjusted to account for any imports exported after December 31, 1993 (Categories 317/617 and 369–F/369–P) and June 28, 1994 (Categories 625/626/627/628/629).

[b] Category 369–F: only HTS number 6302.91.0045; Category 369–P: only HTS numbers 6302.60.0010 and 6302.91.0005.

You are directed to charge the following amounts to the categories listed below for goods imported during the periods June 29, 1994 through September 30, 1994 (Categories 625, 626, 627 and 629) and June 29 through July 19, 1994 (Category 628):

Category	Amount to be charged
625	2,603,503 square meters.
626	3,284,865 square meters.
627	215,125 square meters.
628	–0–
629	6,564,996 square meters.

Textile products in Categories 625, 626, 627 and 629 which have been exported to the United States prior to June 29, 1994 shall not be subject to this directive.

Textile products in Categories 625, 626, 627 and 629 which have been released from the custody of the U.S. Customs Service under the provisions of 19 U.S.C. 1448(b) or 1484(a)(1) prior to the effective date of this directive shall not be denied entry under this directive.

Also, you are directed to adjust the limits for the following categories, pursuant to the current bilateral agreement between the Governments of the United States and Pakistan.

Category	Adjusted twelve-month limit [a]
Specific limits:	
237	147,670 dozen.
239	633,096 kilograms.
314	4,750,800 square meters.

[1] The limit has not been adjusted to account for any imports exported after April 28, 1994

Category	Adjusted twelve-month limit[a]
315	61,368,894 square meters.
331/631	2,050,911 dozen pairs.
334/634	206,253 dozen.
335/635	318,518 dozen.
336/636	405,295 dozen.
338	4,648,373 dozen.
339	1,186,977 dozen.
340/640	501,454 dozen.
341/641	551,269 dozen.
347/348	723,043 dozen.
351/651	253,274 dozen.
352/652	635,420 dozen.
359–C/659–C[b]	502,307 kilograms.
360	2,138,542 numbers.
361	2,780,910 numbers.
363	38,392,736 numbers.
369–R[c]	8,575,301 kilograms.
613/614	16,848,204 square meters.
615	20,021,588 square meters.
638/639	40,143 dozen.
647/648	555,672 dozen.
Aggregate Designated Consultation Level (DCL):	
300, 301, 326, 330, 332, 333, 345, 349, 350, 353, 354, 359–O[d], 362 and 369–O[e], as a group.	90,000,000 square meters equivalent.
Other DCL:	
666	1,800,000 kilograms.

[a] The limits have not been adjusted to account for any imports exported after December 31, 1993.

[b] Category 359–C: only HTS numbers 6103.42.2025, 6103.49.3034, 6104.62.1020, 6104.69.3010, 6114.20.0048, 6114.20.0052, 6203.42.2010, 6203.42.2090, 6204.62.2010, 6211.32.0010, 6211.32.0025 and 6211.42.0010; Category 659–C: only HTS numbers 6103.23.0055, 6103.43.2020, 6103.43.2025, 6103.49.2000, 6103.49.3038, 6104.63.1020, 6104.63.1030, 6104.69.1000, 6104.69.3014, 6114.30.3044, 6114.30.3054, 6203.43.2010, 6203.43.2090, 6203.49.1010, 6203.49.1090, 6204.63.1510, 6204.69.1010, 6210.10.4015, 6211.33.0010, 6211.33.0017 and 6211.43.0010.

[c] Category 369–R: only HTS number 6307.10.2020.

[d] Category 359–O: all HTS numbers except 6103.42.2025, 6103.49.3034, 6104.62.1020, 6104.69.3010, 6114.20.0048, 6114.20.0052, 6203.42.2010, 6203.42.2090, 6204.62.2010, 6211.32.0010, 6211.32.0025 and 6211.42.0010 (Category 359–C).

[e] Category 369–O: all HTS numbers except 6302.91.0045 (Category 369–F), 6302.60.0010, 6302.91.0005 (Category 369–P), 6307.10.2020 (Category 369–R) and 6307.10.2005 (Category 369–S).

For visa purposes, you are directed, effective on December 20, 1994, to amend further the directive dated May 27, 1983. Categories 642 and 842 shall no longer be accepted as merged Categories 642/842. You are directed to include coverage of merged Categories 342/642, 317/617, 369–F/369–P and 625/626/627/628/629 for goods produced or manufactured in Pakistan and exported from Pakistan on and after December 20, 1994. Merchandise in merged Categories 342/642, 317/617, 369–F/369–P and 625/626/627/628/629 may be accompanied by either the appropriate merged category visa or the correct category or part-category visa corresponding to the actual shipment.

Shipments entered or withdrawn from warehouse according to this directive which are not accompanied by an appropriate export visa shall be denied entry and a new visa must be obtained.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 94–31292 Filed 12–16–94; 10:53 am]

BILLING CODE 3510–DR–F

Announcement of Import Restraint Limits for Certain Cotton and Wool Textile Products Produced or Manufactured in Uruguay

December 14, 1994.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing limits for the new agreement year.

EFFECTIVE DATE: December 21, 1994.

FOR FURTHER INFORMATION CONTACT: Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927–5850. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The Governments of the United States and Uruguay have agreed to extend their Bilateral Cotton and Wool Textile Agreement, effected by exchange of notes dated December 30, 1983 and January 23, 1984, for two consecutive one-year periods beginning on July 1, 1994 and extending through June 30, 1996.

In the letter published below, the Chairman of CITA directs the Commissioner of Customs to establish limits for the period beginning on July 1, 1994 and extending through June 30, 1995.

These limits are subject to revision pursuant to the Uruguay Round Agreement on Textiles and Clothing (URATC). On the date that both the United States and Uruguay are members of the World Trade Organization, the restraint limits will be modified in accordance with the URATC.

A copy of the current bilateral agreement is available from the Textiles Division, Bureau of Economic and Business Affairs, U.S. Department of State (202) 647–1683.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 58 FR 62645, published on November 29, 1993). Information regarding the 1995 CORRELATION will be published in the **Federal Register** at a later date.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 14, 1994.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: Under the terms of section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), and the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as further extended on December 9, 1992, pursuant to the Bilateral Cotton and Wool Textile Agreement, effected by exchange of notes dated December 30, 1983 and January 23, 1984, as amended and extended, between the Governments of the United States and Uruguay; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended, you are directed to prohibit, effective on December 21, 1994, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton and wool textile products in the following categories, produced or manufactured in Uruguay and exported during the twelve-month period beginning on July 1, 1994 and extending through June 30, 1995, in excess of the following levels of restraint:

Category	Twelve-month restraint limit
334	117,029 dozen.

Category	Twelve-month restraint limit
335	100,744 dozen.
410	2,768,150 square meters of which not more than 1,581,801 square meters shall be in Category 410–A [1] and not more than 2,548,456 square meters shall be in Category 410–B [2]
433	16,529 dozen.
434	24,659 dozen.
435	49,801 dozen.
442	35,229 dozen.

[1] Category 410–A: only HTS numbers 5111.11.3000, 5111 11.7030, 5111.11.7060, 5111.19.2000, 5111.19.6020, 5111.19.6040, 5111.19.6060, 5111.19.6080, 5111.20.9000, 5111.30.9000, 5111.90.3000, 5111.90.9000, 5212.11.1010, 5212.12.1010, 5212.13.1010, 5212.14.1010, 5212.15.1010, 5212.21.1010, 5212.22.1010, 5212.23.1010, 5212.24.1010, 5212.25.1010, 5311.00.2000, 5407.91.0510, 5407.92.0510, 5407.93.0510, 5407.94.0510, 5408.31.0510, 5408.32.0510, 5408.33.0510, 5408.34.0510, 5515.13.0510, 5515.22.0510, 5515.92.0510, 5516.31.0510, 5516.32.0510, 5516.33.0510, 5516.34.0510 and 6301.20.0020.

[2] Category 410–B: only HTS numbers 5007.10.6030, 5007.90.6030, 5112.11.2030, 5112.11.2060, 5112.19.9010, 5112.19.9020, 5112.19.9030, 5112.19.9040, 5112.19.9050, 5112.19.9060, 5112.20.3000, 5112.30.3000, 5112.90.3000, 5112.90.9010, 5112.90.9090, 5212.11.1020, 5212.12.1020, 5212.13.1020, 5212.14.1020, 5212.15.1020, 5212.21.1020, 5212.22.1020, 5212.23.1020, 5212.24.1020, 5212.25.1020, 5309.21.2000, 5309.29.2000, 5407.91.0520, 5407.92.0520, 5407.93.0520, 5407.94.0520, 5408.31.0520, 5408.32.0520, 5408.33.0520, 5408.34.0520, 5515.13.0520, 5515.22.0520, 5515.92.0520, 5516.31.0520, 5516.32.0520, 5516.33.0520 and 5516.34.0520.

Imports charged to these category limits for the period July 1, 1993 through June 30, 1994 shall be charged against those levels of restraint to the extent of any unfilled balances. In the event the limits established for that period have been exhausted by previous entries, such goods shall be subject to the levels set forth in this directive.

The limits set forth above are subject to adjustment in the future pursuant to the provisions of the current bilateral agreement between the Governments of the United States and Uruguay

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 94–31222 Filed 12–19–94; 8:45 am]

BILLING CODE 3510–DR–F

The Correlation: Textile and Apparel Categories With the Harmonized Tariff Schedule of the United States for 1995

December 14, 1994.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Notice.

FOR FURTHER INFORMATION CONTACT: Lori E. Goldberg, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–3400.

SUPPLEMENTARY INFORMATION:

The Committee for the Implementation of Textile Agreements (CITA) announces that the 1995 Correlation, based on the Harmonized Tariff Schedule of the United States, will be available in late January 1995.

The delay in publication of the 1995 Correlation is due to extensive changes in the Harmonized Tariff Schedule as a result of the recent passage of the World Trade Organization (WTO) on Textiles and Clothing.

Copies of the Correlation may be purchased from the U.S. Department of Commerce, Office of Textiles and Apparel, 14th and Constitution Avenue, NW., room H3100, Washington, DC 20230, ATTN: Correlation, at a cost of $30 per copy. Checks or money orders should be made payable to the U.S. Department of Commerce.

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 94–31221 Filed 12–19–94; 8:45 am]

BILLING CODE 3510–DR–F

DEPARTMENT OF DEFENSE

Public Information Collection Requirement Submitted to the Office of Management and Budget (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 OMB Control Number: Application and Agreement for Establishment of a Junior Reserve Officer's Training Corps Unit; DA Form 3126; OMB Control Number 0702–0021

Type of Request: Reinstatement

Number of Respondents: 65

Responses Per Respondent: 1

Annual Responses: 65

Average Burden per Response: 1 hour

Annual Burden Hours: 65

Needs and Uses: Educational institutions desiring to host a Junior ROTC unit may apply by using DA Form 3126. This form documents the agreement, and becomes a contract when signed by both the institution and U.S. Government representatives

Affected Public: States or local governments; non-profit institutions

Frequency: On occasion

Respondent's Obligation: Required to obtain or retain a benefit

OMB Desk Officer: Mr. Edward C. Springer. Written comments and recommendations on the proposed information collection should be sent to Mr. Springer at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. William Pearce. Written requests for copies of the information collection proposal should be sent to Mr. Pearce, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: December 15, 1994.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94–31216 Filed 12–19–94; 8:45 am]

BILLING CODE 5000–04–M

Department of the Army

Army Science Board; Notice of Open Meeting

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (P.L. 92–463), announcement is made of the following Committee Meeting:

Name of Committee: Army Science Board (ASB).

Date of meeting: 5–6 January 1995.

Time of Meeting: 1030–1730 hours, 5 January 1995; 0830–1500 hours, 6 January 1995.

Place: BDM Federal, 4001 North Fairfax Drive, Suite 750, Arlington, VA 22203.

Agenda

The Army Science Board Ad Hoc Subgroup on fire suppression alternatives for armored combat vehicles will meet to review and discuss the study plan for the conduct of the independent assessment. These meetings will

be open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee. The ASB Administrative Officer, Sally Warner, may be contacted for further information at (703) 695–3039/7046.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 94–31224 Filed 12–19–94; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF EDUCATION

Privacy Act of 1974; Amendments to a Notice of a New System of Records for the National Student Loan Data System

AGENCY: Department of Education.

ACTION: Notice of changes to a system of records.

SUMMARY: On June 29, 1994, the Department of Education published a notice of a new system of records for the National Student Loan Data System (NSLDS). The Department solicited comments on the routine uses for the system and submitted a report of the system to the Office of Management and Budget (OMB) and Congress. The Department received comments from one commenter and some suggestions from OMB regarding improvements to the notice. Several changes have been made to the system as a result of this input and are discussed in the supplementary information portion of this notice.

DATES: This amended system of records becomes effective December 20, 1994.

FOR FURTHER INFORMATION CONTACT: Susan Pentecost; Branch Chief, National Student Loan Data System; U. S. Department of Education; 600 Independence Avenue, SW.; GSA Regional Office Building 3, Room 4640; Washington DC 20202–5175; (202) 708–8125. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday

SUPPLEMENTARY INFORMATION: The Department published in the **Federal Register** on June 29, 1994 (59 FR 33491) a notice of a new system of records for the National Student Loan Data System (18–40–0039). The Department received comments from one commenter and some suggestions for improvement to the system notice from OMB. As a result, several changes have been made to the system notice. Those changes are discussed below

Regarding the categories of individuals clause, it was noted that the phrase "borrowers who have applied for loans under the FFEL (Federal Family Education Loan) Program will be tracked on this new system . . ." implies that the system will maintain data on all students who have applied for aid under Title IV of the Higher Education Act of 1965 (Title IV, HEA) not just those who have received aid. The Department did not intend to cover under this system applicants who may apply for but do not receive aid and this clause has been modified to refer to individuals who applied for and received certain Title IV loans. In addition, because the system notice only covers individuals, references to persons who have died are removed, because persons who have died are not considered individuals under the Privacy Act. However, as a practical matter, the Department will maintain information about these persons as necessary to manage the Title IV program.

Regarding the categories of records clause, the entry "an applicant's demographic background" has been removed because it was only descriptive of the categories of information that followed.

Regarding the routine uses for the system, the following paragraphs discuss the changes the Department is making to the system and issues raised by the comments.

Routine use (a): Program purposes. Paragraph (2) has been removed and the entities for which each disclosure is appropriate have been included with the program purpose disclosures. A number of program purpose routine uses were dropped from the notice because the Department does not disclose individually identifiable information in connection with certain purposes that were included in the original Privacy Act notice. The program purposes have been broken out into a series of eight (8) separate routine uses. Also, the program purpose routine uses are recast to focus on the purpose of each disclosure rather than the end results of the disclosure. Disclosure to OMB under the Credit Reform Act (CRA) is removed from the program purpose routine uses and stated as a separate routine use. The General Accounting Office (GAO) is removed as a recipient under the program purpose routine uses because it can get records under 5 U.S.C. 552a(b)(10) in the course of performing its duties. Finally, consistent with the preamble of the initial notice of this system and as stated in the purposes of the system, disclosures from this system of records may be made to enforce the terms of a loan and to collect a loan. This purpose for disclosure is clarified now in routine use (a).

Routine use (b)(2): Litigation Disclosure. OMB suggested that the Department clarify the routine use permitting disclosure to counsel to clearly indicate that this routine use authorized disclosure only to opposing counsel. OMB also asked that the Department clarify the distinctions among the various types of disclosures made under routine use (b)(2). Routine use (b) has been restructured to address these concerns. OMB commented that a routine use was not appropriate for disclosures to a court, as specified in (b)(2) of the notice, because these disclosures should be made under a court order, pursuant to 5 U.S.C. 552a(b)(11). Therefore, disclosure to courts has been removed from this routine use.

One of the commenters was concerned that disclosure to opposing counsel and other parties in administrative proceedings under (b)(2) would be inappropriate because these disclosures should be obtained under a court order. The Assistant Secretary disagrees because he believes that such a requirement would create an unnecessary burden on the public and the Department. For example, if the Department is involved in administrative litigation with a school regarding the school's default rate calculation, the school would have access to information pursuant to the program purpose routine use. However, the school may need to disclose to its outside counsel certain individually identifiable information obtained from the Department. Disclosure to the school's counsel in this case, in the interest of ensuring proper adjudication of default rate challenges, would certainly be consistent with the purposes for which the records in this system are maintained. However, if the school had to obtain a court order from the district court before it could make such a disclosure, the administrative litigation would be unnecessarily burdened. Thus, the Assistant Secretary has decided to keep in this routine use disclosures to opposing counsels and other representatives of parties in administrative litigation with the Department.

Routine use (d): Contract Disclosure. This routine use has been rewritten to clarify its meaning.

Routine use (e): Employee Grievance, Complaint or Conduct Disclosure. This routine use has been revised to make it clearer.

Routine use (f): Labor Organization Disclosure. It was suggested that the Department remove this routine use as

unnecessary. However, the Assistant Secretary foresees the possibility of a case in which a supervisor takes an action against an employee and cites specific alleged mishandling of Privacy Act information by the employee as the basis for the action. The employee is entitled to representation by a union representative who might need access to the individually identifiable information in order to adequately protect the interests of the employee. This routine use is consistent with the purposes of the system in that it ensures that questions about proper handling of confidential information are properly addressed to the benefit of the individuals on whom the Department maintains information in this system of records.

Routine use (g): Research Disclosure. This routine use has been removed because 5 U.S.C. 552a(b)(5) adequately covers the needs intended to be served by this routine use.

Routine use (i): FOIA Advice Disclosure. The Office of Management and Budget suggested that disclosure to OMB of individually identifiable information be removed because the Department can obtain sufficient advice on Privacy Act matters from OMB without disclosing individually identifiable information. The reference to OMB disclosures has been removed.

Routine use (j): Subpoena Disclosure. This routine use is removed because it appears inconsistent with certain judicial decisions relating to the Privacy Act.

Regarding the Safeguards clause for the system, the description of the safeguards has been rewritten to indicate more precisely the nature of the safeguards used to protect this system.

Regarding the Retention and Disposal clause for the system, the details regarding optical disk storage as a means of archiving data has been changed to clarify that the shelf life of the archived information will be enhanced through an optical disk maintenance program and will be maintained for a total of ten years after the loan is closed.

The commenter was concerned about the timeframe for implementation of the NSLDS system and the enhancements to its own system so that it can report information to the NSLDS. The commenter was also concerned that the Department appeared to be making changes to data elements in the system and believed that the Department should continue to involve program participants in the implementation strategies for NSLDS, including setting the appropriate implementation timeframes. Contrary to the commenter's understanding, the data elements that will require system enhancements are not required to be reported until July 1995, and the Department is now making changes to data elements that will be submitted to NSLDS. The Department has worked closely with program participants during the design phase of this system and intends to continue working closely with them.

The system notice is being republished in its entirety to assist readers in understanding the context for the changes that are being made.

Dated: December 14, 1994.

David A. Longanecker,

Assistant Secretary for Postsecondary Education.

Accordingly, the Assistant Secretary revises the system of records "National Student Loan Data System" (System Number 18–40–0039) to read as follows:

18–40–0039

SYSTEM NAME:

National Student Loan Data System.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

E–Systems, Greenville Division, PO Box 6056, Greenville, Texas 75403–6056.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Borrowers who have applied for and received loans under the William D. Ford Federal Direct Loan Program; borrowers who applied for and received loans under the Federal Insured Student Loan (FISL) Program; borrowers who applied for and received loans under the Federal Family Education Loan (FFEL) Program; borrowers who applied for and received loans under the Federal Perkins Loan Program (including National Defense Student Loans and National Direct Student Loans); borrowers who had a loan discharged in bankruptcy under the FISL Program and on which the Department of Education (ED) paid a claim to the holder of the loan; borrowers who defaulted on their loans or became disabled; borrowers whose loans were guaranteed by a guaranty agency and who defaulted under the FFEL Program if those loans were assigned by the guaranty agency to ED; FFEL borrowers whose lenders have reported them delinquent or reported their locations as unknown; FFEL borrowers whose loans were cancelled due to borrower's total and permanent disability, or whose loans were discharged in bankruptcy under the FFEL Program; FFEL borrowers whose loans were discharged under certain circumstances due to a school closing or a false loan certification; borrowers under the Federal Perkins Loan Program whose loans have been assigned to ED because of default; borrowers whose loans were serviced by guaranty agencies for which ED has assumed management responsibility; and Federal Pell and Federal Supplemental Educational Opportunity Grants on which overpayments are collected by the Department.

CATEGORIES OF RECORDS IN THE SYSTEM:

Contains records regarding (1) loan and educational status; (2) data on family income; (3) name; (4) social security number; (5) address; (6) amount of claim; (7) forbearance; (8) cancellation; (9) disability; (10) deferment information; (11) profile information on schools, lenders and guaranty agencies; (12) student/borrower date of birth; (13) details regarding each loan received by a student; (14) school(s) attended by student who has received aid to attend at least one school; (15) loan repayment information; (16) student/borrower anticipated school completion date; (17) an indication which loans were obtained from a lender-of-last-resort; (18) loan refund/cancellation information; and (19) grant overpayment date and amount.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Higher Education Act of 1965, Title IV–A through IV–G, as amended, (20 U.S.C. 1092b)

PURPOSE(S):

This system of records is maintained for the purposes of: (1) Providing pre-screening for Title IV aid eligibility; (2) providing default rate calculations for schools, guaranty agencies, and lenders; (3) reporting changes in student/borrower enrollment status (Student Status Confirmation Reporting (SSCR)), (4) preparing electronic financial aid transcript information; (5) assisting guaranty agencies in helping lenders collect delinquent loans (pre-claims assistance (PCA)/supplemental PCA support); (6) providing audit and program review planning; (7) supporting research studies and policy development; (8) conducting budget analysis and development; (9) tracking loan transfers from one entity to another; (10) assessing FFEL Program administration of guaranty agencies, schools, and lenders; (11) tracking borrowers; (12) providing information that will support Credit Reform Act of 1992 requirements; (13) providing

information to track refunds/cancellations; and (14) collecting debts owed to the Department under Title IV of HEA.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

ED may disclose information contained in a record in this system of records without the consent of the individual if the disclosure is compatible with the purpose for which the record was collected only as needed to achieve a program objective under the following routine uses:

(a) *Program purposes.* Records may be disclosed for the following program purposes:

(1) To verify the identity of the applicant and assist with the determination of program eligibility and benefits, disclosures may be made to appropriate guaranty agencies, educational and financial institutions, and appropriate Federal agencies;

(2) To provide default rate calculations, disclosures may be made to guaranty agencies, educational and financial institutions, and State agencies;

(3) To assist students in locating the holders of their loan(s) (loan transfer tracking), disclosures may be made to guaranty agencies, educational and financial institutions, and State or Local agencies;

(4) To provide a standardized student status confirmation report for schools to efficiently submit student enrollment status changes, disclosures may be made to guaranty agencies, and educational and financial institutions;

(5) To provide financial aid transcript information, disclosures may be made to educational institutions;

(6) To assist guaranty agencies and lenders in the collection of loans (pre-claims assistance/supplemental pre-claims assistance notification), disclosures may be made to guaranty agencies, educational and financial institutions, and State or Local agencies; and

(7) To enforce the terms of a loan and assist in the collection of a loan, disclosures may be made to guaranty agencies, educational and financial institutions, and Federal, State, or Local agencies.

(b) *Litigation disclosure.*

(1) In the event that one of the parties listed below is involved in litigation, or has an interest in litigation, ED may disclose certain records to the parties described in paragraphs (2), (3) and (4) of this routine use under the conditions specified in those paragraphs:

(i) ED, or any component of the Department; or

(ii) Any ED employee in his or her official capacity; or

(iii) Any employee of ED in his or her individual capacity where the Department of Justice has agreed to provide or arrange for representation for the employee; or

(iv) Any employee of ED in his or her individual capacity where the agency has agreed to represent the employee; or

(v) The United States where ED determines that the litigation is likely to affect the Department or any of its components.

(2) Disclosure to the Department of Justice. If ED determines that disclosure of certain records to the Department of Justice or attorneys engaged by the Department of Justice is relevant and necessary to litigation and is compatible with the purpose for which the records were collected, ED may disclose those records as a routine use to the Department of Justice.

(3) Administrative Disclosures. If ED determines that disclosure of certain records to an adjudicative body before which ED is authorized to appear, individual or entity designated by ED or otherwise empowered to resolve disputes is relevant and necessary to the administrative litigation and is compatible with the purpose for which the records were collected, ED may disclose those records as a routine use to the adjudicative body, individual or entity.

(4) Opposing counsels, representatives and witnesses. If ED determines that disclosure of certain records to an opposing counsel, representative or witness in an administrative proceeding is relevant and necessary to the litigation and is compatible with the purpose for which the records were collected, ED may disclose those records as a routine use to the counsel, representative or witness.

(c) *Enforcement disclosure.* In the event that information in this system of records indicates, either on its face or in connection with other information, a violation or potential violation of any applicable statute, regulation, or order of a competent authority, the relevant records in the system of records may be referred, as a routine use, to the appropriate agency, whether foreign, Federal, State, Tribal, or local, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or executive order or rule, regulation, or order issued pursuant thereto.

(d) *Contract disclosure.* If ED contracts with an entity for the purpose of performing any function that requires disclosure of records in this system to employees of the contractor, ED may disclose the records as a routine use to those employees. Before entering into such a contract, ED shall require the contractor to maintain Privacy Act safeguards as required under 5 U.S.C. 552a(m) with respect to the records in the system.

(e) *Disclosure to the Office of Management and Budget (OMB) for Credit Reform Act (CRA) Support.* ED may disclose individually identifiable information to OMB as necessary to fulfill CRA requirements. (These requirements currently include transfer of data on lender interest benefits and special allowance payments, defaulted loan balances, and supplemental preclaims assistance payments information.).

(f) *Employee grievance, complaint or conduct disclosure.* If a record is relevant and necessary to an employee grievance, complaint, or disciplinary action, ED may disclose the record in the course of investigation, factfinding, or adjudication to any witness, designated factfinder, mediator, or other person designated to resolve issues or decide the matter.

(g) *Labor organization disclosure.* Where a contract between a component of ED and a labor organization recognized under 5 U.S.C., Chapter 71, provides that the Department will disclose personal records relevant and necessary to the organization's mission, records in this system of records may be disclosed as a routine use to such an organization.

(h) *Computer matching disclosure.* Any information from this system of records, including personal information obtained from other agencies through computer matching programs, may be disclosed to a Federal or State agency under a computer matching agreement in connection with an individual's application for, or participation in, any grant or loan program administered by ED. The purposes of these disclosures may be to determine program eligibility and benefits, enforce the condition and terms of a loan or grant, permit the servicing and collecting of the loan or grant, prosecute or enforce debarment, suspension, and exclusionary actions, counsel the individual in repayment efforts, investigate possible fraud and verify compliance with program regulations, locate a delinquent or defaulted debtor, and initiate legal action against an individual involved in program fraud or abuse.

(i) *FOIA advice disclosure.* In the event that ED deems it desirable or necessary in determining whether particular records are required to be

disclosed under the Freedom of Information Act, disclosure may be made to the Department of Justice for the purpose of obtaining its advice.

(j) *Disclosure to the Department of Justice.* ED may disclose information from this system of records as a routine use to the Department of Justice to the extent necessary for obtaining its advice on any matter relevant to an audit, inspection, or other inquiry related to the Department's responsibilities under Title IV of the Higher Education Act of 1965.

(k) *Congressional member disclosure.* ED may disclose information from this system of records to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the written request of that individual; the Member's right to the information is no greater than the right of the individual who requested it.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Disclosure pursuant to 5 U.S.C. 552a(b)(12): The Department may disclose to a consumer reporting agency information regarding a claim which is determined to be valid and overdue as follows: (1) The name, taxpayer identification number and other information necessary to establish the identity of the individual responsible for the claim; (2) the amount, status, and history of the claim; and (3) the program under which the claim arose. The Department may disclose the information specified in this paragraph under 5 U.S.C. 552a(b)(12) and the procedures contained in 31 U.S.C. 3711 (f). A consumer reporting agency to which these disclosures may be made is defined at 15 U.S.C. 1681a(f), and 31 U.S.C. 3701 (a)(3).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISCLOSING OF RECORDS IN THE SYSTEM:

STORAGE:

The records are maintained on magnetic tape and computer disk media.

RETRIEVABILITY:

Data are retrieved by matching social security number, name and date of birth.

SAFEGUARDS:

All physical access to the sites of the contractor where this system of records is maintained, is controlled and monitored by security personnel who check each individual entering the building for his or her employee or visitor badge. The computer system employed by the Department of Education offers a high degree of resistance to tampering and circumvention by use of software that requires user access to be defined down to the individual data element. This security system limits data access to Department of Education and contract staff on a "need to know" basis, including external users of the system (guaranty agency and school personnel) and controls individual users' ability to access and alter records within the system. All users of this system are given a unique user ID with a personal identifier. The software monitors and tracks changes to any data element. Any change to the database is recorded, together with the identity of the individual user who made the change.

RETENTION AND DISPOSAL:

Records of individual loans will be archived twelve months after a loan is closed. The loan will be archived to optical disk for economical and efficient storage. An Optical Disk Maintenance Program will be implemented to lengthen the shelf-life of the exposure on the optical disk. The Department will retain and dispose of NSLDS records in accordance with the ED Comprehensive Records Disposition Schedule, Part 10 item 16(a)(b)(c)(d)(e), which permits retention for a maximum period of ten years after the loan is closed.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Division of Program Systems Service, U. S. Department of Education, Office of Postsecondary Education, 600 Independence Avenue, SW., Washington, DC 20202–5175.

NOTIFICATION PROCEDURE:

If an individual wishes to determine whether a record exists regarding him or her in this system of records, the individual must provide the system manager his or her name, date of birth, social security number, and the name of the school or lender from which the loan or grant was obtained. Requests for notification about an individual must meet the requirements of the Department of Education's Privacy Act regulations at 34 CFR 5b.5.

RECORD ACCESS PROCEDURES:

If an individual wishes to gain access to a record in this system, he or she must contact the system manager and provide information as described in the notification procedures.

CONTESTING RECORD PROCEDURES:

If an individual wishes to change the content of a record in the system of records, he or she must contact the system manager with the information described in the notification procedures, identify the specific item(s) to be changed, and provide a written justification for the change, including any supporting documentation. Requests to amend a record must meet the requirements of the Department of Education Privacy Act regulations at 34 CFR 5b.7.

RECORD SOURCE CATEGORIES:

Information is obtained from guaranty agencies, schools, and the Title IV Program Files (Privacy Act System of Records Number 18–4000–24). However, lenders and guaranty agencies are not a source of information for participants in the William D. Ford Federal Direct Loan Program because the Department maintains individual records of borrowers.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. 94–31242 Filed 12–19–94; 8:45 am]
BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC95–7–000]

Conowingo Power Company, et al.; Electric Rate and Corporate Regulation Filings

December 13, 1994.

Take notice that the following filings have been made with the Commission.

1. Conowingo Power Company PECO Energy Company

[Docket Nos. EC95–7–000; EL95–14–000]

Take notice that on December 7, 1994, Conowingo Power Company (COPCO) and PECO Energy Company (PECO) filed a Joint Request for Disclaimer of Jurisdiction Over a Transfer of the Title to Certain Facilities or, in the Alternative, for Approval of the Transfer. The filing relates to the transfer of title to certain transmission facilities to PECO from COPCO, a subsidiary of PECO. PECO and COPCO are parties to a 1971 Transmission Agreement which makes a 24-mile portion of a 500 Kv transmission line located in Maryland available to PECO and PECO pays all the costs associated with Line. The transfer is an incidental part of a transaction involving PECO's sale of PECO's sale of COPCO's common stock to Delmarva Power & Light Company. PECO and COPCO are requesting that the Commission disclaim jurisdiction over the

transaction or, in the alternative, approve the transfer under Section 203 of the Federal Power Act, 16 U.S.C. 824b(a) and part 33 of the Commission's Rules and Regulations 18 CFR 33.1 *et seq.* COPCO and PECO also request that the Commission accept a notice of cancellation of the 1971 Transmission Agreement.

Comment date: January 3, 1995, in accordance with Standard Paragraph E at the end of this notice.

2. Comangen, Limited

[Docket No. EG95–13–000]

On December 2, 1994, Comangen, Limited ("Applicant"), West Wind Building, P.O. Box 1111, Grand Cayman, Cayman Islands, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator (EWG) status pursuant to Part 365 of the Commission's regulations.

Applicant states that it is a Cayman Islands corporation which intends to directly or indirectly own or operate, or both own and operate, the generating and transmission facilities currently owned by Empresa de Generacion Electrica de Lima, S.A., a nationally owned Peruvian corporation. Applicant states that these facilities consist of five hydroelectric generating facilities and one thermal generating facility having a combined total installed capacity of 692.6 MW and approximately 576 Km of transmission lines, which operate as radial lines to interconnect and deliver energy from the generating units to the national grid in Peru.

Comment date: January 3, 1995, in accordance with Standard Paragraph E at the end of this notice.

3. Indeck-Ilion Limited Partnership

[Docket No. EL95–13–000]

Take notice that on December 2, 1994, Indeck-Ilion Limited Partnership and Power City Partners tendered for filing a Petition for Enforcement. The petition requests the Commission to enforce its rules implementing PURPA with respect to an Order of the New York State Public Service Commission (NYS PSC) concerning the sale of back-up service to qualifying facilities (QFs).

Comment date: December 28, 1994, in accordance with Standard Paragraph E at the end of this notice.

4. Pepperell Power Associates Limited Partnership

[Docket No. ER94–1474–000]

Take notice that on December 9, 1994, Pepperell Power Associates Limited Partnership, submitted an amendment to its filing in this proceeding.

Comment date: December 28, 1994, in accordance with Standard Paragraph E at the end of this notice.

5. Wisconsin Public Service Corporation

[Docket No. ER94–1639–000]

Take notice that on December 7, 1994, Wisconsin Public Service Corporation, tendered for filing an amendment to its network transmission tariff, together with a transmittal letter and supporting testimony.

Comment date: December 28, 1994, in accordance with Standard Paragraph E at the end of this notice.

6. New England Power Company

[Docket No. ER95–261–000]

Take notice that on December 6, 1994, New England Power Company, tendered for filing on behalf of Massachusetts Electric Company a Service Agreement with North Attleborough Electric Light Department for borderline service.

Comment date: December 28, 1994, in accordance with Standard Paragraph E at the end of this notice.

7. Florida Power Corporation

[Docket No. ER95–263–000]

Take notice that on December 6, 1994, Florida Power Corporation (FPC), tendered for filing a service agreement for transmission services resale with Rainbow Energy Marketing Corporation (Rainbow), under Florida Power's existing T–1 Transmission Tariff. This involves transmission service to be provided to Rainbow at all existing and future interconnections of FPC.

FPC request a waiver of the Commission's 60 day notice requirement to allow FPC and Rainbow's Agreement to become effective December 6, 1994.

Comment date: December 28, 1994, in accordance with Standard Paragraph E at the end of this notice.

8. Wisconsin Electric Power Company

[Docket No. ER95–264–000]

Take notice that Wisconsin Electric Power Company (Wisconsin Electric), on December 6, 1994, tendered for filing a Network Transmission Service Tariff (NTST), in response to the November 15, 1994, letter order of the Public Service Commission of Wisconsin. Because transmission service revenues cannot reasonably be estimated in the absence of eligible customers, Wisconsin Electric has submitted materials under the abbreviated filing requirements of the Regulations.

Wisconsin Electric requests an effective date sixty days after filing.

Copies of the filing have been served on each wholesale requirements customer served under Rate W, the Michigan Public Service Commission, and the Public Service Commission of Wisconsin.

Comment date: December 28, 1994, in accordance with Standard Paragraph E at the end of this notice.

9. Southern Company Services, Inc.

[Docket No. ER95–265–000]

Take notice that on December 7, 1994, Southern Company Services, Inc., acting on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company (collectively referred to as "Operating Companies"), tendered for filing information concerning the adoption of certain accounting methods for post-retirement benefits other than pensions as set forth in the Statement of Financial Accounting Standard No. 106 by the Financial Accounting Standards Board in agreements and tariffs of the Operating Companies (jointly and individually).

Comment date: December 28, 1994, in accordance with Standard Paragraph E at the end of this notice.

10. Petroleum Service & Systems Group, Inc.

[Docket No. ER95–266–000]

Take notice that on December 7, 1994, Petroleum Service & Systems Group, Inc. (PS&SG), tendered for filing a petition for waivers and blanket approvals under various regulations of the Commission and for an order accepting its FERC Electric Rate Schedule No 1.

Comment date: December 28, 1994, in accordance with Standard Paragraph E at the end of this notice.

11. New England Power Company

[Docket No. ER95–267–000]

Take notice that on December 7, 1994, New England Power Company (NEP or the Company) filed amendments to its FERC Electric Tariff, Original Volume No. 1, constituting a new rate, referred to as the W–95 rate, as well as a change in the service agreement under that tariff with The Narragansett Electric Company (Narragansett) that would increase the fixed credits to Narragansett. The W–95 rate would increase NEP's base rates for wholesale requirements service by $131.3 million annually. NEP also filed a Stipulation and Agreement, under which NEP and other parties agree to settlement rates, referred to as the W–95(s) rate, in lieu of the filed W–95 rate and a settlement credit to Narragansett. Under the W–95(s) settlement rate, NEP's base

wholesale revenues would not increase. NEP proposes to make the settlement rates effective January 1, 1995. If the Commission does not accept the Stipulation and Agreement, NEP proposes to make the W–95 rate and the revised credit to Narragansett effective February 5, 1995.

NEP states that copies of its filing have been served on all customers taking service under the tariff and on regulatory agencies in Massachusetts, New Hampshire, and Rhode Island.

Comment date: December 28, 1994, in accordance with Standard Paragraph E at the end of this notice.

12. Williams Field Services—Rocky Mountain Region Co.

[Docket No. QF95–15–000]

On December 9, 1994, Williams Field Services—Rocky Mountain Region Co. tendered for filing an amendment to its October 28, 1994, filing, and additional information.

The amendment and supplemental information pertains to technical and ownership structure of the cogeneration facility. No determination has been made that the submittal constitutes a complete filing.

Comment date: December 30, 1994, 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, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 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. 94–31164 Filed 12–19–94; 8:45 am]

BILLING CODE 6717–01–P

[Docket No. CP95–118–000]

East Tennessee Natural Gas Company; Notice of Application

December 14, 1994.

Take notice that on December 12, 1994, East Tennessee Natural Gas Company (East Tennessee), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP95–118–000 an application pursuant to Section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity permitting it to construct and operate certain pipeline loop and compression facilities to ensure continued transportation service to its shippers, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

East Tennessee proposes to construct and operate 2.14 miles of 12-inch pipeline loop and 3.02 miles of pipeline loop, both in Washington County, Virginia as well as uprate three existing turbines at its Compressor Station No. 3110, in Morgan County, Tennessee to Solar Saturn Model T–1300's, each with an I.S.O. rating of 1360 horsepower resulting in an increase of 960 horsepower. East Tennessee estimates a construction cost of $4,264,978, which would be financed initially with funds on hand, funds generated internally, borrowing under revolving credit agreements or short-term financing and which would be rolled into permanent financing.

East Tennessee states that its current total firm contractual commitment is approximately 476,507 dt equivalent of natural gas per day. It is indicated that since 1988 East Tennessee's system has been designed to meet this obligation in part by receiving approximately 5,000 dt equivalent of natural gas per day from Columbia Gas Transmission Corporation (Columbia Gas) and delivering it to Roanoke Gas Company (Roanoke) via an interconnect between Roanoke and Columbia Gas. It is stated that in 1988 East Tennessee and Roanoke entered into an operating agreement specifically providing that approximately 5,000 dt equivalent of natural gas per day of Roanoke's total transportation quantity of 9,789 dt equivalent of natural gas per day could be delivered to Roanoke at the Columbia Gas interconnect. It is stated that this arrangement enabled East Tennessee to reduce the volumes that it was required to transport on its system to Roanoke and thus make those volumes available for East Tennessee's other customers.

East Tennessee states that the operating agreement has expired by its own terms and that Roanoke has advised that it was not interested in extending the agreement. It is indicated that, as a result of terminated agreement, East Tennessee now proposes to construct and operate the above-described facilities.

Any person desiring to be heard or to make any protest with reference to said application should on or before January 4, 1995, file with the Federal Energy Regulatory Commission, Washington, D.C. 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 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 East Tennessee to appear or be represented at the hearing.

Lois D. Cashell,

Secretary

[FR Doc. 94–31165 Filed 12–19–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP95–114–000]

Midwestern Gas Transmission Company; Notice of Request Under Blanket Authorization

December 14, 1994.

Take notice that on December 9, 1994, Midwestern Gas Transmission Company (Midwestern), 1010 Milam Street, P.O. Box 2511, Houston, Texas 77252–2511, filed in Docket No. CP95–114–000 a

request pursuant to §§ 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.212) for authorization to establish a new delivery point for service under an existing firm transportation contract with the City of Morgantown, a Kentucky municipal utility corporation (Morgantown, a Kentucky municipal utility corporation (Morgantown Utilities) in Butler County, Kentucky under the blanket certificate issued in Docket No. CP82–414–000, pursuant to Section 7(c) 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.

Midwestern states that it will install a two-inch tap assembly, interconnect piping, meter station, and electronic gas measurement facilities. Midwestern states that it will own, operate, and maintain the facilities, and Morgantown Utilities will reimburse Midwestern an estimated $50,831 for the installation. Midwestern asserts that under the terms and conditions of its firm and interruptible Rate Schedules, all delivery points on the system are available to all shippers, and therefore, the facilities will also be available for other transportation services.

Midwestern claims that no significant impact on its system peak day deliveries or its annual entitlements is projected to result from the proposed delivery point.

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 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. 94–31166 Filed 12–19–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP95–115–000]

Questar Pipeline Company; Notice of Application

December 14, 1994.

Take notice that on December 7, 1994, Questar Pipeline company (Questar), 79 South State Street, Salt Lake City, Utah 84111, filed in docket No. CP95–115–000 an application pursuant to Section 7(c) of the Natural Gas Act requesting authority to install one compressor unit, restage an existing compressor unit, and construct and operate appurtenant facilities at Questar's existing jurisdictional Fidlar Compressor Station (Fidlar Station) located in Uintah County, Utah, all as more fully set forth in the application on file with the Commission and open to public inspection.

Specifically, Questar proposes to install one 1,085 nominal horsepower Solar Saturn T1001S gas turbine-driven centrifugal compressor unit, restage an existing Solar Saturn T1001S compressor unit, and make related auxiliary modification at Fidlar Station. Questar estimates the total cost of the proposal to be $1.5 million. Questar states that the Fidlar Station modifications will increase its available main-line capacity by approximately 22 Mmcf per day. Questar indicates that it has entered into two firm transportation service agreements with Barrett Fuels Corporation (Barrett) and VESGAS Company (VESGAS) for a total of 19 Mmcf per day (20,000 Dth) of which 14 Mmcf per day will become available through a main-line replacement project pending in Docket No. CP94–765–000. Questar asserts that the remaining 5 Mmcf per day will be furnished through the proposed Fidlar Station expansion, leaving 17 Mmcf per day to be marketed to prospective customers.

Any person desiring to be heard or to make any protest with reference to said application should on or before January 4, 1995, 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 jurisdiction conferred upon the Federal Energy Regulation 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 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 Questar to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 94–31167 Filed 12–19–94; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5121–3]

Underground Injection Control Program; Hazardous Waste Injection Restrictions; Petition for Exemption—Class I Hazardous Waste Injection; Merichem Company

AGENCY: Environmental Protection Agency.

ACTION: Notice of Final Decision on Petition.

SUMMARY: Notice is hereby given that an exemption to the land disposal restrictions under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act has been granted to Merichem Company, for the Class I injection well located at Houston, Texas. As required by 40 CFR part 148, the company has adequately demonstrated to the satisfaction of the Environmental Protection Agency by petition and supporting documentation that, to a reasonable degree of certainty, there will be no migration of hazardous constituents from the injection zone for as long as the waste remains hazardous. This final decision allows Merichem Company, to inject specific restricted hazardous wastes identified in the exemption, into the Class I hazardous waste injection well at the Houston, Texas facility, for as long as the basis for

granting an approval of this exemption remains valid, under provisions of 40 CFR 148.24. As required by 40 CFR 124.10, a public notice was issued October 6, 1994. The public comment period ended on November 21, 1994. No comments were received. This decision constitutes final Agency action and there is no Administrative appeal.

DATES: This action is effective as of December 2, 1994.

ADDRESSES: Copies of the petition and all pertinent information relating thereto are on file at the following location: Environmental Protection Agency, Region 6, Water Management Division, Water Supply Branch (6W–SU), 1445 Ross Avenue, Dallas, Texas 75202–2733.

FOR FURTHER INFORMATION CONTACT: Phil Dellinger, Unit Leader UIC State Programs/Land Ban, EPA—Region 6, telephone (214) 665–7142.

Robert Hannesschlager, P.E.,

Acting Director, Water Management Division (6W).

[FR Doc. 94–31235 Filed 12–19–94; 8:45 am]

BILLING CODE 6560–50–P

[FRL–5125–6]

Good Neighbor Environmental Board; Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Pursuant to the Federal Advisory Committee Act (P.L. 92–463), the U.S. Environmental Protection Agency gives notice of a meeting of the Good Neighbor Environmental Board.

The Good Neighbor Environmental Board was created by the Enterprise for the Americas Initiative Act of 1992. An Executive Order delegates implementing authority to the Administrator of EPA. The Board is responsible for providing advice to the President and the Congress on the need for implementation of environmental and infrastructure projects within the States contiguous to Mexico in order to improve the quality of life of persons residing on the United States side of the border. The Board is required to submit an annual report to the President and the Congress. The statute calls for the Board to have representatives from U.S. Government agencies; the governments of the States of Arizona, California, New Mexico and Texas; and private organizations with expertise on environmental and infrastructure problems along the southwest border. The Board will meet at least twice annually.

DATE: The Board will meet on January 20, 1995, from 8:30 to 5:00 p.m.

ADDRESSES: The Pan Pacific Hotel, 400 West Broadway, San Diego, California 92101. The meeting is open to the public, with limited seating on a first-come, first-served basis.

FOR FURTHER INFORMATION CONTACT: Contact Mr. Robert Hardaker, Designated Federal Official, U.S. EPA, Office of Cooperative Environmental Management, telephone 202–260–2477.

Dated: December 5, 1994.

Robert Hardaker,

Designted Federal Official, Good Neighbor Environmental Board.

[FR Doc. 94–31233 Filed 12–19–94; 8:45 am]

BILLING CODE 6560–50–M

[FRL–5121–4]

Underground Injection Control Program; Hazardous Waste Disposal Injection Restrictions; Petition for Exemption—Class I Hazardous Waste Injection; BP Chemicals

AGENCY: Environmental Protection Agency.

ACTION: Notice of Final Decision on Exemption Reissuance.

SUMMARY: Notice is hereby given that a request for reissuance of an exemption to the land disposal restrictions under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act has been granted to BP Chemicals, for the Class I injection wells located at Port Lavaca, Texas. As required by 40 CFR Part 148, the company has adequately demonstrated to the satisfaction of the Environmental Protection Agency by petition and supporting documentation that, to a reasonable degree of certainty, there will be no migration of hazardous constituents from the injection zone for as long as the waste remains hazardous. This final decision allows BP Chemicals to inject specific restricted hazardous wastes identified in the reissued petition, into the Class I hazardous waste injection wells at the Port Lavaca, Texas facility, for as long as the basis for granting an approval of this petition remains valid, under provisions of 40 CFR 148.24. As required by 40 CFR 124.10, a public notice was issued on October 7, 1994. The public comment period ended on November 21, 1994. EPA received no comments. This decision constitutes final Agency action and there is no Administrative appeal.

DATES: This action is effective as of December 2, 1994.

ADDRESSES: Copies of the petition for reissuance and all pertinent information relating thereto are on file at the following location: Environmental Protection Agency, Region 6, Water Management Division, Water Supply Branch (6W-SU), 1445 Ross Avenue, Dallas, Texas 75202–2733.

FOR FURTHER INFORMATION CONTACT: Phil Dellinger, Unit Leader UIC State Programs/Land Ban, EPA—Region 6, telephone (214) 665–7160.

Robert Hannesschlager, P.E.

Acting Director, Water Management Division.

[FR Doc. 94–31234 Filed 12–19–94; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Intent To Prepare an Environmental Impact Statement and Hold Scoping Meetings for the Central Valley Water Reclamation Facility Water Reuse Project

AGENCY: Central Utah Water Conservancy District (Interior).

ACTION: Notice of Intent to Prepare an Environmental Impact Statement (EIS) and Hold Scoping Meetings on a Proposed Treated Effluent Water Reuse Project in Central Utah.

SUMMARY: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, and PL 102–575, Section 205(b), which provides for the Central Utah Water Conservancy District (District) to be considered a "Federal Agency" for the purposes of compliance with all federal fish, wildlife, recreation, and environmental laws with respect to the use of funds authorized, the District, along with the Department of the Interior as joint lead, will be preparing an EIS on the impacts of the proposed Central Valley Water Reclamation Facility Water Reuse Project. The project has been submitted to the District for consideration of funding under Section 207 (Water Management Improvement) of PL 102–575.

DATES: Written comments will be accepted until February 20, 1995. Public scoping meetings will be held beginning at 7 p.m. on January 17, 1995 at the Utah Department of Natural Resources auditorium, 1636 W. North Temple, Salt Lake City, Utah; and at 7 p.m. on January 18, 1995 in the Board Room at the Central Utah Water Conservancy District, 355 West 1300 South, Orem, Utah.

ADDRESSES: Comments should be sent to Karen Ricks, Project Manager, Central Utah Water Conservancy District, 355 West 1300 South, Orem, Utah 84058.

FOR FURTHER INFORMATION CONTACT: Karen Ricks, Telephone 801–226–7226,

801–226–7271, or within Utah 800–281–7103, FAX 801–226–7150.

SUPPLEMENTARY INFORMATION: The Central Valley Reuse Project (CVRP) will be owned and operated by the Central Valley Water Reclamation Facility Board (Board). Sponsoring agencies include Metropolitan Water District of Salt Lake City and the Salt Lake County Water Conservancy District. The Central Valley Water Reclamation Facility is currently discharging its effluent to the Jordan River. In October of 1991, the Utah Department of Environmental Quality, Division of Water Quality notified the Central Valley Water Reclamation Facility Board that effluent discharged from their 62.5 million gallon per day (mgd) trickling filter/solids contact waste water reclamation facility did not comply with ammonia limits for discharge to the Jordan River. The Board subsequently contracted for the preparation of a feasibility study on ways to meet the discharge requirements.

The proposed waste water reuse project would involve pumping effluent southward from the treatment facility located in Salt Lake County, Utah for direct irrigation season discharge into existing agricultural irrigation canals. An estimated 27,600 acre-feet per irrigation season may be delivered. These deliveries would serve to substitute for contractual Utah Lake irrigation releases, allowing the displaced water to be retained in Utah Lake for a variety of possible environmental enhancement projects.

The EIS will analyze the impacts of several alternative locations of pipelines required to deliver the effluent, impact of use of the conserved water, and delivery points for the treated effluent. The impact of constructing a nitrification unit (no action alternative) at the treatment plant will also be analyzed.

The public scoping process will be used to identify the significant issues to be addressed in the EIS, and identify any additional alternatives or uses of the conserved water that should be considered. A scoping information summary is available upon request.

Dated: December 8, 1994.

Ron Johnston,

CUP Completion Act Program Director, Department of the Interior.

[FR Doc. 94–31225 Filed 12–19–94; 8:45 am]

BILLING CODE 4310–RK–P

Bureau of Land Management

[NV–940–1430–01; N–59082]

Notice of Proposed Withdrawal and Opportunity for Public Meeting; Nevada

Date: December 8, 1994.

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, has filed an application to withdraw 15 acres of public land for an administrative site in Elko County, Nevada. This notice closes the land for up to 2 years from surface entry and mining.

DATES: Comments and requests for meeting should be received on or before March 21, 1995.

ADDRESSES: Comments and meeting requests should be sent to the Nevada State Director, BLM, 850 Harvard Way, P.O. Box 12000, Reno, Nevada 89520.

FOR FURTHER INFORMATION CONTACT: Dennis J. Samuelson, BLM Nevada State Office, 702–785–6507

SUPPLEMENTARY INFORMATION: On July 26, 1994, the Department of Commerce, National Oceanic and Atmospheric Administration, filed an application to withdraw the following described public land from settlement, sale, location, or entry under the general land laws, including the mining laws, subject to valid existing rights:

Mount Diablo Meridian

T. 34 N., R. 54 E.,
Sec. 2, S½NW¼NE¼SE¼ and SW¼NE¼SE¼.

The area described contains 15 acres in Elko County.

The purpose of the proposed withdrawal is for a National Oceanic and Atmospheric Administration, National Weather Service, administrative site/complex in Elko County, Nevada. The complex consists of an office building, weather balloon inflation building, tower structure, and parking lot. The complex is part of a nationwide program to establish Next Generation Weather Radar and modernize forecast facilities.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the Nevada State Director of the Bureau of Land Management.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the Nevada State Director within 90 days from the date of publication of this notice. Upon determination by the authorized officer that a pubic meeting will be held, a notice of the time and place will be published in the **Federal Register** at least 30 days before the scheduled date of the meeting.

The application will be processed in accordance with the regulations set forth in 43 CFR part 2300.

For a period of 2 years from the date of publication of this notice in the **Federal Register**, the land will be segregated as specified above unless the application is denied or canceled or the withdrawal is approved prior to that date. The temporary uses which will be permitted during this segregative period are rights-of-way, leases, and permits. The temporary segregation of the land in connection with a withdrawal application shall not affect administrative jurisdiction over the land, and the segregation shall not have the effect of authorizing any use of the land by the National Oceanic and Atmospheric Administration, except for those uses authorized by right-of-way reservation N–48173.

Dennis J. Samuelson,

Acting Deputy State Director, Operations.

[FR Doc. 94–31171 Filed 12–19–94; 8:45 am]

BILLING CODE 4310–HC–P

Fish and Wildlife Service

Availability of an Environmental Assessment/Habitat Conservation Plan and Receipt of an Application for an Incidental Take Permit Amendment for the Proposed Canyon Ridge, Phase A, Section 3 Development, Austin, Travis County, TX

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: The Beard Family Partnership (Applicant) has applied to the Fish and Wildlife Service (Service) for an amendment to their incidental take permit pursuant to section 10(a) of the Endangered Species Act (Act). The Applicant has been assigned Permit Number PRT–777083. The requested amendment, which is for a period not to exceed 30 years, would authorize the incidental take of the endangered

golden-cheeked warbler (*Dendroica chrysoparia*). The proposed take would occur as a result of the construction of a residential development on 24 acres, in Austin, Travis County, Texas. The proposed development will permanently impact about 24 acres of occupied and/or potential endangered species habitat.

The Service has prepared an Environmental Assessment/Habitat Conservation Plan (EA/HCP) for the incidental take application. A determination of jeopardy to the species or a Finding of No Significant Impact (FONSI) will not be made before 30 days from the date of the publication of this notice. This notice is provided pursuant to Section 10(c) of the Act and National Environmental Policy Act regulations (40 CFR 1506.6).

DATES: Written comments on the application and EA/HCP should be received on or before January 19, 1995.

ADDRESSES: Persons wishing to review the application may obtain a copy by writing to the Assistant Regional Director, Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, New Mexico 87103. Persons wishing to review the EA/HCP may obtain a copy by contacting Joe Johnston, Ecological Services Field Office, U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, Texas 78758. Documents will be available for public inspection by written request, by appointment only, during normal business hours (8:00 to 4:00) at the Southwest Regional Office, Division of Endangered Species Permits, Ecological Services, U.S. Fish and Wildlife Service P.O. Box 1306, Albuquerque, New Mexico 87103, or the Ecological Service Field Office (9:00 to 4:30), U.S. Fish and Wildlife Service 10711 Burnet Road, Suite 200, Austin, Texas 78758. Written data or comments concerning the application and EA/HCP should be submitted to the Acting Field Supervisor, Ecological Services Field Office, Austin, Texas (see **ADDRESS** above). Please refer to Permit Number PRT–777083 when submitting comments.

FOR FURTHER INFORMATION CONTACT: Joe Johnston at the above Austin Ecological Services Field Office.

SUPPLEMENTARY INFORMATION: The proposed development will consist of the construction of residential units (single-family and multi-family residences) in northwest Travis County, Texas. The propose development will comply with all local, State, and Federal environmental regulations addressing environmental impacts associated with this type of development.

A conservation plan has been developed as mitigation for the incidental take of golden-cheeked warblers and its habitat. This plan includes the following features:

- Minimizing clearing of occupied warbler habitat,
- Conducting clearing and construction activities within 300 feet of an occupied warbler territory outside of the warbler's breeding season,
- Donating $90,000 for the purchase and dedication (to a conservation entity approved by the Service) of occupied goldencheeked warbler habitat,
- Providing operational and maintenance funds ($30,000) for the acquired preserve lands,
- Revegetating developed areas with native vegetation, and
- Onsite dedication of conservation easements totalling 2.2 acres in occupied warbler habitat, with these areas also containing populations of canyon mock-orange (*Philadelphus ernestii*), a candidate (C2) plant species.

In addition to what is proposed by the Applicant, the Service will require the Applicant to complete the following activities as part of the permit conditions:

1. Provide territorial mapping surveys for the warbler following International Bird Census Committee or other approved procedures within and 500 feet out from the southern and western boundaries of Phase A, Section 3 in 1995 (where adjacent landowners will allow). This area will be surveyed in 1996 and 1997 using the protocol established and in effect by the Service for presence/absence surveys. This survey format of one territorial survey and two presence/absence surveys will continue until the third breeding season after buildout of the project site, at which time a final territorial mapping survey will be completed. Buildout for the residential area is considered to be when 95 percent of the houses are constructed and occupied.

2. The monies identified in the original PRT–777083 and this amendment must be conveyed to an entity approved by the Service within 30 days of issuance of this amendment.

3. In order to offset the impacts of this development to the maximum extent reasonable and practicable, the Service believes 48 acres of occupied habitat would be necessary to be purchased and maintained by the Applicant in the Bull Creek or Cypress Creek watersheld in close proximity to other lands set aside for the conservation of the warbler.

Details of the mitigation proposed are provided in the Canyon Ridge. Phase A, Section 3 Environmental Assessment/ Habitat Conservation Plan. These conservation plan actions ensure that the criteria established for issuance of an incident take permit will be fully satisfied.

The Applicant considered four alternatives, including an alternate site location, alternate site design, delaying development until a regional section 10(a)(1)(B) permit is issued, and no action. Details of the mitigation are provided in the Environmental Assessment/Habitat Conservation Plan for the Canyon Ridge, Phase A Development.

James A. Young,

Acting Regional Director, Region 2, Albuquerque, New Mexico.

[FR Doc. 94–31173 Filed 12–19–94; 8:45 am]

BILLING CODE 4310–55–M

National Park Service

Public Notice

SUMMARY: Public notice is hereby given that the National Park Service proposes to award a concession permit authorizing a qualified operator(s) to enter Glacier Bay National Park by cruise ship (motor vessel at or over 100 tons gross carrying passengers for hire) from 5/1/95–12/31/99. In addition, the permit will allocate two cruise ship entries into Glacier Bay proper during the 6/1–8/31 regulatory period for the years 1995–1999.

EFFECTIVE DATE: February 21, 1995

ADDRESSES: Interested parties should contact the Superintendent, Glacier Bay National Park and Preserve, P.O. Box 140, Gustavus, Alaska 99826, to obtain information describing the requirements of the proposed permit.

SUPPLEMENTARY INFORMATION: This permit has been determined to be categorically excluded from the procedural provisions of the National Environmental Policy Act and no environmental document will be prepared.

The Secretary will consider and evaluate all proposals received as a result of this notice. Any proposal must be received by the Superintendent not later than the sixtieth (60th) day following publication of this notice to be considered and evaluated.

Dated: November 15, 1994.

Paul R. Anderson,

Deputy Regional Director

[FR Doc. 94–31219 Filed 12–19–94, 8:45 am]

BILLING CODE 4310–70–M

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before December 10, 1994. Pursuant to § 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013–7127. Written comments should be submitted by January 4, 1995.

Carol D. Shull,

Chief of Registration, National Register.

ALABAMA

Jefferson County

Leeds Downtown Historic District. Roughly bounded by Ninth St. NE., Thornton and Railroad Aves. and Parkway Dr. SE., Leeds, 94001546

Lauderdale County

College Place Historic District. Along Sherwood Ave., between W. Lelia St. and Circular Rd., Florence, 94001547

Marion County

Fite, Ernest Baxter, House. Jct. of Jackson Military Rd. and Thomas St., Hamilton, 94001545

MAINE

Cumberland County

Great Falls Historic District. Along Old Great Falls Rd., E of Presumscot R., North Gorham, 94001541

Franklin County

Farmington Historic District. Roughly bounded by High, Academy, Anson and Grove Sts., Farmington vicinity, 94001551

Hancock County

Sedgwick Historic District. Jct. of ME 172 and Old County Rd., Sedgwick, 94001550

Oxford County

Whitman Memorial Library. 1 mi. SW of jct. of ME 26 and ME 232, Bryant Pond, 94001549

Washington County

Pike's Mile Markers. Twelve locations spaced 1 mi. apart along E side of US 1 between Robbinston and Calais, Calais vicinity, 94001548

NEW YORK

Chautauqua County

Jamestown Armory (Army National Guard Armories in New York State MPS). 34 Porter Ave., Albany, 94001542

Erie County

Connecticut Street Armory (Army National Guard Armories in New York State MPS). 184 Connecticut St., Buffalo, 94001543

TENNESSEE

Montgomery County

Forbes—Mabry House. 607 N. Second St., Clarksville, 94001544

[FR Doc. 94–31176 Filed 12–19–94; 8:45 am]

BILLING CODE 4310–70–M

Bureau of Reclamation

Josephine County Water Management Improvement, Fish Passage Improvements, Savage Rapids Dam, OR

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability of planning report/draft environmental statement.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, as amended, the Bureau of Reclamation has prepared a planning report/draft environmental statement (PR/DES) on a proposed project to improve fish passage at Savage Rapids Dam located on the Rogue River in southwest Oregon near the city of Grants Pass. The report presents an evaluation of two alternatives for improving fish passage and reducing loss of salmon and steelhead. A 90-day review period commences with the publication of this notice.

DATES: Written comments on the PR/DES must be submitted to the Regional Director at the address listed below by March 21, 1995.

ADDRESSES: Copies of the PR/DES may be requested from the following:

- Regional Director, Bureau of Reclamation, Attention: PN–6309, Pacific Northwest Region, 1150 North Curtis Road, Boise, ID 83706–1234, Telephone (208) 378–5087;
- Secretary/Manager, Grants Pass Irrigation District, 200 Fruitdale Drive, Grants Pass, OR 97527–5268, Telephone (503) 476–2582.

Copies of the PR/DES are available for inspection and review at the following locations:

- Josephine County Public Library, Grants Pass, Oregon
- Medford Public Library, Medford, Oregon
- Rogue River Public Library, Rogue River, Oregon.

FOR FURTHER INFORMATION CONTACT: Bureau of Reclamation, Pacific Northwest Region, Attention: PN–6309, 1150 North Curtis Road, Boise, Idaho 83706–1234. Telephone (202) 378–5087.

Dated: December 8, 1994.

John W. Keys III,

Regional Director, Pacific Northwest Region.

[FR Doc. 94–31238 Filed 12–19–94; 8:45 am]

BILLING CODE 4310–94–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–219]

GPU Nuclear Corporation; Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. DPR–16, issued to GPU Nuclear Corporation (GPUN/the licensee) for operation of the Oyster Creek Nuclear Generating Station (OCNGS) located in Ocean County, New Jersey.

The proposed amendment would revise Technical Specification 5.3.1.E to allow 2645 fuel assemblies to be stored in the fuel pool. This is an increase of 45 fuel assemblies from the current limit of 2600. The 45 additional storage location currently exist in the racks in the fuel pool. They were included in the re-racking project allowed by License Amendment No. 76 but were not incorporated in the Technical Specifications since, at the time, it was believed they would not be needed.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. *The operation of the Oyster Creek Nuclear Generating Station, in accordance with the proposed amendment, will not*

involve a significant increase in the probability or consequences of an accident previously evaluated.

There are no changes in the existing provisions for load handling in the vicinity of the spent fuel pool associated with the proposed increase in licensed storage capacity. OCNGS Technical Specification 5.3.1.B limits the loads carried over the spent fuel pool to no greater than the weight of one fuel assembly. Therefore, accidents involving the mispositioning or drop of a fuel assembly establish the extent of accident probability or consequences. The Abnormal Positioning of a Fuel Assembly Outside the Storage Rack and the Dropped Fuel Assembly accident scenarios are addressed as follows:

a. The probability of occurrence of the above accidents is not affected by the racks themselves or the stored fuel. Since no physical changes are being made to the racks, an increase in licensed storage capacity cannot increase the probability of these accidents.

b. The consequences of abnormal positioning of a fuel assembly outside the storage rack were evaluated. Since the storage rack criticality calculations were made using an infinite array of storage cells with no neutron leakage, positioning a fuel assembly outside and adjacent to the actual finite rack can add reactivity, but would, because of neutron leakage, result in a lower K_{eff} than the K_{∞} calculated for the infinite array. Thus, additional stored fuel assemblies will not increase consequences of this type of accident than those previously evaluated.

c. The consequences of a dropped fuel assembly striking either the base of the rack or the top of a storage location and the reactivity effects were also evaluated in the licensing report supporting Amendment 76. In all cases, the evaluated integrity of the racks was not exceeded. Also, the dropped fuel assembly did not constitute a criticality hazard because the infinite multiplication factor of the fuel storage racks was not materially altered. An increase in fuel enrichment does not increase consequences since the GE–9 assemblies' mechanical specifications are bounded by previous designs and consequences are not dependent on U–235 enrichment. Thus, since no physical alteration of the storage racks is necessary to store 45 additional fuel assemblies the consequences of this type of accident are not increased.

2. *The operation of Oyster Creek Nuclear Generating Station, in accordance with the proposed amendment, will not create the possibility of a new or different kind of accident from any accident previously evaluated.*

The increase in licensed spent fuel pool storage capacity involves the addition of 45 fuel assemblies. The increased structural loading has already been accounted for in the analyses reviewed by the NRC staff in support of Amendment 76. There are no physical changes to the fuel pool cooling. These systems are capable of handling the additional duty originating from the additional fuel. Criticality accidents or malfunctions also do not change because the analysis assumes an infinite array of fuel and Boraflex gaps have been conservatively accounted for. Therefore, there is no possibility for an accident or malfunction of a different type than previously evaluated.

3. *The operation of Oyster Creek Nuclear Generating Station, in accordance with the proposed amendment, will not involve a significant reduction in a margin of safety*

The margin of safety, when applied to a storage expansion, needs to address nuclear criticality, thermal-hydraulic, mechanical, material and structural adequacy

Nuclear Criticality

The acceptance criterion for criticality as established in Technical Specification 5.3.1.A, is that the neutron multiplication factor shall be less than or equal to 0.95, including all uncertainties.

Since the increase in licensed capacity to 2,600 storage locations, the maximum allowable average enrichment was increased twice. The original analysis was for 3.01% U–235 enrichment fuel with no credit for Gd_2O_3. Subsequent analyses increased the maximum allowable enrichment to 3.8% and then 4.0% U–235. Both analyses take credit for Gd_2O_3 requiring a minimum of 7 (seven) rods containing 3.0% or more Gd_2O_3.

Subsequent to the rack installation, an industry concern was raised with the discovery of the formation of gaps in Boraflex panels. The problem of gap formation in the boraflex and its impact on criticality has been addressed. The criticality analysis was updated to take into account the presence of gaps, including projected gap formation is coplanar. The fuel pool K_{eff} for the 4.0% U–235 enriched fuel with at least 7 (seven) Gd_2O_3 rods at peak reactivity is 0.9174 and increases to 0.945 with 3.9 inch coplanar gaps in the Boraflex which is below the 0.95 limit. Oyster Creek maintains a Boraflex surveillance program to ensure the assumptions used in the analysis remain valid.

Since all criticality analyses were performed with an infinite lattice, it is valid for a spent fuel pool capacity of 2,645 fuel assemblies. Therefore, there is no decrease in the margin of safety.

Thermal-Hydraulic

The heat load analysis performed for the expansion to 2600 licensed storage locations considered all 2,645 actual storage locations filled. Therefore, the initial conclusions are not changed and no re-analysis is required. The thermal-hydraulic calculations which used 125° F pool water temperature, have shown that the cladding temperatures (<219° F) will be well below the local fuel pool water saturation temperature of approximately 240° F. The maximum cladding temperatures will be low enough to preclude nucleate boiling.

Analysis has demonstrated that with an abnormal heat load from 2,732 fuel assemblies in the spent fuel pool, the temperature of the pool will be maintained within the Technical Specification limit to 125° F. Therefore, since this limit will be maintained, other restrictions such as the temperature differential of the spent fuel pool liner will also be maintained. Thus, there is no reduction in the margin of safety from a thermal-hydraulic point of view.

Mechanical and Structural

The additional 45 storage locations were part of the fuel pool expansion of which only 2,600 fuel assemblies were licensed for storage. The fuel storage racks are designed to maintain the spent fuel assemblies in a safe configuration through all environmental and abnormal loadings, such as an SSE or impact due to spent fuel assembly drop Structural and seismic analyses of the racks have established margins against tilting, deflection or movement to preclude impact of the racks with each other or with the pool walls. It is shown that the rack modules will undergo infinitesimal rotations if seismic excitation 50% over the SSE loading are imposed. The threshold of kinematic instability is not even approached.

Analyses performed to arrive at the above conclusions indicate that margins in all areas of structural concern exist. The racks are placed in the pool as individual stand-alone structures, do not load pool walls directly, and are uncoupled from pool liner temperature rise.

To limit the out-of-phase motion of adjacent racks due to non-symmetric loading of the racks, Oyster Creek procedures for loading spent fuel pool racks require the racks to be loaded symmetrically, i.e. the total fuel assemblies stored in any one quadrant of a rack will not deviate by more than 10% of the average of the four quadrants. This limitation will remain in effect for storage of 2,645 fuel assemblies.

In summary, the additional 45 fuel bundles in storage will not decrease structural margins since there is no associated physical change to the storage facility and the 2,645 fuel assemblies were considered in the original analysis which demonstrated that the acceptance criteria were met.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appear that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public

and State comments received. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Rules Review and Directives Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

By January 19, 1995, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Ocean County Library, Reference Department, 101 Washington Street, Toms River, New Jersey 08753. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

No later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. Where petitions are filed during the last 10 days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1–(800) 248–5100 (in Missouri 1–(800) 342–6700). The Western Union operator should be given Datagram Identification Number N1023 and the following message addressed to Phillip F. McKee: petitioner's name and telephone number, date petition was mailed, plant name, and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Ernest L. Blake, Jr., Esquire, Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037 attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1) (i)–(v) and 2.714(d).

The Commission hereby provides notice that this is a proceeding on an application for a license amendment falling within the scope of section 134 of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10154. Under section 134 of the NWPA, the

Commission, at the request of any party to the proceeding must use hybrid hearing procedures with respect to "any matter which the Commission determines to be in controversy among the parties." The hybrid procedures in section 134 provide for oral argument on matters in controversy, proceeded by discovery under the Commission's rules, and the designation, following argument, of only those factual issues that involve a genuine and substantial dispute, together with any remaining questions of law, to be resolved in an adjudicatory hearing. Actual adjudicatory hearings are to be held on those issues found to meet the criteria of section 134 and set for hearing after oral argument.

The Commission's rules implementing section 134 of the NWPA are found in 10 CFR Part 2, Subpart K, "Hybrid Hearing Procedures for Expansion of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors" (published at 50 FR 41670, October 15, 1985) to 10 CFR 2.1101 *et seq.* Under those rules, any party to the proceeding may invoke the hybrid hearing procedures by filing with the presiding officer a written request for oral argument under 10 CFR 2.1109. To be timely, the request must be filed within 10 days of an order granting a request for hearing or petition to intervene. (As outlined above, the Commission's rules in 10 CFR Part 2, Subpart G, and 2.714 in particular, continue to govern the filing of requests for a hearing or petitions to intervene, as well as the admission of contentions.) The presiding officer shall grant a timely request for oral argument. The presiding officer may grant untimely request for oral argument only upon showing of good cause by the requesting party for the failure to file on time and after providing the other parties an opportunity to respond to the untimely request. If the presiding officer grants a request for oral argument, any hearing held on the application shall be concluded in accordance with hybrid hearing procedures. In essence, those procedures limit the time available for discovery and require that an oral argument be held to determine whether any contentions must be resolved in adjudicatory hearing. If no party to the proceedings requests oral argument, or if all untimely requests for oral argument are denied, then the usual procedures in 10 CFR Part 2, Subpart G, apply.

For further details with respect to this action, see the application for amendment dated November 25, 1994, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington DC, and at the local public document room located at the Ocean County Library, Reference Department, 101 Washington Street, Toms River, New Jersey 08753.

Dated at Rockville, Maryland, this 13th day of December 1994.

For the Nuclear Regulatory Commission.

Alexander W. Dromerick,

Senior Project Manager, Project Directorate I–4, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 94–31199 Filed 12–19–94; 8:45 am]

BILLING CODE 7590–01–M

[Docket Nos. 50–325, 50–324, 50–400 and 50–261]

Carolina Power & Light Company; Brunswick Steam Electric Plant, Units 1 and 2, et al.; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an exemption from certain requirements of its regulations to Facility Operating License Nos. DPR–71, DPR–62, DPR–23, NPF–63, issued to the Carolina Power & Light Company (the licensee) for the operation of the Brunswick Steam Electric Plant, Units 1 and 2 (Brunswick), H.B. Robinson Steam Electric Plant, Unit No. 2 (Robinson), and Shearon Harris Nuclear Power Plant, Unit 1 (Harris).

The facilities consist of two boiling water reactors at the Brunswick site in Brunswick County, North Carolina; a pressurized water reactor at the Robinson site in Darlington County, South Carolina; and a pressurized water reactor in Wake County and Chatham County, North Carolina.

Environmental Assessment

Identification of the Proposed Action

The exemption would allow implementation of a hand geometry biometric system of site access control so that photograph identification badges can be taken offsite. The proposed action is in accordance with the licensee's application for exemption dated July 29, 1994, as supplemented December 5, 1994.

The Need for the Proposed Action

The proposed action would give an exemption from certain requirements of 10 CFR 73.55, "Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage."

Pursuant to 10 CFR 73.55(a), the licensee shall establish and maintain an onsite physical protection system and security organization. Paragraph 1 of 10 CFR 73.55(d), "Access Requirements," specifies that the "licensee shall control all points of personnel and vehicle access into a protected area." Title 10 of the *Code of Federal Regulations*, paragraph 73.55(d)(5), specifies that "A numbered picture badge identification system shall be used for all individuals who are authorized access to protected areas without escort." Paragraph 73.55(d)(5) also states that an individual not employed by the licensee (i.e., a contractor) may be authorized access to protected areas without escort provided the individual "receives a picture badge upon entrance into the protected area which must be returned upon exit from the protected area."

Currently, unescorted access into protected areas of the Brunswick and Robinson units is controlled through the use of a photograph on a combination badge and keycard (hereafter, these are referred to as the badge). At the Harris unit unescorted access into protected areas is controlled through the use of a photograph on a badge and a separate keycard. The security officers at each entrance station use the photograph on the badge to visually identify the individual requesting access. The badges for both licensee employees and contractor personnel who have been granted unescorted access are issued upon entrance at each entrance/exit location and are returned upon exit. The badges are stored and are retrievable at each entrance/exit location. In accordance with 10 CFR 73.55(d)(5), contract individuals are not allowed to take badges offsite. In accordance with the plants' physical security plans, neither licensee employees nor contractors are allowed to take badges offsite.

The licensee proposes to implement an alternative unescorted access control system which would eliminate the need to issue and retrieve badges at each entrance/exit location and would allow all individuals with unescorted access to keep their badges with them when departing the site. An exemption from 10 CFR 73.55(d)(5) is required to permit contractors to take their badges offsite instead of returning them when exiting the site.

Under the proposed system, individuals who are authorized for unescorted entry into protected areas would have the physical characteristics of their hand (hand geometry) registered with their badge number in the access control system. When an individual enters the badge into the card reader

and places the hand on the measuring surface, the system would record the individual's hand image. The unique characteristics of the extracted hand image would be compared with the previously stored template to verify authorization for entry. Individuals, including licensee employees and contractors, would be allowed to keep their badge with them when they depart the site.

Based on a Sandia report entitled "A Performance Evaluation of Biometric Identification Devices" (SAND91–0276 UC–906 Unlimited Release, Printed June 1991) and on the licensee's experience with the current photo identification system, the licensee demonstrated that the proposed hand geometry system would provide enhanced site access control. Since both the badge and hand geometry would be necessary for access into the protected area, the proposed system would provide for a positive verification process. Potential loss of a badge by an individual, as a result of taking the badge offsite, would not enable an unauthorized entry into the protected area. The licensee will implement a process for testing the proposed system to ensure continued overall level of performance equivalent to that specified in the regulation. The Physical Security Plans for the Brunswick, Robinson, and Harris sites will be revised to include implementation and testing of the hand geometry access control system and to allow licensee employees and contractors to take their badges offsite.

The access will continue to be under the observation of security personnel. A numbered picture badge identification system will continue to be used for all individuals who are authorized access to protected areas without escorts. Badges will continue to be displayed by all individuals while inside the protected area.

With regard to potential nonradiological impacts, the proposed change does not affect nonradiological plant effluents and has no other environmental impact. Therefore, the Commission concludes that there are no significant nonradiological environmental impacts associated with the proposed action.

Environmental Impacts of the Proposed Action

The Commission has completed its evaluation of the proposed action and concludes that this proposed action would result in no significant radiological environmental impact.

The change will not increase the probability or consequences of accidents, no changes are being made in the types of any effluents that may be released offsite, and there is no significant increase in the allowable individual or cumulative occupational radiation explosure. Accordingly, the Commission concludes that there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential nonradiological impacts, the proposed action does involve features located entirely within the restricted area as defined in 10 CFR Part 20. It does not affect nonradiological plant effluents and has no other environmental impact. Accordingly, the Commission concludes that there are no significant nonradiological environmental impacts associated with the proposed action.

Alternatives to the proposed Action

Since the Commission has concluded there is no measurable environmental impact associated with the proposed action, any alternatives with equal or greater environmental impact need not be evaluated. The principal alternative to the action would be to deny the request. Such action would have no effect on the environmental impact, would not enhance the protection of the environment, and would result in an unjustified loss of cost savings to the licensee.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the Final Environmental Statements for the Brunswick, Robinson, and Harris units.

Agencies and Persons Consulted

The NRC staff consulted with the North and South Carolina State officials regarding the environmental impact of the proposed action. The State officials had no commend.

Finding of No Significant Impact

Based upon the environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letters dated July 29, 1994, as supplemented December 5, 1994, which are available for public inspection at the Commission's Public Document Room, The Gelman Building, 2120 L Street, NW., Washington, DC 20555, and at the local public document rooms for Brunswick Steam Electric Plant, Units 1 and 2, at the University of North Carolina at Wilmington, William Madison Randall Library, 601 S. College Road, Wilmington, North Carolina 28403–3297; for the H.B. Robinson Steam Electric Plant, Unit No. 2, at Hartsville Memorial Library, 147 West College, Hartsville, South Carolina 29550; and for the Shearon Harris Nuclear Power Plant, Unit 1, at the Cameron Village Regional Library, 1930 Clark Avenue, Raleigh, North Carolina.

Dated at Rockville, Maryland, this 14th day of December.

For the Nuclear Regulatory Commission.

Michael L. Boyle,

Acting Director, Project Directorate II–1, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 94–31197 Filed 12–19–94; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–029]

Yankee Atomic Electric Company; Yankee Nuclear Power Station; Issuance of Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuing an order authorizing the decommissioning of the Yankee Nuclear Power Station (YNPS or plant), that is licensed to the Yankee Atomic Electric Company (YAEC or the licensee) located in Franklin County, Massachusetts.

Description of Proposed Action

YNPS has been shut down since October 1, 1991, and was defueled during February 1992.

Finding of No Significant Impact

The staff has reviewed the proposed decommissioning against the requirements in 10 CFR Part 51. Upon conducting an Environmental Assessment, the staff concluded that no significant environmental impacts are associated with the proposed SAFSTOR and DECON decommissioning and that the proposed decommissioning will not significantly affect the quality of the human environment. Therefore, the Commission has determined, pursuant to 10 CFR 51.13, not to prepare an environmental impact statement for the proposed decommissioning of the YNPS.

The following documents contain further details on this action: (1) The application from the licensee of December 20, 1993, as supplemented August 5, August 22, October 24, and October 26, 1994; (2) the Commission's

related Safety Evaluation; and (3) the Commission's Environmental Assessment and Finding of No Significant Impact.

For the Nuclear Regulatory Commission.

Seymour H. Weiss,

Director, Non-Power Reactors and Decommissioning Project Directorate, Division of Project Support, Office of Nuclear Reactor Regulation.

[FR Doc. 94–31198 Filed 12–19–94; 8:45 am]

BILLING CODE 7590–01–M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Trade Policy Staff Committee; Generalized System of Preferences; Initiation of a Review of "Reverse Preferences"; Termination of the Reviews of Worker Rights Practices and the Protection of Intellectual Property Rights in the Dominican Republic

AGENCY: Office of the United States Trade Representative.

ACTION: Notice and solicitation of public comment.

SUMMARY: The Uruguay Round Trade Agreements Act (UR Act) renewed the Generalized System of Preferences (GSP) program until July 31, 1995. The Statement of Administrative Action (SAA) that accompanies the UR Act provides that USTR will initiate a review to determine whether any GSP beneficiary country affords preferential treatment, as a result of an economic association agreement or otherwise, to the products of a developed country, other than the United States, that has, or is likely to have, an adverse effect on U.S. commerce. This notice announces the review and invites public comments.

This notice also announces the successful termination of the reviews of worker rights practices and the protection of intellectual property rights (IPR) in the Dominican Republic.

FOR FURTHER INFORMATION CONTACT: GSP Subcommittee, Office of the United States Trade Representative, 600 17th Street, N.W., Room 513, Washington, D.C. 20506. The telephone number is (202) 395–6971.

SUPPLEMENTARY INFORMATION:

I. Background

The GSP program offers duty-free access to the U.S. market for specified products that are imported from designated developing countries. The GSP program is authorized by Title V of the Trade Act of 1974, as amended (the "GSP law") (19 U.S.C. 2461 et seq.). The GSP law expired on September 30, 1994, but the UR Act extended the current GSP program without modification until July 31, 1995.

When the GSP program was originally enacted in 1974, the Congress was concerned about giving duty-free privileges to some developing countries that, in turn, treat imports from some developed countries more favorably than imports from the United States. Such favorable treatment is called a "reverse preference," and it discriminates against U.S. export interests.

Accordingly, section 502(b)(3) of the GSP law provides that the President shall not designate a country as a GSP beneficiary if the country "affords preferential treatment to the products of a developed country, other than the United States, which has, or is likely to have, a significant adverse effect on United States commerce."

Congressional and Administration concern about the adverse effect of discriminatory "reverse preferences" on U.S. commerce has been rekindled by recent complaints about "reverse preferences" that are allegedly granted to imports from the European Union (EU) by some agreements between the EU and countries in Central and Eastern Europe. Therefore, as provided in the SAA that accompanies the UR Act, the Administration intends to conduct a full review of "reverse preferences" that may be granted by beneficiaries of the GSP program.

II. GSP Review

The SAA provides that, upon enactment, USTR will initiate a GSP review to determine whether any GSP beneficiary grants preferential treatment to imports from another developed country that has, or is likely to have, an adverse effect on U.S. commerce. This review will consider "reverse preferences" granted by any GSP beneficiary, but it is expected to focus principally, although not exclusively, on countries in Central and Eastern Europe that have association agreements with the EU.

USTR is directed to solicit public comments and to seek information from U.S. Embassies in GSP beneficiary countries. Ninety days thereafter, USTR will determine whether the "reverse preferences" granted by a GSP beneficiary have or may have an adverse effect on U.S. export interests sufficient to warrant further review. If so, USTR will enter into bilateral consultations with that country with the goal of eliminating the "reverse preferences." Nine months later, USTR will make a determination of whether the "reverse preferences" have, or are likely to have, a significant adverse effect on U.S. commerce.

If USTR makes an affirmative determination, the country's status as a beneficiary developing country will be withdrawn or suspended, unless the country has agreed to eliminate the significant adverse effect. The review will terminate if the determination is negative.

III. Public Comments

Interested parties are invited to submit comments regarding discriminatory "reverse preferences" that are granted by a GSP beneficiary country, and their effect on U.S. commerce. Interested parties are invited to report on any association agreements, or similar agreements, under which a GSP beneficiary country grants preferential treatment to products of another developed country, that has or may have an adverse effect on U.S. export interests. Preferential treatment may include preferential tariff treatment, as well as preferential non-tariff treatment (e.g., quotas). Interested parties are urged to give specific examples of U.S. export interests that have been adversely affected by "reverse preferences."

In particular, interested parties are urges to be as specific as possible about: (1) Any product that is subject to different rates of duty by a GSP beneficiary country depending upon whether the product is imported from the United States or another developed country, such as the EU; (2) the various, actual, applicable rates of duty (i.e., bound, applied, preferential), as well as any scheduled rate reduction; (3) the level of trade in the subject product that the United States and other developed countries have with the GSP beneficiary; and (4) the size of the market in the beneficiary country.

Comments must be submitted in 15 copies, in English, to the Chairman of the GSP Subcommittee, Trade Policy Staff Committee, 600 17th Street, N.W., Room 513, Washington, D.C. 20506. Comments must be received no later than 5 p.m. on Wednesday, January 25, 1995. Information and comments will be subject to public inspection by appointment with the staff of the USTR Public Reading Room, except for information granted "business confidential" status pursuant to 15 CFR 2003.6 and 2007.7. If the document contains business confidential information, 15 copies of a nonconfidential version of the submission along with 15 copies of the confidential version must be submitted.

The confidential version of the submission should be clearly marked "Submitted in Confidence" at the top and bottom of each and every page of the document. A nonconfidential summary of the confidential information must be included with the confidential submission, along with a written explanation of why the confidential material should be protected. The version which does not contain business confidential information (the public version) should also be clearly marked at the top and bottom of each and every page (either "public version" or "non-confidential").

IV. Dominican Republic

In the 1993 Annual GSP Review, the GSP Subcommittee reviewed the worker rights practices and the adequacy and effectiveness of IPR protection in the Dominican Republic. Notwithstanding evidence of some progress on worker rights and IPR protection in the Dominican Republic during the course of the review, these two cases are continued when the results of the 1993 Annual GSP Review were announced on July 1, 1994. Since that decision, the Dominican Republic has made considerable progress on worker rights and has continued to make progress on IPR protection. In September, the Motion Picture Export Association of America, the domestic petitioner in the IPR case, withdrew its petition. In October, the AFL–CIO, the domestic petitioner in the worker rights case, withdrew its petition. Based on the continuing progress on worker rights and IPR protection in the Dominican Republic, as well as the withdrawal of the two petitions, the GSP reviews have been terminated.

Frederick L. Montgomery,

Chairman, Trade Policy Staff Committee.

[FR Doc. 94–31214 Filed 12–19–94; 8:45 am]

BILLING CODE 3190–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–35087; File No. SR–CHX–94–21]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 to Proposed Rule Change by the Chicago Stock Exchange, Incorporated Relating to the Rules for the Listing and Trading of Stock Index and Currency Warrants

December 12, 1994.

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 3, 1994, the Chicago Stock Exchange, Incorporated ("CHX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organizations Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to (1) amend Article XXVIII, Rule 8 to revise the listing criteria for stock index ("stock index" or "index") warrants and currency warrants ("currency warrants"),[1] (2) add a new Part V to the Rules of the Exchange to provide rules for the trading of index warrants, and (3) amend Article X, Rule 3 of the Exchange's rules to specify the customer margin requirements for the purchase or short sale of index warrants. On Dec. 5, 1994, the CHX amended certain surveillance related matters addressed in the filing. See footnote 3, *infra.*

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 self-regulatory organization 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 self-regulatory organization has prepared summaries, set forth in section (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

Purpose

The Exchange proposes to: (1) amend its listing guidelines for stock index and currency warrants, (2) establish various new rules for the trading of stock index and currency warrants, and (3) establish special customer margin requirements for positions in stock index and currency warrants.

[1] Currency warrants, as used in this filing, may refer to warrants on individual currencies (or cross currencies) or to warrants on a specific currency index group ("currency index warrants").

Description of the Proposed Rules

CHX seeks to amend Article XXVIII, Rule 8 of the Exchange's rules to provide a higher standard for warrant issuers than currently exists. Specifically, future warrant issuers would be expected to have a minimum tangible net worth in excess of $150,000,000. Moreover, the aggregate original issue price of all of a particular issuer's warrant offerings (combined with offerings by its affiliates) that are listed on a national securities exchange or on NASDAQ would not be permitted to exceed 25% of the issuer's net worth. The proposed amendment will require that each warrant issue will be automatically exercised on either the delisting date (if the issue is not listed upon another organized securities market) or upon expiration. Article XXVIII, Rule 8 also will be amended to provide that, for stock index warrants where 25 percent or more of the value of the underlying index is represented by securities that are traded primarily in the U.S., the opening prices of the U.S. traded securities in the index will be used to determine the settlement value of the underlying index.

Article X, Rule 3 is being amended to apply the customer margin requirements used for broad based index and currency options to index warrants and currency warrants, respectively. Thus, purchases of stock index and currency warrants will require payment in full, and short sales of stock index warrants will require initial margin of: (i) 100 percent of the current value of the warrant plus (ii) 15 percent of the current value of the underlying broad stock index less the amount by which the warrant is out of the money up to a maximum of five percent of the index value. Short sales of currency warrants similarly will follow the margin requirements applicable to listed currency options. The Exchange proposes that the index and currency warrant margin requirements be permitted offset treatment for spread, straddle and covered positions.[2]

Article LI is being amended to add definitions related to the listing, trading, and margin requirements of stock index, currency, and currency index warrants.

Proposed Part V of the Exchange rules applies to the trading of index warrants and currency warrants. Proposed Article LIII, Rule 1 provides that, unless the context otherwise requires or a specific

[2] The staff of the Commission has indicated to the Exchange that it must request and obtain appropriate interpretive or no-action relief from the Commission in order to permit its index and currency warrant margin requirements to allow offset treatment for spread, straddle and covered positions.

rule in Part V applies, the provisions of the Constitution and all other rules and policies of the Exchange apply to trading of such securities.

Proposed Article LIII, Rule 2 states that no member or member organization shall accept an order from a customer for the purchase or sale of an index or currency warrant unless the customer's account has been approved for options trading pursuant to Exchange Article XXVIII, Rule 3.

Proposed Article LIII, Rules 3, 4, 5, and 6 require that the options rules for suitability, discretionary account trading, supervision of accounts and customer complaints be applied to stock index and currency warrants.

Proposed Article LIII, Rule 7 requires approval by a Compliance Registered Options Principal of all advertisements, sales literature and educational material issued by a member organization pertaining to stock index and currency warrants. The rule further requires Exchange approval of all advertisements and educational materials pertaining to stock index and currency warrants.

Proposed Article LIII, Rule 8 provides that position limits for stock index warrants on the same index with original issue prices of ten dollars or less will be fifteen million warrants covering all such issues. In addition, with respect to warrants on the Standard & Poor's MidCap 400 Index, the position limit will be seven and one half million warrants covering all such issues, provided the original issue prices of the warrants are not greater than $10. Further, with respect to warrants on the Russell 2000 Index, the position limit will be twelve and one half million warrants. The rule provides that warrants with an original issue price of ten dollars or more will be weighted more heavily than warrants with an original issue price of ten dollars or less in calculating position limits. The rule gives the Exchange the authority to require the liquidation of a position in stock index warrants that is in excess of the position limits set forth in the rule, and commentary to the rule provides procedures for allowing limited exceptions to the position limits.

Proposed Article LIII, Rule 9 provides for exercise limits on stock index warrants analogous to those found in stock index options and states that such limits are separate and distinct from any exercise limits that may be imposed by the issuers of stock index warrants.

Proposed Article LIII, Rule 10, requires that the trading halt provisions in Article IX, Rule 10A shall be applied to the trading of stock index warrants.

Upon SEC approval of the foregoing amendments, the Exchange proposes that it will only file rule changes for specific warrant issues where there is no corresponding option or warrant on the same underlying index already listed on a national securities exchange or NASDAQ. Accordingly, when a listed option or warrant overlies a particular broad based index, the Exchange proposes it be able to list warrants on that index without further SEC review and approval pursuant to Section 19(b) of the Act.

Both initial and maintenance listing standards for stock index warrants will require that no more than 20% of the securities in the underlying index, by weight, may be comprised of foreign securities or American depositary receipts ("ADRs") overlying foreign securities that are not subject to comprehensive surveillance sharing agreements between the CHX and the primary exchange on which the foreign security (including a foreign security underlying an ADR) is traded.[3] Finally, prior to trading index or currency warrants, the Exchange will distribute a circular to its membership providing guidance regarding member firm compliance responsibilities (including suitability recommendations) when handling transactions in index or currency warrants.

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act in general and furthers the goals of Section 6(b)(5) in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose a burden on competition.

[3] Telephone conversation between David T. Rusoff, Foley & Lardner, and Stephen M. Youhn, SEC, on December 5, 1994 ("Amendment No. 1"). The Exchange proposes that the "20% test" be applied in the same manner as that contained in Securities Exchange Act Release No. 34157 (June 3, 1994), 59 FR 30062 (June 10, 1994) (Commission approval order allowing the expedited trading approval of certain narrow-based index options).

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such other 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 the 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 submission should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submissions, 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 at the principal office of the above-referenced self-regulatory organization. All submissions should refer to file number in the caption above and should be submitted by January 10, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–31204 Filed 12–19–94; 8:45 am]

BILLING CODE 8010–01–M

[4] 17 CFR 200.30–3(a)(12) (1993).

[Release No. 34–35096; File No. SR–MSTC–94–14]

Self-Regulatory Organizations; Midwest Securities Trust Company; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Implementing a Fixed Income Transaction System Automated Book Entry Feature for Municipal Bonds

December 13, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on October 21, 1994, the Midwest Securities Trust Company ("MSTC") filed with the Securities and exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared primarily by MSTC. The Commission is publishing this notice and order to solicit comments from interested persons and to grant accelerated approval of the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

MSTC proposes to adopt a new automated book entry feature for municipal bonds.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, MSTC 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. MSTC has prepared summaries, set forth in section (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

Under the proposed rule filing, MSTC proposes to adopt an automated book entry movement feature to work in conjunction with the Midwest Clearing Corporation's ("MCC") interface[2] with the National Securities Clearing Corporation's ("NSCC") fixed income transaction system ("FITS") for municipal securities.[3] The book entry movement feature for municipal securities transactions compared through FITS will be similar in functionality and procedure to the current institutional delivery system where book entry delivery is set up in advance for automatic settlement on settlement date. A municipal bond trade entered for comparison into FITS will be set up for automatice book entry delivery once the trade achieves a compared status as long as the settlement date entered for the trade is a date in the future of the trade date. New issue or unusual trade types that compare without a settlement date or items that compare on or after settlement date will not be subject to automatice book entry delivery. These exception items must be submitted manually.

Participants will have the flexibility to specify the position from which an automatic book entry delivery should originate. MSTC expects that this decision often will be based on the most frequently used safekeeping position as identified on the participant's account profile. Participants will have the option of changing this standing origination location as necessary.

(B) Self-Regulatory Organization's Statement on Burden on Competition

MSTC does not believe that the proposed rule change will impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

(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

Section 17A(b)(3)(F)[4] of the Act requires the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions. The Commission believes that the automated book entry delivery feature should help promote prompt and accurate clearing and settlement by reducing errors by automatically generating book entry movements on behalf of the delivering MSTC participants for compared trades. Section 17A(a)(2)(A)(i)[5] of the Act directs the Commission to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of securities transactions. The Commission believes that the proposal furthers this goal by creating cooperation by automating the process of trades being cleared and settled at Midwest Clearing Corporation and MSTC.

MSTC has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of the filing. The Commission finds good cause for so approving the proposed rule change because accelerated approval will allow MSTC participants to utilize and to take full advantage in a more timely fashion of the benefits of the automated book entry movement feature for municipal securities.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submission should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington D.C. 20549. Copies of the submissions, 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 at the Commission's Public Reference Section, 450 5th Street, N.W., Washington, D.C. 20549. Copies of such filings will also be available at the principal office MSTC. All submissions should refer to File No. SR–MSTC–94–14 and should be submitted by January 10, 1995.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–MSTC–94–14) be, and hereby is, approved.

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[1] 15 U.S.C. 78s(b)(1) (1988).

[2] For a complete description of the Midwest Clearing Corporation's and the Stock Clearing Corporation of Philadelphia's interface with NSCC's FITS for municipal securities, refer to Securities Exchange Act Release No. 33524 (January 26, 1994), 59 FR 4958 [File Nos. SR–MCC–93–04 and SCCP–93–03] (order approving interfaces with NSCC's FITS).

[3] For a detailed description of NSCC's FITS, refer to Securities Exchange Act Release Nos. 32747 (August 13, 1993), 58 FR 44530 [File No. SR–NSCC–93–02] (order approving implementation of FITS for municipal securities) and 34867 (October 20, 1994), 59 FR 54018 [File No. SR–NSCC–94–16] (order approving expansion of NSCC's FITS to include corporate bonds and unit investment trusts).

[4] 15 U.S.C. 78q–1(b)(3)(F) (1988).

[5] 15 U.S.C. 78q–1(a)(2)(A)(i) (1988).

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–31168 Filed 12–19–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–35098; File No. SR–MSTC–94–17]

Self-Regulatory Organizations; Midwest Securities Trust Company; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Legal Expert System

December 13, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on November 29, 1994, the Midwest Securities Trust Company ("MSTC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by MSTC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organizations Statement of the Terms and Substance of the Proposed Rule Change

The purpose of the proposed change is to change the pricing structure of the Legal Expert System and to clarify MSTC's policies with regard to the use of the Legal Expert System.[2]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, MSTC 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. MSTC has prepared summaries, set forth in section (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

MSTC proposes to amend a portion of its services and the schedule of charges relating to the Legal Expert System. MSTC also proposes to clarify its existing policy with respect to the use of the Legal Expert System by participants.

The Legal Expert System is a computer program available to MSTC participants which details the necessary documentation for effecting a legal transfer of securities based on industry criteria and individual state regulations. First, MSTC wishes to clarify that the Legal Expert System is available only to full MSTC participants; accordingly, it is not available to pledgee participants or limited purpose participants. Furthermore, the Legal Expert System is proprietary to MSTC; therefore, participants may not provide third parties with access to the Legal Expert System without MSTC's prior written approval. The new schedule of charges will be effective January 1, 1995.

The text of the proposed rule change is as follows with additions italicized and with deletions bracketed:

MSTC Legal Expert System

[Participants that make inquiries in the Legal Expert System: $750/month]

Terminal Inquiry

1–2500 inquiries per month: $0.50/inquiry
2,501–5,000: $0.35/inquiry
5,001–10,000: $0.35/inquiry
10,001 and over: $0.17/inquiry

MSTC full legal deposit participants will receive a free inquiry for each legal deposit submitted to MSTC. The free inquiries are only valid in the month the legal deposit is made.

The proposed rule change is consistent with Section 17A of the Act in that it provides for the equitable allocation of reasonable fees and other charges among participants using its facilities.

(B) Self-Regulatory Organization's Statement on Burden on Competition

MSTC believes that no burden will be placed on competition as a result of the proposed rule change.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

MSTC has not solicited or received any comments. MSTC will notify the Commission of any written comments it receives.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)[3] of the Act and Rule 19b–4(e)[4] thereunder in that it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule and in that it establishes or changes a due, fee, or other charge imposed by MSTC. At any time within sixty days of the filing of the proposed rule change, the Commission summarily may abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submission should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communication 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 at the Commission's Public Reference Section, 450 Fifth Street N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of MSTC. All submissions should refer to File No. SR–MSTC–94–17 and should be submitted by January 10, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–31169 Filed 12–19–94; 8:45 am]

BILLING CODE 8010–01–M

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[6] 17 CFR 200.30–3(a)(12) (1994).

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] For a complete description of the Legal Expert System, refer to Securities Exchange Act Release No. 33756 (March 11, 1994), 54 FR 13350 [File No. SR–MSTC–94–02] (order approving a rule change regarding the Legal Expert System's fees and a clarification disclaiming any liability on MSTC's part for any misinformation contained in the Legal Expert System).

[3] 15 U.S.C. 78s(b)(3)(A) (1988).

[4] 17 CFR 240.19b–4(e) (1994).

[5] 17 CFR 200.30–3(a)(12) (1994).

[Release No. 34–35085; File No. SR–NYSE–94–41]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 to Proposed Rule Change by the New York Stock Exchange, Inc., Relating to the Establishment of Uniform Listing and Trading Guidelines for Stock Index and Currency Warrants

December 12, 1994.

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 9, 1994, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") 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 self-regulatory organization. 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 Exchange proposes to: (1) Amend its listing guidelines for stock index ("stock index" or "index") warrants and currency warrants ("currency warrants");[1] (2) establish various new rules for the trading of stock index and currency warrants; and (3) establish special customer margin requirements for positions in stock index and currency warrants. On Dec. 8, 1994, the NYSE amended certain surveillance related matters addressed in the filing. See footnote 3, *infra*.

The text of the proposal is available at the Office of the Secretary, NYSE and at the Commission.

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 self-regulatory organization 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 self-regulatory organization 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 NYSE proposes (1) to add a new Rule 414 (Index and Currency Warrants) in order (a) to prescribe procedures for approving and supervising accounts that trade currency warrants, currency index warrants and stock index warrants and (b) to prescribe stock index warrant position and exercise limits, (2) to replace Supplementary Material .30 to Rule 405 (Diligence to Accounts), which contains provisions that the proposed rule change proposes to supersede, with a cross reference to proposed Rule 414, (3) to amend existing Rule 431 (Margin Requirements) to modify currency warrant and stock index warrant margin requirements and to establish currency index warrant margin requirements, (4) to amend Para. 703.15 (Foreign Currency Warrants and Currency Index Warrants) of the Exchange's Listed Company Manual to modify the listing standards for currency warrants and to establish listing standards for currency index warrants, and (5) to amend Para. 703.17 (Stock Index Warrants Listing Standards) of the Exchange's Listed Company manual to modify the listing standards for stock index warrants.

The provisions of proposed Rule 414 include (a) provisions governing the approval, supervision and suitability of customers, which for the most part follow the Rules that the Exchange applies in respect of trading in stock index options, and (b) stock index warrant position limits. It also includes a newly added stock index warrant exercise limit. A more detailed discussion of the provisions of the proposed rule change follows.

Paragraph (a) of Rule 414 defines relevant terms.

Paragraph (b) of Rule 414 specifies that the Rule applies to Exchange trading in currency warrants, currency index warrants and stock index warrants and that other Exchange Rules and the Exchange's Constitution also so apply.

Paragraph (c) of Rule 414 establishes position limits for stock index warrants. For a position of stock index warrants with an original issue price of $10 or less, the position limit is 15 million index warrants. For a position of stock index warrants with an original issue price in excess of $10, the number of such warrants is converted to the equivalent number of warrants that the position would contain if the issuer had originally priced the issue at $10. Thus, 1 million stock index warrants with an original issue price of $20 would represent the equivalent of 2 million stock index warrants with an original issue price of $10 ($20/$10 × 1 million stock index warrants) and the 15 million stock index warrant position limit would apply to the 2 million stock index warrant "equivalents." Paragraph (c) also provides procedures for allowing limited exceptions to those position limits as circumstances warrant.

Paragraph (d) of Rule 414 imposes exercise limits on stock index warrants equal to the position limits. The exercise limits are separate and distinct from any limits the issuer of the stock index warrant may impose.

Paragraph (e) of Rule 414 applies the options rule counterpart to stock index warrant trading halts.

Paragraph (f) of Rule 414 requires a member or member organization to have approved an account for options trading pursuant to the standards and procedures set forth in Rule 721 (Opening of Accounts) before the account can trade currency warrants, currency index warrants and/or stock index warrants. Paragraphs (g), (h), (i) and (j) of Rule 414 apply options rule counterparts to trading in currency warrants, currency index warrants and stock index warrants in the areas of supervision of accounts (see Rule 722 (Supervision of Accounts)), suitability (see Rule 723 (Suitability)), discretionary accounts (see Rule 724 (Discretionary Accounts)), and customer complaints (see Rule 732 (Customer Complaints)).

Paragraph (k) of Rule 414 applies the options rule counterpart (see Rule 791 (Communications to Customers)) to communications to customers relating to currency warrants, currency index warrants and/or stock index warrants. In addition, Paragraph (k) requires those communications to state that currency warrants, currency index warrants and stock index warrants, unlike standardized options, are subject to issuer's credit risks and warrant terms and conditions that may differ from those that apply to other warrant issues overlying the same currency or index. The paragraph also advises that the prospectus requirements of the Securities Act of 1933 apply to certain communications.

Paragraph (l) of Rule 414 requires that, where 25 percent or more of the value of an underlying index stock group is represented by securities of United States issuers, the calculation of a stock index warrant's settlement value must use the opening prices of those securities on the U.S. markets.

[1] Currency warrants, as used in this filing, may refer to warrants on individual currencies (or cross currencies) or to warrants on a specific currency index group ("currency index warrants").

Supplementary Material .30 to Rule 405 is amended to cross-reference Rule 414 and to delete (a) the statement that the suitability requirements of Rule 723 apply to stock index warrants and (b) the recommendation that the account approval requirements of Rule 721 be applied to stock index warrants. Paragraphs (f) and (h) of Rule 414 supersede those notions.

The Exchange proposes to amend those portions of the Rule 431 margin requirements that apply to margin on foreign currency options and options on broad index stock groups so as to apply the same margin requirements to currency warrants and stock index warrants, respectively, and to establish currency index warrant margin requirements. For example, stock index warrants will follow broad index options in requiring margin of (A) 100 percent of the current market value of all "long" stock index warrants and (B) in the case of "short" positions in stock index warrants, (1) 100 percent of the current value of the option plus (2) 15 percent of the current value of the underlying index stock group multiplied by the applicable index multiplier. The Exchange proposes that its margin requirements be permitted offset treatment for spread, straddle and covered positions.[2]

The Exchange proposes to amend Para. 703.15 of the Listed Company Manual, which currently provides listing standards for foreign currency warrants, to cause it to apply to currency index warrants. The Exchange also proposes to amend Para 703.15 and Para. 703.17 of the Listed Company Manual (A) to change the issuer "substantiality" requirement for $100 million in assets to $150 million in tangible net worth, (B) to specify that the issuer is expected to refrain from issuing warrants where its aggregate currency and index warrant offerings exceed 25 percent of its net worth and (C) to require in-the-money currency and index warrants to be automatically exercised at expiration if not otherwise exercised.

In listing new stock index warrant or currency index warrant issues for trading on the Exchange, the Exchange would submit a proposed rule change only where a warrant issue overlies an index on which warrants or options are not already listed, whether on the Exchange or on another self-regulatory organization. Thus, an Exchange would list for trading index warrants on indexes that already underlie listed options or warrants without further Commission review and approval pursuant to Section 19(b) of the Act. Both initial and maintenance listing standards for stock index warrants will require that no more than 20% of the securities in the underlying index, by weight, may be comprised of foreign securities that are not subject to comprehensive surveillance sharing agreements between the NYSE and the primary exchange on which the foreign security (including a foreign security underlying an ADR) is traded.[3] Finally, prior to trading index or currency warrants, the Exchange will distribute a circular to its membership providing guidance regarding member firm compliance responsibilities (including suitability recommendations) when handling transactions in index or currency warrants.

The basis under the Act for the proposed rule change is the requirement under Section 6(b)(5) that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The NYSE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the 1934 Act.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on the proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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, N.W., Washington, D.C. 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 at the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by January 10, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

[FR Doc. 94–31205 Filed 12–19–94; 8:45 am]

BILLING CODE 8010–01–M

[2] The Staff of the Commission has indicated to the Exchange that it must request and obtain appropriate interpretive or no-action relief from the Commission in order to permit its index and currency warrant margin requirements to allow offset treatment for spread, straddle and covered positions.

[3] Telephone conversation between Vincent Patten, NYSE, and Stephen M. Youhn, SEC, on December 8, 1994 ("Amendment No. 1"). The Exchange proposes that the "20% test" be applied in the same manner as that contained in Securities Exchange Act Release No. 34157 (June 3, 1994), 59 FR 30062 (June 10, 1994) (Commission approval order allowing the expedited trading approval of certain narrow-based index options.)

[4] 17 CFR 200.30–3(a)(12) (1993).

[Release No. 34–35092; File No. SR–NYSE–94–42]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by New York Stock Exchange, Inc., Relating to the Mailing of Interim Financial Statements to Shareholders

December 12, 1994.

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 December 1, 1994, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. 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 NYSE is proposing amendments to Para. 203.02 of its Listed Company Manual (the "Manual") regarding the mailing of interim financial statements to shareholders of listed companies. The rule, as amended, would state that corporations that distribute interim reports to shareholders should distribute such reports to both registered and beneficial shareholders.

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 self-regulatory organization 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 self-regulatory organization 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

1. Purpose

Currently, the Exchange requires listed companies to publish interim earnings statements as press reports, but does not require that such statements also be sent to shareholders. The practices of listed companies vary: Some companies mail these reports to all shareholders, some mail only to registered holders, and some companies do not mail interim reports at all.

Various groups, including the American Society of Corporate Secretaries and the Securities Industry Association, have been reviewing this area in an attempt to achieve some uniformity among listed companies with respect to their dissemination of interim earnings reports to shareholders. In balancing the benefit of requiring that these reports be mailed to all shareholders, and the high cost of doing so, particularly as to "street name" holders, a compromise position developed. While companies would continue not to be required to mail interim reports to shareholders, if a company did conduct such a mailing, it was believed to be fair that such reports be mailed to both registered and beneficial holders.

The compromise position is proposed as an amendment to Para. 203.02 of the Manual in the discussion of reporting and disclosure by listed companies.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under section 6(b)(5) that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

This proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 55 days of the publication of this notice in the **Federal Register** or within such other 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 the 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 at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR–NYSE–94–42 and should be submitted by January 10, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–31206 Filed 12–19–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–35088; File No. SR-PSE 94–28]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 to Proposed Rule Change by the Pacific Stock Exchange, Inc. Relating to the Establishment of Uniform Listing and Trading Guidelines for Stock Index and Currency Warrants

December 12, 1994.

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 September 22, 1994, the Pacific Stock Exchange, Inc.

("PSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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 Exchange proposes to: (1) Amend its listing guidelines for stock index ("stock index" or "index") warrants and currency warrants ("currency warrants");[1] (2) establish various new rules for the trading of stock index and currency warrants; and (3) establish special customer margin requirements for positions in stock index and currency warrants. On Dec. 5, 1994, the PSE amended certain surveillance related matters addressed in the filing. See footnote 3, *infra.*

The text of the proposed rule change is available at the Office of the Secretary, PSE, and at the Commission.

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 self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Section (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 PSE proposes to: (1) Amend its listing guidelines and establish uniform rules for the trading of stock index and currency warrants, and (2) establish special customer margin requirements for positions in stock index and currency warrants.

The PSE seeks to amend Rule 7.18 to provide higher standards for warrant issuers than currently exists. In particular, future warrant issuers would be expected to have a minimum tangible net worth in excess of $150 million. In addition, the aggregate original issue price of all of a particular issuer's warrant offerings (combined with offerings by its affiliates) that are listed on a national securities exchange or that are National Market securities traded through NASDAQ would not be permitted to exceed 25% of the issuer's net worth. The proposed amendment will require that each warrant issue will be automatically exercised on either the delisting date (if the issue is not listed upon another organized securities market) or upon expiration. Rule 7.18 also will be amended to provide that opening prices ("a.m. settlement") for all U.S. traded securities will be used to determine an index's settlement value where 25 percent or more of the value of the index is represented by securities whose primary trading market is in the U.S.

Rule 2.16 is being amended to apply the current customer margin requirements for broad based stock index and currency options to stock index and currency warrants, respectively. Thus, purchases of stock index and currency warrants will require payment in full, and short sales of stock index warrants will require initial margin of: (i) 100 percent of the current value of the warrant plus (ii) 15 percent of the current value of the underlying broad stock index less the amount by which the warrant is out of the money up to a maximum of five percent of the index value. Short sales of currency warrants will follow the margin requirements applicable to listed currency options. The Exchange proposes that its stock index and currency warrant margin requirements be permitted offset treatment for spread, straddle and covered positions.[2] Proposed Rule 8 of the Exchange rules applies to the trading of index warrants and currency warrants. Proposed Rule 8.1 provides that, unless the context otherwise requires or a specific provision of Rule 8 applies, the provisions of the Constitution and all other rules and polices of the Exchange apply to trading of such securities.

Proposed Rule 8.4 states that no member or member organization shall accept an order from a customer for the purchase or sale of index or currency warrants unless the customer's account has been approved for options trading pursuant to Exchange Rule 9.18(b). Furthermore, proposed Rules 8.5–8.8 require that the option rules pertaining to suitability, discretionary account trading, supervision of accounts and customer complaints be applied to stock index and currency warrants.

Proposed Rule 8.9 requires approval by a Compliance Registered Options Principal of all advertisements, sales literature and educational material issued by a member organization pertaining to stock index and currency warrants. The rule further requires Exchange approval of all advertisements and educational materials pertaining to stock index and currency warrants.

Proposed Rule 8.10 provides that position limits for stock index warrants on the same index with original issue prices of ten dollars or less will be fifteen million warrants covering all such issues. The rule provides that warrants with an original issue price greater than ten dollars will be weighted more heavily than warrants with an original issue price of ten dollars or less in calculating position limits. The rule also gives the Exchange the authority to require the liquidation of a position in stock index warrants that is in excess of the position limits set forth in the rule, and Commentary to the rule provides procedures for allowing limited exceptions to the position limits.

Proposed Rule 8.11 provides for exercise limits on stock index warrants analogous to those found in stock index options and states that such limits are separate and distinct from any exercise limits that may be imposed by the issuers of stock index warrants.

Proposed Rule 8.12 requires that the trading halt provisions in Rule 7.11 shall be applied to trading in stock index warrants.

Upon Commission approval of the foregoing amendments, the Exchange proposes it will only file rule changes for specific warrant issues where there is no corresponding option or warrant on the same underlying broad based index already listed on a national securities exchange or NASDAQ. Accordingly, when a listed option overlies a particular broad based index, the Exchange proposes it be able to list warrants on that index without further Commission review and approval pursuant to Section 19(b) of the Act.

Both initial and maintenance listing standards for stock index warrants will require that no more than 20% of the securities in the underlying index, by weight, may be comprised of foreign securities or American Depositary Receipts ("ADRs") overlying foreign securities that are not subject to comprehensive surveillance sharing agreements between the PSE and the primary exchange on which the foreign security (including a foreign security

[1] Currency warrants, as used in this filing, may refer to warrants on individual currencies (or cross currencies) or to warrants on a specific currency index group ("currency index warrants").

[2] The staff of the Commission has indicated to the Exchange that it must request and obtain appropriate interpretive or no-action relief from the Commission in order to permit its index and currency warrant margin requirements to allow offset treatment for spread, straddle and covered positions.

underlying an ADR) is traded.[3] Furthermore, Commentary .01 to Proposed Rule 2.16 provides that stock index and currency warrants listed on the Exchange prior to SEC approval of this filing shall continue to be governed by those provisions of the Exchange's rules that were applicable to such warrants prior to approval of this filing. Finally, prior to trading index or currency warrants, the Exchange will distribute a circular to its membership providing guidance regarding member firm compliance responsibilities (including suitability recommendations) when handling transactions in index or currency warrants.

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act, in general, and furthers the objectives of Section 6(b)(5), in particular, in that it will facilitate transactions in securities.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes a burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such other 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 the 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 at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the PSE. All submissions should refer to File No. SR–PSE–94–28 and should be submitted by January 10, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

[FR Doc. 94–31207 Filed 12–19–94; 8:45 am]

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[3] Telephone conversation between Michael Pierson, PSE, and Stephen M. Youhn, SEC, on December 5, 1994 ("Amendment No. 1"). The Exchange proposes that the "20% test" be applied in the same manner as that contained in Securities Exchange Act Release No. 34157 (June 3, 1994), 59 FR 30062 (June 10, 1994) (Commission approval order allowing the expedited trading approval of certain narrow-based index options).

[4] 17 CFR 200.30–3(a)(12) (1993).

[Release No. 34–35090; File No. SR–Phlx–94–49]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 to Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to the Establishment of Uniform Listing and Trading Guidelines for Stock Index and Currency Warrants

December 12, 1994.

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 30, 1994, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. 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 Phlx proposes to amend: (1) Rule 803(e) to revise the listing criteria for stock index ("stock index" or "index") warrants and currency warrants ("currency warrants");[1] (2) Rule 722 to specify the customer margin for the purchase or short sale of index and currency warrants; (3) Option Rules 1001, 1002, 1024, 1025, 1047A, 1049, and 1070 thereby extending these trade practice rules to currency and index warrants; and (4) Rule 1000 to add applicable definitions. On Dec. 2, 1994, the Phlx amended certain surveillance related matters addressed in the filing. See footnote 3, *infra*.

The text of the proposed rule change is available at the Office of the Secretary, Phlx and at the Commission.

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 Phlx 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 Phlx 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 Purpose of this rule change is to: (1) amend listing guidelines for stock index and currency warrants, (2) amend various rules thereby extending their applicability to index and currency warrants trading, and (3) establish special customer margin requirements for positions in stock index and currency warrants.

The Phlx seeks to amend its listing standards for currency and index warrants. Phlx Rule 803(e) will provide that issuers must have a minimum tangible net worth in excess of $150 million. In addition, the aggregate original issue price of all of a particular issuer's stock index or currency warrant offerings (combined with offerings by its affiliates) that are listed on a national securities exchange or on NASDAQ would not be permitted to exceed 25% of the issuer's net worth. The proposed amendment will also provide for automatic exercise of warrants upon expiration and that opening prices will be used to determine the settlement value of an underlying index.

Exchange Rule 722 is being amended to apply the customer margin required

[1] Currency warrants, as used in this filing, may refer to warrants on individual currencies (or cross currencies) or to warrants on a specific currency index group ("currency index warrants").

for broad based index and currency options to stock index and currency warrants, respectively. Thus, purchases of stock index and currency warrants will require payment in full, and short sales of stock index warrants will require an initial margin of 100 percent of the current value of the warrant plus 15 percent of the current value of the underlying index, less the amount by which the warrant is out of the money, up to a maximum of five percent of the index value. Short sales of currency warrants similarly will follow the margin requirements applicable to listed currency options. The Exchange proposes that its index and currency warrant margin requirements be permitted offset treatment for spread, straddle and covered positions.[2]

Exchange Option Rules 1024, 1025, and 1070 concerning opening of accounts, supervision of accounts, and customer complaints will all be made applicable to index and currency warrants. Presently, Exchange Rule 1026 and 1027 respecting suitability and discretionary accounts for option transactions already are applicable to index and currency warrants.

Rule 1049 respecting written customer communications about listed options will apply to index and currency warrants and require approval by a Compliance Registered Options Principal of all advertisements, sales literature and educational material issued by a member organization pertaining to stock index and currency warrants. The Rule further requires Exchange approval of all advertisements and educational materials pertaining to stock index and currency warrants.

Rule 1001 is being amended to provide that index warrants on the same index with original issuer prices of ten dollars or less will be 15 million warrants covering all such warrant issues and that warrant issues with an original issue price over ten dollars will be weighted more heavily than warrants with an original issue price of ten dollars or less. Rule 1002 is being amended to provide that the exercise limits for index warrants will be analogous to those found in stock index options and that such limits are separate and distinct from any exercise limits imposed by the issuer of such warrants.

Rule 1047A regarding trading halts in index options is being amended to indicate that it also will apply to the trading of index and currency warrants.

Rule 1000 will be amended to include applicable definitions of "stock index group," "stock index warrant," "currency warrant," "currency index group" and "currency index warrant."

Upon Commission approval of the foregoing amendments, the Exchange proposes that it will only file rule changes for specific warrant issues where there is no corresponding option or warrant on the same underlying index already listed on a national securities exchange or NASDAQ. Accordingly, when a listed option or warrant overlies a particular broad based index, the Exchange proposes that it be allowed to list warrants on that index without further Commission review and approval pursuant to Section 19(b) of the Act.

Both initial and maintenance listing standards for stock index warrants will require that no more than 20% of the securities in the underlying index, by weight, may be compromised of foreign securities or American Depositary Receipts ("ADRs") overlying foreign securities that are not subject to comprehensive surveillance sharing agreements between the Phlx and the primary exchange on which the foreign security (including a foreign security underlying an ADR) is traded.[3] Finally, prior to trading index or currency warrants, the Exchange will distribute a circular to its membership providing guidance regarding member firm compliance responsibilities (including suitability recommendations) when handling transactions in index or currency warrants.

The Phlx believes the proposed rule change is consistent with Section 6(b) of the Act in general and furthers the objectives of Section 6(b)(5) in particular in that it is designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade, and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes the proposed rule change will impose no burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such other 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 the 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 at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR–Phlx–94–49 and should be submitted by January 10, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Margaret H. McFarland,

Deputy Secretary

[FR Doc. 94–31208 Filed 12–19–94; 8:45 am]

BILLING CODE 8010–01–M

[2] The staff of the Commission has indicated to the Exchange that it must request and obtain appropriate interpretive or no-action relief from the Commission in order to permit its index and currency warrant margin requirements to allow offset treatment for spread, straddle and covered positions.

[3] Telephone conversation between Michele R. Weisbaum, Phlx, and Michael Walinskas, SEC, on December 2, 1994 ("Amendment No. 1"). The Exchange proposes that the "20% test" be applied similarly to that contained in Securities Exchange Act Release No. 34157 (June 3, 1994), 59 FR 30062 (June 10, 1994) (Commission approval order allowing the expedited trading approval of certain narrow-based index options).

[4] 17 CFR 200 30–3(a)(12) (1993).

[Release No. 34–35091; File No. SR–Phlx–94–66]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. To Adopt a Monthly Examinations Fee

December 12, 1994.

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 December 2,1994, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. 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 Phlx, pursuant to Rule 19b–4 of the Act, proposes to adopt an examinations fee applicable to Phlx member and participant organizations for which the Exchange is the Designated Examining Authority ("DEA"), effective January 1, 1995. The following Phlx member/participant organizations would be exempt from the examinations fee: (1) Inactive organizations; (2) organizations that operate from the Exchange's trading floors; (3) organizations for any month where they incur transaction or clearing fees charged directly to them by the Exchange or by its registered clearing subsidiary, provided that the fees exceed the examinations fee for that month;[1] and (4) organizations affiliated with an organization exempt from this fee due to the second or third category.[2]

Affiliation includes an organization that is a wholly owned subsidiary of, as well as an organization controlled by or under common control with, an "exempt" member or participant organization. An inactive organization is one which had no securities-related transaction revenue, as determined by semi-annual FOCUS reports, as long as the organization continues to have no revenue each month.[3] In order to compensate for the extensive staff time and costs associated with examining off-floor firms who are not active participants in Phlx markets, the Exchange is proposing to amend its fee schedule by adopting a $1,000 per month examination fee.

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 self-regulatory organization 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 self-regulatory organization 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

1. Purpose

Commission Rule 15b2–2(b) requires that broker-dealers designated to a self-regulatory organization ("SRO") be examined for compliance with applicable financial responsibility rules within six months of registration with the Commission. In addition, the examining SRO must conduct an examination within 12 months of Commission registration to review compliance with all other Commission rules. Thereafter, examinations are conducted on a periodic basis. In accordance with Commission rules, the Phlx administers an examinations program conducting reviews of organizations for which the Exchange is the DEA. The examinations focus on an organization's compliance with applicable financial and record keeping requirements, including net capital, books and record maintenance, Regulation T and financial reporting, of the Phlx as well as the Commission.

The Examinations Department incurs certain costs in the course of conducting these examinations, including travel and staff costs. Of course, such costs rise when the offices of the organization being reviewed are located outside of the Philadelphia area. Staff time required to conduct an examination is substantially longer when the businesses of the firm are atypical of those firms for which the Phlx has historically served as DEA. Because of the familiarity that inherently results from repeatedly conducting similar examinations, Phlx Examinations staff has accumulated substantial experience regarding where to focus and locate information revealing potential areas of concern.

However, the Exchange is currently the DEA for approximately one dozen firms that engage in Phlx-atypical businesses from remote locations. The Phlx is the DEA for firms located in other geographic regions, which do not transact business on the Exchange, and trade products not available on the Phlx. For instance, a Chicago-based firm conducting proprietary trades in government securities and a Connecticut-based firm engaged in convertible debt securities arbitrage are examples of atypical Phlx firms. The heightened costs, which include both money as well as valuable staff time, may be due to an atypically lengthy examination, travel and specific training regarding non-Phlx trading instruments.

In addition to actual costs incurred in conducting required examinations, the Exchange notes that, as the DEA for a firm, the Phlx, similar to other SROs, also frequently performs an advisory role respecting the regulatory obligations of its member/participant firms. This "service" function may take the form of answering telephone calls and other questions of such firms regarding Exchange and Commission rules, as well as the types of procedures such firm should have in place. Initially, becoming a member/participant firm of the Phlx, the Exchange assists in the firm's set-up of its financials and communicates with the firm, providing sample forms and general guidance. Thereafter, a firm may require periodic follow-up advice. These advisory costs to the Exchange of serving as the DEA are greater for the Phlx-atypical firms.

However, these heightened costs may be offset by transaction charges and related revenues received by the Exchange if such firms trade in Phlx markets. In reviewing these costs, the Exchange notes that Phlx member/participant organizations may be required to pay various fees and transaction charges, which usually constitute a large part of the revenue collected by the Exchange. Organization not trading on the Phlx escape these fees, while the Exchange remains obligated to administer various regulatory functions, including costlier

[1] The $1,000 threshold is required in order for a firm to be exempt from the examinations fee. For example, a firm with $600 in transaction fees for a month is required to pay the full amount of the $1,000 examinations fee. See letter from Gerald D O'Connell, First Vice President, PHLX, to Glen Barrentine, Branch Chief, SEC, dated December 12, 1994 ("Letter").

[2] Affiliated firms, which are exempt if affiliated with an exempt organization, are permitted to aggregate their respective transaction fees to meet the $1,000 threshold, *i.e.*, each firm is not required to meet a separate threshold. See Letter, *supra* note 1

[3] A FOCUS report, Securities and Exchange Commission Form X–17A–5, Financial and Operational Combined Uniform Single Report, is required by SEC Rule 17a–5 and Phlx Rule 703(c)(i)

examinations. In the area of examinations, the factor of staff time is particularly pronounced.

In some cases, these firms do not engage in business on the Phlx, and, consequently, the heightened costs are not offset by revenues derived from these firms. Without this income source, the Exchange has determined to adopt an examinations fee in order to alleviate certain costs of conducting examinations. Currently, the Phlx does not charge an examinations or DEA fee, noting, in contrast, that most other SROs in the U.S. impose direct examinations fees.[4] For the above reasons, therefore, the Phlx is proposing such a fee for those organizations for which it serves as DEA—with certain exceptions. The proposed examinations fee would apply primarily to those member and participant organizations which do not execute trades on the Phlx.

In order to fairly allocate the proposed examinations fee, the Exchange has determined to exempt those member and participant organizations that actively trade on the Exchange, thereby counterbalancing examination costs with transaction fees. Organizations that for any month incur transaction or clearing fees charged directly to them by the Exchange or by its registered clearing subsidiary would be exempt from the fee, provided that the fees exceed the examinations fee for that month. Inactive organizations would be exempt because examinations are not customarily conducted for such organizations. Compliance with the inactive status will be determined by gross securities-related transaction revenues reported on the organization's most recent semi-annual FOCUS report. In addition, the organization must continue to lack such revenues, as determined monthly, in order to be exempt from the examinations fee.

Similarly, a member or participant organization that is wholly owned by, controlled by, or under common control with an organization operating from the Phlx trading floor or generating counterbalancing Phlx transaction or clearing fees would be exempt from this fee, because the affiliated organization is generating transaction or clearing fees to help offset examinations costs.

2. Statutory Basis

The proposed rule change is consistent with Section 6 of the Act in general, and in particular, with Section 6(b)(4), in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. The Exchange believes that the proposed examinations fee of $1,000 per month is reasonable in view of the Exchange's costs in conducting examinations of non-Phlx-trading organizations, especially in terms of staff time.

The Exchange also believes that structuring the fee to exempt organizations that transact business on the Exchange represents an equitable allocation of the Exchange's examination costs among members by focusing on those member organizations that generally do not otherwise continually contribute to compensating for, and usually, in fact, increase Exchange examination costs. The Exchange notes that the fee becomes effective January 1, 1995.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Phlx does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange and therefore has become effective pursuant to Section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b–4 thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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 at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR–Phlx–94–66 and should be submitted by January 10, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–31209 Filed 12–19–94; 8:45 am]

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[4] The Chicago Board Options Exchange imposes a fee equal to $.40 per $1,000 in gross revenues. Other exchanges similarly impose revenue-based examinations fees.

[Release No. 34–35097; File No. SR–PHLX–94–54]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Philadelphia Stock Exchange, Inc., Relating to the Holiday Expiration Date for Cash/Spot Foreign Currency Options

December 13, 1994.

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 7, 1994, the Philadelphia Stock Exchange, Inc ("PHLX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization.[1] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] On December 7, 1994, the PHLX withdrew the portion of the proposal requesting approval to list cash/spot foreign currency options in consecutive month and cycle month series. In addition, the PHLX requested accelerated approval for the portion of the proposal concerning holiday expirations and the definition of "underlying foreign currency." See Letter from Michele R Weisbaum, Associate General Counsel, PHLX, to Michael Walinskas, Branch Chief, Division of Market Regulation, Commission, dated December 5 1994 ("Amendment No. 1"). Under Amendment No. 1, the contract listed on December 19, 1994, will be effected on Friday, December 23, 1994, will not be effected by the new procedure

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PHLX proposes to amend PHLX Rule 1000, "Applicability, Definitions, and References," to provide that the expiration date for cash/spot foreign currency options ("3D options") that expire on a holiday or an Exchange designated bank holiday will be the business day following the holiday or the Exchange designated bank holiday. In addition, the PHLX proposes to amend PHLX Rule 1000(b)(14) to correct the definition of "underlying foreign currency" as it applies to 3D options. Under the proposal, the 3D option contract listed on December 19, 1994, will be effected by the proposed expiration procedure, but the 3D contract expiring on Friday, December 23, 1994, will not be effected by the proposed expiration procedure.[2]

The text of the proposed rule change is available at the Office of the Secretary, PHLX, and at the Commission.

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 self-regulatory organization 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 self-regulatory organization 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 PHLX proposes to amend its rules to make two changes to its 3D options. Presently, 3D options expire every Monday at 11:59 p.m. Eastern Standard Time. PHLX Rule 1000(b)(21)(iii), "Expiration Date," provides that if Monday is a holiday or Exchange designated bank holiday, 3D options will expire on the preceding business day. The Exchange also trades physically settled foreign currency options that expire on the Friday preceding the third Wednesday of each month ("mid-month options") and on the last Friday of each month ("month-end options"). the PHLX states that the Exchange created 3D options with a Monday expiration to attract users seeking an option capturing the risk associated with the weekend.

Pursuant to existing PHLX Rule 1000(b)(21)(iii), if Monday is a holiday, the expiration reverts back to the preceding business day, which is usually Friday but on some occasions may be Thursday. The Exchange now realizes that this defeats the purpose of using 3D options to capture weekend risk. In response to this concern, which has been raised by users of the product, the Exchange proposes that 3D options expire on the following business day, instead of the previous business day, when the regular Monday expiration occurs on an Exchange holiday or designated bank holiday. This usually will be a Tuesday, however, it may be a Wednesday. For example, Monday, December 26, 1994, is an Exchange holiday, (Christmas) so expiration, as proposed, should be Tuesday. However, Tuesday, December 27, 1994, is a designated bank holiday (Boxing Day), so expiration would occur on Wednesday, December 28, 1994, if the proposed "next business date" rule were in effect.

In addition, the PHLX proposes to revise the definition of "underlying foreign currency" to reflect that for 3D options which are cash settled, the underlying foreign currency is the currency that the Options Clearing Corporation ("OCC") would have been obligated to sell or purchase upon exercise of the contract since OCC actually transfers the cash value upon exercise of the foreign currency.

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act, in general, and, in particular with Section 6(b)(5), in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest by providing both a more appropriate expiration date for 3D options when the expiration date falls on a holiday

(b) Self-Regulatory Organization's Statement on Burden on Competition

The PHLX does not believe that the proposed rule change will impose any inappropriate burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were either solicited or received

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has requested that the proposed rule change be given accelerated effectiveness pursuant to Section 19(b)(2) of the Act.

The Commission finds that the proposed rule change is consistent with the requirements of the Act of the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of Section 6(b)(5).[3] The PHLX state that the Exchange created 3D options with a Monday expiration in order to attract investors seeking an option that captures weekend risk. Under current rules, however, if Monday is a holiday or designated bank holiday, the 3D options will expire on the preceding business day, which is usually the preceding Friday. By amending its rules to provide that 3D options will expire on the following business day when the regular expiration Monday is an Exchange holiday or designated bank holiday, the Commission believes that the proposal will accommodate the investment objectives of market participants and facilitate transactions in 3D options by providing investors with a means to capture weekend currency risk.

The Commission believes that 3D options, as amended, should provide investors with greater flexibility to tailor foreign currency options positions to satisfy their investment objectives. In this regard, the Commission notes that the PHLX has stated that foreign currency options provide a strategic investment tool for sophisticated retail options customers, multi-national corporations, and proprietary traders who manage and hedge foreign currency exposure, as well as banks, which trade short-term FCOs to hedge the risks of trading in the foreign currency forward and cash markets.[4] In addition, the Commission continues to believe that 3D options broaden the hedging opportunities of foreign currency market participants by providing them with an alternative to using futures contracts, forward contracts and/or off-exchange customized derivative instruments to satisfy their short-term currency investment needs.

The Commission believes that the proposal to revise the definition of "underlying foreign currency" clarifies the definition in the context of 3D options by reflecting the fact that the

[2] See Amendment No. 1, *supra* note 1

[3] 15 U.S.C. 78f(b)(50 (1988).

[4] See Securities Exchange Act Release No. 33732 (March 8, 1994), 59 FR 12023 (March 15, 1994) (order approving File No SR–PHLX–93–10).

OCC delivers the cash value, rather than the underlying currency, upon exercises of a 3D option.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register** in order to allow the Exchange to implement the new holiday expiration procedure prior to the January 2, 1995, expiration, an Exchange holiday. The Commission believes that the proposal to amend the holiday expiration procedure for 3D options will allow investors to continue to use 3D options for the purpose of hedging weekend currency risk. In addition, the Commission notes that the PHLX has notified its members of the proposed change and that the Commission has received no comments on the proposal. The Commission also believes that it is appropriate to grant accelerated approval to the proposal to revise the definition of "underlying foreign currency" because the proposal clarifies the Exchange's rule without making any substantive change. Accordingly, the Commission believes it is consistent with Sections 6(b)(5) and 19(b)(2) of the Act to approve the proposed rule change on an accelerated basis.

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 at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by January 10, 1995.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[5] that the proposed rule change (SR–PHLX–94–54) is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[5] 15 U.S.C. 78s(b)(2) (1988).

[6] 17 CFR 200.30–3(a)(12) (1993).

[Release No. 34–35086; File No. SR–Amex–94–38]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 to Proposed Rule Change by the American Stock Exchange, Inc. Relating to the Listing and Trading of Stock Index and Currency Warrants

December 12, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 12, 1994, the American Stock Exchange, Inc. ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. 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 Amex proposes to: (1) Amend Section 106 of the Amex Company Guide to revise the listing criteria for stock index ("stock index" or "index") warrants and currency warrants ("currency warrants");[3] (2) amend Rule 462 to specify the customer margin requirements for the purchase or short sale of stock index and currency warrants; (3) add a new Part VI to the rules of the Exchange to provide rules for the trading of index and currency warrants; and (4) rescind Commentaries .01 and .02 to Rule 411 (Duty to Know and Approve Customers) upon the adoption of new Part VI of the Exchange's rules. On Dec. 2, 1994, the Amex amended certain surveillance related matters addressed in the filing. See footnote 5 *infra.*

The text of the proposed rule change is available at the Office of the Secretary, Amex and at the Commission.

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1991).

[3] Currency warrants, as used in this filing, may refer to warrants on individual currencies (or cross currencies) or to warrants on a specific currency index group ("currency index warrants").

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 Amex 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 Amex 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

1. Purpose

The Amex proposes to: (1) Amend its listing guidelines and establish uniform rules for the trading of stock index and currency warrants; and (2) establish special customer margin requirements for positions in stock index and currency warrants.

The Amex seeks to amend Section 106 of the Amex Company Guide to provide higher standards for index and currency warrant issuers than currently exists. In particular, such issuers would be expected to have a minimum tangible net worth in excess of $150 million. In addition, the aggregate original issuer price of all of a particular issuer's warrant offerings (combined with offerings by its affiliates) that are listed on a national securities exchange or that are National Market securities traded through NASDAQ would not be permitted to exceed 25% of the issuer's net worth. The proposed amendment requires that each warrant issuer will be automatically exercised on either the delisting date (if the issue is not listed upon another organized securities market) or upon expiration. Section 106 also will be amended to provide that opening prices ("a.m. settlement") for all U.S. traded securities will be used to determine an index's settlement value where 25 percent or more of the value of the index is represented by securities whose primary trading market is in the U.S.

Rule 462 is being amended to apply the current customer margin requirements for broad based stock index and currency options to stock index and currency warrants, respectively. Thus, purchases of stock index and currency warrants will require payment in full, and short sales of stock index warrants will require initial margin of: (i) 100 percent of the current value of the warrant plus (ii) 15

percent of the current value of the underlying broad stock index less the amount by which the warrant is out of the money, up to a maximum of five percent of the index value. Short sales of currency warrants will follow the margin requirements applicable to listed currency options. The Exchange proposes that its stock index and currency warrant margin requirements be permitted offset treatment for spread, straddle and covered positions.[4]

Proposed Part VI of the Exchange rules applies to the trading of index warrants and currency warrants. Proposed Rule 1100 provides that, unless the context otherwise requires or a specific rule in part VI applies, the provisions of the Constitution and all other rules and policies of the Exchange apply to trading of such securities.

Proposed Rule 1101 states that no member or member organization shall accept an order from a customer for the purchase or sale of index or currency warrants unless the customer's account has been approved for options trading pursuant to Exchange Rule 921. Accordingly, the Exchange will rescind Commentaries .01 and .02 to Rule 411, its current suitability standard applicable to warrants, which currently provide that the Exchange "recommends" that index and currency warrants only be sold to investors whose accounts have been approved for options trading. Furthermore, proposed Rules 1102–1105 require that the option rules pertaining to suitability, discretionary account trading, supervision of accounts and customer complaints be applied to stock index an currency warrants.

Proposed Rule 1106 requires approval by a Compliance Registered Options Principal of all advertisements, sales literature and educational material issued by a member organization pertaining to stock index and currency warrants. The rule further requires Exchange approval of all advertisements and educational materials pertaining to stock index and currency warrants.

Proposed Rule 1107 provides that position limits for stock index warrants on the same index with original issue prices of ten dollars or less will be fifteen million warrants covering all such issues. In addition, with respect to warrants on the Standard & Poor's MidCap 400 Index, the position limit will be seven and one-half million warrants covering all such issues, provided the original issue prices of the warrants are not grater than ten dollars. The rule provides that warrants with an original issue price of ten dollars or more will be weighted more heavily than warrants with an original issue price of ten dollars or less in calculating position limits. The rule also gives the Exchange the authority to require the liquidation of a position in stock index warrants that is in excess of the position limits set forth in the rule, and Commentary V to the rule provides procedures for allowing limited exceptions to the position limits.

Proposed Rule 1108 provides for exercise limits on stock index warrants analogous to those found in stock index options and states that such limits are distinct from any exercise limits that may be imposed by the issuers of stock index warrants.

Proposed Rule 1109 requires that the trading halt provisions in Rule 918C(b) shall be applied to the trading stock index warrants.

Upon Commission approval of the foregoing amendments, the Exchange proposes that it will only file rule changes for specific warrant issues where there is no corresponding option or warrant on the same underlying index already listed on a national securities exchange or NASDAQ. Accordingly, when a listed option overlies a particular broad based index, the Exchange proposes it be allowed to list warrants on that index without further Commission review and approval pursuant to Section 19(b) of the Act.

Both initial and maintenance listing standards for stock index warrants will require that no more than 20% of the securities in the underlying index, by weight, may be comprised of foreign securities or American depositary receipts ("ADRs") overlying foreign securities that are not subject to comprehensive surveillance sharing agreements between the Amex and the primary exchange on which the foreign security (including a foreign security underlying an ADR) is traded.[5] Furthermore, proposed Rule 1100 provides that stock index and currency warrants listed on the Exchange prior to SEC approval of this filing shall continue to be governed by those provisions of the Exchange's rules that were applicable to such warrants prior to approval of this filing. Finally, prior to trading index or currency warrants, the Exchange will distribute a circular to its membership providing guidance regarding member firm compliance responsibilities (including suitability recommendations) when handling transactions in index or currency warrants.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act in general and furthers the objectives of Section 6(b)(5) in particular in that it is designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade, and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes the proposed rule change will impose no burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such other 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 the 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, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule

[4] The staff of the Commission has indicated to the Exchange that it must request and obtain appropriate interpretive or no-action relief from the Commission in order to permit its index and currency warrant margin requirements to allow offset treatment for spread, straddle and covered positions.

[5] Telephone conversation between Benjamin D. Krause, Amex, and Michael Walinskas, SEC, on December 2, 1994 ("Amendment No. 1"). The Exchange proposes that the "20% test" be applied in the same manner as that contained in Securities Exchange Act Release No. 34157 (June 3, 1994), 59 FR 30062 (June 10, 1994) (Commission approval order allowing the expedited trading approval of certain narrow-based index options).

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 at the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR–Amex–94–38 and should be submitted by January 10, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–31202 Filed 12–19–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–35102; File Nos. SR–AMEX–94–59; SR–CBOE–94–49; SR–CHX–94–27; SR–MSRB–94–17; SR–NASD–94–72; SR–NYSE–94–43; SR–PHLX–94–52; SR–PSE–94–35]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Changes by the American Stock Exchange, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Incorporated, Municipal Securities Rulemaking Board, National Association of Securities Dealers, Inc., New York Stock Exchange, Inc., Pacific Stock Exchange Incorporated, and Philadelphia Stock Exchange, Inc. Relating to a Continuing Education Requirement for Registered Persons

December 15, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on November 30 and December 1, 5, 7, 12, 13, and 14, 1994, the Chicago Stock Exchange, Incorporated ("CHX"), the Chicago Board Options Exchange, Incorporated ("CBOE"), the New York Stock Exchange, Inc. ("NYSE"), the National Association of Securities Dealers, Inc. ("NASD"), the Municipal Securities Rulemaking Board ("MSRB") and the Pacific Stock Exchange Incorporated ("PSE"), the American Stock Exchange, Inc. ("AMEX"), and the Philadelphia Stock Exchange, Inc. ("PHLX"), respectively, (each individually referred to herein as a "Self-Regulatory Organization" or "SRO," and two or more collectively referred to as "Self-Regulatory Organizations" or "SROs") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule changes as described in Items I, II, and III below, which Items have been prepared primarily by the SROs. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

I. Self-Regulatory Organizations' Statement of the Terms of Substance of the Proposed Rule Changes

The SROs propose to amend their rules to establish a formal, two-part continuing education program for securities industry professionals that includes a Regulatory Element requiring uniform, periodic training in regulatory matters, and a Firm Element requiring members[2] to maintain ongoing programs to keep their registered persons[3] up-to-date on job and product related subjects.

II. Self-Regulatory Organizations' Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

In their filings with the Commission, the SROs included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments they received on the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below. The SROs have prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organizations' Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

1. Purpose

The purpose of the proposed rule changes is to adopt uniform enabling rules for the implementation of a continuing education program for the securities industry.

2. Description of the Proposal

a. *Background.* In May 1993, a self-regulatory organization task force ("Task Force") was formed by the AMEX, CBOE, MSRB, NASD, NYSE, and PHLX, which included 12 representatives from a wide range of broker-dealers, to study the continuing education needs of the securities industry. In September 1993, the Task Force issued a report recommending a formal two-part continuing education program that would require uniform, industry-wide, periodic training in regulatory matters and ongoing training programs conducted by firms to keep their employees updated on job and product-related subjects. The Task Force also recommended that a permanent Council on Continuing Education, composed of broker-dealer and SRO representatives, be formed to develop the content and provide ongoing maintenance of the continuing education program. Pursuant to this recommendation, the Securities Industry/Regulatory Council on Continuing Education ("Council") was formed in September 1993, with representatives from six SROs and 13 broker-dealers. The Council prepared draft rules to implement the continuing education program, which the SROs have filed as proposed rule changes with the Commission.[4]

The proposed rule changes would codify the Task Force's recommendations, enable uniform implementation of the continuing education program, and provide a means for the SROs to monitor and enforce the program's requirements. The proposal provides for a two-part continuing education program consisting of a Regulatory Element requiring uniform, periodic training in regulatory matters and a Form Element requiring firms to maintain ongoing programs to keep their employees up-to-date on job and product related subjects.

b. *The Regulatory Element.* Satisfaction of the Regulatory Element

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[6] 17 CFR 200.30–3(a)(12) (1993).

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] As used herein, the term "members" refers to: members and member organizations when used with reference to the AMEX, CBOE, CHX, NYSE, and PSE; members, member organizations, participants, or participant organizations when used with reference to the PHLX; brokers, dealers, or municipal securities dealers when used with reference to the MSRB; and members when used with reference to the NASD.

[3] For purposes of the proposed rules, the term "registered person" means any person required to be registered under the rules of the applicable SRO, including members and registered representatives, but does not include any member whose activities are limited solely to the transaction of business on the floor of a national securities exchange with other members or registered broker-dealers. When used with reference to the MSRB, however, the term "registered person" means any person registered with the appropriate enforcement authority as a municipal securities representative, municipal securities principal, municipal securities sales principal, or financial and operations principal pursuant to MSRB Rule G–3.

[4] See proposed AMEX Rule 341A, proposed CBOE Rule 9.3A; proposed CHX Article VI, Rule 9; proposed MSRB Rule G–3(h); proposed Schedule C to the NASD's By-Laws, Part XII; proposed NYSE Rule 345A, proposed PHLX Rule 640; and proposed PSE Rule 9.27(c).

would require all registered persons (unless exempt) to complete a prescribed training program after their second, fifth, and tenth registration anniversary dates.[5] The Regulatory Element would be administered using computer-based interactive training techniques and would consist of standardized subject matters covering generally compliance, ethics, and sales practice issues. Failure to complete the program within prescribed time-frames (*i.e.*, within 120 days after the occurrence of the applicable registration anniversary date, or as otherwise determined by the SROs) would result in a person's registration being deemed inactive and that person being prohibited from performing the functions of a registered person until such time as the person has completed the program. The SRO will terminate administratively the registration of anyone who is inactive for two years, provided that upon application and a showing of good cause, the SRO may allow a registered person additional time to satisfy the program requirements.[6]

Persons registered for more than 10 years as of the effective date of the rule would not have to satisfy the Regulatory Element requirements. Persons registered for 10 years or less as of the effective date of the rule would be required to satisfy the Regulatory Element and complete the computer-based training program after the occurrence of the next relevant registration anniversary date and on any applicable registration anniversary date(s) thereafter.

A registered person who has completed all or part of the regulatory Element of the program or otherwise is exempt from participation therein would have to reenter the Regulatory Element in the event he or she is subject to certain disciplinary actions. Such individual would have to complete the computer-based training program within 120 days of such reentry and at two, five and 10 years thereafter. The following disciplinary events would trigger such reentry:

A. Being subject to a statutory disqualification as defined in Section 3(a)(39) of the Act;[7]

B. Being ordered to reenter the Regulatory Element by the Commission, an SRO, or state securities regulatory agency as a sanction in a disciplinary action; or

C. Being subject to suspension or imposition of a fine of $5,000 or more for the violation of any securities law or regulation, or agreement with, or rule or standard of conduct of, any SRO or securities regulatory agency, or as imposed by any such SRO or regulatory agency in connection with a disciplinary proceeding.

c. *The Firm Element.* Satisfaction of the Firm Element of the program would require SRO members to develop and administer training programs to enhance the securities knowledge, skills, and professionalism of their registered sales, trading, and investment banking personnel who have direct contact with customers, and for the immediate supervisors of such persons. Members would be required to prepare training plans taking into consideration the organization's size, organizational structure, and scope of business activities, as well as regulatory developments and the performance of covered persons in the Regulatory Element. At a minimum, programs used to implement a member's training plan must be appropriate for the business of the members and must cover the following matters concerning securities products, services, and strategies offered by the member: General investment features and associated risk factors; suitability and sales practice considerations; and applicable regulatory requirements.

Members would be required to review and, if necessary, update their training plans annually. The SROs may require their members, either individually or as part of a group, to provide specific training in any areas the SROs deem necessary. Persons subject to the training plan would have an affirmative obligation to participate in the programs identified by the member. Finally, members would be required to maintain records documenting the content of their training programs and the completion of the program by registered persons covered under the plan.

d. *Effective Date.* The SROs intend that the requirements of the Regulatory Element portion of the continuing education program become effective on July 1, 1995, and that the Firm Element be implement in two steps whereby members would be required to have completed their Firm Element plans by July 1, 1995, and have implemented their plans no later than January 1, 1996.

3. Statutory Basis

The SROs believe that their respective proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to national securities exchanges, national securities associations, and the MSRB and, in particular, the respective requirements of Sections 6(b)(5), 15A(b)(6), and 15B(b)(2)(C) of the Act.[8] Sections 6(b)(5), 15A(b)(6), and 15B(b)(2)(C) require, among other things, that the rules of an exchange, and association, or the MSRB, respectively, be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The SROs further believe that their proposed rule changes also are consistent with the respective provisions of Sections 6(c)(3)(B), 15A(g)(3)(A), and 15B(b)(2)(A) of the Act,[9] each of which makes it the responsibility of an exchange, an association, or the MSRB to prescribe standards of training, experience and competence for persons associated with SRO members.

(B) Self-Regulatory Organizations' Statement on Burden on Competition

The SROs do not believe that the proposed rule changes would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

(C) Self-Regulatory Organizations' Statement on Comments on the Proposed Rule Changes Received From Members, Participants, or Others

1. Comments Received by the NASD

On August 15, 1994, the NASD published Special Notice to Members ("NTM") 94–59 to request member comment regarding the Council's draft rules to create a mandated continuing education program for the securities industry. Thirty-three comment letters were received in response. Twenty-six letters were from financial services firms, four from trade associations, two from firms active in the continuing education field, and one was from the NASD's District 1. Five of the letters were opposed to the NASD's proposal,

[5] Any registered person who has terminated his or her association with a member and who, within two years of the date of termination, becomes reassociated in a registered capacity with a member, would be required to participate in the Regulatory Element at such intervals (two, five, and 10 years) as would apply based upon the individual's initial registration anniversary date rather than the date of reassociation in a registered capacity.

[6] Anyone administratively terminated must requalify on the Series 7 (the General Securities Registered Representative Examination) before such person's registration could be reactivated.

[7] 15 U.S.C. 78c(a)(39) (1988 & Supp. 1993).

[8] 15 U.S.C. 78f(b)(5), 78*o*–3(b)(6), 78*o*–4(b)(2)(C) (1988).

[9] 15 U.S.C. 78f(c)(3)(B), 78*o*–3(g)(3)(A), 78*o*–4(b)(2)(A) (1988).

while the remaining letters either expressed support for, or were not opposed to, the proposal. As discussed below, the proposed rules that the SROs have filed with the Commission have been revised from the Council's original draft rules to address some of the commenters' concerns.

Three letters from financial services firms question the usefulness of the Regulatory Element. The first, from a firm that limits its business primarily to wholesaling mutual funds, stated that the Regulatory Element creates more problems than it solves, costs too much, and would have the effect of fostering a negative attitude towards regulation. The second letter requests that the Regulatory Element be tailored to the specific products and services provided by each member. The third letter questions the use of the disciplinary fine threshold with respect to the re-entry provision, and believes the 10 year grandfather provision should be shortened in some cases. The writer concludes that the securities industry should model its program after state insurance continuing education programs, where the licensing authority imposes the regulatory requirement directly on the individual, rather than on the firm.

Three letters from financial services firms express concern that the Regulatory Element of the program would be administered at testing centers operated by the NASD. The request that firms be allowed to administer the Regulatory Element in-house, subject to appropriate controls.

Three letters support the goals of the Regulatory Element, but raise concerns about its specific focus. One letter suggests that the Regulatory Element be divided into two separate units, one for commissioned brokers and one for registered persons operating in a no-load environment. One letter suggests that this part be divided based on the registration category of the individual and the membership of the individual's firm. The third commenter believes that the Regulatory Element should relate to the daily activities of the largest number of registered persons possible.

Three letters address concerns regarding the statistics that would be generated from the Regulatory Element. All three letters seek specific information on the types of statistics that would be available. Two of the letters express concern that the NASD has not enuniated clearly the intended and acceptable uses of these statistics.

Two letters from financial services firms seek a clearer definition of "inactive status" as used in the Regulatory Element. The letters have questions regarding the disposition of monies earned, but not paid, prior to inactive status, and the allowable level of interaction between an individual on inactive status and his or her member firm. One writer asks whether inactive status should be treated as a disciplinary event, while the other writer believes that the rules should state clearly that inactive status is in no way a disciplinary event.

Four commenters address the re-entry provisions of the Regulatory Element. These concerns range from technical wording of the re-entry provision, to stating that the fine threshold is unfair with respect to technical violations and ambiguous in cases where several individuals are held jointly and severally liable, to stating that the provision regarding disciplinary actions is overly harsh. One commenter believes that the provision allowing the SEC, SROs, and state regulators to require a registered person to re-enter the Regulatory Element should be deleted, or at least changed to require a showing of cause.

Another commenter believes that Central Registration Depository ("CRD") [10] support would help firms comply with the Regulatory Element. Specifically, CRD could be used by firms to identify registered persons and their length of service to determine how many of their registered persons would be subject to the Regulatory Element in each of the next few years.

One letter offers broad insights and recommendations for a continuing education program, but does not contain specific reactions to the proposal.

Four letters were received from financial services firms that expressed concerns regarding the costs of complying with the Firm Element. Generally, these firms state that the Firm Element could have a disproportionately burdensome effect on smaller firms, as compared to larger ones. To mitigate these effects, the commenters suggest that the NASD prepare and administer training programs, or, alternatively, that subsidies be provided to smaller firms to help them comply with the Firm Element. Another commenter recommends a video via satellite program that would enable firms to secure qualified speakers, and be assured that the material provided would comply with the Firm Element.

Two letters regarding the Firm Element have questions about those to whom it would apply. The first letter asks whether municipal securities brokers fall under the definition of "covered persons" for this part of the program. The second asks whether the Firm Element applies to sales assistants who are registered persons, or whether an accommodation for such persons could be made.

Five letters comment on the standards for the Firm Element. The first commenter asks how and what information should be maintained regarding the program and offers suggestions. The second commenter believes that the Firm Element should focus on suitability, and favors some form of pre-approval regarding the contents of a firm's program. The third commenter asks whether a firm may include relevant compliance matters in the Firm Element so that it may meet its "annual compliance interview/meeting" requirement under the NASD Rules of Fair Practice. The fourth commenter believes that the Firm Element content requirements are too vague to ensure proper compliance. The fifth commenter questions the usefulness of feedback from the Regulatory Element in developing an appropriate Firm Element.

Two financial services firms comment on the provision allowing the NASD to require members to undertake specific training. The first letter seeks a definition of the phrase "class of covered registered person," stating that such a class should be clearly identifiable by firms. The second letter states that to grant the NASD discretion to mandate specific training for certain individuals or groups could have potentially arbitrary results that could place certain firms at a competitive disadvantage.

Four industry associations submitted letters in response to the proposal. Two associations, the Securities Industry Association ("SIA") and the Security Traders Association ("STA"), are comprised almost entirely of people potentially affected by the proposal. The other two, The Association for Investment Management and Research "AIMR") and the Certified Financial Planner Board of Standards ("CFP"), are active in the continuing education field and have many members who are potentially affected people.

The STA strongly supports the proposal, and expresses its desire to help implement the program. The SIA also supports the program, but believes that several of its aspects merit further consideration. The SIA believes that the NASD and the Council should develop

[10] CRD is a computerized filing and data processing system operated by the NASD that maintains registration information regarding registered broker-dealers and their registered personnel for access by state regulators, SROs, and the Commission.

standards to determine when registered persons may be required by regulators to re-enter the Regulatory Element, and the power of the NASD arbitrarily to prescribe specific training for a member firm. The SIA also supports in-house administration of the Regulatory Element, with appropriate controls. Lastly, the SIA seeks clearer guidelines to determine the adequacy of a given Firm Element training program.

Although the AIMR and the CFP each endorse the proposal, both are concerned about overlap for individuals who hold their designations and are also subject to this proposal. Both groups desire to work with the Council to minimize the impact caused by the overlap between the proposed rules and the existing requirements of the AIMR and CFP on individuals who would be subject to both regimes.

Two parties that are active in the continuing education field responded to the proposal, the Securities Education Institute, Inc. ("SEI"), and the American Institute for Continuing Education ("AICE"). Both focus on the differences between the proposed program and programs that already exist in the insurance industry. Both seek more information regarding the Firm Element so as to help NASD members and independent training providers meet the program requirements. The SEI believes that administration of the Regulatory Element should not be limited to the NASD testing centers or to those firms with the proper in-house delivery means. Instead, interactive programs similar to those the SEI provides to the futures industry should be used (these would include safeguards already authorized by the Commodity Futures Trading Commission).

NASD District 1 supports the proposal and offers two suggestions. First, with respect to the Regulatory Element, the commenter suggests that the sections relating to "Requirements" and "Re-entry into Program" be amended to make it clear that the time frame of the Regulatory Element is 10 years, not 15. Regarding the Firm Element, the commenter asks who the "Specific Training" provision would operate (*i.e.*, at what level of the NASD would such decisions be made).

The comments submitted on NTM 94–59 were reviewed by the Council and by the NASD Membership Committee. Neither the Council nor the Membership Committee agreed with those commenters who opposed instituting a continuing education program for the securities industry, believing that it is in the best interest of the investing public and the industry to proceed with the program.

The Membership Committee made three technical changes to the rule as originally proposed in NTM 94–59. First, the language in Section (1)(a)(i) of the NASD's proposal was redrafted to state clearly that registered persons must participate in the Regulatory Element of the continuing education program on three occasions, after the occurrence of their second, fifth, and tenth registration anniversary dates. Second, Section (1)(b) of the NASD's proposal has been expanded to state that a registration that is inactive for a period of two calendar years would be terminated administratively, and that a person whose reregistration is so terminated must requalify by taking the Series 7 examination before such person's registration could be reactivated. Finally, Section (1)(c)(iii) of the NASD's proposal was amended to clarify that the Commission, a state securities regulator, or an SRO could require re-entry into the program only as a result of a sanction in a formal disciplinary action. This change is meant to address the concerns of those commenting on the due process issues that could arise were regulatory authorities able to mandate re-entry arbitrarily.

The NASD Membership Committee did not respond to other recommendations made by commenters. The Committee believes that it is unnecessary to state explicitly that inactive status under the Regulatory Element of the program is not a disciplinary action. Explanatory materials on this point would accompany the notice to members announcing the effectiveness of the rule.

A number of commenters suggested that member firms be permitted to administer the Regulatory Element in-house. The Council and the SROs will continue to study this issue and will formulate a final response for the industry in the future. The program, however, initially would be implemented only in the NASD's testing centers. The Membership Committee believes this to be necessary to allow the NASD to manage the introduction of the program in a reasonable manner. The technology and administrative issues that arise with respect to the in-house administration of the Regulatory Element will require further study to be resolved.

Finally, some commenters questioned the use of a single computer-based training program in a Regulatory Element for all persons within the first 10 years of their initial registration. The Membership Committee and the Council recognized that there are variations in function and degree of involvement in the securities industry among the approximately 500,000 individuals registered as representatives. Both the Council and the NASD Membership Committee believe that the initial computer-based training program should deal with the most important compliance and regulatory concerns confronting the industry, and that these matters are important for all segments of the securities industry. The Council, the Membership Committee, and the other SROs would continue to review the need for more specialized computer-based training programs for different segments of the industry. In the future, these groups may recommend that such programs be introduced, but only after further assessing the experience with the initial single computer-based training program.

2. Comments Received by the MSRB

In August 1994, the MSRB published its proposal for comment, and subsequently received five comment letters.

One commenter stated that its dealer department is a two-person operation and the proposed Firm Element is an unreasonable burden to be placed on such a small operation. The Firm Element Committee of the Council is developing materials for dealers' use in devising and carrying out training programs to meet the requirements of the Firm Element. The Committee intends to incorporate "samples" of how different firms might approach the requirements (*e.g.*, firms that deal with one product, small firms, and firms with large numbers of very small offices or solo representatives). The MSRB believes this future guidance would assuage the concerns of small firms as to the burden of compliance with this requirement.

One commenter, a municipal securities broker's broker, asked whether it would be subject to the Firm Element requirements. The Firm Element is applicable to all persons who conduct business with retail, institutional, or investment banking customers of the dealer and the immediate supervisors of such persons. The Firm Element is not applicable to dealers who deal only with other brokers and dealers.

One commenter stated that the MSRB has not shown that a continuing education program is needed in the industry. Another commenter expressed similar concerns. The Task Force formed by the securities industry to study the issue of continuing education and to develop recommendations concluded that the industry would be will served by a uniform continuing

education program. The MSRB believes that a formal industry-wide continuing education program to keep professionals up-to-date on products, markets, and rules would be beneficial to the municipal securities industry.

Another commenter sent the same comments to the MSRB and the NASD. These comments have been summarized above.

The MSRB also received two telephone inquiries from bank dealers concerning the planned procedure for the CRD system to track and communicate an individual's registration anniversary date for use with the Regulatory Element. Bank dealer personnel are not registered on the CRD system. The MSRB has discussed this notification matter on an informal basis with the bank regulatory agencies. Such agencies have stated that they would probably require banks to put procedures into place for internal tracking of anniversary dates.

3. Comment Received by the NYSE

The NYSE received one letter from a member organization commenting on its proposal. The commenter endorsed the computer-based training of the Regulatory Element, but recommended that such training be required upon an individual's initial registration, in addition to the required three occasions thereafter (*i.e.*, after the second, fifth and tenth registration anniversary dates).

The NYSE believes that the continuing education program has been designed to apply to registered persons after they have satisfied the initial qualification requirements and that two years after a person's initial registration and qualification is an appropriate time to reinforce significant general regulatory and sales practice concepts and provide training on recent rule and other current developments through the continuing education process.

4. Comments Received by Other SROs

The other SROS have not solicited, and do not intend to solicit, comments regarding the proposed rule change. They also have not received any unsolicited written comments from members or other interested parties. All of the SROs have made, or intend to make, changes to their proposals to conform to changes made by the other SROs in response to comments they received.

III. Date of Effectiveness of the Proposed Rule Changes 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 organizations consent, the Commission will:

A. By order approve such proposed rule changes, or

B. Institute proceedings to determine whether the proposed rule changes 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, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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 offices of the Exchanges. All submissions should refer to the file number(s) in the caption above and should be submitted by January 10, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–31203 Filed 12–19–94; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF STATE

[Public Notice 2140]

United States International Telecommunications Advisory Committee (ITAC), Standardization Sector, U.S. Study Group A, U.S. Study Group D; Meeting Notice

The Department of State announces that the United States International Telecommunications Advisory Committee (ITAC), Telecommunications Standardization Sector (ITAC-T) Study Group A will meet on January 18, 1995, in Room 1107 from 9:30 AM to 4:00 PM, and that Study Group D will meet on February 22, 1995, in Room 1205, from 9:00 AM to 2:00 PM, at the U.S. Department of State, 2201 "C" Street, N.W., Washington, DC 20520.

The agenda for the Study Group A meeting will include a debrief of the November—December ITU-T Study Group 2 and 3 meetings; preparations for the upcoming CITEL PCC I meeting scheduled for Honduras in February with particular emphasis on the December COM/CITEL meeting results; the initial Spring preparations for 1995 ITU-T Study Group and Working Party meetings covering Study Groups 1, 2, and 3; and to discuss other issues concerning ITAC-T Study Group A.

The Study Group D meeting will including preparations for the March meeting of Study Group 8, the April meeting of Study Group 14, and a debrief of the Study Group 14 Working Party meeting taking place in Florida during December, 1994. Any other issues regarding ITU-T or CITEL Permanent Consultative Committees may be raised during this meeting.

Members of the General Public may attend the meetings and join in the discussions, subject to the instructions of the chair. Admittance of public members will be limited to the seating available. In this regard, entrance to the Department of State is controlled. If you are not presently named on the mailing list of the Telecommunications Standardization Sector Study Group A or D, and wish to attend please call 202–647–0201 not later than 5 days before the scheduled meetings. Enter from the "C" Street Main Lobby. A picture ID will be required for admittance.

Dated: December 6, 1994.

Earl S. Barbely,

Chairman, U.S. ITAC for Telecommunication Standardization.

[FR Doc. 94–31226 Filed 12–19–94; 8:45 am]

BILLING CODE 4710–45–M

[Public Notice 2141]

Overseas Schools Advisory Council; Notice of Meeting

The Overseas Schools Advisory Council, Department of State, will hold its Executive Committee Meeting on Thursday, January 19, 1995 at 9:30 a.m. in Conference Room 1207, Department of State Building, 2201 C Street, NW., Washington, DC. The meeting is open to the public.

The Overseas Schools Advisory Council works closely with the U.S. business community in improving those American-sponsored schools overseas which are assisted by the Department of

[11] 17 CFR 200.30–3(a)(12) (1993).

State and which are attended by dependents of U.S. government families and children of employees of U.S. corporations and foundations abroad.

This meeting will deal with issues related to the work and the support provided by the Overseas Schools Advisory Council to the American-sponsored overseas schools.

Members of the general public may attend the meeting and join in the discussion, subject to the instructions of the Chairman. Admittance of public members will be limited to the seating available. Access to the State Department is controlled and individual building passes are required for each attendee. Persons who plan to attend should so advise the office of Dr. Ernest N. Mannino, Department of State, Office of Overseas Schools, SA–29, Room 245, Washington, D.C. 20522–2902, telephone 703–875–7800, prior to December 30, 1994. Visitors will be asked to provide their date of birth and Social Security number at the time they register their intention to attend and must carry a valid photo ID with them to the meeting. All attendees must use the C Street entrance to the building.

Dated: November 2, 1994.

Ernest N. Mannino,

Executive Secretary, Overseas Schools Advisory Council.

[FR Doc. 94–31227 Filed 12–19–94; 8:45 am]

BILLING CODE 4710–24–M

[Public Notice 2139]

Shipping Coordinating Committee, Subcommittee on Safety of Life at Sea and Associated Bodies; Working Group on Stability and Load Lines and on Fishing Vessels Safety; Notice of Meeting

The Working Group on Stability and Load Lines and on Fishing Vessels Safety of the Subcommittee on Safety of Life at Sea (SOLAS) will conduct an open meeting at 9:00 AM on Tuesday, January 10, 1995, in Room 6303, at U.S. Coast Guard Headquarters, 2100 Second Street, S.W., Washington, DC 20593–0001. This meeting will discuss preparations for the 39th Session of the Subcommittee on Stability and Load Lines and on Fishing Vessels Safety (SLF) and associated bodies of the International Maritime Organization (IMO) which is scheduled for March 13–17, 1995, at the IMO Headquarters in London. The purpose of the meeting is to discuss the papers received and the draft U.S. positions for the upcoming meeting.

Among other things, the items of particular interest are:

a. The role of human factors in design and operations;

b. Harmonization of probabilistic damage stability provisions for all ship types;

c. Technical revisions to the 1966 Loan Line Convention;

d. Probabilistic oil outflow.

Members of the public may attend this meeting up to the seating capacity of the room. Interested persons may seek information by writing: Paul Cojeen or William Hayden, U.S. Coast Guard Headquarters, Commandant (G–MTH–3), Room 1308, 2100 Second Street, S.W., Washington, DC 20593–0001 or by calling: (202) 267–2988.

Dated: December 12, 1994.

Charles A. Mast,

Chairman, Shipping Coordinating Committee.

[FR Doc. 94–31228 Filed 12–19–94; 8:45 am]

BILLING CODE 4710–07–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

[CGD 94–114]

Commercial Fishing Industry Vessel Advisory Committee; Meeting

AGENCY: Coast Guard, DOT.

ACTION: Notice of meeting.

SUMMARY: The Commercial Fishing Industry Vessel Advisory Committee (CFIVAC) will meet to discuss various issues. The meeting will be open to the public.

DATES: The meeting will be held February 1 and 2, 1995, from 8:30 a.m. to 5 p.m. daily. Written material should be submitted not later than January 23, 1995.

ADDRESSES: The meeting will be held at the Coast Line Convention Center, 501 Nutt Street, Wilmington, North Carolina 28401. Written material should be submitted to LCDR Mark D. Bobal, Executive Director, Commandant (G–MVI–4), U.S. Coast Guard, 2100 Second Street S.W., Washington, DC 20593–0001.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2 section 1 et seq. The agenda will include discussion of the following topics:.

(1) Seek committee input on obtaining the safety goals for commercial fishing vessels contained in the Coast Guard Business Plan for the Office of Marine Safety, Security and Environmental Protection.

(2) Committee discussion on the Coast Guard plan to license operators of commercial fishing industry vessels.

(3) Briefing by the Marine Index Bureau on commercial fishing vessel casualty reporting.

(4) Committee discussion on the Occupational Safety and Health Administration (OSHA) and Coast Guard Memorandum of Understanding.

(5) Sub-Committee presentation regarding Title 46, Code of Federal Regulations, (CFR), Part 28 regulations dealing with the requirements for commercial fishing industry vessels.

(6) Sub-Committee presentation on the voluntary standards of U.S. uninspected commercial fishing vessels found in Navigational and Vessel Inspection Circular, (NVIC), 5–86.

(7) Results of Coast Guard District Fishing Vessel Safety Program audits.

(8) Committee input on fishing vessel dissemination on fishing vessel safety information.

Attendance is open to the public. With advance notice, and at the Chairman's discretion, members of the public may make oral presentations during the meeting. Persons wishing to make oral presentations should notify the Executive Director, listed above under **ADDRESSES**, no later than the day before the meeting. Written material may be submitted at any time for presentation to the Committee. However, to ensure advance distribution to each Committee member, persons submitting written material are asked to provide 20 copies to the Executive Director no later than January 23, 1995.

Dated: December 14, 1994.

J.C. Card,

Rear Admiral, U.S. Coast Guard Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 94–31241 Filed 12–19–94; 8:45 am]

BILLING CODE 4910–14–M

Federal Highway Administration

Environmental Impact Statement: Putnam County, NY

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed highway project in the Town of Southeast, Putnam County, New York.

FOR FURTHER INFORMATION CONTACT: Harold J. Brown, Division Administrator, Federal Highway Administration, New York Division, Leo

W. O'Brien Federal Building, 9th Floor, Clinton Avenue and North Pearl Street, Albany, New York, 12207, Telephone (518) 472–3616, or A.J. Bauman, Regional Director, New York State Department of Transportation, Region 8, 4 Burnett Boulevard, Poughkeepsie, New York 12601, Telephone (914) 431–5750.

SUPPLEMENTARY INFORMATION: The FHWA and the New York State Department of Transportation (NYSDOT), in cooperation with the Town of Southeast, with input from the County of Putnam, will be preparing an environmental impact statement (EIS) on a proposal to improve New York State Route 22. The proposed improvement will involve the reconstruction of the existing route from the northern terminus of Interstate 684 to Putnam County Route 65, Putnam Lake Road, a distance of 2.9 miles. Also under consideration in this proposal is construction of a grade separated interchange at Putnam County Route 54, Milltown Road.

The project proposes to improve traffic operation and safety on the existing route. The proposed action is consistent with the NYSDOT transportation improvement program for the Route 22 corridor, between Interstate Route 684 and Route 55, which has been studied by the FHWA and NYSDOT since 1980. In 1990, the Route 22 Corridor Development Study—Final Project Development Report was completed. the Corridor Development Study identified existing traffic operation and safety problems, projected significant future increases in traffic demand, identified needed highway improvements and recommended in implementation plan. Improvement of Route 22 between Interstate Route 684 and County Route 65, Putnam Lake Road, was recommended, as were other improvements within the corridor.

Alternatives under consideration include (1) taking no action, (2) expanding the existing two-lane highway to four lanes with a flush median and improved intersections; (3) expanding the existing two-lane highway to four lanes divided by a median barrier and with turning lanes at intersections; and (4) congestion management system strategies. Variations to horizonal and vertical alignment and the possible provision of an interchange at Milltown Road will also be studied with the various build alternatives.

Based on studies done to date, issues that need to be analyzed in depth include the impacts on noise, air and water quality, cultural resources, floodplains, and adjacent right of way. The project's effect on features such as Bog Brook Reservoir and East Branch will also be addressed.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State and local agencies, and to private organizations and citizens who have previously expressed interest in this proposal. If necessary, a scoping meeting will be held with involved Federal, State and local agencies. A public information meeting will be held after additional study. The EIS will be made available for agency and public review and comment, after which a public hearing will be held.

To ensure that the full range of issues related to the proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA or NYSDOT at the addresses provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Harold J. Brown,

Division Administrator, Albany, New York.

[FR Doc. 94–31229 Filed 12–19–94; 8:45 am]

BILLING CODE 4910–29–M

Dwight David Eisenhower Transportation Fellowship Program

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice inviting fellowship applications.

SUMMARY: The Federal Highway Administration announces the fiscal year (FY) 1995 Eisenhower Transportation Fellowship Program. The objectives of the overall program are to attract the Nation's brightest minds to the field of transportation, to enhance the careers of transportation professionals by encouraging them to seek advanced degrees, and to retain top talent in the transportation community of the United States. This notice contains instructions for submitting applications for the six fellowships under the program.

DATES: The closing date for submission of applications under this announcement is February 17, 1995.

FOR FURTHER INFORMATION CONTACT: Ms. Ilene D. Payne, Director, Universities and Grants Programs, National Highway Institute (HHI–20), Federal Highway Administration, 6300 Georgetown Pike, (room F–203), McLean, Virginia 22101; Tel: (703) 285–2785, FAX: (703) 285–2791. Office hours are from 7:30 a.m. to 4 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: The Dwight David Eisenhower Transportation Fellowship Program was authorized by section 6001 of the Intermodal Surface Transportation Efficiency Act of 1991, Public Law 102–240, 105 Stat. 1914. The program is expected to enhance the educational level of the transportation work force in the United States. The program will contribute to the talent pool in transportation because it encourages students from their senior year through the post doctorate level to pursue careers in fields related to transportation.

The Eisenhower Program is a DOT-wide fellowship program and is managed by the National Highway Institute. The program was developed in the Summer of 1992. The first fellowships were awarded in the Spring of 1993. FY 1994 funding for the program was $2 million and served 125 fellows; FY 1995 funding for the program is also $2 million.

All fellows must be in a field of study which is directly related to transportation. For students pursuing degrees, the fellow's degree program must contain a major, minor, or emphasis in transportation. In addition, each fellowship has specific requirements unique to that fellowship.

The six fellowships are:

Eisenhower Graduate Fellowships, to enable students to pursue Masters Degrees or Doctorates in transportation-related fields at the school of their choice;

Eisenhower Grants for Research Fellowships (GRF), to acquaint students with transportation research, development, and technology transfer activities at the U.S. Department of Transportation;

Eisenhower Historically Black Colleges and Universities (HBCU) Fellowships, to provide HBCU students with additional opportunities to enter careers in transportation (announcements are issued by recipient HBCU's);

Eisenhower Hispanic Serving Institutions (HSI) Fellowships, to provide HSI students with additional opportunities to enter careers in transportation; (announcements are issued by recipient HSIs);

Eisenhower Post Doctorate Fellowships, to enable GRF students to

continue research initiated during a GRF assignment; and

Eisenhower Faculty Fellowships, to provide talented faculty in transportation fields with opportunities to improve their transportation knowledge, including attendance at conferences, courses, seminars, and workshops.

Applications must be submitted by February 17, 1995, and will be evaluated by review panels. All applicants will be notified of the results of the panel evaluation. Each fellowship has specific requirements and forms which can be obtained by writing a letter of request to the address listed under the caption FOR FURTHER INFORMATION CONTACT.

Authority: 23 U.S.C. 307(a)(1)(C)(ii) and 315; 49 CFR 1.48.

Issued on: December 14, 1994.

Rodney E. Slater,

Federal Highway Administrator.

[FR Doc. 94–31217 Filed 12–19–94; 8:45 am]

BILLING CODE 4910–22–P

National Highway Traffic Safety Administration

[Docket No. 91–66; Notice 4]

Chrysler Corporation; Grant of Application for Renewal of Temporary Exemption From Three Federal Motor Vehicle Safety Standards

Chrysler Corporation of Highland Park, Michigan, applied for a renewal of NHTSA Temporary Exemption No. 92–1, expiring August 31, 1994 (57 FR 27507) which was granted covering three Federal motor vehicle safety standards, for electric-powered multipurpose passenger vehicles ("TEVan"). As of June 10, 1994, the company had produced 52 TEVans under the exemption. Its application for renewal was accompanied by a copy of its original petition, and NHTSA interpreted this action as an indication that the company intended to repeat its original requests and arguments.

Notice of the application was published on August 3, 1994, and an opportunity afforded for comment (59 FR 39631). This notice grants a renewal of the exemption.

The TEVan is an electrically driven version of the Dodge Caravan/Plymouth Voyager multipurpose passenger vehicle. If the exemption is renewed, modifications will be made to production Dodge and Plymouth vans manufactured between September 1, 1994 and August 31, 1996. Although a successor to the current van will be introduced within this time frame, "electric conversions of that new platform will not be ready for production initially" and Chrysler is planning "to produce the current TEVan versions until the new electric conversion units are ready for introduction." The TEVan was developed in cooperation with the Electric Power Research Institute, U.S. Advanced Battery Consortium, and the United States Department of Energy. The basis for the petition was that a temporary exemption would facilitate the development and field evaluation of a low-emission motor vehicle within the meaning of 49 CFR 555.6(c). The vehicles use electric motors powered by nickel-iron or other equivalent batteries that replace the internal combustion engine. According to Chrysler, the TEVans meet the California Air Resource Board zero emission requirements, and are low-emission vehicles as defined by section 123(g) of the National Traffic and Motor Vehicle Safety Act (now 49 U.S.C. 30113(a)).

The TEVan differs from regular production vans as follows: The internal combustion engine, transmission, coolant system, power brakes, gasoline fuel system, and power steering system have been replaced by an electric drive motor, a nickel-iron or equivalent battery pack, a micro-processor based battery management system, a controller-converter-charger unit, a two-speed manual/automatic transmission, and electric-motor-driven pumps for the vacuum power brakes and the hydraulically assisted power steering. Finally, the hot water heater/defroster unit is replaced by an electric resistance type heating/defrosting system.

The TEVan is based on production vehicles certified as complying with all applicable Federal motor vehicle safety standards. However, it does not comply with the portions of the standards indicated below.

1. Standard No. 101, *Controls and Displays.*

S5.1. The TEVan is equipped with a state-of-charge gauge to serve as an indicator of reserve battery power, rather than the fuel gauge required by the standard.

2. Standard No. 102, *Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect.*

S3.1.2. The requirement for transmission braking effect is met by regenerative braking, in which the electric motor becomes a generator, recharging the batteries and dissipating energy in the process. Regenerative braking can be switched off at the option of the driver to restore steering control on slippery surfaces.

S3.1.3. The starter interlock mechanism is deleted since there will be no electric starting motor.

S3.1.4. The automatic transmission shift mechanism is replaced with an electric switch control device that operates in a similar manner.

3. Standard No. 105, *Hydraulic Brake Systems*

S5.1. The performance of the service brake system is predicated on the use of the regenerative characteristic of the drive motor to augment the power-assisted hydraulic wheel brakes. The motor, driven through the transmission by the mass of the coasting vehicle, functions as a generator to dissipate energy through charging the drive batteries. Chrysler has never conducted tests using regenerative braking, however, tests of a conventionally powered weighted simulation of the TEVan indicate that the TEVan will meet the stopping distance requirements of S5.1.1. In the fade and recovery test, S5.1.4, the distance specified between the starting points of successive brake applications at 60 mph is 0.4 mile. The TEVan cannot accelerate to 60 mph in that distance, so the test cannot be conducted as prescribed, but based on the performance of a simulated TEVan, the TEVan could comply if it could accelerate as specified.

On TEVans equipped with anti-lock brake systems, the regenerative braking is disabled during hard stops that actuate the anti-lock feature of the brakes.

According to the original petition, an exemption would facilitate the development and field evaluation of a low-emission motor vehicle by enabling the petitioner to develop the electric drive motor, battery controller, battery, and other subsystems to increase the efficiency and durability of future generations of electric vehicles.

The petitioner requested extension of its exemption for a two-year period beginning September 1, 1994. In its original petition it argued that the exemptions will not unduly degrade the safety of the vehicles because the vehicles from which the TEVan is adapted are certified as conforming to the standards. Chrysler observes in its petition for renewal that its "field experience to date would indicate no negative result if this extension was granted."

Finally, petitioner originally argued that granting the exemption would be in the public interest and consistent with the National Traffic and Motor Vehicle Safety Act because it would accelerate the development of electrically-driven vehicles and related technology which

could help to reduce the dependency on foreign oil.

No comments were received on the petition.

In order to grant the renewal of an exemption originally provided under 49 U.S.C. 30113(b)(3)((B)(iii) (formerly 15 U.S.C. 1410(a)(1)(C)), the Administrator must find that the temporary exemption would "make the development or field evaluation of a low-emission motor vehicle easier and would not unreasonably lower the safety level of that vehicle," and that the exemption is consistent with the public interest and 49 U.S.C. Chapter 301 *Motor Vehicle Safety*. The applicant has argued that the exemption would enable it to continue to develop the components of the vehicle to increase the efficiency and durability of future generations of electric vehicles. NHTSA concurs with this argument. It is probable that an exemption would permit the use of the vehicles under varied conditions of climate and terrain, testing those components for durability and life.

Petitioner has also argued that safety is not compromised because the vehicles from which the TEVan is adapted are certified as conforming to the standards. The inability of the TEVan to meet two of the standards from which exemption is requested, Standards Nos. 101 and 102, appears only technical in nature, as systems and instruments are provided that are the equivalents of those in gasoline-powered vehicles. As for Standard No. 105, the petitioner on the basis of simulated tests of weighted vehicles, judges that the stopping distance requirements will be met. It is NHTSA's experience that regenerative braking can provide a drag on the vehicle's forward motion when the foot is removed from the accelerator; this, coupled with foot brake activation should ensure adequate stopping capability.

It is manifestly in the public interest to accelerate the development of electrically-driven vehicles, not only to reduce reliance on oil, no matter where it originates, but also to reduce the level of harmful emissions in the environment. Because of the minimal impact on safety of the renewal of this exemption, NHTSA considers that an exemption is consistent with the objectives of Chapter 301.

In consideration of the foregoing, it is hereby found that renewal of NHTSA Temporary Exemption No. 92–1 for a further two years would make the development or field evaluation of a low-emission vehicle easier, and would not unreasonably lower the safety level of that vehicle, and that renewal of this exemption would be in the public interest and consistent with the objectives of 49 U.S.C. Chapter 301 *Motor Vehicle Safety*. Accordingly, Chrysler Corporation is hereby granted a renewal of NHTSA Temporary Exemption No. 92–1, beginning September 1, 1994, and expiring August 31, 1996, from providing a fuel gauge as required by paragraph S5.1 of 49 CFR 571.101 Motor Vehicle Safety Standard No. 101 *Controls and Displays*, from paragraphs S3.1.2, S3.1.3, and S3.1.4 of 49 CFR 571.102 Motor Vehicle Safety Standard No. 102 *Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect*, and from paragraph S5.1.4 of 49 CFR 571.105 Motor Vehicle Safety Standard No. 105 *Hydraulic Brake Systems*.

(49 U.S.C. 30113; delegation of authority at 49 CFR 1.50)

Issued on: December 14, 1994.

Ricardo Martinez,

Administrator.

[FR Doc. 94–31188 Filed 12–19–94; 8:45 am]

BILLING CODE 4910–59–P

[Docket No. 94–80; Notice 2]

Ford Motor Company; Decision of Inconsequential Noncompliance

Ford Motor Company (Ford) of Dearborn, Michigan decided that some of its windows failed to comply with the labeling requirements of 49 CFR 571.205, Federal Motor Vehicle Safety Standard (FMVSS) No. 205, "Glazing Materials," and filed an appropriate report pursuant to 49 CFR Part 573, "Defect and Noncompliance Reports." Ford also applied to be exempted from the notification and remedy requirements of 49 U.S.C. Chapter 301—"Motor Vehicle Safety" on the basis that the noncompliance is inconsequential to motor vehicle safety.

Notice of receipt of the application was published on October 3, 1994, and an opportunity afforded for comment (59 FR 50329). This notice exempts Ford from the notification and remedy requirements of the statute.

Standard No. 205, which incorporates, by reference, the American National Standards Institute's "Safety Code for Safety Glazing Materials for Glazing Motor Vehicles Operating on Land Highways" Z–26.1–1977, January 26, 1977, as supplemented by Z26.1a, July 3, 1980 (ANS Z26.1), specifies that typical automotive tempered glass with a luminous transmittance of less than 70 percent shall be labeled "AS3."

Ford manufactured approximately 1,820,000 quarter windows with a luminous transmittance of less than 70 percent for use in 1986 through 1994 model year Ranger Supercab and Mazda B-series Cab Plus vehicles. These windows were labeled "AS2" instead of "AS3." Approximately 7,900 were located and scrapped. The remaining windows were used in vehicle production or provided to aftermarket distributors for service replacement.

Ford supported its application for inconsequential noncompliance with the following:

[Ford believes that t]he incorrect marking presents no risk of accident or injury. The windows can be installed only as rear quarter windows in Ranger Supercab trucks; AS2 and AS3 glazing are both appropriate for these applications in accordance with Standard 205. In Ford's judgement, the mismarking is inconsequential as it relates to motor vehicle safety. The stated purposes of FMVSS No. 205 are to reduce injuries resulting from impact to glazing surfaces, to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and to minimize the possibility of occupants being thrown through vehicle windows in collisions. As previously noted the affected quarter windows fully comply with the performance requirements of FMVSS No. 205. Because all performance requirements are met, the incorrect marking of the quarter windows has no effect upon the ability of the glazing to perform in the manner intended by the standard. Ford is not aware of any complaints, accidents, or injuries related to this condition.

The mismarking should not cause confusion in glass replacement in vehicles in service. Aftermarket distributors do not use the marking to determine which glazing is used for replacement. Rather, replacement parts are determined by service part numbers which are obtained from cataloged listings. Further, we are not aware of any confusion in aftermarket servicing of vehicles as a result of this mismarking.

No comments were received on the petition.

NHTSA has considered these arguments and has found them persuasive. Because FMVSS No. 205 permits either AS2 or AS3 glazing to be used in the rear quarter location, the use of mislabeled glazing in those areas will have no safety impact. The fact that the windows can be used only in that location and not in other locations where use of AS3 glazing would be inappropriate confirms this conclusion.

Accordingly, for the reasons expressed above, the applicant has met its burden of persuasion that the noncompliance herein described is inconsequential to motor vehicle safety, and Ford Motor Company is hereby exempted from providing notification and remedy with respect thereto.

(49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.50 and NHTSA Order 800–2)

Issued on: December 14, 1994.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 94–31189 Filed 12–19–94; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Office of the Secretary

List of Countries Requiring Cooperation With an International Boycott

In order to comply with the mandate of section 999(a)(3) of the Internal Revenue Code of 1986, the Department of the Treasury is publishing a current list of countries which may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986).

On the basis of the best information currently available to the Department of the Treasury, the following countries may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986).

Bahrain
Iraq
Jordan
Kuwait
Lebanon
Libya
Oman
Qatar
Saudi Arabia
Syria
United Arab Emirates
Yemen, Republic of

Dated: December 13, 1994.

Joseph Guttentag,

International Tax Counsel.

[FR Doc. 94–31220 Filed 12–19–94; 8:45 am]

BILLING CODE 4810–25–M

Customs Service

[T.D. 95–1]

Revocation of William J. Leach Jr. & Assoc.'s; Customs Gauger Approval

AGENCY: U.S. Customs Service, Department of the Treasury

ACTION: Notice of Revocation of Approval of a Commercial Gauger.

SUMMARY: William J. Leach Jr., & Associates (formerly Halcyon Transport Corporation), of Houston, Texas, a Customs approved gauger under Section 151.13 of the Customs Regulations (19 CFR 151.13), has requested that the U.S. Customs Service revoke its gauger approval. Accordingly, pursuant to 151.13(f) of the Customs Regulations, notice is hereby given that the Customs commercial gauger approval of William J. Leach Jr., & Associates has been revoked without prejudice.

EFFECTIVE DATE: November 23, 1994

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Chief, Technical Branch, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Ave., NW, Washington, D.C. 20229 at (202) 927–1060.

Dated: November 29, 1994.

George D. Heavey,

Director, Office of Laboratories and Scientific Services.

[FR Doc. 94–31190 Filed 12–19–94; 8:45 am]

BILLING CODE 4820–02–P

Application for Recordation of Trade Name: "California Hipermart"

ACTION: Notice of Application for Recordation of Trade Name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "CALIFORNIA HIPERMART," used by California Hipermart, a corporation organized under the laws of the State of California, located at 317 S. Palm Avenue, Alhambra, California 91803.

The application states that the trade name is used in connection with the following merchandise descripted below:

Toys & Sporting goods—Electrical apparatus
Paper & Plastic goods—Clothing
Houseware & glass—Bicycles
Environmental control apparatus

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the **Federal Register**.

DATES: Comments must be received on or before February 21, 1995.

ADDRESSES: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington D.C. 20229 (202–482–6960).

Dated: December 14, 1994.

John F. Atwood, Chief,

Intellectual Property Rights Branch.

[FR Doc. 94–31191 Filed 12–19–94; 8:45 am]

BILLING CODE 4820–02–P

Application for Recordation of Trade Name: "Chengcorp"

ACTION: Notice of Application for Recordation of Trade Name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "CHENGCORP," used by CHENGCORP, a corporation organized under the laws of the State of California, located at 317 S. Palm Avenue, Alhambra, California 91803.

The application states that the trade name is used in connection with the following merchandise descripted below:

Toys & Sporting goods—Electrical apparatus
Paper & Plastic goods—Clothing
Houseware & glass—Bicycles
Environmental control apparatus

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the **Federal Register**.

DATES: Comments must be received on or before February 21, 1995.

ADDRESSES: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington D.C. 20229 (202–482–6960).

Dated: December 14, 1994.

John F. Atwood,

Chief, Intellectual Property Rights Branch.

[FR Doc. 94–31192 Filed 12–19–94; 8:45 am]

BILLING CODE 4820–02–P

Application for Recordation of Trade Name: "Weighpack International, B.V."

ACTION: Notice of Application for Recordation of Trade Name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "WEIGHPACK INTERNATIONAL, B.V.," used by Weighpack International, B.V., a corporation organized under the laws of The Netherlands, located at Stevinstraat 31 A, 2587 EA Den Haag, The Netherland.

The application states that the trade name is used in connection with weighing, counting, packaging and orienting equipment for fasteners and hardware items, including the following equipment:

automatic packaging systems
carton erectors and carton closers
labeling systems
lifting and tipping units
mechanical and magnetic orienters
high speed hardware counters
furnace feeders
pelletizing systems
soft drop systems
fibre packaging and dosage systems
conveyor and transfer systems
vibration tables
universal counters
bulk storage hoppers
form, fill and seal bagmakers
counting/weighing tables and systems

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the **Federal Register.**

DATES: Comments must be received on or before February 21, 1995.

ADDRESSES: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington D.C. 20229 (202–482–6960).

Dated: December 14, 1994.

John F. Atwood,

Chief, Intellectual Property Rights Branch.

[FR Doc. 94–31193 Filed 12–19–94; 8:45 am]

BILLING CODE 4820–02–P

Internal Revenue Service

Privacy Act of 1974, as Amended; System of Records

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed amendment to Privacy Act system of records.

SUMMARY: The Treasury Department, Internal Revenue Service, gives notice of a proposed amendment to the system of records entitled Compliance Programs and Projects Files—Treasury/IRS 42.021, which is subject to the Privacy Act of 1974, 5 U.S.C. 552a.

DATES: Comments must be received no later than January 19, 1995. This revised system of records will be effective January 30, 1995, unless comments are received which result in a contrary determination.

ADDRESSES: Comments should be sent to the Office of Disclosure, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. 20224. Comments will be made available for inspection and copying in the Freedom of Information Reading Room, (202) 622–5164 upon request.

FOR FURTHER INFORMATION CONTACT: Larry Faulkner, Compliance 2000 Executive, (202) 622–6900.

SUPPLEMENTARY INFORMATION: The Internal Revenue Service is redesigning business and work processes to improve the way we use technology to maximize the availability of information resources. This will require long-term, continuous improvement to product quality, productivity, and customer satisfaction.

One of the strategies to implement this change is Compliance 2000. This is a mission-based philosophy of tax administration that emphasizes taxpayer education and assistance coupled with a more focused use of enforcement resources. Compliance 2000 will address making the tax system easier for taxpayers to comply voluntarily, yet recognizes that despite the Service's best efforts some people will not voluntarily respond. One goal of Compliance 2000 is to identify and address causes of noncompliance.

This system presently includes records relating to information gathering to identify noncompliance with the Internal Revenue Code. Enhancements are being added to the system to enable the Internal Revenue Service to identify causes of noncompliance. These enhancements will be accomplished by use of an automated information system to form an integrated, on-line resource network. Instead of each function or level within a geographical area addressing isolated or systemic compliance or business issues on its own (National, Regional, District, or Service Center), we will approach business from a more unified perspective to provide one-stop information to compliance personnel within a local area and greatly reduce the need for separate contracts with outside sources. Data will be drawn from the Audit Information Management System (AIMS)—Treasury/IRS 42.008; the Individual Master File (IMF)—Treasury/IRS 24.030; the Business Master File (BMF)—Treasury/IRS 24.046; the Returns Compliance Programs File—Treasury/IRS 26.016; the Taxpayer Delinquent Accounts Files (TDA)—Treasury/IRS 26.019; Taxpayer Delinquency Investigation (TDI) Files—Treasury/IRS 26.020; Wage and Information Returns Processing (IRP) System—Treasury/IRS 22.061; the International Enforcement Program Files—Treasury/IRS 42.017; the Case Management and Time Reporting System—Treasury/IRS 46.002; and from the Centralized Evaluation and Processing of Information Items—Treasury/IRS 46.009. In addition, data will be drawn from other third party sources. As an example, these third party sources may include commercial sources, state and local agencies, construction contract information, license information from state and local agencies, Currency and Banking Reports (CBRS), data regarding assets and financial transactions from state and local agencies, and information on significant financial transactions from reviews of periodicals and local newspapers, and other media sources.

The system of records notice is being amended to give a more definitive description of the records that are to be included in the system. This notice will also reflect the change to consolidate this new information within each geographical location and for on-line access to this information on a need-to-know basis. There will be additional authorized users within each local area network.

Internal Revenue Service will develop and maintain database and retrieval systems accessed through automated local area networks. The purpose of these systems will be to combine information from sources inside and outside the IRS, such as motor vehicle data, business license data, currency and banking data (CBRS), commercial database information, into a centralized processing unit which will serve as a comprehensive compliance network for each district, service center, region, etc. These databases would be available for use by all IRS functions on a need-to-

know basis. As an example, a database may be configured to identify a particular grouping or market segment of taxpayers and their assets in a more efficient and effective manner than is presently available. Previously this was not possible because of the format and configuration of the original databases. For example, in addition to taxpayer data from the system of records listed herein, this system may include on-line access to such information as the Currency and Banking Retrieval System (CBRS), any state's Department of Motor Vehicle (DMV), Credit Bureau information, real estate ownership information, and commercial databases.

This system of records is currently exempt from certain provisions of the Privacy Act. No amendment to the rule exempting this system from certain provisions of the Privacy Act is being made to the system. The system notice, as revised, is published in its entirety below.

Alex Rodriguez,

Deputy Assistant Secretary (Administration).

Treasury/IRS 42.021

SYSTEM NAME:

Compliance Programs and Project Files.

SYSTEM LOCATION:

National Office, Districts, Service Centers, and Austin Compliance Center. (See IRS Appendix A for addresses.)

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Any individual who has business and/or financial activities. These may be grouped by industry, occupation, or financial transactions, included in commercial databases, or in information provided by state and local licensing agencies. Taxpayers who may be involved in any area of noncompliance: Such as self-employed persons who don't file income tax returns, businesses who don't file employment tax returns, taxpayers with income reported on information returns who don't file tax returns, withholding noncompliance, migrant workers, and any individuals who may be involved in tax evasion schemes.

CATEGORIES OF RECORDS IN THE SYSTEM:

From the Audit Information Management System (AIMS)—Treasury/IRS 42.008: Tax return status and location, closing information as well as other internal management information (i.e., type of return, adjustment, penalty, occupation code, issue code, etc.). From the Individual Master File (IMF)—Treasury/IRS 24.030 and the Business Master File (BMF)—Treasury/IRS 24.046: Taxpayer entity records (name, address, identification number (TIN), tax modular records which contain all records relative to specific tax returns for each applicable tax period or year. Tax transactions such as tax amount, statements and/or additions, etc. From the Wage and Information Returns Processing (IRP) File—Treasury/IRS 22.061; Records representing certain wages and information returns: For example, Forms W–2, W–2P, and 1087 and 1099 series, currency transaction reports, state tax refunds, statements of sales and equity obligations, and records of agricultural subsidy payments, etc. Information from the Returns Compliance Programs System—Treasury/IRS 26.016. Information from the Taxpayer Delinquent Accounts Files (TDA)—Treasury/IRS 26.019: For example, taxpayers who have outstanding assessments and persons owing child support obligations. From the Taxpayer Delinquency Investigation (TDI) Files—Treasury/IRS 26.020; Taxpayers who may be delinquent in filing Federal tax returns. Information on foreign corporations from International Enforcement Program Files, Treasury/IRS 42.017. From the Centralized Evaluation and Processing of Information Items (CEPII), Treasury/IRS 46.009, and from the Case Management and Time Reporting System, Treasury/IRS 46.002: Information items received by Internal Revenue Service about taxpayers alleging violation of laws. Other information would relate to unreported income and asset situations involving significant financial transactions within the U.S. as well as foreign transactions. Examples of other information would include data from commercial databases, any state's Department of Motor Vehicles (DMV), credit bureaus, state and local real estate records, commercial publications, newspapers, airplane and pilot information, US Coast Guard vessel registration information, any state's Department of Natural Resources information, as well as other state and local records. In addition, Federal government databases may also be accessed, such as, federal employment files, federal licensing data, etc.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, 26 U.S.C. 7602, 7801, and 7802.

PURPOSE(S):

The Internal Revenue Service has adopted a mission-based philosophy to increase voluntary compliance with the tax laws of the Internal Revenue Code. In order to accomplish this, we will be focusing more on research and analysis techniques as opposed to case-by-case enforcement in order to determine key areas of non-compliance. The IRS will approach these areas with a more unified perspective instead of addressing isolated or systemic compliance of business issues on national, regional or local levels. The IRS will also address major broad-based issues that affect compliance and will lead to better tax administration.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM INCLUDING CATEGORY OF USERS AND THE PURPOSES OF SUCH USES:

Disclosure of returns and return information may be made only as provided by 26 U.S.C. 6103.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records, microfilm, and magnetic media.

RETRIEVABILITY:

Name and/or taxpayer identification number (social security number or employer identification number), and any personal identifier or characteristic (i.e., document locator number) included in this system.

SAFEGUARDS:

Access controls will not be less than those provided by the Manager's Security Handbook, IRM 1(16)12, and the Automated Information System Security Manual, IRM 2(10)00. Passwords and access codes must be used to access this system.

RETENTION AND DISPOSAL:

Records are maintained in accordance with Records Control Schedule, IRM 1(15)59.

SYSTEM MANAGER(S) AND ADDRESS:

Officials prescribing policies and practices—Chief Operations Officer and Compliance 2000 Executive, 1111 Constitution Avenue, NW., Washington, DC 20224. Officials maintaining the system—District Directors, Service and Compliance Center Directors, Regional Commissioners. Refer to Appendix A and addresses.

NOTIFICATION PROCEDURE:

This system is exempt from the notification provisions of the Privacy Act.

RECORD ACCESS PROCEDURES:

This system is exempt from the access and contest provisions of the Privacy Act.

CONTESTING RECORD PROCEDURES:

26 U.S.C. 7852(e) prohibits Privacy Act amendment of tax records.

RECORD SOURCE CATEGORIES:

(1) Taxpayer's returns, (2) taxpayer's books and records, (3) informants and third party information, (4) city, state government, (5) other Federal agencies, (6) examinations of related taxpayers, (7) taxpayer's employer, and (8) investigatory material compiled for law enforcement purposes whose sources need not be reported.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

This system is exempt from 5 U.S.C. 552a(c)(3), (d)(1), (d)(2), (d)(3), (d)(4), (e)(1), (e)(4)(G), (H), and (I), (f) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2), as published at 31 CFR 1.36.

[FR Doc. 94–31213 Filed 12–19–94; 8:45 am]

BILLING CODE 4830–01–M

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported for Exhibition; Determination

Notice is hereby given of the following determination: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), the Delegation Order No. 85–5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects in the exhibit "Italian Paintings From Burghley House" (see list [1]), imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. These objects are imported pursuant to a loan agreement with the foreign lender. I also determine that the temporary exhibition of the objects at The Frick Art Museum, Pittsburgh, PA, from on or about February 18, 1995, to on or about April 30, 1995, and The Indianapolis Museum of Art, Indianapolis, IN, from on or about May 20, 1995, to on or about July 23, 1995 and The Fresno Metropolitan Museum, Fresno, CA, from on or about August 19, 1995, to on or about November 12, 1995, and The Phoenix Art Museum, Phoenix, AZ, from on or about December 2, 1995, to on or about February 25, 1996, and The Mississippi Museum of Art, Jackson, MS, from on or about March 16, 1996, to on or about May 12, 1996, is in the national interest.

Public notice of this determination is ordered to be published in the **Federal Register.**

Dated: December 13, 1994.

Les Jin,

General Counsel.

[FR Doc. 94–31187 Filed 12–19–94; 8:45 am]

BILLING CODE 8230–01–M

[1] A copy of this list may be obtained by contacting Ms. Lorie Nierenberg of the Office of the General Counsel of USIA. The telephone number is 202/619–6084 and the address is U.S. Information Agency, 301 Fourth Street, S.W., Room 700, Washington, D.C. 20547.

Sunshine Act Meetings

Federal Register
Vol. 59, No. 243
Tuesday, December 20, 1994

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

NATIONAL CREDIT UNION ADMINISTRATION

Notice of Change in Subject of Meeting

The National Credit Union Administration Board determined that its business required the addition of the following item, which was closed to public observation, to the previously announced closed meeting (Federal Register, Vol. 59, No. 236, page 63857, Friday, December 9, 1994) scheduled for December 14, 1994.

4. Administrative Action under Section 306 of the Federal Credit Union Act. Closed pursuant to exemption (8).

The Board voted unanimously that Agency business required that this item be considered with less than the usual seven days notice, that it be closed to the public, and that no earlier announcement of this change was possible.

The previously announced items were:

1. Approval of Minutes of Previous Closed Meetings.
2. Request from Federal Credit Union for a Community Expansion through Merger. Closed pursuant to exemptions (8) and (9)(A)(ii).
3. Administrative Action under Section 206 of the Federal Credit Union Act. Closed pursuant to exemptions (8) and (9)(A)(ii).

FOR MORE INFORMATION CONTACT: Becky Baker, Secretary of the Board, Telephone (703) 518–6304.

Becky Baker,

Secretary of the Board.

[FR Doc. 94–31282 Filed 12–16–94; 8:45 am]

BILLING CODE 7535–01–M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of December 19, 26, 1994, January 2, and 9, 1995.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of December 19

Monday, December 19

10:00 a.m.
Briefing on Status of High Level Waste Program (Public Meeting)
2:30 p.m.
Briefing by International Programs (Closed—Ex. 1)

Tuesday, December 20

10:00 a.m.
Briefing on Progress of Design Certification Review and Implementation (Public Meeting)
(Contact: Dennis Crutchfield, 301–504–1199)

Wednesday, December 21

2:00 p.m.
Briefing by Nuclear Energy Institute (NEI) on Their Nuclear Regulatory Review Study (Public Meeting)
3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting)
a. Final Amendments to 10 CFR Parts 20 and 61 on Low-Level Waste Shipment Manifest Information and Reporting (Tentative)
(Contact: William Lahs, 301–415–6756)

Week of December 26—Tentative

There are no Commission meetings scheduled for the Week of December 26.

Week of January 2—Tentative

There are no Commission meeting scheduled for the Week of January 2.

Week of January 9—Tentative

Thursday, January 12

10:00 a.m.
Briefing on Status of Activities with the Center for Nuclear Waste Regulatory Analysis (CNWRA) (Public Meeting)
11:30 a.m.
Affirmative/Discussion and Vote (Public Meeting)

Note: Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 504–1292.

CONTACT PERSON FOR MORE INFORMATION: Dr. Andrew Bates (301) 504–1963.

Dated: December 16, 1994.

Andrew L. Bates,

Chief, Operations Branch, Office of the Secretary.

[FR Doc. 94–31367 Filed 12–16–94; 3:30 pm]

BILLING CODE 7590–01–M

federal register

Tuesday
December 20, 1994

Part II

Environmental Protection Agency

40 CFR Parts 141, 142, and 143

National Primary Drinking Water Regulations—Sulfate; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 141, 142 and 143

[WH-FRL-5120-7]

RIN 2040-AC07

Drinking Water; National Primary Drinking Water Regulations—Sulfate; National Primary Drinking Water Regulation Implementation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: By this action, EPA is reproposing a maximum contaminant level goal (MCLG), and a National Primary Drinking Water Regulation (NPDWR) including a maximum contaminant level (MCL) for sulfate. There is a potential for an adverse health effect for infants, travelers, and new residents in areas that have high sulfate levels in their drinking water. The objective of this rule is to ensure that sulfate levels in drinking water provided by public water systems are reduced below levels of concern. The proposal contains alternatives that allow public water systems the flexibility to select compliance options appropriate to protect the population served.

DATES: Comments must be received on or before March 21, 1995. Comments received after this date may not be considered. A public hearing on the proposal will be held in Washington, DC on February 2, 1995 at the address listed below under **ADDRESSES.**

ADDRESSES: The Agency will hold a public hearing on the proposal at the following location: EPA Education Center Auditorium, 401 M Street SW., Washington, DC 20460, on February 2, 1995.

The hearing will begin at 9:30 am, with registration at 9 am. The hearing will end at 4 pm, unless concluded earlier. Anyone planning to attend the public hearing (especially those who plan to make statements) may register in advance by writing the Sulfate Public Hearing Officer, Office of Ground Water and Drinking Water (4603), USEPA, 401 M Street SW., Washington, DC 20460; or by calling Tina Mazzocchetti, (703) 931–4600. Oral and written comments may be submitted at the public hearing. Persons who wish to make oral presentations are encouraged to have written copies (preferably three) of their complete comments for inclusion in the official record

Send written comments to the Sulfate Docket Clerk, Water Docket (MC–4101), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Please submit any references cited in your comments. EPA would appreciate an original and three copies of your comments and enclosures (including references). Commenters who want EPA to acknowledge receipt of their comments should include a self-addressed, stamped envelope. No facsimiles (faxes) will be accepted because EPA cannot ensure that they will be submitted to the Water Docket.

The proposed rule with supporting documents, including public comments and EPA responses to the Phase V rulemaking and this proposed rule, are available for review at the Water Docket at the address above. For access to Docket materials, call (202) 260–3027 between 9 am and 3:30 pm for an appointment.

FOR FURTHER INFORMATION CONTACT: The Safe Drinking Water Hotline, telephone 800–426–4791. The Hotline is open Monday through Friday, excluding Federal holidays, from 9 am to 5:30 pm Eastern Standard Time. For technical inquiries, contact Jude Andreasen, Drinking Water Standards Division, Office of Ground Water and Drinking Water (4603), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, 202–260–5555, or one of the EPA Regional Office contacts listed under Supplementary Information.

SUPPLEMENTARY INFORMATION: The Agency prefers that commenters type or print comments in ink, and cite, where possible, the paragraph(s) in this proposed regulation (e.g., § 141.32(b)) to which each comment refers. Commenters should use a separate paragraph for each issue discussed. Technical inquiries can be directed to the contacts in regional offices as follows:

I. JFK Federal Bldg., Room 2203, One Congress Street, 11th floor, Boston, MA 02203, Phone: (617) 565–3484, Jerome Healey
II. 26 Federal Plaza, Room 824, New York, NY 10278, Phone: (212) 264–1800, Walter Andrews
III. 841 Chestnut Street, Philadelphia, PA 19107, Phone: (215) 597–8826, Stuart Kerzner
IV 345 Courtland Street, NE., Atlanta, GA 30365, Phone: (404) 347–2207, Wayne Aronson
V 77 West Jackson Boulevard, Chicago, IL 60604, Phone: (312) 353–2151, Ed Watters
VI. 1445 Ross Avenue, Dallas, TX 75202, Phone: (214) 655–7150, Tom Love
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Abbreviations Used in This Document

ASDWA. Association of State Drinking Water Administrators
BAT: Best Available Technology
BTGA: Best Technology Generally Available
CRAVE: Cancer Risk Assessment Verification Endeavor
CWS: Community Water System
DWEL: Drinking Water Equivalent Level
ED: Electrodialysis
EIA: Economic Impact Analysis
EPA: Environmental Protection Agency
FDA: Food and Drug Administration
FR: Federal Register
FRDS: Federal Reporting Data System
ICR: Information Collection Request
IE: Ion Exchange
IOC: Inorganic Chemical
IRIS: Integrated Risk Information System
LCP: Laboratory Certification Program
LOAEL. Lowest-Observed-Adverse-Effect Level
MCL. Maximum Contaminant Level (expressed as mg/L) (1,000 micrograms (µg) = 1 milligram (mg))
MCLG: Maximum Contaminant Level Goal
MDL: Method Detection Limit
NAS: National Academy of Science
NCWS: Non-Community Water System
NIRS: National Inorganics and Radionuclides Survey
NOA: Notice of Availability
NOAEL. No-Observed-Adverse-Effect Level
NOEL: No-Observed-Effect Level
NPDWR: National Primary Drinking Water Regulation
NTIS: National Technical Information Service
NTNCWS: Non-Transient Non-Community Water System
O&M: Operations & Maintenance
OMB: Office of Management and Budget
PE: Performance Evaluation
POE: Point-of-Entry Device
POU: Point-of-Use Device
PQL: Practical Quantitation Level
PWS: Public Water System
RFA: Regulatory Flexibility Analysis
RfD: Reference Dose
RIA: Regulatory Impact Analysis
RMCL: Recommended Maximum Contaminant Level
RO: Reverse Osmosis
RSC: Relative Source Contribution
RWS: Rural Water Survey
SDWA: Safe Drinking Water Act, or the "Act," as amended in 1986
SMCL: Secondary Maximum Contaminant Level
SMF: Standardized Monitoring Framework
SOC: Synthetic Organic Chemical
T&C: Technology & Costs
TWS: Transient Non-Community Water System
URTH: Unreasonable Risk To Health
VOC: Volatile Organic Chemical
WS: Water Supply

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I. Summary of Today's Action

Today the Agency is proposing an MCLG of 500 mg/L, an MCL of 500 mg/L, and other NPDWR requirements for sulfate. Sulfate is a unique contaminant for several reasons. The health effect associated with the ingestion of relatively high levels of sulfate in drinking water (i.e., ranging from loose stools to diarrhea) is acute and temporary, and is expected to last approximately two weeks. In addition, the health risk only applies to persons not already acclimated to high sulfate-containing water: infants, travelers, and new residents. (For the purposes of this rule, infants are defined as children up to the age of 12 months.) Today's proposed rule is also unique because it affects all public water systems, that is, community water systems, traveler non-community water systems, and non-transient, non-community water systems. In the past, only regulations on microbial contaminants and nitrate have affected transient, non-community systems.

EPA decided to defer promulgation of a sulfate standard, originally proposed July 25, 1990 (55 FR 30370) in order to identify an implementation approach which was tailored to the target populations. The approach EPA developed, working in cooperation with several States at a 1992 meeting, is innovative, and was designed specifically to provide flexibility to smaller systems. This approach could reduce compliance costs while still providing adequate protection of public health. It provides public water systems a means of compliance which is less expensive than central treatment, and it affords States flexibility in implementing the rule. Under this approach, the State would have the authority to allow the public water system (PWS), as one means of compliance with the sulfate MCL, to provide "Alternative Water" and public education/notification to the targeted, sensitive population. A PWS authorized to comply under this option would choose to supply customers with "Alternative Water", defined as either bottled water which has been monitored or certified to be in compliance with all EPA MCLs, or water treated by point-of-use (POU) or point-of-entry (POE) devices.

In the interest of reducing costs and maximizing flexibility, the proposal allows for unique means of compliance. Four options are being proposed for public comment. The lead option requires provision of alternative water to both transient adults (travelers and new residents) and infants. Two variations of the lead option require provision of alternative water to infants only. These two options differ only in the content of the public notification. In one case, only infants are considered at risk, and temporary diarrhea is considered as only an inconvenience for adults. In the other, both adults and infants are considered at risk, but public notification is deemed sufficient protection for adults. Because the lead option and its two variations represent a significant change in regulatory approach, EPA considered another, more conventional option. This fourth option would enable systems to seek a variance from the sulfate MCL. As a condition of receiving a variance, systems would be required to provide alternative water to their target populations, just as in the lead option. The only difference is that the relief for small systems would be provided through a different statutory mechanism. The Agency also considered limiting compliance to central treatment, which would be consistent with the approach for other contaminants, but which would not provide flexibility for smaller systems.

The Agency expects that approximately 1,500 of the 2,000 affected systems would choose the lead option (Option 1) if it were available to them. The annual cost to those systems is estimated to be $7 million. The Agency has conservatively assumed that the remaining 500 systems would choose central treatment or regionalization in spite of the availability of Option 1. The cost to those systems is estimated to be $71 million. Total national cost of Option 1, including $8 million for State implementation and monitoring costs, is $86 million. If central treatment were the only means of compliance with the sulfate rule, the annual national cost would be $147 million (household costs ranging from $244 to $811). Household costs for Option 1 range from $106 to

$287 per year, but this is an average of all households in all systems, including those choosing central treatment.

In an effort to reduce the cost of this rule even further, the Agency is giving serious consideration to variations of Option 1 These variations, described as Options 2 and 3, would require public notification/education, but would only require the provision of bottled water which complies with EPA MCLs to infants. The difference between Options 2 and 3 is that Option 2 would target only infants as being at risk from an adverse effect, and Option 3 would target both adults and infants, but would propose that public notification/education is sufficient protection for adults. The Agency sees advantages and disadvantages to these alternative options, which are discussed later in this notice. The cost for either option would be $16 million, which includes $8 million for State implementation and monitoring costs. Household costs for these two options would be from $2 to $145 per year.

EPA also considered Option 4, which would achieve the same result as Option 1, but with different administrative procedures involving a variance from the sulfate MCL. Under Option 4, the regulation would specify that the conditions for States to grant a variance from the sulfate MCL would include the same elements described for Option 1, namely public notification/education and Alternative Water provisions. These elements would be defined as BAT only for the purposes of Section 1415 of the SDWA. The Agency believes that the unique nature of the sulfate health effect warrants a more flexible perspective on the implementation of the Act. The Agency recognizes that while the transitory nature of the diarrhetic effect of high-sulfate water may be uncomfortable and inconvenient for healthy adults, the potential risk to infants of diarrhea, as well as the dehydration and electrolyte imbalance which may be associated with it, are significant and potentially fatal if untreated.

TABLE 1.—PROPOSED MCLG AND MCL FOR SULFATE

Inorganic Contaminant.	Sulfate
Proposed MCLG	500 mg/L[1]
Proposed MCL	500 mg/L
Best Available Technologies.	Reverse Osmosis (RO) Ion Exchange[2] (IE) Electrodialysis (ED)
Analytical Methods[3] ..	Colorimetry Gravimetry Ion Chromatography

[1] An alternative MCLG/MCL option of 400 mg/L was proposed in the July 25, 1990 notice but is not proposed here.

[2] For those systems with other anions that need to be removed (such as nitrate), the removal efficiency will decrease for those anions since sulfate binds more strongly to the exchange resin than other anions.

[3] Acceptance limits=±15% at ≥10 mg/L.

TABLE 2.—COMPLIANCE MONITORING REQUIREMENTS[1] FOR SYSTEMS BELOW THE MCL, OR WITH BAT INSTALLED

Contaminant	Base requirement		Trigger that increases monitoring	Waivers
	Ground water	Surface water		
Sulfate	1 Sample/3 yr	Annual sample	> MCL	Yes[2]

[1] The compliance monitoring requirements apply to community water systems, transient non- community and non-transient non-community water systems.

[2] Sample/9 Years After 3 Samples < MCL.

The options in today's proposal would override the general prohibition in 40 CFR 141.101 on using bottled water which complies with EPA MCLs and point-of-use devices to achieve compliance with an MCL. This override would apply only to sulfate because of its unique characteristics.

II. Background

A. Statutory Authority

The Safe Drinking Water Act (SDWA or "the Act"), as amended in 1986 (Pub. L. No. 99–339, 100 Stat. 642), requires EPA to publish "maximum contaminant level goals" (MCLGs) for contaminants which, in the judgment of the Administrator, "may have any adverse effect on the health of persons and which (are) known or anticipated to occur in public water systems" (Section 1412(b)(3)(A)). MCLGs are to be set at a level at which "no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety" (Section 1412(b)(4)).

Concurrent with EPA publishing an MCLG, which is a non-enforceable health goal, it must promulgate a National Primary Drinking Water Regulation (NPDWR) which includes either:

(1) an MCL, or (2) a required treatment technique (Section 1401(1), 1412(a)(3), and 1412(b)(7)(A)).

An MCL must be set as close to the MCLG as feasible (Section 1412(b)(4)). Under the Act, "feasible" means "feasible with the use of the best technology, treatment techniques and other means which the Administrator finds, after examination for efficacy under field conditions and not solely under laboratory conditions (taking cost into consideration)" (Section 1412(b)(5)). In setting MCLs, EPA considers the cost of treatment technology to large public water systems (i.e., >1,000,000 people) with relatively clean source water supplies (132 Cong. Rec. S6287 (daily ed., May 21, 1986)).[1] Each NPDWR that establishes an MCL must list the best available technology, treatment techniques, and other means that are feasible for meeting the MCL (Section 1412(b)(6)). NPDWRs include monitoring, analytical and quality assurance requirements, specifically, "criteria and procedures, to assure a supply of drinking water which dependably complies with such maximum contaminant levels * * *." (Section 1401(1)(D)). Section 1445 also authorizes EPA to promulgate monitoring requirements.

A treatment technique may be required if it is not "economically or technologically feasible" to ascertain the level of a contaminant (Sections 1401(1) and 1412(b)(7)(A)).

Section 1414(c) requires each owner or operator of a PWS to give notice to persons served by it of (1) any failure to comply with a maximum contaminant level, treatment technique, or testing procedure required by a NPDWR; (2) any failure to comply with any monitoring required pursuant to section 1445 of the Act;

(3) the existence of a variance or exemption; and

(4) any failure to comply with the requirements of any schedule prescribed pursuant to a variance or exemption.

Under the 1986 Amendments to the SDWA, EPA was to complete the promulgation of NPDWRs for 83 listed contaminants, including sulfate, by June 19, 1989. After 1989, an additional 25

[1] EPA also evaluates the costs to smaller systems in its analysis of economic impacts.

contaminants must be regulated every three years (section 1412(b)).

In the 1986 Amendments to the SDWA, Congress required that MCLGs and MCLs be proposed and promulgated simultaneously (section 1412(a)(3)). This change streamlined development of drinking water standards by combining two steps in the regulation development process. Section 1412(a)(2) renamed recommended maximum contaminant levels (RMCLs) as maximum contaminant level goals (MCLGs).

B. Regulatory History

EPA is required by the 1986 amendments to the SDWA to issue a proposed and final standard for sulfate. EPA grouped sulfate with 23 other organic and inorganic compounds in the "Phase V" regulatory package proposal. The 24 contaminants were among the last of the original list of 83 to be regulated by the SDWA. On June 25, 1990 EPA proposed the Phase V regulation, including sulfate (published at 55 FR 30370, July 25, 1990). In the notice, EPA described the health effects associated with sulfate (see 55 FR 30382–83). The notice stated that the available scientific information suggests that an adverse health effect from ingesting high levels of sulfate is diarrhea and associated dehydration. Because local populations usually acclimate to high sulfate levels, the impact is primarily on infants, transient populations (e.g., business travelers, visitors and vacationers), and new residents. In the 1990 notice, EPA proposed alternative levels of 400 mg/L and 500 mg/L for the MCLG for sulfate.

In the Fall of 1991, as EPA was nearing publication of regulations for the 24 Phase V contaminants, it became apparent that the Agency had not reached a consensus on how to proceed with the sulfate regulation in light of concerns raised by the commenters. Given the high cost of the rule, the relatively low risk, and the need to explore alternative regulatory approaches targeted at the transient consumer, EPA decided to seek a deferral of a final regulatory decision on sulfate. The Agency needed more time to resolve issues that included: (1) Whether additional research is needed on how long it takes infants to acclimate to water with high sulfate content, (2) whether new regulatory approaches were needed for regulating a contaminant whose health effect is confined largely to transient populations, and (3) whether the Agency should revise its definition of BAT for small systems (i.e., what should be considered affordable for the small, transient non-community water systems). For the above reasons, the regulation on sulfate was deferred. A new schedule has been established in connection with litigation brought over the schedule for regulating sulfate. This schedule requires EPA to finalize its regulatory action for sulfate by May 1996.

The secondary maximum contaminant level (SMCL) for sulfate is 250 mg/L and is based on aesthetic effects (i.e., taste and odor). EPA is not proposing changes in the SMCL for sulfate, but is requesting public comment on the correlation between sulfate concentrations, palatability, and consumption of high-sulfate water by the public.

C. Sulfate General Information

Sulfate is the divalent anion (SO_4^{-2}). It exists in a variety of inorganic compounds and salts formed with metal cations. Sulfate salts with lower molecular weight alkali metals such as sodium, potassium, and magnesium are very water soluble and are often found in natural waters. Salts of higher molecular weight metals such as barium, iron or lead have very low water solubility.

Sulfate is found in soil sediments and rocks, and occurs in the environment as a result of both natural processes and human activities. Specific data on the total production of all sulfates are not available, but production is expected to be thousands of tons per year; the use of sodium sulfate alone in 1987 was reported to be 792 tons. Sulfate is used for a variety of commercial purposes, including pickle liquor (sulfuric acid) for steel and metal industries, and as a reagent in manufacturing of products such as copper sulfate (a fungicide/algicide).

Sulfate may enter surface and ground water as a result of discharge or disposal of sulfate-containing wastes. In addition, sulfur oxides produced during the combustion of fossil fuels are transformed to sulfuric acid in the atmosphere. Through precipitation (i.e., acid rain), sulfuric acid can enter surface waters, lowering the pH and raising sulfate levels.

III. Explanation of Today's Action

A. Establishment of MCLG for Sulfate

The MCLG for sulfate is reproposed today at a level of 500 mg/L. In this notice, EPA is responding to the public comments submitted in reference to the MCLG options contained in the July 1990 proposal. EPA's complete responses to the public comments on the previously proposed MCLGs appear in the Comment/Response Document that is included in the docket for this rulemaking.

MCLGs are set at concentration levels at which no known or anticipated adverse health effects occur, allowing for an adequate margin of safety. The process for establishing an MCLG for a contaminant has been described in many documents, including the final Phase V rule issued in July 1992 (57 FR 31781–31783).

1. Health Effects

The available information on the health effects of sulfate was fully described in the July 25, 1990 (55 FR 30370) Phase V proposal. Studies mentioned in that notice are summarized in the Health Criteria Document for Sulfate (US EPA, 1992), which is available for review and comment in the docket for this rulemaking. Since that time, EPA has funded additional studies on humans and piglets which are currently under review.

In the July 25, 1990 notice, EPA stated that there was no evidence of adverse health effects in animals or humans from chronic exposure to sulfate in drinking water. The available health data indicate that chronic exposure to sulfate is not harmful to health.

The acute effects noted from exposure to high levels of sulfate range from soft stools to diarrhea. Infants may be more sensitive to sulfate than healthy adults. Infants consume more water and food on a body weight basis than adults, and consequently ingest a higher dose of sulfate (per body weight) in drinking high-sulfate water than do adults. In infants, the greatest risk is from dehydration and electrolyte imbalance that may result from diarrhea. This effect can be fatal if untreated.

It has been questioned whether the concentration of sulfate found in drinking water would cause significant dehydration in infants or adults. Schild (1980) reported that eight grams of sulfate retain 120 milliliters of water in the intestine. In this case, an adult drinking two liters of water containing 1500 milligrams of sulfate per liter would ingest three grams of sulfate and retain 45 milliliters of water in the intestine. The Agency is requesting any scientific data which would support or refute the hypothesis that this decrease in available water is likely to cause dehydration and electrolyte imbalance in adults or infants.

There are three documented case histories of infants, 5 to 12 months old, who were given formulas prepared with water containing 630 to 1,150 mg/L of sulfate (Chien, et al., 1968). These

infants developed diarrhea shortly after they ingested the formula, but the effect subsided after use of the high sulfate water was discontinued. Cole (1992) evaluated this study and concluded that neither the potential effects of osmolarity, specifically hyperosmolarity, nor viral gastroenteritis had been considered as possible causes of the observed diarrhea. Thus, Cole suggested and the Agency agrees that the Chien study provides qualitative evidence of the effects of sulfate but should not be used quantitatively in a sulfate risk assessment.

Similar effects have been observed in adults, but individuals seem to become acclimated to high sulfate levels in a short period of time, with a cessation of all ill effects.

The laxative effect of sulfate is well-known. Peterson (1951) compiled the results of questionnaires sent to North Dakota residents and concluded that "waters with 600 to 750 ppm sulfates should be looked upon with suspicion as they may or may not be laxative. Over 750 ppm sulfates is generally a laxative water and below 600 ppm sulfates should be considered safe." Moore (1952) replotted the Peterson data and found that as sulfate concentrations increased from 500 to 1000 mg/L, the number of adults reporting laxative effects also increased. At concentrations of sulfate above 1,000 mg/L, the majority of respondents noted a laxative effect. While it is not known how long is needed to achieve acclimation in adults or infants, EPA scientists believe the time to be approximately two weeks, based on mucosal cell turnover rate in the intestines.

The Agency is using these studies to support the MCLG, although each has limitations. For example, in the Peterson (1951) study, there is no information available on the chemical composition or the microbiological quality of the water, nor on the length of time that people drank the water.

There are insufficient data to calculate a precise and reliable quantification of the exact dose which will cause diarrhea in a given percentage of the susceptible population. Some sulfate salts are used as laxative agents. Their mechanism of action is known, and there is apparently little interest in the medical community in additional research on the subject. Acclimation to sulfate is assumed due to the fact that people living in regions with high-sulfate drinking water seem to have no adverse effect, whereas newcomers drinking that region's water will initially experience the laxative effect.

In developing the MCLG for sulfate, issues were raised concerning the ability of infants to acclimate to sulfate in drinking water. In 1992, EPA convened an expert panel to discuss the sulfate data base (US EPA, 1992). The panel (D.E.C. Cole, Children's Hospital, Halifax, Nova Scotia; M. Cassidy, George Washington University, Washington, DC; and M. Morris, State University of New York, Amherst, NY) concluded that the lack of data on the sulfate content and the osmolarity of the formulas used in the Chien et al. (1968) study prevents it from being a reliable estimate of the level of sulfate that would induce diarrhea in infants. They concluded that: (1) Additional studies on sulfate are desirable, (2) the Chien et al. (1968) study cannot be used quantitatively, (3) the 500 mg/L value for sulfate is conservative for adults, and there are no differences between sulfate levels of 400 and 500 mg/L, (4) the three cases of diarrhea reported in the Chien study may or may not be attributable to sulfate, and (5) acute short-term effects are the appropriate focus for risk assessment and further research.

The panel members recommended additional research with piglets and humans. EPA agreed and initiated studies in collaboration with the University of North Carolina School of Medicine and the North Carolina State University Department of Animal Science. These studies have been completed and are undergoing internal and external peer review.

2. Occurrence and Human Exposure

The available information on the occurrence and human exposure to sulfate was fully described in the July 25, 1990 proposal. Since that time, additional State data have been gathered and used to update the information in Table 8.

Review of data sources for estimating national occurrence levels of sulfate included: The Community Water Supply Study (CWSS) released in 1969; the Rural Water Survey (RWS) from the late 1970s; new State survey data from Utah, North and South Dakota, and Texas: The Federal Reporting Data System (FRDS) and STORET, EPA's computerized water quality data base. In the CWSS, 106 surface water supplies sampled had an apparent detection limit of 1 mg/L. For the ground water supplies the mean of the positive sulfate detections was approximately 43 mg/L (range of 1 to 480 mg/L), and for surface water it was approximately 49 mg/L (range of 2 to 358 mg/L). The Rural Water Survey (RWS) reported a lower frequency of positives and a higher mean of the positive values, but this lower frequency probably reflects the higher detection limit of 15 mg/L. In the RWS, sulfate was reported to be present in 271 of 494 ground water supplies with a mean of about 98 mg/L (range of 10 to 1,000 mg/L) for the positives (some laboratories can achieve accuracy at levels lower than the published detection limit of 15 mg/L). In surface water, it was found in 101 of 154 supplies, with a mean of 53 mg/L (range of 15 to 321 mg/L) for the positives.

As noted above, sulfate can be formed in the atmosphere, and EPA has reported ambient levels during the period of 1980–1986 to range from 0.2 to 199.4 $\mu g/m^3$. Since the amounts of sulfate that could be transferred from the atmosphere through the pulmonary system to the gastrointestinal tract are minuscule compared to what could be ingested in drinking water, atmospheric levels are not of concern for the purposes of this rule.

No information is available on the occurrence of sulfate in foods, nor are there any estimates on dietary intake. The Agency did not follow its usual practice of determining a relative source contribution (RSC) factor. As with certain other inorganic contaminants (nitrate, fluoride, barium, manganese), calculation of RSC is not appropriate for sulfate because the MCLG is derived directly from human exposure to the contaminant in drinking water.

3. Previously Proposed MCLG

In July 1990, EPA proposed two alternative options for the sulfate MCLG based on the available health information. The first option was to set the MCLG at 400 mg/L, based on a Science Advisory Board (SAB) conclusion that sulfate's mode of action is well known and some human data are available indicating that ill effects occur only at concentrations above 600 mg/L (Peterson, 1951). SAB applied a small uncertainty factor of 1.5 to the 600 mg/L level to give a recommended MCLG of 400 mg/L. Their recommendation corresponded to the World Health Organization (WHO) sulfate standard of 400 mg/L, which is based on aesthetic considerations.

The second option was to set the MCLG at 500 mg/L. As a basis for choosing this option, EPA referred to the survey conducted by Peterson (1951) and evaluated by Moore (1952). Combining the questionnaire respondents into discrete groups, Moore indicated that the number of adults reporting laxative effects increased at sulfate concentrations above 500 mg/L.

The Health Protection Branch of Health and Welfare/Canada has indicated to EPA (Canadian Guidelines,

1991) that the maximum acceptable concentration of sulfate in water is 500 mg/L, considered an aesthetic objective, since "at this level sulfate gives an objectionable taste, but is still below the level at which we would expect to see deleterious health effects". The Agency notes that the Canadian sulfate guideline of 500 mg/L and the lack of health problems reported at that level lends support to the proposed MCLG. Canada does not yet have national drinking water regulations. Their guidelines are offered to the provinces, which may choose to adopt them as provincial regulations.

Public Comments

There were 15 separate comments concerning sulfate on the 1990 proposed rule. Several commenters believed that EPA should not regulate sulfate due to a lack of adequate health data, lack of chronic effects and because people acclimate to the laxative effects of sulfate. Eleven commenters stated that if it were necessary to regulate sulfate, that the MCLG should be higher than 500 mg/L (between 600 and 1,000 mg/L). The remaining four commenters stated that 500 mg/L was protective. One commenter stated that the usual approach for deriving the MCLG—an RfD calculation—should be used for sulfate. Another commenter cited a July 17, 1989 letter from the Metals Subcommittee of the Science Advisory Board's Environmental Health Committee to the Administrator stating that the Subcommittee could not support the setting of an acute MCLG, and recommending additional study before regulation. Several commenters urged EPA not to regulate sulfate, stating that a secondary MCL is sufficient. They noted that infants as well as adults acclimate to sulfate, sulfate is present in food, and the WHO guidelines are based on taste considerations and not health effects. Several commenters noted that systems which do not serve the target population, infants in particular, should be excused from complying with the sulfate regulation. Several commenters questioned EPA's cost analysis.

EPA Response

Some commenters noted that no chronic health effects have been associated with long-term exposure to high levels of sulfate. However, sulfate can have acute adverse effects on non-acclimated persons. The population at risk is readily identified and targeted for protective measures. While the laxative effect eases and disappears as the person acclimates to the high sulfate concentration, the individual is subject to debilitation during the acclimation period.

Diarrhea and/or laxative effects have been reported in infants ingesting water with high levels of sulfate and in adults at concentrations in the 500 to 1000 mg/L range. EPA believes an MCL level of 500 mg/L will be sufficiently protective of infants and adults. An RfD for sulfate has not been determined.

SMCLs for aesthetic qualities relating to the public acceptance of drinking water are not federally enforceable, and intended only as guidance for the States. SMCLs do not meet the statutory requirement to set an NPDWR for sulfate.

The requirements for transient and non-transient, non-community water systems which do not serve the target population frequently would be minimal. They could achieve compliance by placing permanent signs at drinking fountains and having bottled water which complies with EPA MCLs available for visitors.

The Agency has updated the occurrence data and the cost analysis since the Phase V proposal.

4. Today's Proposed MCLG

Today EPA is proposing an MCLG of 500 mg/L which represents the level at which no known or anticipated adverse effects on human health occur, and which allows for an adequate margin of safety based on current data. As a basis for choosing this level, EPA notes that the survey conducted by Peterson (1951) and evaluated by Moore (1952) indicated that the number of people reporting laxative effects greatly increased at sulfate concentrations above 500 mg/L. This concentration is considered protective of infants based on the information reported by Chien et al. (1968).

EPA believes that the MCLG for sulfate should be based on the potential for causing loose stools and diarrhea. Infants are at risk from diarrhea regardless of the cause, and unacclimated adults may also be at risk. A standard to limit the intake of sulfate will protect the infant population and unacclimated adults from potential adverse effects.

EPA requests comment on this proposed MCLG. EPA particularly requests any new data or any other new information that may be submitted in support of or opposing the reproposed sulfate MCLG of 500 mg/L. In light of comments opposing the regulation of sulfate, the Agency is also requesting any new data or information that would support a higher level for the MCLG. The Agency is particularly interested in comments that raise issues other than those that EPA has already considered and responded to above and in the record for today's proposal.

B. Establishment of NPDWR for Sulfate

1. Methodology for Determination of MCLs

The SDWA directs EPA to set the MCL "as close to" the MCLG "as is feasible." The term "feasible" means "feasible with the use of the best technology, treatment techniques, and other means, which the Administrator finds, after examination for efficacy under field conditions and not solely under laboratory conditions, are available (taking costs into consideration)", (SDWA section 1412(b)(5)). Each NPDWR that establishes an MCL lists the technology, treatment techniques, and other means which the Administrator finds to be feasible for meeting the MCL (SDWA section 1412(b)(6)).

The present statutory standard for BAT under 1412(b)(5) represents a change from the provision prior to 1986, which required EPA to judge feasibility on the basis of "best technologies generally available" (BTGA). The 1986 Amendments to the SDWA changed BTGA to BAT and added the requirement that BAT must be tested for efficacy under field conditions, not just under laboratory conditions. The legislative history explains that Congress removed the term "generally" to assure that MCLs "reflect the full extent of current technology capability" (S. Rep. No. 56, 99th Cong., 1st Session at 6 (1985)). EPA has concluded that the statutory term "best available technology" is a broader standard than "best technology generally available" and that this standard allows EPA to select a technology that is not necessarily in widespread use, as long as its performance has been validated in a reliable manner. In addition, EPA believes that the technology selected need not necessarily have been field tested for each specific contaminant but, rather, that the operating conditions may be projected for a specific contaminant using a field tested technology from laboratory or pilot systems data.

Based on the statutory directive for setting the MCLs, EPA derives the MCLs based on an evaluation of (1) the availability and performance of various technologies for removing the contaminant, and (2) the costs of applying those technologies. Other technology factors considered in determining the MCL include the ability of laboratories to measure accurately and consistently the level of the

contaminant with available analytical methods.

EPA's initial step in deriving the MCL is to make an engineering assessment of technologies that are capable of removing a contaminant from drinking water. EPA reviews the available data to determine technologies that have the highest removal efficiencies, are compatible with other water treatment processes, and are not limited to a particular geographic region.

Based on the removal capabilities of the various technologies, EPA calculates the level of each contaminant that is achievable by their application to large systems with relatively clean raw water sources. (See H.R. Rep. 1185, 93rd Cong., 2nd Sess. at 13 (1974); 132 Cong. Rec. S6287, May 21, 1986, statement of Sen. Durenberger.)

When considering costs to control contaminants, EPA analyzes whether the technology is reasonably affordable by regional and large metropolitan PWSs (See H.R. Rep. No. 93–1185 at 18 (1974) and 132 Cong. Rec. S6287 (May 21, 1986) (statement of Sen. Durenberger)). EPA also evaluates the total national compliance costs, considering the number of systems that will have to install treatment in order to comply with the MCL. The resulting total national costs vary depending upon the concentration level chosen as the MCL. The more stringent the MCL, the greater the number of systems that may have to install BAT to achieve compliance and the higher the national cost.

The feasibility of setting the MCL at a precise level is also influenced by laboratory ability to measure the contaminant reliably. Because compliance with the MCL is determined by analysis with approved analytical techniques, the ability to analyze consistently and accurately for a contaminant at the MCL is important for enforcing a regulatory standard. Thus, the feasibility of meeting a particular level is affected by the ability of analytical methods to determine with sufficient precision and accuracy whether such a level is actually being achieved.

2. Treatment Technologies and Costs

In the July 25, 1990 proposal, EPA identified two technologies as BATs under Section 1412 of the SDWA for sulfate: Reverse osmosis (RO) and ion exchange (IE). EPA believes that the costs of these technologies to large systems are reasonable, and that these technologies are compatible with other water treatment processes in different regions of the U.S. These technologies and the costs of using them are described as follows:

Reverse Osmosis. RO uses semi-permeable membranes to remove a high percentage of almost all inorganic ions. The technology is relatively insensitive to flow and total dissolved solids (TDS). The effectiveness of RO is adversely affected by the presence of turbidity, iron, manganese, silica, or scale-producing constituents in the source water. If pretreatment is not already in place to remove these constituents, additional costs may be incurred to install other technologies (e.g., pH adjustment, filtration, or scale-prevention additives). The cost generated by the model includes the cost of a scale inhibitor. On the other hand, in situations where high dissolved solids and/or several contaminants may have to be removed simultaneously, the RO process may offer an especially desirable and cost-effective approach to their removal. Less chlorine may be needed due to removal of many bacteria and viruses during the RO process.

Disadvantages to RO include fouling of membranes either from scaling or from water with high organic content and a reject stream of 20% to 50% of the water flow. It is also possible that corrosion control chemicals will be needed after RO, and a more qualified operator may be needed.

Full scale tests indicate that RO is capable of removing between 86 and 97 percent of the sulfate, and is effectively used for the reduction of contaminants other than sulfate. Estimated cost for reducing sulfate by RO range from $3.50/1,000 gallons for systems serving between 500 and 1,000 persons to $1.00/1,000 gallons for systems serving more than 1,000,000 persons. High sulfate levels are typically associated with high levels of TDS, which can indicate the presence of other inorganics; in such cases, RO becomes a cost effective treatment technology because it removes those other inorganics as well. Since the removal efficiency required for sulfate will typically be less than 86 percent, a portion of the water can be treated and blended with an untreated portion to reduce the cost of this process.

Commenters to the Phase V proposed rule expressed concerns regarding the potential costs associated with disposal of wastes generated by treatment processes such as RO, particularly in water-scarce regions. The Agency believes that wastewater would be minimized, since only a portion of source water containing elevated sulfate levels would need to be treated, and would then be blended with source water. With an MCL of 500 mg/L, EPA believes blending treated water and source water would greatly reduce the reject stream.

Ion Exchange. IE reduces sulfate concentrations to levels below the MCLG of 500 mg/L at reasonable costs to large systems. Typical sulfate anion removals using IE are greater than 75 percent in full-scale studies that evaluated influent concentrations close to drinking water levels. Estimated costs for IE to reduce sulfate concentrations range from $2.90/1,000 gallons for systems serving between 500 and 1,000 persons to $1.40/1,000 gallons for systems serving more than 1,000,000 people. When the removal efficiency required for sulfate is less than 75 percent, a portion of the water can be treated and blended with an untreated portion to reduce cost. For those systems with other anions that need to be removed (such as nitrate), the removal efficiency will decrease for those anions since sulfate binds more strongly to the exchange resin than other anions. A disadvantage of IE is that it may not be feasible at high levels of TDS.

EPA received a number of public comments on the proposal to select RO and IE as BATs for the Phase V inorganic contaminants in general and for sulfate in particular. EPA's responses are in the comment-response document for the Phase V rulemaking and in the preamble to the final rule (57 FR 31809–12). In the preamble, EPA responded to comments on sulfate in particular concerning the disposal of wash brines from IE and RO treatments in water-scarce areas and on the costs of using RO and IE to treat for sulfate. EPA is not aware of any new information on these two technologies or costs since the proposal. Interested parties are invited to submit any new public comments or new information on the selection of RO and IE as BAT for sulfate.

Electrodialysis. Since the Phase V proposal, EPA has identified electrodialysis (ED) as an additional proposed BAT. EPA requests comment on its conclusion that electrodialysis should also be considered BAT for sulfate.

ED was the first membrane process developed for desalting brackish waters, and was commercially available in the 1950's. In the early 1970's, a major technological improvement was made, called electrodialysis reversal. Recovery ratios increased from the 50% to 60% range to 80% to 90% recovery.

In ED, feed water containing dissolved ions is pumped across electrified membranes. The positive ions migrate to the negative electrode,

and the negative ions migrate to the positive electrode, and are effectively trapped in alternating compartments. The partially deionized/dilute stream is circulated through additional stages until the desired purity is obtained. Since this is a unidirectional process, membrane fouling and mineral scale formation tend to degrade system performance. Some pretreatment may be required, such as clarification, presoftening, or treatment with acid or anti-scaling agents.

Electrodialysis reversal (EDR) is the same process but with the polarity of the current automatically reversed at regular 15 to 30-minute intervals. This changes the direction of ion movement within the membrane stack. As a result, foulants and scale tend to be removed from the membrane surfaces and carried away during the purge period. EDR requires minimum pretreatment and is very tolerant of system upsets, shock chlorination, and long-term operation at temperatures up to 45 C. Sulfate removal of 84% was achieved in a 1990 pilot study in Virginia, in which efficiency and costs for RO and EDR were compared (AWWA, 1991).

Operating costs for EDR are comparable to those for RO. All reference to ED as BAT for sulfate removal in this notice will refer to electrodialysis reversal, rather than unidirectional electrodialysis. Table 3 summarizes the efficiency and cost of the treatment technologies proposed as BATs for sulfate, and indicates that each can reduce the contaminant level from the maximum expected occurrence level to below the proposed MCLG. The costs in Table 3 are representative of annual operation and maintenance (O & M) costs plus annualized capital costs, and may differ depending on local conditions. Costs may be lower if sulfate concentration levels encountered in the raw water are lower than those used for the calculations, or higher if additional system-specific treatment or storage requirements are needed. The general assumptions used to develop the treatment costs include: Capital costs amortized over 20 years at a 7 percent interest rate; engineering fees; contractor overhead and profit; late 1991 power, fuel, labor and chemical costs. The removal efficiencies cited in Table 3 are what is possible, and are not directly linked with the cited costs. These costs are linked with the efficiency needed to achieve the sulfate MCL.

TABLE 3. ANNUAL COSTS OF PROPOSED 1412 BAT FOR SULFATE (1991 DOLLARS)

BAT	Percent removal	Cost per 1,000 gallons 500–1000 population	Cost per 1,000 gallons 3,300–10,000 population	Cost per 1,000 gallons 1,000,000 population
Reverse osmosis	86–97	$3.50	$2.20	$1.00
Ion Exchange	>75	2.90	1.90	1.40
Electrodialysis	80–90	3.50	2.20	1.00

3. Sulfate Analytical Methods

a. *Choice of analytical method.* The reliability of analytical methods used for compliance monitoring is critical at the MCL. EPA evaluated the availability, costs and the performance of analytical methods for measuring sulfate, and considered the ability of laboratories to measure consistently and accurately for sulfate at the level of the proposed MCL.

In selecting analytical methods, EPA considers five factors:

(a) Reliability (i.e., precision/accuracy) of the analytical results;

(b) Specificity in the presence of interferences;

(c) Availability of enough equipment and trained personnel to implement a national monitoring program;

(d) Simplicity of analysis to permit routine use; and

(e) Cost of analysis to water supply systems.

Sulfate has an SMCL of 250 mg/L for which EPA recommends measurements be made with an EPA method or a Standard Method (SM) method (40 CFR 143.4(b)), each of which uses a turbidimetric analytical technique. The July 1990 proposal listed analytical methods for sulfate that use one of four analytical techniques: turbidimetry, colorimetry, ion chromatography, and gravimetry. The July 1992 regulations did not regulate sulfate, but specified a colorimetric analytical technique to measure sulfate as an unregulated contaminant (40 CFR 141.409(n)(12)). However, the regulations did not list specific colorimetric methods. In an analytical methods proposal (58 FR 60622, December 15, 1993) EPA removed this ambiguity by identifying several colorimetric methods. The December 1993 proposal also proposed methods that use other analytical techniques, and improved laboratory efficiency by allowing all sulfate methods to be used for both secondary and unregulated contaminant monitoring.

Today EPA is proposing methods that use colorimetric, gravimetric or ion chromatographic analytical techniques. The methods are proposed for analysis of sulfate as regulated and as a secondary contaminant. For information on the precision and accuracy of these methods, EPA refers readers to the references in Table 4.

TABLE 4.—PROPOSED ANALYTICAL METHODS FOR SULFATE

Contaminant	Method	EPA (1)	ASTM (2)	SM (3)
Sulfate	Colorimetry	375.2		4500–SO_4–F.
	Gravimetry			4500–SO_4–C,D.
	Ion chromatography	300.0	4327–91	4110

(1) "Methods for the Determination of Inorganic Substances in Environmental Samples", EPA/600/R/93/100. NTIS, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161, PB 94–121811, August 1993.

(2) Annual Book of ASTM Standards, Vol. 11.01, 1993, American Society for Testing and Materials, 1916 Race Street, Philadelphia, PA 19103.

(3) 18th edition of *Standard Methods for the Examination of Water and Wastewater,* American Public Health Association, American Water Works Association, Water Environment Federation, 1992.

EPA is not proposing turbidimetric methods because the methods are inadequate. The operating range of turbidimetric methods is 0 to 40 mg/L, which requires excessive dilution of the sample to cover the range between the SMCL (250 mg/L) and the proposed MCL (500 mg/L). EPA recommends that compliance samples not be diluted more than four or five-fold to obtain reliable and reproducible results. The gravimetric and colorimetric chromatographic methods require acceptable dilution of the sample to measure samples containing more than 350 mg/L of sulfate.

Colorimetric and gravimetric methods have been used for many years to measure sulfate in water, and were described in the July 1990 proposal. As stated in the July 1992 rule, EPA agrees with comments that only methylthymol blue, not chloranilate, colorimetric methods are suitable for sulfate analysis. Therefore, EPA is only proposing methylthymol blue colorimetric methods for sulfate analysis.

Ion chromatographic methods have been approved for measurement of nitrate and nitrite (40 CFR 141.23) in drinking water. These methods have been described or discussed in the July 1990 and the December 1993 proposals, and in 54 FR 22097 (May 22, 1989). EPA is proposing ion chromatographic methods for sulfate analysis only with the suppressed column option. EPA has no data to support use of a "non-suppressed" column (57 FR 31800), and the Agency is not proposing to approve this option in any ion chromatographic method.

EPA believes the proposed analytical methods are technologically and economically feasible for sulfate monitoring. The analytical cost for sulfate is $10 to $30 per sample. EPA believes these costs are affordable. Actual analytical costs may vary with the laboratory, analytical technique selected, the total number of samples and other factors. The number of laboratories that routinely participate in EPA's Water Supply and Water Pollution performance evaluation studies indicates that many laboratories have the capability to conduct analysis for sulfate.

Sulfate has a long history as a water quality parameter. There is a large body of performance data available for water pollution studies. The proposed analytical methods have detection limits much lower than the proposed MCLG for sulfate. The detection limit for a given contaminant varies with the analytical method (Table 5).

b. *Method detection limits and practical quantitation levels.* EPA determines practical quantitation levels (PQLs) for each substance for the purpose of integrating analytical chemistry data into regulation development. The PQL yields a limit on measurement and identifies specific precision and accuracy requirements which EPA uses to develop regulatory requirements. As such, PQLs are a regulatory device rather than a standard that labs must specifically demonstrate they can meet. The PQLs for inorganic compounds are determined based on the method detection limits (MDLs) and the results from performance evaluation data.

TABLE 5.—PROPOSED METHODOLOGY AND DETECTION LIMITS FOR SULFATE

Contaminant	Method	Detection limit (mg/L)
Sulfate	Colorimetry	3
	Gravimetry	1
	Ion chromatography.	0.02

The PQL for sulfate was determined using the MCL as well as EPA and State laboratory data from Water Pollution PE studies using the procedure described in 54 FR 22100 (May 22, 1989). A PQL of 10 mg/L was proposed for sulfate in the Phase V proposed rule (55 FR 30411, July 25, 1990). Since the detection limit using the colorimetric method is 3 mg/L, EPA is soliciting comment on whether a higher PQL of 30 mg/L should be set in order to retain the colorimetric method.

c. *Sulfate sample preservation, container and holding times.* Requirements for sample preservation, containers and holding times listed in Table 6 were proposed for sulfate in the 1990 proposal. No comments were received on these specifications. The Agency is reproposing these requirements today.

TABLE 6.—SULFATE SAMPLE PRESERVATION CONTAINER, AND HOLDING TIME REQUIREMENTS

Contaminant	Preservative	Container [1]	Maximum holding time [2]
Sulfate ..	Cool, 4 °C.	Plastic or glass.	28 days.

[1] Container may be a hard or soft, plastic or glass material.

[2] Samples should always be analyzed as soon after collection as possible.

d. *Laboratory certification.* Today EPA is proposing that only certified laboratories be allowed to analyze samples for compliance with the proposed MCL for sulfate. EPA recognizes that the effectiveness of today's proposed regulations depends on the ability of laboratories to reliably analyze contaminants at low levels. EPA has a drinking water laboratory certification program that States must adopt as a part of primacy. (40 CFR 142.10(b)) EPA's Manual for the Certification of Laboratories Analyzing Drinking Water, EPA/570/9-90/008, April, 1990, specifies minimum criteria which States must use to implement their drinking water laboratory certification program.

Performance evaluation (PE) samples are an important tool in EPA's laboratory certification program. The samples are provided by EPA or the States to laboratories seeking certification. To obtain and maintain certification a laboratory must use an approved method, and at least once a year successfully analyze an appropriate PE sample. Successful analysis requires that a laboratory report a concentration of sulfate in the PE-sample that is within the acceptance limits. Specification of these proposed limits, which are listed in drinking water regulations at § 141.23(k), is discussed below.

e. *Setting PE sample acceptance limits for sulfate.* Acceptable performance has historically been set by EPA using two different approaches: (1) Regressions from performance of preselected laboratories (using 95 percent confidence limits), or (2) specified accuracy requirements. Acceptance limits based on specified accuracy requirements are developed from existing PE study data. When there are insufficient PE data to determine expected laboratory performance, EPA determines acceptance limits from individual study statistics based upon 95 percent confidence limits. After sufficient performance data are generated from PE studies, EPA will develop fixed acceptance limits using a "plus or minus of the true value approach." The true value approach requires each laboratory to demonstrate its ability to perform within pre-defined limits. Laboratory performance is evaluated using a constant yardstick independent of performance achieved by other laboratories participating in the same study. A fixed criterion based on a percent error around the "true" value reflects the experience obtained from numerous laboratories and includes relationships of the accuracy and precision of the measurement to the concentration of the analyte. It also assumes little or no bias in the analytical methods that may result in average reporting values different from

the reference "true" value. This concept assures that reported results can be related to the percentage variance from the PQL.

Performance data are available for sulfate at concentrations proposed for regulation. The data are sufficient to set fixed acceptance limits of ± 15% for sulfate PE samples. The acceptance limits are estimated using the approach described in 54 FR 22132.

4. Establishment of a NPDWR

a. Today's Proposed MCL. Today EPA is proposing an MCL for sulfate of 500 mg/L, which is equal to the proposed MCLG. EPA believes that costs for large systems are reasonable and affordable, and that it is technologically feasible for PWSs to achieve this level for sulfate. EPA also believes that the flexibility afforded by Option 1 allows small systems to comply with the MCL in a way that is reasonable and affordable.

Examination of the BATs identified above (RO, IE, and ED) indicates that each can reduce the levels of sulfate from the maximum expected occurrence levels to levels below the proposed MCLG of 500 mg/L (minimum removal efficiencies of 86%, 75%, and 80%, respectively). The maximum reported occurrence level for sulfate in a national study (RWS) is 1,000 mg/L, although individual State data have shown levels twice as high. Each of these technologies is currently available, has been installed in PWSs, is compatible with other water treatment processes, and can remove sulfate from the maximum occurrence level to below the proposed MCLG. EPA is proposing an MCL for sulfate based upon an analysis of several factors, including:

(1) The effectiveness of BAT in reducing sulfate levels from influent concentrations to the MCLG.

(2) The feasibility (including costs) of applying BAT. EPA considered the availability of the technology and the costs of installation and operation for large systems.

(3) The performance of available analytical methods.

b. Lead option for implementing the MCL requirement. As described in the Regulatory Background section, EPA determined that sulfate is found primarily in small PWSs in the western part of the U.S., and that compliance with the sulfate MCL would place a significant burden on these systems. EPA decided that a requirement for PWSs to comply with the sulfate MCL by treating all of their source water might be excessive since high sulfate levels affect only persons who are not acclimated to the water. Therefore, the Agency decided in 1992 to defer the regulation for sulfate in order to consider ways of allowing PWSs to comply with the MCL that would not require central treatment.

To develop alternative options for complying with the MCL, EPA held a meeting with interested States and the Association of State Drinking Water Administrators (ASDWA). In November 1992, officials from Texas, South Dakota, Colorado, and New Mexico, ASDWA staff, EPA Regional staff, and EPA Headquarters staff met to explore regulatory options for sulfate. They discussed the regulatory process, a toxicological profile of sulfate, and State perspectives on sulfate regulation, health effects and implementation options. Neither the issue of whether or not to regulate sulfate nor the MCL/MCLG levels were topics of discussion. The participants felt that the sulfate regulation should give the States flexibility. After the discussions at this meeting, most of the States present supported the conclusion that PWSs should be allowed to protect their customers from the risk of sulfate levels exceeding the MCL either by centralized treatment or through public education/notification and provision of Alternative Water. The outline of a regulatory option that included all of these elements was formulated. Each of the components was directed at a certain population and the majority agreed that those components, together, would be adequately protective. The option developed at that meeting is essentially Option 1, being proposed today. In the past, EPA has not generally set restrictions or conditions on the means of compliance with the MCL. Traditionally, EPA simply identifies the central treatment technologies that are considered BAT and then sets the MCL based on the capabilities of those technologies to remove the contaminant. PWSs are not required to use the identified BATs but must achieve compliance with the MCL. EPA regulations prohibit PWSs from using bottled water or POU devices to achieve compliance with the MCL. In addition, the regulations prohibit PWSs from using POE devices to achieve compliance with the MCL unless the PWS meets certain conditions for ensuring effective protection of all consumers. See 40 CFR 141.100 and 141.101. In Option 1, EPA proposes to override the general prohibition on the use of bottled water and POU/POE devices and to allow States to authorize PWSs to use these methods to achieve compliance with the MCL.

c. Method of compliance. The State would have the authority under Option 1 to allow PWSs to achieve compliance with the sulfate MCL by one of two methods. The PWS could comply either by using conventional central treatment or by providing Alternative Water. With the State's authorization, PWSs would have the choice of supplying bottled water which complies with EPA MCLs, POU or POE devices to target populations. Under Option 1, PWSs that provide Alternative Water would also need to meet certain public education/notification requirements. Transient systems would also have to provide Alternative Water, but their public notification requirement would be posting of signs, unless POE/POU devices brought all taps into compliance. This approach directly focuses protection on the sensitive populations: Infants, travelers and new residents. Under Option 1, any program developed by a PWS would need to contain the following provisions or others which it can demonstrate are at least as stringent and protective:

(1) Community Water Systems

(i) Bottled water.

PWSs would need to provide and deliver two liters of bottled water per person per day (unless the customer requests less), on request, to households with infants, new residents, or transients (visitors). The bottled water would have to have been monitored or certified to be in compliance with all EPA MCLs. PWSs would be allowed to deliver enough water for several weeks, or the entire time period, at once, and would not be required to provide daily delivery. Infants, up to one year old, would receive bottled water for a maximum of 20 weeks from the date of request. Since a mother may nurse her infant during the first year, it would be her decision as to when to begin giving the infant tap water. Each new resident (person moving to the high-sulfate community from another location) would receive bottled water for a maximum of six weeks. New residents with infants up to one year old would receive bottled water for their infant for 20 weeks. New residents with infants older than one year would receive bottled water for themselves and their infant for six weeks. Since new residents would be informed about the Alternative Water by the PWS at the time of starting water service to their residence, the six weeks would begin at that time. Travelers (guests visiting residents and hotel guests) would receive bottled water for the period requested, not to exceed six weeks. In resident households with infants, the public water system would only need to supply bottled water for the infant in the household. EPA is not proposing to require that bottled water be provided to

resident pregnant women prior to childbirth, since there seems to be no transfer of sulfate through the placenta.

The rule would require PWSs supplying Alternative Water to determine an equitable way of recouping their expenses in providing that service without charging a premium to the recipients of the Alternative Water. EPA believes that an additional charge for Alternative Water (above and beyond what would normally be charged for the water if it had been delivered through the distribution system) would be a disincentive to a consumer's decision to request Alternative Water and receive protection from high levels of sulfate. Therefore, the proposed rule would prohibit PWSs from charging a premium. The Agency believes this is necessary in order to "assure a supply of drinking water which dependably complies with" the sulfate MCL (see SDWA Section 1401(1)(D)). Each utility would need to determine the best way to meet its operating expenses without imposing a premium on the subpopulation of customers that is receiving Alternative Water under the sulfate rule. For example, a PWS could charge the same unit cost for each liter of bottled water as it charges for centrally-distributed water. The number of liters of bottled water delivered to a household would simply be added to the number of liters of centrally-distributed water that appears on the meter, and the same unit cost would apply to the entire volume. EPA requests comment on whether it is appropriate to restrict the PWS's fee structure in this way. In particular, the Agency is interested in whether there are State or local ratemaking laws or other laws that bear on this issue.

Two liters per day is the amount of water selected to be provided since that is the consumption level used by EPA in calculating risk estimates, and is the 85th percentile consumption level of water for the U.S. population. Infants are considered to consume one liter per day, but since they comprise a small portion of the target population, two liters per day for all members of the target population is retained for simplicity of implementation. Twenty weeks was chosen as the period for providing bottled water to infants since EPA staff scientists believe that this is a sufficiently lengthy period for infants to become gradually acclimated to high sulfate-containing water. Similarly, six weeks was chosen as the period for providing bottled water to new residents and travelers (guests) to allow gradual acclimation. Although two weeks is the period necessary to acclimate to high sulfate levels if a person is exposed continually to high-sulfate water, this rapid time frame would require the person to experience the adverse effect. In addition, new residents and travelers are likely to have many activities occupying their attention which may prevent them from accomplishing the acclimation in a shorter time period. EPA is requesting comment on these allotted time periods.

The notice provided to customers by the PWS would advise that during the period when bottled water is provided, there should be mixing of bottled water with tap water to allow gradual acclimation of the digestive system to the high-sulfate water. If gradual introduction of tap water is not done, there could still be adverse health effects when use of bottled water ceases.

The PWS would be responsible for providing bottled water which complies with EPA MCLs on request to any household which has an infant or travelers (guests), and to any household with new residents who have moved to the community from outside the service area.

Monitoring requirements to ensure that the bottled water meets the sulfate MCL and other MCLs are explained in the section below on Compliance Monitoring Requirements.

PWSs would need to maintain a record of public requests for bottled water, either by a telephone log or other means, by which the date of the request and the date of delivery are recorded and maintained for State verification.

If the public notification is done effectively, it is not anticipated that emergency delivery of bottled water will be necessary. Customers should have the time to notify the PWS well in advance of the desired delivery date. In the event that a customer has not had access to the public notification and is unable to procure bottled water prior to the normal delivery by the PWS, the PWS should have the ability to provide an emergency delivery within 24 hours of receiving the request.

(ii) Public Education/Notification.

Public education and public notification are important in making people aware of the potential adverse health effects of high levels of sulfate and educating them about how to protect themselves if they are within the targeted population. For CWSs, there are four components to the proposed public education and public notification requirement: Notices in bills, pamphlets, signs and notices to the media. In communities where a significant portion of the population speaks a language other than English, the text would need to be in the appropriate language(s), in addition to English.

Notices in Bills. PWSs would be required to use their bill notices to inform residents of the sulfate content in their water and its potential impact on non-acclimated persons. The compliance requirements for mail delivery would be the same as those for the general public notification mail delivery requirements in § 141.32(a) (2) and (3), except that the interval for sulfate notification is proposed to be every six months rather than three months. EPA is proposing to specify a six-month interval to assure that a pregnant woman would receive at least one notice during the term of her pregnancy. The notice would have to be typed in bold lettering on the bill itself. There would also need to be an additional page with more information on the potential health effect from ingesting high levels of sulfate in drinking water. That page would include information about how expectant mothers and residents can request and receive bottled water for infants and guests, how to mix tap water with bottled water over time to gradually acclimate the person to sulfate, as well as a section reassuring the consumer that there are no ill effects from high sulfate-containing water for residents.

The PWS would also need to provide the same notice to new customers or billing units prior to or at the time service begins.

Pamphlets. PWSs would be required to provide pamphlets to all medical facilities, which includes, but is not limited to city, county and State health departments, pharmacies, public and private hospitals and clinics, family planning clinics and local welfare agencies. The PWS would need to request that the operators of those facilities make the pamphlets available to pregnant women. The pamphlets would contain the information listed above for notices in bills.

Signs. PWSs would be required to post permanent, prominent and visible signs in all public areas where not all taps will have treated water.

Notices to the Media. PWSs would be required to submit copies of the notice described above to radio and television stations that broadcast to the community served by the water system when sulfate in excess of the MCL has been detected in the water, and once every six months while the water delivered into the distribution system exceeds the sulfate MCL. The geographical service area in question would have to be indicated and clearly defined in the notice.

(2) Transient Systems and Non-Transient, Non-Community Systems

(i) Bottled Water and POU/POE Devices

Transient systems, which comprise most of the affected systems (1,200 of 1,950), and non-transient, non-community systems would be required to make either bottled water which complies with EPA MCLs or water treated with a POU/POE device available for travelers at establishments in the service area. Where the target population is affected on a relatively continual basis, PWSs may find it more cost-effective to provide POU or POE devices. Where the system rarely serves members of the target population, it might choose to have a supply of bottled water on hand. Non-transient, non-community water systems, such as schools, factories and hospitals, might choose to install POEs in their cafeterias. PWSs would be responsible for maintaining POU/POE devices to ensure their continuing effectiveness.

(ii) Public Education/Notification

Public notification for transient systems and non-transient, non-community systems would be posting of signs. Such systems have no customers to "bill", and notices to the media and pamphlets would not be effective or necessary. PWSs would be required to post permanent, prominent and visible signs, made of durable material such as plastic, in places such as rest areas, campgrounds, gas stations and public areas. The signs would target travelers and newcomers, and would alert the public to the health effects of sulfate and the nearest location of drinking water for individuals not acclimated to high sulfate levels. The signs would have to be placed in any location where all taps (i.e., faucets, fountains, or other source of water that could be used for drinking) are not providing water in compliance with the sulfate MCL. If the location has a POE device, posting would not be necessary, since all taps would provide water that complies with the MCL. In the case of campgrounds, sources such as hand pumps or trailer hook-ups would be posted with signs, and bottled water could be available at the entrance gate or registration area. The Agency recognizes that there are unmanned, remote campgrounds in the national parks system, and requests comment on the means of compliance for those systems.

(3) Rationale

The sanctioning of Alternative Water as a means of compliance is an innovative approach that EPA has developed in recognition of the special circumstances and concerns surrounding the sulfate regulation. The proposed option would provide Alternative Water to sensitive populations only for the period of time needed for acclimation. The Alternative Water approach is appropriate in this case because the target populations are readily identifiable and because their need is short-term. Option 1 provides PWSs flexibility and seeks to alleviate the financial burden that central treatment might entail for small PWSs, and as such is in accordance with the objectives of the Regulatory Flexibility Act.

EPA believes that the requirements of Option 1 for PWSs to provide bottled water which complies with EPA MCLs or POU/POE devices and to provide public notice and education, taken together, will assure a supply of drinking water to the Target Population which dependably complies with the MCL for sulfate (see SDWA Section 1401(1)(D).

As detailed below in the section on costs, EPA finds that this Alternative Water approach would result in an annual national cost of $86 million annually, as compared to an annual cost for central treatment by all affected systems of $147 million. The $86 million estimate would be substantially lower except that EPA assumed conservatively that about 25% of affected systems would choose central treatment or regionalization even with Option 1 available to them. Of the $86 million, $7 million would be the cost to the 1,500 systems choosing the public notification/Alternative Water method of compliance, and $71 million would be the cost to the 500 systems choosing central treatment.

To understand how the logistics of the option would work, the Agency chose two system sizes: A PWS serving a town of 500 people, and another serving a town of 3,300 people. As very few systems (approximately 40) serving 3,300 people or more are expected to exceed the sulfate MCL, this system size was chosen to illustrate that it would be more cost-effective for a system of that size to centrally treat. Costs were calculated by using national averages.

In a population of 500, the Agency assumed (based on analysis of U.S. Census Bureau and Current Population Reports data) that there would be eight households (500 times 1.68%) with infants and 30 households with new residents (500 times 16.4% divided by 2.6 persons per household) at any given time. (EPA assumed that an average household contains 2.6 people. New residents and infants would require Alternative Water for 6 weeks and 20 weeks, respectively. A system serving this population of 500 would be required to deliver a maximum of approximately 8,800 liters of bottled water annually, or 24 liters per day, as illustrated by the calculations below.

30 households×2.6 persons×2 liters×42 days=6,552 liters

8 infants×2 liters×140 days=2,240 liters

Total Annual Bottled Water Needs=8,792 liters

Average Daily Bottled Water Needs 8,792/365 days=24 liters

The above calculation is given as an example only, and the 24-liter figure is a high estimate. The required mixing of tap water with bottled water over time for infants and new residents would reduce their consumption of bottled water. The cost analysis in the RIA for this rulemaking assumes that bottled water will represent, on average, half the water consumption for infants and new residents, and that customers will exercise their option to have less than 2 liters per day delivered over the entire period.

Although it is up to the water system to decide how to deliver the water, the Agency finds that the system could contract the delivery service out to a bottled water supplier or could procure and distribute bottled water itself. For the sake of simplifying the model, EPA assumed that a town with a population of 500 would not have to install any POUs or POEs, and would rely entirely on bottled water for the target population. The Agency recognizes that, in actuality, some percentage of such towns may have a restaurant and/or gas station, and could use a POU/POE device. However, these towns would be few in number, and the simplified model is retained for costing purposes only. If such a town had very few travelers passing through, for example, a restaurant or gas station might find it more cost-effective to use permanent signs and have bottled water available for those few travelers. EPA assumes that systems which rarely serve the target population would comply by posting signs and having bottled water available for visitors, rather than install POE/POU devices. The Agency solicits comment on the types of Alternative Water that PWSs would choose.

For a town with a population of 3300, the logistics become more complicated. The estimated number of households with infants increases from 8 to 55. The number of households with new residents becomes 210, and the number of liters of bottled water to be delivered per day is approximately 170. It is also estimated that there will be 3 POU units per town. The Agency thinks that few PWSs serving populations this large will

choose Option 1, and will choose instead to centrally treat.

There are several disadvantages to Option 1. First, it requires persons to learn about sulfate and take action to protect themselves. Second, because high-sulfate water is still available at the tap, Option 1 does not guarantee that all target audiences will be protected. The Agency requests comment on the feasibility, equity, enforceability, and attractiveness of the option.

Although EPA believes that allowing compliance with the MCL through the use of POUs, POEs, and bottled water is acceptable in the case of sulfate, the Agency continues to believe that it should not be allowed in the case of other drinking water contaminants, for which the general prohibitions in 40 CFR 141.100 and 141.101 still would apply. Option 1 proposes to override the prohibition in these sections against using bottled water and POU devices as a means of compliance with the sulfate MCL because of its unique characteristics. The susceptible population is limited, and the health effects are short-lived, so the logistics of Option 1 are feasible for smaller systems. The effects are immediate, so the cause/effect relationship of drinking water containing high levels of sulfate can be easily demonstrated, and the affected population can be readily convinced of the need for precautions. EPA is unaware of any other drinking water contaminant having these unique features. Therefore, EPA considers Alternative Water and public notification/education to be acceptable means for compliance with the MCL for sulfate, but not for other contaminants, given current information on health risk and treatment costs.

Because of the burden of administering Alternative Water in larger systems, noncompliance and the difficulties of enforcement become larger concerns. Therefore, EPA considered, but decided against, limiting the availability of Option 1 to smaller systems (e.g., systems serving fewer than 3,300 persons). Such a limitation would be unlikely to have any practical effect since, for cost efficiency reasons, systems above this size would probably choose central treatment. Also, EPA's occurrence projections indicate that few if any systems above 3,300 are likely to exceed a sulfate MCL of 500 mg/L.

d. *Other options being considered.* Option 1 above is EPA's preferred approach to regulating sulfate in drinking water and is being proposed by EPA today. EPA believes that Option 1 fully complies with SDWA's scheme for establishing drinking water regulations and is the best approach for regulating sulfate. However, there has been considerable discussion as to the necessity for federal regulatory action in protecting the public from the real, yet temporary laxative effect of sulfate. Various commentors on the 1990 proposal argued that sulfate should not be regulated at all because diarrhea does not present a significant risk to health, but rather is only an inconvenience.

The Agency has a statutory requirement to regulate sulfate. In light of the above comments, EPA is seriously considering the following additional options for regulating sulfate. EPA solicits public comment and scientific evidence on all of the options being considered.

Option 2 Under this option, the sulfate MCL and MCLG would be set at 500 mg/L. However, the target population would be limited to only infants, that is, only infants would need to be provided drinking water that meets the MCL for sulfate. The rationale for this option is that infants are the only population subgroup potentially subject to a significant risk to health, not due to the initial effect (diarrhea), but due to their inability to modify their environment or fluid intake, and the possibility that dehydration could occur if no action is taken. Under this Option, EPA would be taking the position that the laxative effect is more of an inconvenience than an adverse health effect in adults, and that no protection of adults is necessary.

The implementation of Option 2 would require the same public notification/education activities outlined in Option 1, with modifications in the text to limit the target population to infants. The text would state that only infants are exposed to significant risk from sulfate ingestion. Just as in Option 1, CWSs in excess of the sulfate MCL would be required to provide notices in bills, signs, pamphlets and media notices to their customers in the service area. These CWSs would be required to deliver Alternative Water upon request to households with infants for a maximum of 20 weeks during their first year of life. Transient systems and non-transient, non-community systems would be required to post signs and assure a supply of bottled water for infants if there is any possibility of an infant being present at the facility. Since the target population is comprised only of infants, the allocation of bottled water would be 1 liter per day, rather than the 2 liters per day proposed under Option 1 for adults and infants. For costing purposes, the Agency assumes that under Option 2, no PWS would choose central treatment as a means of compliance. This assumption is based on the relatively small number of infants (less than 2% of a given population) and the option's relatively low administrative and logistical costs. The cost of arranging delivery of bottled water and providing public notification in the service area would be lower than the cost of installing central treatment. However, it is possible that a large PWS, in anticipation of future regulations for other contaminants, or to comply with other existing regulations for contaminants that can be removed by the same treatment technologies as sulfate (e.g., RO), might, in reality, choose central treatment. Such a system may find the permanent requirement to provide public notification and bottled water to the target population to be a long-term administrative burden that is ultimately less cost-effective than central treatment. A disadvantage to this option is the possible precedent that would be set by an EPA statement that diarrhea is not considered an adverse effect for adults.

Option 3 Option 3 differs from Option 2 in the definition of the targetpopulation. The target population would be composed, as in Option 1, of infants and transient adults (including new residents), all of whom are subject to the adverse effect. However, unlike Option 1, there would be two different strategies under Option 3 to protect the two target population subgroups, infants and adults. As in Option 2, Alternative Water would have to be provided for infants. Unlike Option 2 however, PWSs would be required to notify transient adults of their risk, even though not required to provide them with Alternative Water. Public education/notification requirements would be identical to those described for Option 1 for both subgroups, except that the text of the notices would state that Alternative Water is only provided for infants upon request of the parent. Just as in Option 2, CWSs exceeding the sulfate MCL would be required to provide notices in bills, signs, pamphlets and media notices to their customers in the service area, and deliver bottled water upon request to households with infants for a maximum of 20 weeks. Similarly, transient and non-transient, non-community systems would be required to post signs and maintain a supply of bottled water.

The rationale for Option 3 is that it is necessary to set the MCL at a protective level, but sufficient for compliance purposes to provide notification/education to the affected adult population. This option is based on the theory that adequate protection for

adults can be achieved through proper education and notification. Informed adults would be able to reduce or avoid the effect by taking the initiative to purchase bottled water or otherwise abstain from drinking tap water. Infants, on the other hand, depend on adults for their survival, and the minimization of diarrhea's effects depends on the adult's gradual mixing of the infant's tap water with water that complies with the sulfate MCL. Consequently, more stringent requirements (provision of Alternative Water) would be imposed to ensure protection of infants. The disadvantage of this option is that it requires members of the affected public to protect themselves after being notified of a potential risk.

e. *Implications of Options 1, 2 and 3.* Options 1, 2 and 3 represent a significant change from the Agency's approach in other drinking water regulations. The principal advantage to these options is the reduced cost to systems. However, there are potential disadvantages in terms of policy implications to adopting any of these options which should be addressed and debated with public participation. EPA recognizes that there may be concern over the decision not to require PWSs to treat their water centrally but to allow them to supply water at levels that may exceed the sulfate MCL, and to rely on the provision of Alternative Water at the consumer's end to ensure ultimate compliance. A disadvantage of these three options is that it is possible that some members of sensitive subpopulations may still drink untreated tap water from the distribution system and thus, not be protected. Consumers may be unaware of the need to request Alternative Water, or may find it too burdensome to do so. While EPA believes that this strategy conforms with the requirements and intent of the Safe Drinking Water Act, EPA requests comment on this issue.

Options 1, 2 and 3 also require more assertive action by the public to ensure protection, especially those served by a CWS. This is true for Option 1, where adults in the target population would be required to contact the CWS for Alternative Water, which would then be delivered. Even more assertive action is needed for Option 3, since informed adults would have to obtain Alternative Water themselves. For Options 2 and 3, in transient systems, an adult wishing Alternative Water might not readily find it, as there would be no requirement to have it available, except for infants. The Agency is requesting comment on whether this need for assertive action would be appropriate, or whether such a strategy is reasonable, given the unique aspects of sulfate.

Option 2 is based on the premise that diarrhea is not an adverse effect in adults. Until now, the Agency has considered some effects as adverse which, by themselves, are not harmful, but are precursors of adverse effects. Examples are (a) developmental effects, such as an extra embryonic rib which is later resorbed; (b) benign tumors; (c) reduction in maternal weight gain, even with no observable fetal effect; and (d) marginal cholinesterase inhibition. In comparison to these effects, the long-term effects of sulfate ingestion appear to be nil, and acclimation occurs in a short period of time. The other effects mentioned are only detected with scientific measurement, while diarrhea or loose stools are readily observed by the person ingesting sulfate. EPA requests comment on whether transient bouts of diarrhea should be considered an adverse health effect or simply an inconvenience in adults.

In addition, EPA requests comment on whether, given the available information, a conclusion can be made that experiencing transient bouts of diarrhea resulting from ingestion of sulfate in drinking water is not an adverse effect in any segment of the population (adults or infants) within the meaning of the Safe Drinking Water Act.

EPA also recognizes that the provisions of this regulation are more difficult to enforce than central treatment. Indeed, it is for similar reasons that EPA has always prohibited Alternative Water as a means of compliance. While PWSs already have the legal option to use a POE device to comply with any MCL if certain requirements are followed, the requirements for using bottled water or POU devices have been applicable only to temporary situations to prevent unreasonable risk to health. Adoption of any of the proposed options would also mean that individuals in the target population would drink bottled water on a temporary basis. However, the extent to which bottled water quality (i.e., compliance with all MCLs) can be assured varies from State to State. The Food and Drug Administration (FDA), which is responsible for overseeing bottled water quality, is continuing to adopt standards which ensure truthful labeling. However, production and sales of bottled water have increased dramatically in recent years, and FDA does not have a complete inventory of domestic bottled water plants. FDA inspects the known plants, on average, every three to four years, or more frequently if problems arise (GAO, 1992). A few States have stricter standards than FDA (NY, CA, PA, CT) and require all bottled water plants to register with the State and conform to State requirements.

Similarly, POU devices are not subject to EPA certification. Since the proposed rule gives the States full authority to decide whether or not an alternative option would be allowed, each State would presumably base its decision on the extent to which it believes implementation is practicable. EPA requests comment on whether it is appropriate to allow use of bottled water and POU devices for sulfate MCL compliance.

f. *Option 4.* Because the proposed option (1) and its variations (2) and (3) represent a significant change in regulatory approach, and in order to fully consider the issues raised, EPA considered another, more conventional option. Option 4 was considered in the event EPA determines that Alternative Water may not be as effective as central treatment in enabling small systems to comply with the sulfate MCL. Option 4 would not directly allow the use of Alternative Water as a means of compliance with the MCL.

In Option 4, systems would need to obtain a variance from the sulfate MCL under the provisions of SDWA section 1415. As a condition of receiving a variance, systems would be required to provide Alternative Water to their target populations, just as in Option 1. Therefore, the relief under Option 4 would be similar to the relief under Option 1 but would be provided through a different statutory mechanism.

In Option 4, central treatment would be designated as section 1412 BAT. Central treatment would be considered economically feasible despite the financial difficulties presented to small systems, because the SDWA legislative history indicates Congress' desire that economic feasibility be determined by reference to large metropolitan water systems.

Section 1415 (and corresponding State laws) provide that systems may obtain a variance only after they have applied the designated BAT technology. However, section 1415 also states that the EPA Administrator may vary the technologies identified as BAT for purposes of section 1415 variances "depending on the number of persons served by the system or for other physical conditions related to engineering feasibility and costs of compliance with [MCLs] as considered appropriate by the Administrator." As a key component of Option 4, EPA would designate Alternative Water along with central treatment as BAT for purposes of

section 1415 variances only. A PWS that is granted a variance would also be required to meet all of the requirements of Option 1 for public education/notification and provision of Alternative Water.

Alternative Water would be designated as a section 1415 BAT because of the special need to provide bottled water which complies with EPA MCLs only to targeted populations for a limited time, which represents a special "physical condition related to engineering feasibility" under section 1415. To protect public health from the adverse effects of sulfate, it is necessary to protect only these specific subpopulations (infants, travelers, and new residents). It is technically infeasible to direct treated water only to those households containing these subpopulations, particularly when various households contain sensitive subpopulations at different times. However, it is technically feasible to direct public education and notification and Alternative Water only to those homes which require it. To treat water going to households with sensitive subpopulations would require a PWS to treat all water. The cost of providing treated water to everyone could be much higher than the PWS would otherwise have to incur.

Option 4 would require administrative involvement by the State in reviewing variance applications. The additional administrative burden is a clear disadvantage of this option, especially because many State agencies administering the drinking water program currently have significant funding and resource problems. On the other hand, a scheme based on individually granted variances might be considered more desirable in that each PWS would need to justify to the State its individual plan for providing Alternative Water.

States may also choose to grant variances in a block to many PWSs at a time, thus reducing their own administrative burden. However, the burden would remain on each system to make an application and present the details of its program to the State.

For the reasons stated above with respect to Option 1, EPA has decided not to limit the availability of variances based on Alternative Water under Option 4 to smaller systems. The public education/notification requirements discussed under Option 1 would apply to those systems receiving a variance under Option 4.

Making relief available to small systems only through variances presents some additional statutory constraints compared to Option 1. First, variances are only available at the discretion of the State. The State is free not to grant variances or to issue them under more stringent conditions than set by EPA. For sulfate, based on the prior State comments and input, States are seeking flexibility and relief for small systems and, therefore, might generally be expected not to be more stringent on variances than EPA. On the other hand, it is unclear whether States will be dissuaded from providing many variances by the administrative burdens presented by Option 4.

Second, under section 1415, variances are available only where the State finds that they will not result in an unreasonable risk to health ("URTH"). However, EPA does not believe that this constraint will present any problems since, as a condition of receiving the variance, PWSs will be required to supply Alternative Water that complies with the sulfate MCL.

Third, section 1415 requires the State to prescribe with the variance a schedule for compliance with the MCL. In this case, by providing Alternative Water to qualify for the variance, the PWS would in fact be supplying water that meets the MCL. Therefore, EPA believes it is not necessary or appropriate to prescribe any further schedules for achieving compliance with the sulfate MCL.

Finally, EPA also notes that SDWA section 1415 provides for variances where a system cannot meet the MCL because of characteristics of the raw water source. Here, the raw water source is not the issue; application of Alternative Water as section 1415 BAT would achieve the MCL but would be considered not as effective as central treatment in ensuring a consistent and reliable supply of water at the MCL. EPA nevertheless believes that Option 4 is consistent with the purposes and intent of SDWA section 1415, but requests comment on this issue.

As an additional option, EPA considered whether relief to small systems could be provided through exemptions under SDWA section 1416. This does not appear to be a viable approach, however. Unlike section 1415, section 1416 does not authorize EPA to vary its designation of BAT for purposes of exemptions. Instead, to qualify for indefinite exemptions, section 1415 envisions that small systems will be continuously working toward obtaining the financing necessary to install the BAT technologies identified under section 1412 (i.e., central treatment). Therefore, exemptions do not appear to be an appropriate mechanism for providing relief from the sulfate MCL to small systems. EPA solicits comment on whether exemptions do provide a mechanism for relief.

g. *Additional option.* The Agency requests comment on the feasibility and appropriateness of the Options discussed above. The Agency is also considering an additional option, namely the traditional approach of simply relying on central treatment as BAT for all systems, with no special provisions for relief for small systems. The advantages to central treatment are that it is the easiest approach to enforce, and it is consistent with the Agency's regulatory approach for other contaminants. The disadvantages are that it is costly and would not provide flexibility or relief for small systems. In particular, under this option, drinking water that meets the sulfate MCL would need to be provided to all consumers even though only a small percentage of the population would experience adverse health effects from ingesting sulfate. Also, the Agency has concerns that this option would not be economically feasible for small systems, as discussed in section IV below. Accordingly, this option is not being offered as the preferred option in today's notice, but EPA is still considering it, and it has the potential to be adopted in the final rule. This option would be adopted, for example, if it appears that the other options would be inadequate to assure a supply of drinking water that dependably complies with the sulfate MCL (see § 1401(1)(D) because members of the target population would fail to take appropriate action to protect themselves from an acute but temporary adverse health effect. The total national cost of this option would be identical to that for Option 4 ($147 million, see Table 8), since the economic analysis assumed that all systems would choose central treatment under Option 4. Similarly, the household cost for this option would be identical to those for Option 4 (Table 9). The Agency requests comment on whether this option, which would effectively limit methods of compliance to central treatment, should be adopted.

5. Compliance Monitoring Requirements

a. *Introduction.* The proposed compliance monitoring requirements for sulfate would apply to all systems (community, non-transient non-community, and transient non-community water systems).

The occurrence of sulfate in drinking water may be predictable based on several factors including geological conditions, use patterns (e.g., pesticides), presence of industrial

activity in the area, and type of source or historic record.

PWSs would need to monitor for sulfate in accordance with EPA's Standard Monitoring Framework (SMF), published Jan. 30, 1991 (56 FR 3564). Monitoring is done for three, three-year compliance periods in a nine-year cycle. The Phase II regulations established a nine-year cycle for those contaminants in that **Federal Register** notice. By agreement between States and EPA at a Denver work group meeting in 1992, subsequent rules will begin their individual nine-year cycles in the first January after the effective date (18 months after promulgation).

The monitoring requirements described in the next section are proposed to apply to systems which exceed the MCL and are authorized by the State to select the preferred option (Option 1) to achieve compliance with the sulfate MCL. For systems which select central treatment, or which do not exceed the MCL, the SMF is proposed to apply. If either Option 2 or Option 3 becomes the final regulation for sulfate and the State allows that method of compliance, the monitoring requirements described for Option 1 regarding Alternative Water and the reporting/record keeping requirements for public notification would apply for systems exceeding the sulfate MCL. Initial monitoring to determine MCL exceedence would be required of all systems, that is, community, transient and non-transient, non-community systems.

b. *Proposed monitoring requirements for sulfate.* The monitoring requirements for those systems selecting Option 1, with State authorization, would be as follows, and are consistent with the provisions of § 142.62 (g) and (h).

(1) Bottled water.

There are regulations in effect (§ 142.62) which state that a PWS can be required or permitted by the State to supply its customers with bottled water as a condition for receiving a variance or exemption. These regulations indicate that the State shall require and approve a monitoring program for bottled water and that the PWS shall develop and put in place a monitoring program that provides reasonable assurances that the bottled water meets all MCLs. These same monitoring requirements are proposed to apply here. The PWS monitors a representative sample of the bottled water for all contaminants regulated under §§ 141.61 (a) and (c) and 141.62 during the first three-month period that it supplies the bottled water to the public, and annually thereafter. Results of the monitoring are provided to the State annually.

The State, in lieu of the above requirements, could accept certification from the bottled water company that the bottled water supplied has come from an approved source as defined in 21 CFR 129.3(a); and that the bottled water company has conducted monitoring in accordance with 21 CFR 129.80(g) (1) through (3); and that the bottled water does not exceed any EPA MCLs. The PWS would have to provide certification to the State the first quarter after it supplies bottled water and annually thereafter. At the State's option a PWS may satisfy the requirements of this subsection by citing an approved monitoring program which is already in place in another State.

The existing regulations regarding interim use of bottled water to avoid an unreasonable risk to health state that the PWS is fully responsible for the provision of sufficient quantities of bottled water to every customer via door-to-door delivery. The Option being proposed today (Option 1) would similarly require door-to-door delivery by the PWS to persons in the target population when the sulfate MCL is exceeded. EPA requests comment on whether this door-to-door delivery requirement is appropriate for the sulfate rulemaking, or whether the requirements should be more flexible. For example, several possible means of delivery might be allowed. Distribution points could be authorized to stock and supply bottled water to the target population, with coupons issued to consumers in the target population redeemable at the distribution point. PWSs supplying bottled water to households would deliver that water upon request and free of charge, except as discussed under III.B.4.c. above. EPA requests comment on the degree of flexibility needed in the mechanism for delivery of bottled water that meets the sulfate MCL.

(2) POU/POE devices.

The existing regulations for variance and exemption conditions (§ 142.62) also describe the requirements for allowing a PWS to use POU or POE devices. These regulations state that it is the responsibility of the PWS to operate and maintain the POU and/or POE treatment system. Before POU or POE devices are installed, the PWS obtains the primacy agent's approval of a monitoring plan which ensures that the devices provide health protection to the target population equivalent to that provided by central treatment. The PWS must apply effective technology under a State-approved plan. The microbiological safety of the water must be maintained at all times. The State must require certification of adequate performance, field testing, and if not included in the certification process, an engineering design review of the POU/POE devices. Under § 142.62(h), the design and application of the POU/POE devices must consider the potential for increasing concentrations of heterotrophic bacteria in water treated with activated carbon. The State must be assured that buildings connected to the system have sufficient POU or POE devices that are properly installed, maintained, and monitored such that all consumers will be protected.

The existing regulations described above would be applied in both Options 1 and 4. EPA assumes that only Options 1 and 4 would entail the use of POU/POE devices, since in Options 2 and 3, bottled water would likely be more cost-effective, given the reduced target population. The Agency seeks comment on whether all of these existing requirements should be proposed in the case of sulfate MCL exceedence, or whether more flexible requirements would be appropriate. For example, if recordkeeping could demonstrate that an effective maintenance program was in place to ensure the proper functioning of the treatment equipment and compliance with the MCL, some reduction in monitoring might be foreseen. The efficiency or longevity of certain types of POU or POE devices might also be considered.

(3) Effective Dates for Initial Monitoring.

Initial monitoring for all systems would begin in the first January after the effective date of the rule. EPA's issuance of the final sulfate rule is scheduled for May 1996. The effective date will be 18 months after the promulgation of the final rule, or November of 1997. If this schedule is maintained, the initial monitoring for sulfate would begin in January 1998 for all systems.

(4) Sampling Location.

Under the proposed regulation, both ground water and surface water systems would take a minimum of one sample at every entry point to the distribution system which is representative of each well or source after treatment. The number of samples a system must take will be determined by the number of entry points. This will make it easier to pinpoint possible contaminated sources (wells) within a system. In both surface and ground water systems, the system shall take each sample at the same sampling point unless conditions make another sampling point more representative of each source or treatment plant.

(5) Monitoring Frequency.

Surface water systems would be required to monitor annually and ground water systems would sample every three years. Systems which comply by Option 1 would not be required to continue monitoring the water in the distribution system for sulfate. That water may continue to exceed the sulfate MCL, but the PWS would be in compliance by providing Alternative Water and public notification to target populations. However, the water would still have to be monitored for and meet MCLs for other contaminants.

(6) Public Notice Requirements.

EPA proposes that PWSs who use central treatment and who are nevertheless not in compliance with the sulfate MCL would be subject to the public notification requirements in § 141.32. However, the Agency recognizes that having different public education/notification requirements for those systems choosing central treatment and those choosing Option 1 may create confusion, and seeks comment on this issue.

For PWSs authorized by the State to use whichever option (1 through 4) is promulgated in the final sulfate rule, public notification requirements are proposed to be those described in section III.B.4.b.3 of this Notice.

c. *State Implementation.* The Act provides that States may assume primary implementation and enforcement responsibilities for the PWS program (primacy). 40 CFR part 142 contains EPA's primacy regulations. In States or tribal governments where EPA has direct implementation, resource constraints make it unlikely that the Agency would offer the alternative options (1 through 4, whichever is promulgated) to systems. EPA Regional Offices will, however, have the discretion to consider particular circumstances in their decision about whether or not to offer and implement the alternative option. The Agency assumes that most States with primacy would offer the alternative option, but requests comment on this issue.

Fifty-five out of 57 jurisdictions have applied for and received primacy under the Act. To implement the federal regulations for drinking water contaminants, States must have legal authorities which are at least as stringent as the federal regulations. To update their programs, States must comply with the requirements in 40 CFR 142.12 on revising approved primacy programs. This proposal describes the regulations and other procedures and policies States would need to adopt or have in place to implement the new regulations for sulfate.

Under this proposal, States would be required to adopt the following requirements: Modifications to § 141.23, Inorganic Chemical Sampling and Analytical Requirements, § 141.32, Public Notification Requirements (i.e., mandatory health effects language to be included in public notification or violations), and § 141.62(b), Maximum Contaminant Levels for Inorganic Contaminants, where sulfate has been added to the list.

In addition to adopting drinking water provisions no less stringent than the federal regulations listed above, EPA is proposing to allow States to adopt certain requirements related to this regulation in order to have their program revision application approved by EPA. This rule proposes to provide flexibility to the State with regard to implementation of the monitoring requirements for sulfate depending on whether a system chooses central treatment or the alternative method of compliance promulgated in the final rule. In all cases, States would decide and inform PWSs as to whether the alternative method of compliance (referred to as Option 1 for simplicity) promulgated in the final sulfate rule will be allowed. Specifically, States would be authorized to offer Option 1 as a means of compliance to PWSs who exceed the sulfate MCL. Under Option 1, the State would need to approve the monitoring plan of a PWS that chooses the Alternative Water and public education/notification as a means of compliance. The requirements would be as follows:

(1) State Primacy Requirements.

To ensure that the State program includes all the elements necessary for an effective and enforceable program, the State's request for approval must include a plan that each system monitor for sulfate by the end of each compliance period. If the State is planning to authorize PWSs to use Option 1, it would need to submit the text of State laws requiring the Alternative Water and public notification/education program, and a description of the State's plan to oversee compliance of the program. States planning to issue monitoring waivers would do so according to the requirements of § 142.16.

(2) State Recordkeeping Requirements.

The State shall keep a record of PWSs choosing to use Option 1 to comply. If the State has authorized Option 1, PWSs would be required to notify the State within 30 days of reporting a sulfate MCL exceedence, of its decision on whether to use Option 1 or other means of achieving compliance.

(3) State Reporting Requirements.

The quarterly report shall include all systems that have violated the sulfate MCL, and those which the State has authorized to use Option 1.

d. *Variances and Exemptions.* Option 4 offers relief to small systems in the form of an alternative to centralized treatment. If a system in violation of the sulfate MCL chooses centralized treatment but for some reason cannot achieve compliance, the system would apply to the Primacy Agent for a variance, and the conditions of the variance would be the same elements described for Option 1.

(1) Variances

Under section 1415(a)(1)(A) of the SDWA, EPA or a State with primacy may grant variances from MCLs to those public water systems that cannot comply with the MCLs because of characteristics of their water sources. At the time a variance is granted, the State must prescribe a compliance schedule and may require the system to implement additional control measures. The SDWA requires that variances may only be granted to those systems that have installed BAT (as identified by EPA). However, in limited situations a system may receive a variance if it demonstrates that the BAT would only achieve a *de minimis* reduction in contamination (see § 142.62(d)). Before EPA or a State issues a variance, it must find that the variance will not result in an unreasonable risk to health (URTH). In general, the URTH level would reflect acute and subchronic toxicity for short-term exposures and high carcinogenic risks for long-term exposures. For sulfate EPA's guidance regarding what is an URTH level is set at the MCL because sulfate has an acute adverse health effect. For the sulfate variance, if the PWS provides public education/notification and Alternative Water, EPA believes that the State should be able to conclude that the PWS will not be considered to exceed an URTH because those actions are considered protective of public health.

Under section 1413(a)(4) of the Act, States with primacy that choose to issue variances must do so under conditions and in a manner that is no less stringent than EPA allows under section 1415.

The Act permits EPA to vary the BAT established under section 1415 from that established under section 1412 based on a number of findings such as system size, physical conditions related to engineering feasibility, and the cost of compliance. Paragraph 142.62 of this proposed rule lists the BAT that EPA

has specified under section 1415 of the Act for the purposes of issuing variances. The variance BAT is Alternative Water and public education/notification.

(2) Exemptions

Under section 1416(a), a State or EPA may grant an exemption extending deadlines for compliance with a treatment technique or MCL if it finds that:

(a) Due to compelling factors (which may include economic factors), the PWS is unable to comply with the requirement;

(b) The exemption will not result in an URTH; and

(c) The system was in operation on the effective date of the NPDWR, or, for a system not in operation on that date, that no reasonable alternative source of drinking water is available to the new system.

In determining whether to grant an exemption, EPA expects the State to determine whether the facility could be consolidated with another system or whether an alternative source could be developed. Another compelling factor is the affordability of the required treatments. It is possible that very small systems may not be able to consolidate or find a low-cost treatment. EPA's analysis of cost for the proposed sulfate rule shows that, for very small systems, the cost is lower to provide public education/notification, and Alternative Water than to provide central treatment. Thus, EPA believes this alternative BAT is affordable for these systems.

As discussed above, granting exemptions under SDWA section 1416 does not appear to be a viable approach to providing relief from the sulfate MCL for smaller systems. Unlike section 1415 for variances, section 1416 does not authorize EPA to vary its designation of BAT for purposes of exemptions.

IV. Economic Analysis

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact on entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action" because it proposes a means of MCL compliance that is unique in its attempt to limit protection only to the affected populations. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

EPA prepared a Regulatory Impact Analysis (RIA) for this rule, titled the Regulatory Impact Analysis of Sulfate (August 30, 1994). The analysis used the following data, where available, for sulfate:

- Occurrence data to determine the number of systems exceeding the MCL;
- Treatment and waste disposal cost data and corresponding selection probabilities to estimate the system level and aggregate costs of achieving the proposed MCL; and
- Monitoring costs to estimate aggregate costs of the monitoring requirements.

Occurrence data adequate to determine the number of systems exceeding the proposed MCL are available for sulfate. Table 7 indicates the number of systems in several system size categories expected to be out of compliance with the proposed MCL of 500 mg/L.

TABLE 7.—NUMBER OF SYSTEMS EXPECTED TO EXCEED 500 MG/L SULFATE [1]

Water system type	Serving less than 500 people	Serving less than 3300 people	Total of all systems
Community Water Systems	350 (356)	500 (477)	500 (511)
Non-Transient, Non-Community Systems	250 (235)	250 (264)	250 (266)
Transient, Non-Community Systems	1150 (1144)	1200 (1187)	1200 (1189)
Total Number of Systems	1750 (1735)	1950 (1929)	1950 (1966)

[1] Numbers are rounded; actual numbers are in parentheses.

B. National Costs of the Proposed Rule

Under Option 1, annualized national treatment and waste disposal cost is projected to total $86 million for the proposed MCL of 500 mg/L, of which $8 million is estimated for monitoring and State implementation.

With State authorization, the 1,500 systems assumed to choose public notification/education and Alternative Water account for $7 million of the total, or about $5,000 per system. The Agency assumes that, despite the availability of Option 1, 25% of the systems (approximately 500) exceeding the sulfate MCL would choose either central treatment or regionalization, for a total cost of $71 million. Possible reasons for choosing central treatment would be to avoid a permanent requirement for public notification/Alternative Water provision and its associated administrative and logistical costs and activities, or to comply with other existing or future regulations on other contaminants. The difference in cost to large systems choosing central treatment rather than Option 1 is a factor of approximately 3 to 5. EPA assumes that this additional cost would not dissuade large systems from choosing central treatment. For costing purposes, it was assumed that all transient systems not choosing central treatment would install a POE device, and all CWS and NTNC systems not choosing central treatment would use bottled water or POU devices. In reality, the Agency recognizes that there would be a mixture of choices among system types, and that the choice of a POE by a small system constitutes "central treatment" for that system, since all water is treated and the technology used for the POE would be a BAT technology such as RO. Small transient systems could legally choose a POE device under any of the proposed options, and

since their cost cannot be counted under both centralized treatment and Option 1, their costs have been included under the heading "non-centralized treatment".

Under Options 2 and 3, the total cost of the rule is approximately $16 million, which also includes $8 million for State implementation and monitoring costs. The implementation of Options 2/3 would be much less costly than Option 1, but would involve all 2,000 systems, compared to the 1,500 systems which would choose public notification/education and Alternative Water in Option 1. Consequently, the cost of implementation would be $8 million rather than the $7 million for Option 1. The target population would be reduced to infants and the water allocated reduced to 1 liter per day. Although more infants would be included by large systems choosing this option, infants comprise less than 2% of the population at any given time. The difference in cost to large systems choosing central treatment rather than Options 2/3 would be at least an order of magnitude. EPA assumes that this additional cost would dissuade large systems from choosing central treatment, and therefore that all systems would choose Option 1. Implementation of Options 2 and 3 would be identical, except for the content of the public education/notification.

Under Option 4, the total national cost of the rule is $147 million. For costing purposes, it was assumed that all systems would install central treatment, rather than request a variance. For some of the smallest systems, the central treatment installed consists of a POE device, which functions on the same principles as a treatment plant (e.g., reverse osmosis). Since some percentage of systems would, in reality, request a variance and comply by public notification/education and Alternative Water provision, the cost for Option 4 is somewhat of an overestimate. At the same time the cost for Option 4 is an accurate estimate of what the cost would be for central treatment for all affected systems.

Under all options, approximately 2,000 systems, most serving populations less than 500, are expected to exceed the sulfate MCL.

1. Assumptions Used To Estimate Costs

For each system size category, for both ground and surface water systems, the projected number of systems with contamination above the sulfate proposed MCL was determined from the occurrence data. The number of systems exceeding the MCL was then merged with a compliance decision matrix, which gave the relative likelihood that a given system would choose various treatment, compliance and waste disposal options.

For systems choosing central treatment, the resulting estimates were then multiplied by the unit engineering costs, which include both capital and O&M costs. Although pre-treatment costs were included in the estimates, the operation of reverse osmosis by some systems with very high influent sulfate levels may contribute to the need for additional post-treatment corrosion control to comply with the lead and copper rule. This would likely affect only systems with influent sulfate concentrations above 750 mg/L because more than one-third of the influent stream would be treated. These costs would be added to the costs of the BAT, but would not affect EPA's conclusions on affordability because they would be insignificant compared to the overall costs of the central treatment technology.

For the purposes of cost estimation, the Agency assumed that the cost of either POU or POE is the same. Each system is assumed to install POE, since the cost of one POE is generally less than the cost of multiple POU units. For example, in a gas station, a POU unit would be needed at the men's restroom, the women's restroom and the water fountain in the public area. In this scenario, it might be cost-effective to install one POE unit versus three POU devices. Several sources were used to estimate the capital and O&M costs for POU/POE units, including (1) "Point-Of-Use Treatment of Drinking Water in San Ysidro, New Mexico;" March, 1990; (2) National Network for Environmental Management Studies Research Report on Affordable Drinking Water Treatment for PWSs Contaminated by Excess Levels of Natural Fluoride;" December, 1991; and (3) "Very Small Systems Best Available Technology Document;" First Draft; September, 1993. The calculations included some of the following assumptions:

(1) Laboratory costs including four bacteriological analyses and two sulfate analyses per year.

(2) The replacement frequency for both the particulate filter and the carbon post filter is assumed to be twice per year.

(3) The purchase price for the POU devices ranges from $329 to $665 depending on the number purchased at one time.

(4) The cost for installation is assumed to be $79.

(5) The cost for a one year maintenance service contract is assumed to be $508 per unit.

Bottled water costs are based on data provided by the International Bottled Water Association. The cost includes cost of water, delivery, and labor. Water is estimated at $1.06 per gallon. People are assumed to consume 0.53 gallons per day. The Agency estimated 1 delivery per week with a round trip distance of 25 miles costing $0.28 cents per mile. The Agency also estimated one hour for each delivery at a labor rate of $14.70 per hour. For Options 2 and 3, where bottled water is provided only to infants, the water allocation is one liter per day.

The Agency used Federal Reporting Data System (FRDS) data to determine how many people lived in an average system in each system size category. EPA used U.S. Census Bureau population and fertility data to estimate that 1.68% of the people were infants and 16.4% of the people were new residents. Recent census data put the average number of people per household at 2.6. The number of travelers needing Alternative Water was derived from information from the National Travel Data Center that there are approximately 1.27 billion person-trips made nationally each year. The number of traveling persons exposed is calculated by multiplying the estimated 250 million people served by all water systems with the probability that a traveler will visit a system with water containing sulfate levels exceeding the MCL. The probability that a traveler will visit such a system is calculated by dividing the resident population in a given system size category by the total resident population of all systems. This value is then multiplied by the number of person trips and divided by five (the number of person trips per year per traveler) to get the population of exposed travelers in that size category. The resulting estimate is that approximately 1 million travelers are exposed to sulfate in excess of 500 mg/L.

For the public education and notification requirements, the PWS is responsible for producing and delivering pamphlets according to EPA's public notification guidelines. The number of pamphlets needed per size category is calculated based on the population served by the PWS. Larger population centers will contain more medical facilities. For example, if size category 1 (25–100 people) serves 0.03% of the total population, it is also assumed to serve 0.03% of the nation's 6,634 hospitals, 83,425 schools, and so on. The number of permanent signs per system is calculated by taking the number of hotels, campgrounds, interstate rest areas, rest rooms in

restaurants and gas stations in the nation and multiplying by the percent of population served by each size category.

The national annualized cost of the rule for the four options is shown in Table 8.

TABLE 8.—NATIONAL ANNUAL SULFATE COSTS FOR OPTIONS 1–4 (DOLLARS IN MILLIONS)

	Option 1	Options 2/3	Option 4
Central Treatment	$71	.....	$139
Public Not./Ed./Alt. Water	7	$8	.....
State Implementation	7	7	7
Monitoring	0.5	0.5	0.5
Total	86	16	147

2. Costs to Households

Table 9 illustrates estimated household costs for the options being considered. For costing purposes, it was assumed that all systems were community water systems, since transient systems do not have households. For Option 1, costs increase for systems serving populations greater than 3,300 due to the fact that most of those systems would choose central treatment. Costs level off and decrease for systems serving populations greater than 10,000 due to economies of scale.

TABLE 9.—AVERAGE ANNUALIZED COSTS FOR HOUSEHOLDS (DOLLARS IN MILLIONS) IN COMMUNITY WATER SYSTEMS

System size	No. of systems	Option 1	Options 2/3	Option 4
25–100	1244	$250	$145	$811
101–500	491	138	56	534
501–3.3K	194	106	24	376
3.3K–10K	26	287	4	287
10K–100K	10	244	2	244
>100K	0	NA	NA	NA

[1]NA—no systems that size affected by high-sulfate water.

On the basis of these estimated costs, EPA concludes that the options being considered would be economically feasible, and requests comment on this conclusion.

3. Assumptions Used to Estimate Benefits

The Agency made assumptions for estimating the benefits of diarrhea cases avoided which included affected population, costs of medical care, and value of days lost to care givers, business travelers and vacationers.

It is estimated that approximately 1.2 million people will have reduced exposure to sulfates as a result of PWSs' compliance with the sulfate MCL. The low and high estimates of reduced population exposure, based on uncertainty in occurrence data, are 0.9 million and 1.7 million people, respectively.

Evaluating benefits is limited to estimating reduced population exposure because there are inadequate dose-response data to estimate cases of adverse health effects avoided. Consequently, potential benefits per case of diarrhea avoided are estimated rather than total benefits. Exposed population is usually calculated by multiplying the number of systems failing the MCL by the average population served by each system. A different approach was used for sulfate, since only unacclimated persons and infants are affected. The affected population is in areas served by systems with sulfate levels of 500 mg/L or more, and includes resident infants under one year of age, travellers, including infants, of all ages visiting the area, new residents and houseguests that stay with residents. Infants were assumed to accompany parents on pleasure trips but not on business trips. Sources of population data were the National Travel Data Center and the U.S. Census Bureau Current Population Reports and fertility statistics. The Agency used the 1991 census data for the number of infants born in a year. The number of persons exposed is calculated by multiplying the estimated 250 million people served by all water systems with the probability that the average traveler will visit a system with elevated sulfate levels. The Agency used the National Travel Data Center estimate of approximately 1.27 billion person-trips made nationally each year for travelers. The number of diarrhea cases avoided is based on the estimate of person-trips because each un-acclimatized individual is assumed to face multiple exposures to sulfate and potentially contract diarrhea more than once a year.

This estimate of people exposed has uncertainty based on two variables: the number of systems with elevated sulfate levels, and the data used to model the traveling population. The best estimate of the number of travellers and resident infants with reduced exposure to sulfate at an MCL of 500 mg/L is 1.2 million people (including 27,000 infants). A logistic response function was used to characterize the statistical relationship between sulfate levels in drinking water and the probability of an exposed individual experiencing a laxative effect. One weakness of this approach is that it assumes that consumption of either sodium sulfate or magnesium sulfate results in equivalent laxative effects. It has been reported that magnesium sulfate is a better purgative than sodium sulfate.

Uncertainty is also associated with the lack of toxicological data on the relationship between various sulfate levels and the resulting laxative effect. There are insufficient data to plot a

dose-response function. As a result, the Agency is limiting its estimate of benefits to an individual case basis.

The assumptions made in estimating benefits on a case by case basis are shown in Table 10. The value of an outpatient case in Table 10 is between $218–$273. For example, the value of a case of diarrhea in a resident infant who is not hospitalized would be $55+$11 for the doctor and medication, plus 8 hours of the care giver's time ($19×8=$152), since it is assumed the caretaker would miss work. The total value for the case is $66+$152=$218. An additional $55 would be added in the case of a traveling infant for hotel and travel expenses lost. The range accounts for the difference between residents and travelers. The infant hospitalization cases cost between $3,608 and $3,828 per case. The Agency is requesting comment on the assumptions used in the analysis of the benefits of the proposed rule.

TABLE 10.—ASSUMPTIONS MADE IN ESTIMATING BENEFITS

	Resident infants	Travelling infants	Travelling adults	New resident adults
Out-Patient Cases:				
Doctor Charges	$55	$55	$55	$55
Medication Charges	$11	$11	$11	$11
Days Lost Per Case	1	1	1	1
Value of Each Day Lost[1]	(NA)	$55	$55	(NA)
Hours Lost Per Case	8	8	8	8
Value of Each Hour Lost	$19	$19	$19	$19
Value Per Case:	$218	$273	$273	$218
Hospitalized Cases:[2]				
Number of Days	4	4	0	0
Hospital Cost Per Day	$750	$750	0	0
Value of Each Trip Day Lost[3]	(NA)	$55	0	0
Hours Lost Per Case	32	32	0	0
Value of Each Hour Lost	$19	$19	0	0
Value Per Case	$3,608	$3,828	0	0

[1] Out of-pocket hotel and travel expenses, not applicable to infants or new residents, only to business travelers.
[2] NA—Older travellers are not hospitalized.
[3] No value assigned to trip days lost for infants.

C. Comparison to Earlier Proposed Rule

The 1990 proposed rule estimated the cost for central treatment to be $65 million (excluding monitoring costs). There were assumed to be 1350 systems which would need to treat for sulfate. For this reproposal EPA updated the cost to $139 million (excluding State and monitoring costs). The increase in cost is due to: (1) The increase in projected number of systems that would exceed the sulfate MCL from 1350 to 1950, (2) change in the interest rate from 3% to 7%, and (3) updating for 1991 dollars.

Although the new occurrence information was taken primarily from the National Inorganics and Radionuclides Survey (NIRS), EPA complemented that information with sampling data from New York, Utah, South Dakota, North Dakota and New Jersey. Because of the new occurrence information, the number of systems has gone up from 1350 to 1950. Another reason for the increase is EPA's modification, as a result of research for the upcoming regulation concerning the control of radionuclides in drinking water, of the number of treatment sites per ground water system. Ground water systems frequently contain more than one site requiring treatment because wells are typically not piped to a central source. EPA has incorporated this estimation method for all systems served by ground water.

D. Annual Burden to PWSS and States

EPA estimates that the cost of sulfate regulation to State programs will be $7 million per year. Table 11 illustrates the 18-year average annual national burden hours, responses and costs to PWSs and States. Sulfate testing does not require special laboratory equipment. Therefore, it is assumed that laboratory expansion undertaken to implement the Phase II and Phase V regulations will largely satisfy the monitoring needs of this rule. On the other hand, EPA recognizes that States are likely to provide more technical assistance to systems than for an average contaminant because of the unique nature of Option 1. Total annual costs are estimated to be $10.6 million. The additional public reporting burden on PWSs for this collection of information is estimated to average 8.6 hours per response.

TABLE 11.—ANNUAL BURDEN HOURS

	PWSs	States	Total
Annual Burden (Hours)	66,581	300,000	366,581
Annual Cost ($)	$3,577,613	$7,000,000	$10,577,613
Annual Responses	42,615	57	42,672

Source: Sulfate ICR, August 31, 1994.

V. Summary of Selected Issues

EPA is soliciting public comment and scientific information on all issues presented in or pertaining to this proposed sulfate regulation. In particular, EPA requests comments on the following:

(1) Is there a correlation between sulfate concentrations, palatability and consumption of high-sulfate water by the public?

(2) Are there new data in support of or opposing the reproposed MCLG of 500 mg/L? Are there new data in support of a higher MCLG?

(3) Are there data to support or refute the hypothesis that the decrease in available water resulting from sulfate ingestion may result in dehydration in adults or infants?

(4) Are reverse osmosis, ion exchange and electrodialysis reversal appropriate technologies for sulfate removal?

(5) Should a higher PQL of 30 mg/L be set in order to retain the colorimetric method of analysis?

(6) Are the allotted time periods for provision of Alternative Water, i.e., 20 weeks for infants within the first year of life and 6 weeks for new residents and travelers, appropriate and protective?

(7) What should be the means of compliance for unmanned, remote campgrounds in the national parks system, particularly in regard to the provision of Alternative Water?

(8) What types of Alternative Water would be likely to be chosen by public water systems of various types and sizes?

(9) Are the compliance requirements, that is, Alternative Water and public notification, sufficiently protective of the sensitive population?

(10) Should the target population be limited just to infants, or should there be different requirements for protecting infants and adults?

(11) Are the proposed options consistent with the purposes and intent of SDWA, and are they feasible?

(12) Is a provision to allow the water supply to exceed the sulfate MCL while relying on public notification and self-protection appropriate under SDWA?

(13) Is the need for assertive action on the part of the public for self-protection appropriate?

(14) Should temporary diarrhea be considered an adverse health effect in adults or infants?

(15) Would exemptions provide a mechanism for relief to smaller systems?

(16) Should compliance be limited to central treatment?

(17) Is it appropriate under SDWA to allow the use of bottled water and POU devices for sulfate MCL compliance?

(18) What degree of flexibility is appropriate in the bottled water monitoring requirements and delivery mechanism?

(19) In Options 1 and 4, should all the existing regulations regarding use of POU and POE devices be imposed in the case of sulfate levels higher than the MCL, or are more flexible requirements appropriate?

(20) Should the generic public notice requirements applicable to variances under § 141.32 apply under Option 4 to systems who choose central treatment, in lieu of the public notice requirements proposed in Option 1?

(21) Are the assumptions used in the analysis of the costs and benefits of the proposed rule reasonable?

(22) What flexibility is appropriate or practical in regard to the maintenance of POU/POE devices installed to comply with the sulfate MCL? What flexibility is appropriate regarding a reduction in monitoring if certain types of POU/POE devices were installed?

(23) Would most States offer the alternative option to PWS as a means of compliance?

VI. Other Requirements

A. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) calls for the Agency to consider the potential impacts of proposed regulations on small businesses, organizations and government jurisdictions. If an analysis shows that regulations would have a significant impact on a substantial number (usually taken as at least 20 percent) of small entities, then a regulatory flexibility analysis (RFA) must be prepared. In an RFA, an agency examines "any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities" (Regulatory Flexibility Act section 603).

Today's proposed regulation would affect less than 2,000, or one percent, of the total of 200,000 public water systems (including all community and non-community systems). Nevertheless, EPA's analysis shows that regulating sulfate through standard approaches that assume the need for central treatment would have significant economic impacts that would fall largely on smaller public water systems. Therefore, EPA has conducted a regulatory flexibility analysis by investigating alternative, less burdensome regulatory approaches for those small systems. From these investigations, EPA developed and is considering the innovative options for regulating sulfate described earlier in this notice. These innovative options accomplish the Regulatory Flexibility Act's goal of minimizing the impacts of this regulation on small public water systems while meeting the objectives of the Safe Drinking Water Act by ensuring that drinking water that meets the sulfate MCL will be provided to all persons within the target population.

B. Paperwork Reduction Act

The information collection requirements in this proposed 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.). An Information Collection Request (ICR) document has been prepared by EPA(ICR No. 270.34) and a copy may be obtained from Sandy Farmer, Information Policy Branch; EPA; 401 M Street, SW. (Mail Code 2136); Washington, DC 20460 or by calling (202) 260–2740.

This collection of information has an estimated annual reporting and recordkeeping burden averaging 9.3 hours per respondent. These estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. National annual burden and cost estimates for PWSs and States are presented in Table 11.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Information Policy Branch; EPA; 401 M Street, SW. (Mail Code 2136); Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget; Washington, DC 20503, marked "Attention: Desk Officer for EPA". The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Enhancing the Intergovernmental Partnership

Executive Order 12875, Enhancing Intergovernmental Partnerships explicitly requires Federal agencies to consult with State, local, and tribal entities in the development of rules and policies that will affect them. EPA has complied with the Order in proposing the sulfate rule in the following ways.

First, the Agency met with interested parties, including representatives from four States, Region 8, and the Association of State Drinking Water Administrators in Denver, Colorado in November, 1992.

Secondly, the Agency plans to meet with the National Drinking Water Advisory Council (NDWAC), a group composed of representatives from State, local and tribal governments in addition to water suppliers and environmentalists.

Thirdly, the Agency is developing generic contacts with State, Tribal and

local fiscal and program officials which will enable various programs to consult with affected parties in a coordinated fashion. Identification of appropriate contacts was not accomplished in a time frame which enabled EPA's Office of Water to have extensive consultation with affected parties in compliance with the E.O. before proposal. However, a contact person has now been designated from ASDWA, and the Agency will be meeting with this designee and other interested State officials. EPA is committed to expanded dialogue and collaboration with State, Tribal and local governments. EPA will schedule a work group or public meeting to solicit comments of fiscal and program officials or State, Tribal and local governments. The intent of such a meeting is to allow for the maximum input from the regulated community for the drafting of the final rule. EPA will also send copies of this proposed rule to these governmental bodies, as well as to national and local associations (e.g., the Association of State Drinking Water Administrators, the National League of Cities, the National Association of Towns and Townships, the National Association of County Health Officers, etc.)

VII. References

The following references are referred to in this notice and are included in the public docket together with other correspondence and information. The public docket is available as described at the beginning of this notice. All public comments received on the proposal are included in the public docket.

American Water Works Association (AWWA) Conference Proceedings (March 1991): Suffolk Introduces Electrodialysis Reversal to Virginia. M. Thompson and M. Robinson.

Canadian Guidelines. Personal correspondence (August 23, 1991) from R. Tobin to C. Abernathy, citing Guidelines for Canadian Drinking Water Quality, 4th Edition (1989).

Chien, L., Robertson, H., Gerard, J.W. 1968. Infantile gastroenteritis due to water with high sulfate content. Can. Med. Assoc. J. 99:102–104

Federal Register. Vol. 54, No. 97. National Primary and Secondary Drinking Water Regulations; Proposed Rule (May 22, 1989) 22062–22160. (54 FR 22062)

Federal Register. Vol. 55, No.143. National Primary and Secondary Drinking Water Regulations; Synthetic Organic Chemicals and Inorganic Chemicals; Proposed Rule (July 25, 1990), 30370–30448. (55 FR 30370)

Federal Register. Vol. 57, No. 138. National Primary and Secondary Drinking Water Regulations; Synthetic Organic Chemicals and Inorganic Chemicals; Final Rule (July 17, 1992), 31776–31838. (57 FR 31776)

Federal Register. Vol. 58, No. 239. National Primary and Secondary Drinking Water Regulations; Proposed Rule. (December 15, 1993) (58 FR 60622)

GAO, Food Safety and Quality, Limitations of FDA's Bottled Water Survey and Options for Better Oversight. GAO/RCED–92–87, February 1992.

Information Collection Request, August 31, 1994

Peterson, N.L. 1951. Sulfates in drinking water. Official Bulletin N.D. Water Sewage Works 18:11.

Moore, E.W. 1952. Physiological effects of the consumption of saline drinking water. A progress report to the 16th Meeting of the Subcommittee on Water Supply of the Committee on Sanitary Engineering and Environment, January, 1952. Washington, DC: National Academy of Sciences, Appendix B.

Regulatory Impact Analysis, August 31, 1994

Schild, H.O. Applied Pharmacology 12th Edition (1980) "The Alimentary Canal": 197–198. Churchill Livingstone, Inc.

U.S. EPA Comment/Response Document for Sulfate from Phase V

U.S. EPA Expert Panel Meeting Minutes, May 20, 1992.

U.S. EPA Early Involvement Meeting Minutes, Denver, CO, 1992

U.S. EPA Health Criteria Document for Sulfate, January 1992

U.S. EPA Lab Certification Manual Section

WHO, 1983. World Health Organization. Guidelines for drinking water quality—recommendations. Volume 1. Geneva, Switzerland: World Health Organization.

List of Subjects in 40 CFR Parts 141, 142 and 143

Chemicals, Reporting and recordkeeping requirements, Water supply, Administrative practice and procedure.

Dated: November 30, 1994.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, 40 CFR parts 141, 142 and 143 are proposed to be amended as follows:

PART 141—NATIONAL PRIMARY DRINKING WATER REGULATIONS

1. The authority citation for part 141 continues to read as follows:

Authority: 42 U.S.C. 300f, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–4 and 300j–9.

§ 141.23 Inorganic chemical sampling and analytical requirements.

2. Section 141.23 is amended by revising the last sentence of the introductory text to read as follows:

Transient, non-community water systems shall conduct monitoring to determine compliance with the nitrate, nitrite and sulfate maximum contaminant levels in § 141.11 and § 141.62 (as appropriate) in accordance with this section.

* * * * *

§ 141.23 [Amended]

3. In § 141.23(a)(4)(i), the table is amended by adding in alphabetical order an entry for sulfate to read as follows:

* * * * *

(a) * * *

(4) * * *

(i) * * *

Contaminant	MCL (mg/l)	Methodology	Detection limit (mg/l)
* * *	*	* * *	*
Sulfate	500	Colorimetry	3
		Gravimetry	1
		Ion Chromatography	0.02

* * * * *

§ 141.23 [Amended]

4. In § 141.23(c) introductory text, "sulfate" is added in alphabetical order to the list of contaminants.

§ 141.23 [Amended]

5. In § 141.23(d) introductory text, "and sulfate" is added after the word "nitrate".

§ 141.23 [Amended]

6. In § 141.23(f)(1), "sulfate" is added in alphabetical order to the list of contaminants.

§ 141.23 [Amended]

7. In § 141.23(i)(1) and § 141.23(i)(2), "sulfate" is added in alphabetical order to the list of contaminants.

§ 141.23 [Amended]

8. The table in § 141.23(k)(1) is amended by adding an entry for "Sulfate" in alphabetical order as follows:

* * * * *

(k) * * *

(l) * * *

Contaminant	Methodology	EPA[1 5 12]	ASTM[2]	SM[3]	USGS[4]	Other
*	*	*	*	*	*	*
Sulfate	Ion chromotography	[8]300.0	D4327–91	4110		
	Colorimetry	[8]375.2		4500–SO_4–C,D		
	Gravimetry			4500–SO_4–F		

* * * * *

§ 141.23 [Amended]

9. In § 141.23(k)(4), "Sulfate" is added in alphabetical order to the list of contaminants, and the table is amended as follows:

* * * * *

(k) * * *

(4) * * *

Contaminant	Preservative[1]	Container[2]	Time[3]
*	*	*	*
Sulfate	Cool, 4 °C.	P or G	28 days

* * * * *

§ 141.23 [Amended]

10. In § 141.23(k)(5), introductory text, "sulfate" is added in alphabetical order to the list of contaminants.

§ 141.23 [Amended]

11. In § 141.23(k)(5)(ii), the table is amended by adding an entry for sulfate as follows:

(k) * * *

(5) * * *

(ii) * * *

Contaminant	Acceptance limit
Sulfate	±15% at ≥ 10 mg/l

* * * * *

§ 141.23 [Amended]

12. Section 141.23 is amended by adding paragraph (r) to read as follows:

* * * * *

(r)(1) *Compliance with the MCL for Sulfate.* (i) PWSs subject to the sulfate MCL established under § 141.62(b) shall demonstrate compliance with the sulfate MCL. If authorized by the State to do so, PWSs may choose to comply in one of the following two ways:

(A) The PWS shall demonstrate compliance by achieving the MCL in samples taken at each entry point to the distribution system; or

(B) The PWS shall demonstrate compliance by meeting the requirements of §§ 141.23(r)(2) and (3) (program for providing Alternative Water to Target Populations and providing public notification and education). The requirements of §§ 141.23(r)(2) and (3), taken together, are termed the "Alternative Method of Compliance." However, the availability of the Alternative Method of Compliance is limited by paragraph (r)(1)(ii) of this section.

(ii) The State has the option of whether or not to allow PWSs to demonstrate compliance through the Alternative Method of Compliance. Where the State has chosen not to allow the Alternative Method of Compliance, PWSs shall demonstrate compliance by achieving the MCL in samples taken at each entry point to the distribution system.

(iii) Where EPA is the primacy agent, the Regional Administrator may authorize PWSs to demonstrate compliance through the Alternative Method of Compliance. In determining whether to authorize the use of the Alternative Method of Compliance, the Regional Administration in its sole discretion may consider the availability of regional resources, and whether it is reasonable and practical for the Regional Office to oversee implementation of the Alternative Method of Compliance. If the Regional Administrator authorizes the Alternative Method of Compliance, each PWS shall have the option to comply either by achieving the MCL in samples taken at each entry point to the distribution system or through the Alternative Method of Compliance.

(iv) Until such time as notified by the State or Primacy Agency that the Alternative Method of Compliance will be authorized, PWSs shall be required to achieve the MCL at each entry point to the distribution system.

(v) The general prohibition on the use of bottled water and point-of-use devices in 40 CFR 141.101 shall not apply to PWSs that choose to achieve compliance with the MCL for sulfate by meeting the requirements of the Alternative Method of Compliance.

(vi) A PWS must report failure to comply with a NPDWR to the State under the requirements of 40 CFR 141.31. Within 30 days of notifying the State of failure to comply with the sulfate MCL, the PWS shall notify the State as to which of the two methods of compliance, § 141.23(r)(1)(i) (A) or (B), the PWS intends to use to return to compliance with the sulfate MCL.

(2) *Alternative Water Supplied to Target Populations.* The requirements of this subsection apply only to a PWS that has chosen to comply with the MCL for sulfate through the Alternative Method of Compliance instead of by achieving the MCL in samples taken at each entry point to the distribution system.

(i) *Definitions.* (A) *Alternative water:* For purposes of this section, a PWS supplies Alternative Water when it supplies either bottled water or water that has been treated with a POU or POE device (as defined in § 141.2).

(B) *Target population,* for purposes of this section, means all infants, travelers and new residents within the PWS's service area, according to the following:

(1) For the purposes of this rule, *infant* is defined as persons under the age of 12 months.

(2) *Transients* means visitors from outside the service area, vacation travelers and business travelers.

(3) *New residents* means persons who have resided in the service area for no more than six weeks.

(ii) Community water systems shall maintain a record of all requests for Alternative Water. Records shall include the name and address of the person requesting the water, date of request, date of delivery requested, date of delivery and quantity of water delivered (or date of installation in the case of a POU/POE device). This record shall be maintained for five years from the time of recording.

(iii) Community water systems shall supply Alternative Water in compliance with this subsection to the Target Population for the time periods described under paragraph (r)(2)(vii) of this section. Transient water systems and non-transient, non-community systems shall have alternative water available for infants, travelers, newcomers and visitors.

(iv) Community water systems shall provide door-to-door delivery of the bottled water or installation of POU or POE devices upon request to customers who are within the Target Population. The PWS shall have the option of deciding whether to provide a customer with bottled water or POU/POE devices.

(v) *Bottled water requirements.* (A) *Quality.* Bottled water provided by the PWS shall meet the requirements of § 142.62 (g)(1) or (g)(2) of this chapter.

(B) *Quantity.* Community water systems shall have bottled water available and delivered at the level of two liters per day for each person within the Target Population for whom bottled water is requested (unless the customer requests a lesser amount). Transient water systems and non-transient, non-community systems shall have sufficient bottled water to serve the transient population, unless POE or POU devices are installed.

(C) *Time of delivery.* Community water systems shall deliver the bottled water within 24 hours of the request, or on the date requested, whichever is later.

(vi) *POU and POE device requirements.* PWSs that choose POU or POE devices as a method of compliance shall meet the following requirements:

(A) PWSs that choose POE devices as a method of compliance shall meet the requirements of § 141.100 (a) through (d).

(B) If the PWS decides to provide a POE/POU device and is unable to install such equipment within 24 hours of the request, or on the date requested, the PWS shall provide bottled water to the target population during the interim time period between the time of the request and the time of installation of the POU/POE device.

(C) PWSs that choose POU devices as a method of compliance shall obtain the approval of a monitoring plan which ensures that the devices provide water that complies with the sulfate MCL. It is the responsibility of the public water system to operate and maintain the POU system. The microbiological safety of the water must be maintained at all times. The State shall require adequate certification of performance and a rigorous engineering design review. The design and application of the POU must consider the potential for increasing concentrations of heterotrophic bacteria in water treated with activated carbon.

(D) The State must be assured that the POU and POE devices are properly installed, maintained and monitored.

(vii) *Period of delivery.* The PWS shall provide Alternative Water for the following time periods:

(A) Alternative Water shall be provided to each infant for the period requested, which may not exceed twenty weeks from the date of initial delivery. Alternative Water delivery shall be provided for the full twenty weeks if requested, even if the infant becomes one year of age during the delivery period.

(B) Alternative Water shall be provided to each traveler and new resident for the period requested, not to exceed six weeks from the date of initial delivery.

(3) *Public Notification/Education Program.* The requirements of this section apply only in States which have authorized the Alternative Method of Compliance. The requirements apply only to those PWSs in such States which have chosen to comply with the sulfate MCL through the Alternative Method of Compliance rather than by achieving the MCL in samples taken at each entry point to the distribution system. The PWS shall implement the public notification/education program described in this subsection in lieu of § 141.32, and shall provide the State with copies of all public notification and education materials at the same time. There are four components to the program: Notices in bills, pamphlets, signs, and notices to the media. Transient systems (e.g., campgrounds and gas stations) and non-transient, non-community systems (e.g. schools, factories) shall be required to post signs in accordance with paragraphs (r)(3)(v) of this section, but shall not be required to comply with the requirements for notices in bills, notices to the media, or pamphlets in paragraphs (r)(3) (i)–(iv) and (vi) of this section. Community water systems which are non-transient systems shall comply with all four components set forth in paragraphs (r)(3) (i)–(vi) of this section, i.e., notices in bills, pamphlets, signs, and notices to the media.

(i) *Newspaper, mail, hand delivery, of notices.* PWSs shall give notice by publication in a daily newspaper of general circulation in the area served by the system as soon as possible, but in no case later than 14 days after sulfate in excess of the MCL has been detected in the water. The notice shall be repeated at intervals of 6 months while the sulfate concentration of the water in the distribution system continues to exceed the MCL. If the area served by a public water system is not served by a daily newspaper of general circulation, notice shall instead be given by publication in a weekly newspaper of general circulation. The notice shall define and describe the geographic location served by the system. In communities where a significant portion of the population speaks a language other than English, the text shall be published in the appropriate language(s), in addition to English. A telephone number(s) and an office location for requesting Alternative Water delivery shall be provided. The notice shall be provided at least once every six months by mail delivery (by direct mail or with the water bill), or by hand delivery, not later than 45 days after the sulfate MCL has been exceeded.

(ii) *Text of the Notice.* The PWS shall, within 60 days of confirmed detection of sulfate in the distribution system, insert notices in each customer's water utility bill containing the following mandatory paragraph on the water bill itself in large bold print.

Warning: The water being supplied to you has high levels of sulfate which can cause diarrhea in people who are not used to it. If you have visitors in your home from outside the area, or if you are expecting a baby, please read the enclosed notice for further information.

The notices included in the water utility bill and those provided to the media shall also contain the following mandatory language. Any additional information presented shall be consistent with the information in these paragraphs, and in plain English that can be understood by laypersons. In communities where a significant portion of the population speaks a language other than English, the text shall be published in the appropriate language(s), in addition to English. The text shall be as follows: "Introduction. The United States Environmental Protection Agency (EPA), the [insert name of State primacy agency], and [insert name of water supplier] are

concerned about sulfate in your drinking water. Sulfate salts are found naturally in soil and rock in certain areas of the country, including ours. With the exception of infants, residents of the area should be accustomed to the sulfate in our drinking water, and should not experience ill effects. However, people who are not accustomed to high levels of sulfate in their drinking water may experience diarrhea. Under Federal law, we are required to provide sensitive populations with alternative water until their bodies adapt to the sulfate concentrations in our water. This brochure explains the simple steps you can take to protect the sensitive populations: infants, visitors from outside the area, and new residents.

Health Effects of Sulfate

Ingestion of sulfate in high concentrations is known to cause diarrhea. The greatest risk is to infants, for whom prolonged diarrhea can be dangerous. New residents and travelers may also experience diarrhea when they first drink water with high levels of sulfate. After approximately two weeks, adult's bodies become accustomed to the sulfate, and the diarrhea stops. Available studies have not shown any long-term or chronic adverse effects from consuming sulfate in drinking water. Boiling the water will not reduce the sulfate content, and in fact, will concentrate it through evaporation of the water.

The Alternative Water Program

If you are expecting a baby, if you are a new resident, or expecting visitors from outside the area, please call [insert phone number of water system] to request delivery of alternative water to your home. We will provide you with sufficient water for the cooking and drinking needs for each sensitive person. We will provide you with two liters per day of bottled water for your infant for up to 20 weeks, during which time you should gradually add tap water to the bottled water. In this way, your baby will become gradually accustomed to the sulfate in the water. We will provide your out-of-town guests with two liters of bottled water per day for the period needed, up to a maximum of six weeks. We will provide new residents with two liters per person per day for up to six weeks. During that time, tap water should be gradually mixed with the bottled water. Restaurants and other establishments who are likely to serve at least some members of the target population on a continual basis may be provided individual treatment devices. depending on our evaluation of the size of the target population and other circumstances.

(iii) *New customers.* The PWS shall provide notice of the following to new customers or billing units prior to or on the date service begins: Sulfate MCL exceedence in the water entering the distribution system, the health effect of sulfate for target populations, and the need to mix bottled water and tap water for gradual acclimation to sulfate.

(iv) *Pamphlets.* PWSs shall deliver pamphlets to all physicians and all medical facilities within the PWS service area, including, but not limited to, city, county and State health departments, pharmacies, public and private hospitals and clinics, family planning clinics and local welfare agencies. The PWS shall request the operators of such facilities to make the pamphlets available, in particular, to pregnant women. The pamphlets shall contain the information in paragraph (r)(3)(ii) of this section. The pamphlet shall define the extent of the geographical service area in question.

(v) *Signs.* A prominent, permanent sign in a durable material, such as plastic, shall be placed at each faucet, fountain or source of water which could be used for drinking water in places such as restaurants, hotels/motels, rest areas, campgrounds, gas stations and public areas where not all taps will have treated water. If such facilities are equipped with a POE device or with POU devices such that all taps deliver water in compliance with the sulfate MCL, sign posting is not required. The signs must state the location of the nearest source of water which complies with the sulfate MCL and why precautions should be taken by non-acclimated persons. The text of the sign, in multiple languages where appropriate, shall be as follows:

This water contains high levels of sulfates. This mineral can cause diarrhea in persons not accustomed to drinking water with high sulfate content. Persistent diarrhea can cause dehydration. Special care should be taken for infants. Bottled water is available nearby at_____.

(vi) *Notices to the media.* PWSs shall submit copies of the notice described in paragraph (r)(3)(ii) of this section to radio and television stations that broadcast to the community served by the water system as soon as possible, but in no case later than 14 days after sulfate in excess of the MCL has been detected in the water, and once every six months while the water delivered into the distribution system exceeds the sulfate MCL. The geographical service area in question shall be indicated and clearly defined in the notice.

13. Section 141.33 is amended by adding paragraph (e) to read as follows:

§ 141.33 Record maintenance.

* * * * *

(e) Record maintenance requirements concerning a PWS's delivery of Alternative Water as a means of compliance with the MCL for sulfate are contained in § 141.23(r)(2)(ii).

§ 141.51 Maximum contaminant level goals for inorganic contaminants. [Amended]

14. The table in § 141.51(b) is amended by adding "Sulfate" in alphabetical order under the column heading "Contaminant", and next to it, under the column heading "MCL(mg/l)" adding "500".

§ 141.62 Maximum contaminant levels for inorganic contaminants. [Amended]

15. In the last sentence in paragraph § 141.62(b), the word "and" between "(b)(8)" and "(b)(9)" is removed, and "and (b)(16)," is added after "(b)(9)".

§ 141.62 [Amended]

16. The table in § 141.62(b) is amended by adding "sulfate" in alphabetical order under the column heading "Contaminant" and next to it, under the column heading "MCL" adding "500".

§ 141.62 [Amended]

17. The table in § 141.62(c) is amended by adding "Sulfate" in alphabetical order under the column heading "Chemical Name", and next to it, under the column heading "BAT" adding "5, 7, 9".

18. Section 141.101 is amended by adding two sentences to the end to read as follows:

§ 141.101 Use of other non-centralized treatment devices.

* * * The requirements of this section do not apply to the control of sulfate in drinking water by public water systems in States authorizing the Alternative Method of Compliance with the sulfate MCL. Instead, a public water system that chooses to use bottled water or point-of-use devices to achieve compliance with the MCL for sulfate must meet the requirements of § 141.23(r).

PART 142—NATIONAL PRIMARY DRINKING WATER REGULATIONS—IMPLEMENTATION

19. The authority citation for part 142 continues to read as follows:

Authority: 42 U.S.C. 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–4 and 300j–9.

20. Section 142.14 is amended by adding paragraph (d)(12) to read as follows:

§ 142.14 Records kept by States.

* * * * *

(d) * * *

(12) Records of notification received pursuant to § 141.23(r)(1)(vi) of this chapter of the method of compliance chosen by PWSs which exceed the sulfate MCL.

* * * * *

21. Section 142.15 is amended by adding paragraph (a)(4) to read as follows:

§ 142.15 Reports by States.

* * * * *

(a) * * *

(4) Notification of public water systems authorized to implement the Alternative Method of Compliance for sulfate.

* * * * *

22. Section 142.16 is amended by adding paragraph (f) to read as follows:

§ 142.16 Special primacy requirements.

* * * * *

(f) *Sulfate requirements.* The national primary drinking water regulation for sulfate in part 141 gives States the option to allow PWSs to use the Alternative Method of Compliance with the sulfate MCL contained in §§ 141.23(r)(2) and (3) (see 141.23(r)(1)(ii)). If a State chooses to allow PWSs to use the Alternative Method of Compliance, its application for approval of a State program revision must include the text of State laws and regulations that are no less stringent than §§ 141.23(r)(2) and (3) of this chapter. In addition, the State's application must include a description of the State's method for overseeing implementation by PWSs of the Alternative Method of Compliance. Such a description must include actions the State will take to assure compliance with bottled water requirements (§ 141.23(r)(2)(v) of this chapter), POU and POE device requirements (§ 141.23(r)(2)(vi) of this chapter), and public notification/education program requirements (§ 141.23(r)(3) of this chapter).

23. Section 142.62 is amended by adding one sentence to the end of paragraph (f) to read as follows:

§ 142.62 Variances and exemptions from the maximum contaminant levels for organic and inorganic chemicals.

* * * * *

(f) * * * The State may authorize a public water system to use bottled water, point-of-use or point-of entry devices to comply with the sulfate MCL, pursuant to §§ 141.23(r)(1) through (3) of this chapter.

* * * * *

[FR Doc. 94–30953 Filed 12–19–94; 8:45 am]

BILLING CODE 6560–50–P

Federal Register

Tuesday
December 20, 1994

Part III

Nonprocurement Debarment and Suspension and Federal Acquisition Regulation; Debarment, Suspension, and Ineligibility (Ethics); Proposed Rules

(continued)

Office of Personnel Management
Department of Agriculture
Department of Energy
Small Business Administration
National Aeronautics and Space Administration
Department of Commerce
Office of National Drug Control Policy
Department of State
International Development Cooperation Agency
Agency for International Development
Peace Corps
United States Information Agency
Inter-American Foundation
African Development Foundation
Department of Housing and Urban Development
Department of Justice
Department of Labor
Federal Mediation and Conciliation Service
Department of the Treasury
Department of Defense
Department of Education
National Archives and Records Administration
Department of Veterans Affairs
Environmental Protection Agency
General Services Administration
Department of the Interior
Federal Emergency Management Agency
Department of Health and Human Services
National Science Foundation
National Foundation on the Arts and the Humanities
National Endowment for the Arts
National Endowment for the Humanities
Institute of Museum Services
Corporation for National and Community Service

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 970

DEPARTMENT OF AGRICULTURE

7 CFR Part 3017

DEPARTMENT OF ENERGY

10 CFR Part 1036

SMALL BUSINESS ADMINISTRATION

13 CFR Part 145

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1265

DEPARTMENT OF COMMERCE

15 CFR Part 26

OFFICE OF NATIONAL DRUG CONTROL POLICY

21 CFR Part 1404

DEPARTMENT OF STATE

22 CFR Part 137

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

22 CFR Part 208

PEACE CORPS

22 CFR Part 310

UNITED STATES INFORMATION AGENCY

22 CFR Part 513

INTER-AMERICAN FOUNDATION

22 CFR Part 1006

AFRICAN DEVELOPMENT FOUNDATION

22 CFR Part 1508

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 24

DEPARTMENT OF JUSTICE

28 CFR Part 67

DEPARTMENT OF LABOR

29 CFR Part 98

FEDERAL MEDIATION AND CONCILIATION SERVICE

29 CFR Part 1471

DEPARTMENT OF THE TREASURY

31 CFR Part 19

DEPARTMENT OF DEFENSE

32 CFR Part 25

DEPARTMENT OF EDUCATION

34 CFR Part 85

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

36 CFR Part 1209

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 44

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 32

GENERAL SERVICES ADMINISTRATION

41 CFR Part 105-68

DEPARTMENT OF THE INTERIOR

43 CFR Part 12

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 17

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 76

NATIONAL SCIENCE FOUNDATION

45 CFR Part 620

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts

45 CFR Part 1154

National Endowment for the Humanities

45 CFR Part 1169

Institute of Museum Services

45 CFR Part 1185

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

45 CFR Part 2542

Nonprocurement Debarment and Suspension

AGENCIES: Department of Agriculture; Department of Commerce; Department of Defense; Department of Education; Department of Energy; Department of Health and Human Services; Department of Housing and Urban Development; Department of the Interior; Department of Justice; Department of Labor; Department of State; Department of the Treasury; Department of Veterans Affairs; African Development Foundation; Agency for International Development, IDCA; Corporation for National and Community Service; Environmental Protection Agency; Federal Emergency Management Agency; Federal Mediation and Conciliation Service; General Services Administration; Institute of Museum Services, NFAH; Inter-American Foundation; National Aeronautics and Space Administration; National Archives and Records Administration; National Endowment for the Arts, NFAH; National Endowment for the Humanities, NFAH; National Science Foundation; Office of National Drug Control Policy; Office of Personnel Management; Peace Corps; Small Business Administration; United States Information Agency.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed revision to the nonprocurement common rule is issued in response to Executive Order 12689 and section 2455 of the Federal Acquisition Streamlining Act of 1994. E.O. 12689 requires agencies to establish regulations for reciprocal governmentwide effect across procurement and nonprocurement for each agency's debarment and suspension actions, after technical differences between the procurement and nonprocurement regulations governing debarments and suspensions are resolved. Section 2455 provides that the debarment, suspension, or other exclusion of a participant in a procurement activity under the Federal Acquisition Regulation, or in a nonprocurement activity under regulations issued pursuant to Executive Order 12549, shall be given reciprocal governmentwide effect.

DATES: Comments must be received on or before February 21, 1995 in order to be assured of consideration.

ADDRESSES: Persons wishing to submit comments on this notice of proposed rulemaking should send them to Robert Meunier, Director, Suspension and Debarment Division, Office of Grants and Debarment, Mail Code 3902F, Environmental Protection Agency, 401 "M" Street S.W., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: See preambles of the individual agencies below.

SUPPLEMENTARY INFORMATION: As part of the Federal Government's initiatives to

curb fraud, waste, and abuse, on February 18, 1986, President Reagan signed Executive Order (E.O.) 12549, "Debarment and Suspension." E.O. 12549 established governmentwide effect for an agency's nonprocurement debarment and suspension actions.

Section 6 of E.O. 12549 directed the Office of Management and Budget (OMB) to issue guidelines governing implementation of the Order, and section 3 of the Order directed the departments and agencies to promulgate final rules, consistent with these guidelines. On May 26, 1988, 27 agencies issued a final common rule (53 FR 19161–19211), consistent with OMB guidelines. On January 30, 1989, six more agencies co-signed the final common rule (54 FR 4722–4735). On November 27, 1992 and May 17, 1993, two more agencies co-signed the final common rule (57 FR 56262 and 58 FR 28759). On April 4, 1994, the functions of ACTION were transferred to the Corporation for National and Community Service. Each agency's codification of the common rule appears in its volume of the Code of Federal Regulations. The Federal Home Loan Bank Board, which participated in the initial rulemaking, no longer exists. On June 30, 1992, the Commission on the Bicentennial of the United States Constitution closed and thus will not participate in this proposed rulemaking. Section 4 of E.O. 12549 established the Interagency Committee on Debarment and Suspension (the Interagency Committee).

On August 16, 1989, President Bush signed E.O. 12689, "Debarment and Suspension." E.O. 12689 requires agencies to establish regulations providing for reciprocal governmentwide effect across procurement and nonprocurement for each agency's debarment and suspension actions, after technical differences between the procurement and nonprocurement regulations governing debarments and suspensions are resolved.

President Clinton signed Public Law 103–355, the Federal Acquisition Streamlining Act of 1994 on October 13, 1994. Section 2455 of that Act provides that the debarment, suspension, or other exclusion of a participant in a procurement activity under the Federal Acquisition Regulation, or in a nonprocurement activity under regulations issued pursuant to E.O. 12549, shall be given reciprocal governmentwide effect. Thus, these proposed regulations would implement both E.O. 12689 and section 2455 of Pub. L. 103–355.

The Interagency Committee established three subcommittees that identified issues and made recommendations for consideration by the full Interagency Committee. The matters addressed by the three subcommittees were technical differences between the procurement and nonprocurement rules, automation issues, and nonprocurement scope. In 1989, the Interagency Committee presented recommendations to the agencies participating in this rulemaking action. The agencies considered these proposed changes and concluded that the initial recommendations addressed more issues than necessary to implement the Executive Order. As a result, representatives of the participating agencies reconsidered their initial recommendations and determined that very few technical differences needed to be resolved to obtain reciprocity between the procurement and nonprocurement rules. The determinations of the agency representatives are incorporated in this notice of proposed rulemaking.

Section 3 of E.O. 12689 directed the agencies to simultaneously publish proposed rules within six months after resolution of differences between the procurement and nonprocurement rules and to publish final regulations within 12 months after publication of the proposed rules. The Federal Acquisition Regulation provisions governing debarments and suspensions are also being published for comment today.

In order to focus commenters' attention on the changes that are proposed for the nonprocurement debarment and suspension rule, the agencies participating in this proposed rulemaking—all but the Department of Transportation which did not complete clearance of this proposed rule—have decided to publish the text of only those portions of the common rule that are affected by changes proposed by the Interagency Committee, rather than publishing the complete text of the common rule. Comments are sought on only those portions of the common rule that are proposed for amendment in this document.

In addition to the amendments discussed below, the agencies propose to make minor technical changes to correct spelling errors and other nonsubstantive errors in the printing of the common rule.

Section-by-Section Analysis

Subpart A.

Section _____.100, Purpose.

The agencies participating in this rulemaking action propose to amend §_____.100, *Purpose*, to reflect the E.O. 12689 requirement that both procurement and nonprocurement debarment and suspension actions have governmentwide effect across procurement and nonprocurement programs and activities.

Section _____.105, Definitions.

Under §_____.105 as proposed for amendment, the definition of the nonprocurement list would be replaced by a new definition for a "List of Parties Excluded from Federal Procurement and Nonprocurement Programs." The List will integrate all procurement and nonprocurement debarments, suspensions, and other exclusionary actions.

The definitions section also contains proposed technical amendments to implement E.O. 12689 and to correct printing errors in the initial publication of the common rule.

Section _____.110, Coverage.

Section _____.110(c) would be amended to provide for reciprocity between nonprocurement and procurement debarment and suspension actions. Under the reciprocity rule, every Executive Branch agency would have to give effect not only to exclusionary actions of other Federal agencies under the common rule but also to debarments, suspensions, proposed debarments or other governmentwide exclusions imposed under the Federal Acquisition Regulation after the effective date of the common rule reciprocity amendments. Thus, for example, once an agency has proposed for debarment an entity under the FAR, no other executive agency could enter into a covered transaction with that entity nor could a primary tier recipient enter into a lower tier covered transaction with that entity.

Section _____.225, Failure to adhere to restrictions.

Section _____.225 would be amended to make clear that the prohibition against knowingly doing business under a covered transaction with a person who is debarred or suspended also prohibits doing business with a person proposed for debarment under the FAR.

Appendix A.

The agencies propose to amend paragraph (1)(a) of the *Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions* to ensure that it covers actions taken under the Federal Acquisition Regulation to debar, suspend, propose for debarment, or

otherwise take a governmentwide exclusionary action.

Impact analyses

Executive Order 12866

This rule has been reviewed under Executive Order 12866. These proposed amendments would unify two separate debarment and suspension systems—nonprocurement and procurement—that previously existed.

Regulatory Flexibility Act of 1980

The Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)) requires that, for each rule with a "significant economic impact on a substantial number of small entities," an analysis must be prepared describing the rule's impact on small entities, identifying any significant alternatives to the rule that would minimize the economic impact on the small entities.

The participating agencies certify that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The participating agencies certify that this proposed rule would not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1980, 44 U.S.C. Chapter 35.

Text of the Common rule

The text of the common rule as proposed for amendment in this document appears below:

PART _____—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1 Section _____.100 is amended by redesignating paragraph (c) as paragraph (d) and adding a new paragraph (c) to read as follows:

§ _____.100 Purpose.

* * * * *

(c) These regulations also implement Executive Order 12689 (3 CFR, 1989 Comp., p.235) and 31 U.S.C. 6101 note (Public Law 103-355, sec. 2455, 108 Stat. 3327) by—

(1) Providing for the inclusion in the List of Parties Excluded from Federal Procurement and Nonprocurement Programs all persons proposed for debarment, debarred or suspended under the Federal Acquisition Regulation, 48 CFR part 9, subpart 9.4; persons against which governmentwide exclusions have been entered under this Part; and persons determined to be ineligible; and

(2) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion.

* * * * *

2. Section _____.105 is amended by adding introductory text, removing paragraph designations for the definitions and placing them in alphabetical order, removing the definition for "Nonprocurement List", adding, in alphabetical order, a definition for "List of Parties Excluded from Federal Procurement and Nonprocurement Programs", in the definition for "Affiliate", after the phrase "affiliates of each", removing the word "another" and adding, in its place, "other", in the definition for "Conviction", removing the phrase "A judgment of conviction" and adding, in its place "Judgment or conviction", in the definition for "Legal proceedings", removing "or a State of local" and adding, in its place, "or a State or local" to read as follows:

§ _____. 105 Definitions.

The following definitions apply to this part:

* * * * *

List of Parties Excluded from Federal Procurement and Nonprocurement Programs. A list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Orders 12549 and 12689 and these regulations or 48 CFR part 9, subpart 9.4, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, and those persons who have been determined to be ineligible.

* * * * *

3. Section _____.110 is amended by revising paragraph (c) to read as follows.

§ _____.110 Coverage.

* * * * *

(c) *Relationship to Federal procurement activities.* In accordance with E.O. 12689 and section 2455 of Public Law 103-355, any debarment, suspension, proposed debarment or other governmentwide exclusion imposed under the Federal Acquisition Regulations (FAR) after [the effective date of the final rule] shall be recognized by and effective for Executive Branch agencies and participants as an exclusion under this regulation. Similarly, any debarment, suspension or other governmentwide exclusion imposed under this regulation shall be recognized by and effective for those agencies as a debarment or suspension under the FAR.

§ _____.200 [Amended]

4. Section _____.200 is amended by revising the heading for paragraph (b) to read "Lower tier covered transactions.".

5. Section _____.225 is revised to read as follows.

§ _____.225 Failure to adhere to restrictions.

(a) Except as permitted under § _____.215 or § _____.220 of these regulations, a participant shall not knowingly do business under a covered transaction with a person who is—

(1) Debarred or suspended;

(2) Proposed for debarment under the FAR; or

(3) Ineligible for or voluntarily excluded from the covered transaction.

(b) Violation of the restriction under paragraph (a) of this section may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

(c) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, proposed for debarment under the FAR, ineligible, or voluntarily excluded from the covered transaction (See Appendix B of these regulations), unless it knows that the certification is erroneous. An agency has the burden of proof that a participant did knowingly do business with a person that filed an erroneous certification.

Appendix A to Part _____ [Amended]

6. Appendix A to Part _____ is amended in paragraph (1)(a) of the Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions by removing "from covered transactions".

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 970

RIN 3206–AG51

FOR FURTHER INFORMATION CONTACT: Murray M. Meeker, Attorney, Office of the General Counsel, (202) 606–1980.

List of Subjects in 5 CFR Part 970

Contract programs, Grant programs.

It is purposed that title 5, part 970 of the Code of Federal Regulations be amended as follows:

Lorraine A. Green,

Deputy Director.

PART 970—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCURRENT)

1. The authority for part 970 continues to read as follows:

Authority: Executive Order 12549 (51 FR 6370–71).

§§ 970.100, 970.105, 970.110, 970.225 and Appendix A [Amended]

2. Sections 970.100, 970.105, (except amendments to definitions for "Affiliate" and "Legal proceedings"), 970.110, and 970.225 and Appendix A to Part 970 are amended as set forth at the end of the common preamble.

DEPARTMENT OF AGRICULTURE

7 CFR Part 3017

FOR FURTHER INFORMATION CONTACT:

Gary W. Butler, Deputy Assistant General Counsel, Office of the General Counsel, (202) 720–2577.

List of Subjects in 7 CFR Part 3017

Contract programs, Grant programs—Agriculture, Grant administration, Administrative practice and procedure.

It is proposed that title 7, chapter XXX of the Code of Federal Regulations be amended as follows.

Dated: December 18, 1994.

Mike Espy,

Secretary of Agriculture.

PART 3017—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 3017 continues to read as follows:

Authority: E.O. 12549, Sec. 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub. L. No. 100–690, Title V, Subtitle D; 41 U.S.C. 701 et seq.), 5 U.S.C. 301.

§§ 3017.100, 3017.105, 3017.110, 3017.225 and Appendix A [Amended]

2. Sections 3017.100, 3017.105 (except amendments to definitions for "Affiliate" and "Legal proceedings"), 3017.110, and 3017.225 and Appendix A to Part 3017 are amended as set forth at the end of the common preamble.

DEPARTMENT OF ENERGY

10 CFR Part 1036

RIN 1991–AA69

FOR FURTHER INFORMATION CONTACT: Cynthia Yee, Office of Clearance and Support, Office of Procurement and Assistance Management, Human Resources and Administration, 202–586–1140.

List of Subjects in 10 CFR Part 1036

Contract programs, Grant programs.

It is proposed that title 10, chapter X of the Code of Federal Regulations be amended as follows.

Richard H. Hopf,

Deputy Assistant Secretary for Procurement and Assistance Management.

PART 1036—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 1036 is revised to read as follows:

Authority: E.O. 12689, Sec. 644 and 646, (Pub. L. 95–91, 91 Stat. 599 (42 U.S.C. 7254 and 7256).

§§ 1036.100, 1036.105, 1036.110, 1036.200, 1036.225 and Appendix A [Amended]

2. Sections 1036.100, 1036.105, 1036,110, 1036,200, and 1036.225 and Appendix A to Part 1036 are amended as set forth at the end of the common preamble.

SMALL BUSINESS ADMINISTRATION

13 CFR Part 145

FOR FURTHER INFORMATION CONTACT: John W. Klein, Chief Counsel for Special Programs, Office of General Counsel, U.S. Small Business Administration, 409 3rd Street SW., Washington, DC 20416, (202) 205–6645.

ADDITIONAL SUPPLEMENTARY INFORMATION: As stated in the supplementary information to the common rule, the purpose of this proposed rule is to give reciprocal governmentwide effect to both nonprocurement and procurement debarment and suspension actions. SBA reads proposed section 145.110(c) as having no effect on the exceptions from coverage already provided for in sections 145.110(a)(2), 145.215, and 145.220. These exemptions include SBA disaster assistance.

List of Subjects in 13 CFR Part 145

Debarment and suspension (nonprocurement), Loan programs—business, Contract programs, Grant programs.

It is proposed that Title 13, chapter I of the Code of Federal Regulations (CFR) be amended as follows:

PART 145—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 145 continues to read as follows:

Authority: E.O. 12549; Secs. 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, Title V, Subtitle D; 41 U.S.C. 701 et seq.); 15 U.S.C. 634(b)(6).

§§ 145.100, 145.105, 145.110, 145.200, 145.225 and Appendix A [Amended]

2. Sections 145.100, 145.105, 145.110, 145.200, and 145.225 and Appendix A to Part 145 are amended as set forth at the end of the common preamble.

Dated: December 8, 1994.

John T. Spotila,

Acting Administrator.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1265

RIN 2700–AB99

FOR FURTHER INFORMATION CONTACT: Thomas J. Whelan, NASA Headquarters, Acquisition Liaison Division (Code HP), (202) 358–0475.

List of Subjects in 14 CFR Part 1265

Grants, Cooperative Agreements, Debarment and suspension (nonprocurement).

Thomas S. Luedtke,

Deputy Associate Administrator for Procurement.

It is proposed that title 14, part 1265 of the Code of Federal Regulations be amended as follows:

PART 1265—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 1265 is revised to read as follows:

Authority: National Aeronautics and Space Act, Pub. L. 85–568, July 29, 1958, As Amended, Sec. 203(c)(1); Executive Order 12549.

§§ 1265.100, 1265.105, 1265.110, 1265.225 and Appendix A [Amended]

2. Sections 1265.100, 1265.105, 1265.110, and 1265.225 and Appendix A to Part 1265 are amended as set forth at the end of the common preamble.

DEPARTMENT OF COMMERCE

15 CFR Part 26

RIN 0605–AA02

FOR FURTHER INFORMATION CONTACT: John J. Phelan, 202/482–4115.

List of Subjects in 15 CFR Part 26

Administrative practice and procedure, Grant administration, Grant programs, Reporting and recordkeeping requirements.

It is proposed that title 15, part 26 of the Code of Federal Regulations be amended as follows.

John J. Phelan, III,

Acting Director for Federal Assistance and Management Support.

PART 26—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority citation for part 26 is revised to read as follows:

Authority: 5 U.S.C. 301; Sec. 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, Title V, Subtitle D); Sec. 2455 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355); Executive Order 12549; Executive Order 12689.

§§ 26.100, 26.105, 26.110, 26.200, 26.225 and Appendix A [Amended]

2. Sections 26.100, 26.105, 26.110, 26.200, and 26.225 and Appendix A to part 26 are amended as set forth at the end of the common preamble.

OFFICE OF NATIONAL DRUG CONTROL POLICY

21 CFR Part 1404

RIN 3201–ZA00

FOR FURTHER INFORMATION CONTACT: Edward H. Jurith, General Counsel, (202) 395–6709.

List of Subjects in 21 CFR Part 1404

Contract programs, Grant programs.

It is proposed that title 21, chapter III of the Code of Federal Regulations be amended as follows.

Lee P. Brown,

Director

PART 1404—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 1404 is revised to read as follows:

Authority: 5 U.S.C. 301.

§§ 1404.100, 1404.105, 1404.110, 1404.225 and Appendix A [Amended]

2. Sections 1404.100, 1404.105, 1404.110, and 1404.225 and Appendix A to part 1404 are amended as set forth at the end of the common preamble.

DEPARTMENT OF STATE

22 CFR Part 137

[Public Notice 2127]

FOR FURTHER INFORMATION CONTACT: Robert E. Lloyd, Office of the Procurement Executive, 703–516–1690.

List of Subjects in 22 CFR Part 137

Contract programs, Grant programs.

It is proposed that title 22, chapter I of the Code of Federal Regulations be amended as follows.

Lloyd W. Pratsch,

Procurement Executive.

PART 137—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 137 continues to read as follows:

Authority: 22 U.S.C. 2658

§§ 137.100, 137.105, 137.110, 137.200, 137.225 and Appendix A [Amended]

2. Sections 137.100, 137.105, 137.110, 137.200, and 137.225 and Appendix A to Part 137 are amended as set forth at the end of the common preamble.

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

22 CFR Part 208

RIN 0412–AA–24

FOR FURTHER INFORMATION CONTACT: Kathleen J. O'Hara, M/OP/P, Telephone (703) 875–1534.

List of Subjects in 22 CFR Part 208

Administrative practice and procedures, Contract programs, Grant programs—foreign relations, Grant programs, Loan programs—foreign relations.

It is proposed that title 22, chapter II of the Code of Federal Regulations be amended as follows:

Michael D. Sherwin,

Deputy Assistant Administrator for Management.

PART 208—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for Part 208 is revised to read as follows:

Authority: Executive Order 12549, Section 621, Foreign Assistance Act of 1961, 22 U.S.C. 2381.

§§ 208.100, 208.105, 208.110, 208.200, 208.225 and Appendix A [Amended]

2. Sections 208.100, 208.105, 208.110, 208.200, and 208.225 and Appendix A to Part 208 are amended as set forth at the end of the common preamble.

PEACE CORPS

22 CFR Part 310

RIN 0420–AA13

FOR FURTHER INFORMATION CONTACT: Kirby Mullen, 202–606–3114.

List of Subjects in 22 CFR Part 310

Contract programs, Grant programs.

It is proposed that title 22, chapter III of the Code of Federal Regulations be amended as follows.

Carol Bellamy,

Director.

PART 310—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 310 is revised to read as follows:

Authority: 22 U.S.C. 2503.

2. Sections 310.100, 310.105 (except amendment to definition for "Legal proceedings"), 310.110, 310.225 and Appendix A to Part 310 are amended as set forth at the end of the common preamble.

§§ 310.100, 310.105, 310.110, 310.225 and Appendix A [Amended]

UNITED STATES INFORMATION AGENCY

22 CFR PART 513

FOR FURTHER INFORMATION CONTACT: Georgia Hubert on (202) 205–5404.

List of Subjects in 22 CFR Part 513

Contract programs, Grant programs.

It is proposed that title 22, chapter V of the Code of Federal Regulations be amended as follows.

Henry Howard,

Associate Director for Management.

PART 513—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 513 is revised to read as follows:

Authority: 40 U.S.C. 486(c); E.O. 12689; Section 2455 of the Federal Acquisition and Streamlining Act of 1994.

§§ 513.100, 513.105, 513.110, 513.200, 513.225 and Appendix A [Amended]

2. Sections 513.100, 513.105, 513.110, 513.200, and 513.225 and Appendix A to Part 513 are amended as set forth at the end of the common preamble.

INTER-AMERICAN FOUNDATION

22 CFR Part 1006

FOR FURTHER INFORMATION CONTACT: Evan M. Koster, 703–841–3894.

List of Subjects in 22 CFR Part 1006

Contract programs, Grant programs.

It is proposed that title 22, chapter X of the Code of Federal Regulations be amended as follows.

Evan M. Koster,

Deputy General Counsel.

PART 1006—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 1006 continues to read as follows:

Authority: E.O. 12549; Sec. 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, Title V, Subtitle D; 41 U.S.C. 701 et seq.); 22 U.S.C. 290f.

§§ 1006.100, 1006.105, 1006.110, 1006.225 and Appendix A [Amended]

2. Sections 1006.100, 1006.105 (except amendment to definition for "Legal proceedings"), 1006.110, and 1006.225 and Appendix A to Part 1006 are amended as set forth at the end of the common preamble.

AFRICAN DEVELOPMENT FOUNDATION

22 CFR Part 1508

FOR FURTHER INFORMATION CONTACT: Paul S. Magid, (202) 673–3916.

List of Subjects in 22 CFR Part 1508

Contract programs, Grant programs—foreign relations, grants administration.

It is proposed that title 22, chapter XV of the Code of Federal Regulations be amended as follows.

Gregory Robeson Smith,

President.

PART 1508—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 1508 is revised to read as follows:

Authority: Executive Order 12549, Sec. 506(1)(4) of Title V of Pub. L. 96–533, the International Security and Development Cooperation Act.

§§ 1508.100, 1508.105, 1508.110, 1508.225 and Appendix A [Amended]

2. Sections 1508.100, 1508.105 (except amendment to definition for "Legal proceedings"), 1508.110, and 1508.225 and Appendix A to Part 1508 are amended as set forth at the end of the common preamble.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 24

[Docket No. R–94–1563; FR–3065–P–01]

RIN 2501–AB24

FOR FURTHER INFORMATION CONTACT: Emmett N. Roden, Assistant General Counsel for Administrative Proceedings, Office of General Counsel, U.S. Department of Housing and Urban Development, 451 7th Street, S.W., Room 10251, Washington, D.C. 20410, telephone (202) 708–2350. The telephone number for the hearing impaired (TDD) is (202) 708–9300. These are not toll-free numbers.

ADDITIONAL SUPPLEMENTARY INFORMATION: In accordance with Executive Order 12549, the Department, along with other Federal agencies, promulgated governmentwide non-procurement debarment and suspension regulations. The common rule, which is identical to the Office of Management and Budget's final guidelines, and the various agency-specific supplements to the common rule were published at the same time on May 26, 1988 (53 FR 19161). The provisions of the common rule that provide nonprocurement participants with the opportunity to contest suspensions and proposed debarments and the procedures by which suspending and debarring officials make final agency determinations are substantially similar to the procedures applicable to procurement contractors under the Federal Acquisition Regulation (FAR, 48 CFR, especially subpart 9.4 thereof). Although the Department adopted verbatim significant portions of the common rule, it did not include the provisions concerning suspension and debarment hearing procedures or the reconsideration or appeal of post-hearing determinations.

In 1989, Executive Order 12689 required that the debarment, suspension, or other exclusion of a participant in a procurement activity under the FAR, or in a nonprocurement activity under an agency's debarment regulations, shall have the governmentwide effect of excluding the participant from both procurement and nonprocurement activities. Under current HUD rules, a debarment of a nonprocurement participant does not affect such person's participation in procurement activities with other agencies.

In addition, the proposed revisions would conform the Department's hearing procedures to those of the common rule. The Department's departure from the generally applicable governmentwide provisions has adversely affected the Department's ability to process suspensions and debarments in an efficient and cost-effective manner. The amount of time and expense currently involved in the Department's suspension and debarment proceedings benefit neither the Department nor the persons who are subject to such sanctions. The Department considers these changes necessary to comply with the President's directive to streamline agency operations throughout the Executive Branch. The proposed revisions are also an element in the Government reinvention process at the Department.

Written comments from the public will be considered prior to issuance of a final rule. No hearing will be conducted with respect to this proposed rule.

List of Subjects in 24 CFR Part 24

Administrative practice and procedure, Government contracts, Grant programs, Government procurement, Loan programs, Drug abuse, Reporting and recordkeeping requirements.

It is proposed that title 24, chapter 24 of the Code of Federal Regulations be amended as follows:

Henry G. Cisneros,

Secretary.

PART 24—GOVERNMENT DEBARMENT AND SUSPENSION AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 24 would be revised to read as follows:

Authority: 41 U.S.C. 701 et seq.; 42 U.S.C. 3535(d); E.O. 12549; E.O. 12689.

§ 24.100 [Amended]

1a. Section 24.100 is amended by resdesignating paragraphs (d) and (e) as paragraphs (e) and (f), respectively.

§§ 24.100, 24.105, 24.110, 24.200, 24.225 and Appendix A [Amended]

2. Sections 24.100, 24.105, 24.110, 24.200, and 24.225 and Appendix A to Part 24 would be amended as set forth at the end of the common preamble.

3. Section 24.105 would be further amended by removing the subparagraphs (1) and (2) under the definitions of "Debarment", "Suspension" and "Voluntary exclusion or voluntarily excluded," by revising the definitions for "Limited denial of participation," and "Respondent", by adding paragraph (3) to the definitions for "Debarring official" and "suspending official," and by adding a definition for "hearing official" to read as follows:

§ 24.105 Definitions.

* * * * *

Debarring official. * * *

* * * * *

(3) For purposes of §§ 24.313 and 24.314 of this Part, the term debarring official includes the term hearing official as defined in this section.

* * * * *

Hearing official. A Departmental official authorized by the Secretary to conduct proceedings under this Part.

* * * * *

Limited denial of participation. An action taken by a HUD official, in accordance with subpart G of these regulations, that immediately excludes or restricts a person from participating in HUD program(s) within a defined geographic area.

* * * * *

Respondent. A person against whom a debarment or suspension action has been initiated.

(1) A respondent is also a person against whom a limited denial of participation has been initiated.

(2) [Reserved]

* * * * *

Suspending official. * * *

* * * * *

(3) For purposes of §§ 24.412 and 24.413 of this Part, the term *suspending official* includes the term *hearing official* as defined in this section.

* * * * *

4. Section 24.110 would be amended by adding a paragraph (a)(3), and by revising the last sentence of paragraph (d), to read as follows:

§ 24.110 Coverage.

(a) * * *

(3) *Other exceptions.* (i) Sanctions against participants whose only involvement in HUD programs is as ultimate beneficiaries, such as subsidized tenants and subsidized mortgagors, may be taken only upon commission of one of the offenses set forth in § 24.305(a) of this part, unless the participant has otherwise been debarred or suspended by another Federal agency.

(ii) Sanctions under this part against mortgagees approved by HUD to participate in Federal Housing Administration programs may be initiated only with the approval of the Mortgagee Review Board.

* * * * *

(d) * * * The consequences of a debarment or suspension as set forth in § 24.200 apply to contractors in Federal procurement programs, and §§ 24.325 and 24.420 govern the extent to which a specific contractor or its organizational elements would be included within a debarment or suspension action.

* * * * *

§ 24.115 [Amended]

5. In § 24.115, paragraph (d) would be removed.

6. Section 24.200 would be further amended by adding a new paragraph (c)(9) by removing paragraphs (d) and (e), and by redesignating paragraph (f) as paragraph (d), to read as follows:

§ 24.200 Debarment or suspension.

* * * * *

(c) *Exceptions.* * * *

* * * * *

(9) Sanctions imposed on an individual participant under this part shall not preclude the participant from selling his or her principal residence to a purchaser using HUD/FHA financing.

* * * * *

§ 24.215 [Amended]

7. In § 24.215, paragraph (a) would be removed.

8. In § 24.305, paragraph (d) would be revised to read as follows:

§ 24.305 Causes for debarment.

* * * * *

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

* * * * *

9. Section 24.313 would be revised to read as follows:

§ 24.313 Opportunity to contest proposed debarment.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(1) The information and argument should be addressed to the Debarment Docket Clerk, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410.

(2) If the respondent does not contest the proposed debarment within the 30 day period, the proposed debarment shall become final.

(3) If the respondent desires a hearing, it shall submit a written request to the Debarment Docket Clerk within the 30-day period following receipt of the notice of proposed debarment.

(b) *Additional proceedings as to disputed material facts.*

(1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

(2) A transcribed record of any additional proceedings shall be made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

10. Section 24.314 would be revised to read as follows:

§ 24.314 Debarring official's decision.

(a) *No additional proceedings necessary.* In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(b) *Additional proceedings necessary.*

(1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(i) If the debarring official refers disputed material facts to an Administrative Law Judge or Member of the Board of Contract Appeals, the provisions of part 26 of this chapter shall be generally applicable to the proceeding, with the exception that no appeal to the Secretary may be taken under §§ 26.24–26.26 of this chapter with respect to any order or decision by such Judge or Member.

(ii) Such additional proceedings shall in all events be concluded within 45 days after the debarring official has issued the notice of disputed factual issues in accordance with § 24.313(b)(1) of this part. Findings of fact shall be issued by the debarring official, or by any official to whom the factual issues have been referred, within 30 days after conclusion of such additional proceedings. The time limitations of this subparagraph may be extended only upon issuance, by the debarring official or other official to whom factual issues have been referred, of a written notice describing good cause for such extension.

(3) The debarring official's decision shall be made after the conclusion on the proceedings with respect to the disputed facts.

(i) Such decision shall be made within 15 days after the issuance of findings of fact concerning the disputed material facts.

(ii) [Reserved].

(c)(1) *Standard of proof.* In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(2) *Burden of proof.* The burden of proof is on the agency proposing debarment.

(d) *Notice of debarring official's decision.*

(1) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in § 24.215.

(A) Where a debarment is based solely on § 24.305(f) of this Part, the notice of the debarring official's decision shall advise that the debarment is effective for programs or activities of the Department.

(B) [Reserved].

(2) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

§ 24.400 [Amended]

11. In § 24.400, paragraph (d) would be removed.

§ 24.410 [Amended]

12. In § 24.410, paragraph (c) would be removed.

13. Section 24.411 would be revised to read as follows:

§ 24.411 Notice of suspension.

When a respondent is suspended, notice shall immediately be given:

(a) That the suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) relied upon under § 24.405 for imposing suspension;

(e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment or Program Fraud Civil Remedies Act proceedings;

(f) Of the provisions of §§ 24.411 through 24.413 and any other HUD procedures, if applicable, governing suspension decisionmaking; and

(g) Of the effect of the suspension.

14. Section 24.412 would be revised to read as follows:

§ 24.412 Opportunity to contest suspension.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(1) The information and argument should be addressed to the Debarment Docket Clerk, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410.

(2) If the respondent does not contest the suspension within the 30 day period, the suspension shall become final.

(3) If the respondent desires a hearing, it shall submit a written request to the Debarment Docket Clerk within the 30-day period following receipt of the notice of suspension.

(b) *Additional proceedings as to disputed material facts.*

(1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witnesses the agency presents, unless:

(i) The action is based on an indictment, conviction or civil judgment, or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

15. Section 24.413 would be revised to read as follows:

§ 24.413 Suspending official's decision.

The suspending official may modify or terminate the suspension (see § 24.320(c)) for reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(a) *No additional proceedings necessary.* In actions based upon an indictment, conviction, or civil judgment, in which there is no genuine dispute over material facts, or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(3) If the suspending official refers disputed material facts to an Administrative Law Judge or Member of the Board of Contract Appeals, the provisions of part 26 of this chapter shall be generally applicable to the proceeding, with the exception that no appeal to the Secretary may be taken under §§ 26.24–26.26 of this chapter with respect to any order or decision by such Judge or Member.

(4) Such additional proceedings shall in all events be concluded within 45 days after the suspending official has issued the notice of disputed factual issues in accordance with § 24.412(b)(1) of this part. Findings of fact shall be issued by the suspending official, or by any official to whom the factual issues have been referred, within 30 days after conclusion of such additional proceedings. The time limitations of this subparagraph may be extended only upon issuance, by the suspending official or other official to whom factual issues have been referred, of a written notice describing good cause for such extension.

(5) The suspending official's decision shall be made within 15 days after the issuance of findings of fact with respect to the disputed material facts.

(c) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent.

§ 24.415 [Amended]

16. In § 24.415, paragraph (d) would be removed.

§ 24.705 [Amended]

17. In § 24.705, paragraph (c) would be amended to remove the words "regional or field".

§ 24.710 [Amended]

18. In § 24.710, paragraph (a)(3) is amended to remove the words "the Deputy Assistant Secretary for Single Family Housing" and add, in their place, the words "an Assistant Secretary or Deputy Assistant Secretary".

19. Section 24.711 is revised to read as follows:

§ 24.711 Notice of limited denial of participation.

A limited denial of participation shall be made effective by advising the participant or contractor, and any specifically named affiliate, by mail, return receipt requested:

(a) That the limited denial of participation is being imposed;

(b) Of the cause(s) under § 24.705 for the sanction;

(c) Of the potential effect of the sanction, including the length of the sanction and the HUD program(s) and geographic area affected by the sanction;

(d) Of the right to request, in writing, within 30 days of receipt of the notice, a conference under § 24.712;

(e) That the failure to request a conference shall cause the limited denial of participation to become final, without any further proceeding pursuant to § 24.713 of this part.

20. Section 24.712 would be revised to read as follows:

§ 24.712 Conference.

Within 30 days after receiving a notice of limited denial of participation, the respondent may request a conference with the official who issued such notice. If the respondent does not request a conference within such 30-day period, the notice of limited denial of participation shall become final. The conference shall precede any submission in opposition under § 24.713 of this part. It shall be held within 15 days after the Department's receipt of the request for a conference, unless the respondent waives this time limit. The official who imposed the sanction, or his or her designee, shall preside. At the conference, the respondent may appear with a representative and may present all relevant information and materials to the official or designee. Within 20 days after the conference, the official shall, in writing, advise the respondent of the decision to terminate, modify, or affirm the limited denial of participation. If the official's decision is to affirm all or a portion of the remaining period of exclusion, the notice of affirmation shall advise the respondent of the opportunity to contest the notice pursuant to § 24.713.

21. Section 24.713 would be revised to read as follows:

§ 24.713 Opportunity to contest affirmation of the limited denial of participation.

(a) *Submission in opposition.* Within 30 days after receipt of a notice of affirmation of all or a portion of the remaining period of exclusion under a limited denial of participation, the respondent may submit, personally or through a representative, written information and argument in opposition to the notice of affirmation. The information and argument should be addressed to the Debarment Docket Clerk, Department of Housing and Urban Development, 451 Seventh Street S.W., Washington, D.C. 20410. If the respondent does not contest the notice of affirmation within the 30-day period, the notice shall become final.

(b) *Procedures.* The procedures of 24.313 and 24.314 shall govern respondent's contest of the notice of affirmation.

(c) *Effect of suspension or debarment on limited denial of participation.* If a respondent has contested a notice of affirmation pursuant to paragraph (a) of this section, and if the respondent has also received, pursuant to subpart C or D of this part, a notice of proposed debarment or suspension that is based on the same transaction(s) or conduct as the limited denial of participation, the following rules shall apply:

(1) If the respondent has not contested the proposed debarment pursuant to § 24.313(a) or the suspension pursuant to § 24.412(a), the final imposition of the

debarment or suspension shall also constitute a final decision with respect to the limited denial of participation to the extent that the debarment or suspension is based on the same transaction(s) or conduct as the limited denial of participation.

(2) If the respondent has contested the proposed debarment pursuant to § 24.313(a) of this part or the suspension pursuant to § 24.412(a), the hearing official shall consolidate the hearings on the limited denial of participation and on the proposed debarment or suspension.

(3) To the extent that the limited denial of participation is based on additional transaction(s) or conduct that are not described in the notice of proposed debarment or suspension, the hearing official shall, in his or her discretion, either withdraw the limited denial of participation to the extent of such additional bases, or issue a decision on them.

22. A new section 24.714 would be added to read as follows:

§ 24.714 Reporting of limited denial of participation.

If the period for requesting a conference pursuant to § 24.712 of this part has expired without receipt of such a request, or if a conference has been held and a notice of affirmation of all or part of the remaining period of exclusion has been issued pursuant to § 24.712, the official imposing the limited denial of participation shall notify the Director of the Participation and Compliance Division in the Office of Housing of the scope of the limited denial of participation.

DEPARTMENT OF JUSTICE

28 CFR Part 67

[A.G. Order No. 1940–94]

FOR FURTHER INFORMATION CONTACT: Cynthia J. Schwimer, Acting Director, Financial Management and Grants Administration Division, (202) 307–3186.

List of Subjects in 28 CFR Part 67

Contract programs, Grant programs.

It is proposed that title 28, chapter I, of the Code of Federal Regulations be amended as follows:

Dated: December 12, 1994.

Janet Reno,

Attorney General.

PART 67—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority citation for Part 67 continues to read as follows:

Authority: E.O. 12549; Sec. 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, Title V, Subtitle D; 41 U.S.C. 701 *et seq.*), Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3711, *et seq.* (as amended), Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. 5601, *et seq.* (as amended); Victims of Crime Act of 1984 42 U.S.C. 10601, *et seq.* (as amended); 18 U.S.C. 4042; and 18 U.S.C. 4351–4353.

§§ 67.100, 67.105, 67.110, 67.200, 67.225 and Appendix A [Amended]

2. Sections 67.100, 67.105, 67.110, 67.200, and 67.225 and appendix A to Part 67 are amended as set forth at the end of the common preamble.

DEPARTMENT OF LABOR

29 CFR Part 98

FOR FURTHER INFORMATION CONTACT: Melvin Goldberg, Chief, Division of Procurement and Grant Policy, (202) 219–9174

List of Subjects in 29 CFR Part 98

Contract programs, Grant programs.

It is proposed that title 29, part 98 of the Code of Federal Regulations be amended as follows:

Cynthia A. Metzler,

Assistant Secretary for Administration and Management.

PART 98—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 98 continues to read as follows:

Authority: E.O. 12549; sec. 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, title V, subtitle D; 41 U.S.C. 701 *et seq.*.); 5 U.S.C. 552–566.

§§ 98.100, 98.105, 98.110, 98.200. 98.225 and Appendix A [Amended]

2. Sections 98.100, 98.105, 98.110, 98.200, and 98.225 and Appendix A to Part 98 are amended as set forth at the end of the common preamble.

FEDERAL MEDIATION AND CONCILIATION SERVICE

29 CFR Part 1471

FOR FURTHER INFORMATION CONTACT: Lee Buddendeck, (202) 653–5320.

List of Subjects in 29 CFR Part 1471

Contract programs, Grant Programs.

It is proposed that title 29, Chapter XII of the Code of Federal Regulations be amended as follows:

John Calhoun Wells,

Director.

PART 1471—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCEDUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 1471 continues to read as follows:

Authority: E.O. 12549; Sec. 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, title V, subtitle D; 41 U.S.C. 701 et seq.), Pub. L. 95–524, Oct 27, 1978, 29 U.S.C. 175a.

§§ 1471.100, 1471.105, 1471.110, 1471.200, 1471.225 and Appendix A [Amended]

2. Sections 1471.100, 1471.105, 1471.110, 1471.200, and 1471.225 and Appendix A to Part 1471 are amended as set forth at the end of the common preamble.

DEPARTMENT OF THE TREASURY

31 CFR Part 19

RIN 1505–AA57

FOR FURTHER INFORMATION CONTACT: Debra Sonderman (202) 622–0520

List of Subjects in 31 CFR Part 19

Contract programs, Grant programs.

It is proposed that title 31, part 19 of the Code of Federal Regulations be amended as follows.

Dated: December 12, 1994.

George Muñoz,

Assistant Secretary for Management.

PART 19—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 19 is revised to read as follows:

Authority: 5 U.S.C. 321

§§ 19.100, 19.105, 19.110, 19.200, 19.225 and Appendix A [Amended]

2. Sections 19.100, 10.105, 19.110, 19.200, and 19.225 and Appendix A Part 19 are amended as set forth at the end of the common preamble.

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 25

RIN 0790–AF68

FOR FURTHER INFORMATION CONTACT: Mark Herbst, (703) 614–0205.

ADDITIONAL SUPPLEMENTARY INFORMATION: The Department of Defense proposes to adopt this amendment to the Governmentwide common rule on debarment and suspension for nonprocurement transactions. In adopting this rule, the Office of the Secretary of Defense, the Military Departments and the Defense Agencies will maintain uniform policies and procedures that are consistent with those of other Executive Departments and Agencies.

The Department of Defense originally codified this Governmentwide rule on May 26, 1988 (53 FR 19190 and 19204), at 32 CFR Part 280. On February 21, 1992 (57 FR 6199), Part 280 was redesignated as Part 25. This Notice of Proposed Rulemaking proposes to amend the redesignated Part 25.

List of Subjects in 32 CFR Part 25

Contract programs, Grant programs.

It is proposed that title 32, chapter I of the Code of Federal Regulations be amended as follows.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

PART 25—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 25 is revised to read as follows:

Authority: E.O. 12549; E.O. 12689; sec. 2455 of the Federal Acquisition and Streamlining Act of 1994 (Pub. L. 103–355); sec. 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, Title V, Subtitle D; 41 U.S.C. 701, et seq.)

§§ 25.100, 25.105, 25.110, 25.200, 25.225 and Appendix A [Amended]

2. Sections 25.100, 25.105, 25.110, 25.200, and 25.225 and Appendix A to Part 25 are amended as set forth at the end of the common preamble.

3. Section 25.105 is amended further by adding paragraph (3) to the definition for *Debarring official* and by adding paragraph (3) to the definition for *Suspending official* to read as follows:

§ 25.105 Definitions.

* * * * *

Debarring official. * * *

(3) DoD Components' debarring officials for nonprocurement transactions are the same officials identified in 48 CFR Part 209, subpart 209.4 as debarring officials for procurement contracts.

* * * *

Suspending official. * * *

(3) DoD Components' suspending officials for nonprocurement transactions are the same officials identified in 48 CFR Part 209, subpart 209.4 as suspending officials for procurement contracts.

* * * * *

4. Section 25.610 is amended by adding paragraph (b)(1) to read as follows and by reserving paragraph (b)(2):

§ 25.610 Coverage.

* * * * *

(b) * * *

(1) Heads of Defense Agencies, Heads of DoD Field Activities, and their designees are authorized to make such determinations on behalf of the Secretary of Defense.

(2) [Reserved]

* * * * *

5. Section 25.616 is added to read as follows:

§ 25.616 Determinations of grantee violations.

Heads of Defense Agencies, Heads of DoD Field Activities, and their designees are authorized to make determinations of grantee violations under § 25.615.

DEPARTMENT OF EDUCATION

34 CFR Parts 85, 668, and 682

RIN 1880–AA51

ADDRESSES: All comments concerning these proposed regulations should be addressed to Mary Jane Kane, U.S. Department of Education, 600 Independence Avenue, S.W., Room 3636 ROB–3, Washington, D.C. 20202–4700. Comments may also be sent through the internet to "Debarment__Suspension@ed.gov."

FOR FURTHER INFORMATION CONTACT: Mary Jane Kane. Telephone: 708–7802. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time Monday through Friday.

ADDITIONAL SUPPLEMENTARY INFORMATION: In addition to the amendments proposed by all participating agencies for the common rule, the Secretary proposes to amend the Department's debarment and suspension procedures to reflect certain changes made by 1992 amendments to those provisions of title IV of the Higher Education Act of 1965, as amended (title IV, HEA), that govern administrative proceedings to limit or terminate the eligibility of participants in programs under that title. The Secretary also proposes to amend subpart G of part 668, which contains the Department's procedures for fine, limitation, suspension, and termination proceedings, to make technical amendments to reflect the 1992 amendments to the HEA, to amend Subpart G of Part 682 in order to apply the same procedures to debarments or suspensions of lenders or loan servicers under the Federal Family Education Loan Programs (FFELP), and to limit a hearing officer's discretion in termination and suspension actions under both subparts when the termination or suspension is based on an action under Executive Order 12549 (3 CFR, 1986 Comp., p. 189) or the Federal Acquisition Regulation (FAR), 48 CFR part 9, subpart 9.4.

In 1988, when the governmentwide nonprocurement debarment and suspension regulations were first published, the Department established procedures to ensure that debarment actions would trigger actions by the Department under part 668 to consider termination of institutions participating in Title IV, HEA. Those special rules were needed because section 487(c) of the HEA, 20 U.S.C. 1094(c), provided that actions to limit, suspend or terminate the eligibility of a school in the Title IV, HEA programs be conducted with an opportunity for a hearing "on the record" under 5 U.S.C. 554–557 while debarment and suspension actions did not have to comply with these "on-the-record" hearing requirements.

In 1992 Congress amended the HEA to eliminate the need for these procedures to include an opportunity for a hearing "on-the-record." However, Title IV, HEA suspension or termination procedures include notice and procedural requirements that are different than those required under the debarment and suspension common rule. Therefore, the Secretary proposes to give direct effect with respect to

eligibility to participate in a Title IV, HEA program only to those debarment and suspension actions that have been imposed under procedures that provide equivalent due process protections to those afforded under the procedural standards in Subparts G of Parts 668 and 682. The Secretary recognizes that the procedures applied by the Department or by another agency may differ in some particulars from Subpart G procedures, but provide the same level of procedural due process, and where the Secretary so determines, that debarment or suspension will apply with respect to participation in Title IV, HEA programs without further administrative appeal. Also, the Secretary proposes to amend those Subparts to provide that a hearing officer must terminate or limit an entity if the designated Department official proves that the entity has been debarred. The addition of this as a mandatory ground for termination reflects the Secretary's recognition of the compelling government interest underlying debarment and suspension decisions in ensuring protection of public funds and deterring their misuse; the adoption of a binding rule that debarment or suspension warrants termination or suspension is consistent with similar determinations compelled under the regulations in cases in which there has been a failure to submit timely required audits, or loss of required accreditation or State licensure.

Regarding suspensions, the Secretary has concluded that there are significant legal differences between suspensions under part 85 and emergency actions under parts 668 and 682.

Therefore, suspensions under part 85 or the common regulations of other agencies will not be given effect as emergency actions under those parts. However, the Secretary proposes to amend part 85 to provide that, whenever an institution, lender, or third-party servicer is suspended under the common rule, the Secretary will determine whether an emergency action should be initiated against that entity.

List of Subjects

34 CFR Part 85

Administrative practice and procedure, Contract programs, Grant programs, Grant programs—education, Grant administration.

34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Education, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Student aid.

34 CFR Part 682

Administrative practice and procedure, Colleges and universities, Grant programs—education, Loan programs—education Reporting and recordkeeping requirements, Student aid, Vocational education.

It is proposed that title 34, parts 85, 668, and 682 of the Code of Federal Regulations be amended as follows:

Richard W. Riley,

Secretary of Education.

PART 85—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 85 is revised to read as follows:

Authority: Executive Orders 12549 and 12689; Sec. 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, Title V Subtitle D 41 U.S.C. 701 et. seq.); 20 U.S.C. 1232 and 3474, unless otherwise noted.

§§ 85.100, 85.105, 85.110, 85.225 and Appendix A [Amended]

2. Sections 85.100, 85.105, 85.110, and 85.225 and Appendix A to Part 85 are amended as set forth at the end of the common preamble.

3. Section 85.201 is amended by revising paragraph (a) and paragraph (b)(2) to read as follows:

§ 85.201 Treatment of Title IV, HEA participation.

(a)(1) The debarment of an educational institution, lender, or third-party servicer under E.O. 12549 pursuant to procedures that provide equivalent due process protections to those requirements in 34 CFR part 668, subpart G, or 34 CFR part 682, subpart G, applicable to the termination of the eligibility of the entity, terminates the eligibility of the entity to participate in any student financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended, for the duration of the debarment.

(2)(i) The suspension of an educational institution, lender, or third-party servicer under E.O. 12549 pursuant to procedures that provide equivalent due process protections to those requirements in 34 CFR part 668, subpart G, or 34 CFR part 682, subpart G, applicable to the suspension of the eligibility of the entity suspends the eligibility of the entity to participate in any student financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended.

(ii) The suspension of Title IV, HEA eligibility lasts for a period of 60 days, beginning on the date of the suspending official's decision, except that it may last longer if the suspended entity and the Secretary agree to an extension or if the Secretary initiates a limitation or termination proceeding against the entity under 34 CFR part 668, subpart G, or 34 CFR part 682, subpart G, as applicable, prior to the 60th day.

(b) * * *

(2)(i) The Secretary initiates a debarment or suspension proceeding under §§ 85.316 or 85.414, respectively, against an educational institution, lender, or third-party servicer that is suspended or debarred under E.O. 12549 by ED or another Federal agency if the procedures used did not provide equivalent due process protections to those requirements in 34 CFR 668, subpart G, or part 682, subpart G, that apply to the termination or suspension of the eligibility of that entity.

(ii) If an institution, lender, or third-party servicer is suspended by ED or another Federal agency, the Secretary determines whether grounds exist for the initiation of an emergency action against the entity under 34 CFR part 668, subpart G or part 34 CFR 682, subpart G, as applicable.

§ 85.314 [Amended]

4. Section 85.314 is amended by adding the words "or third-party servicer" after the word "institution" in paragraph (d)(1)(iv)(A) and after the word "lender" in paragraph (d)(1)(iv)(B).

§ 85.316 [Amended]

5. Section 85.316 is amended by removing paragraph (a)(2), by redesignating paragraphs (a)(1) introductory text, (a)(1)(i) and (a)(1)(ii) as paragraphs (a) introductory text, (a)(1) and (a)(2), respectively, and by adding ", lender, or third-party servicer" after the word "institution" in newly designated paragraph (a) introductory text and ", or 34 CFR part 682, subpart G, as applicable" after the words "subpart G" in newly designated paragraph (a)(2).

§ 85.414 [Amended]

6. Section 85.414 is amended by removing paragraph (a)(2) and redesignating paragraph (a)(3) as paragraph (a)(2).

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

1. The authority for part 668 continues to read as follows:

Authority: 20 U.S.C. 1085, 1088, 1091, 1092, 1094, 1099c, and 1141, unless otherwise noted.

§ 668.82 [Amended]

2. Section 668.82 is amended by removing from paragraph (f)(1) "that comply with 5 U.S.C. 554–557 (formal adjudication requirements under the Administrative Procedure Act)," and adding, in their place, "provide equivalent due process protections to the procedural requirements of this subpart applicable to termination of eligibility," and by removing from paragraph (f)(2)(i) introductory text "that comply with 5 U.S.C. 554–557" and adding, in their place, "provide equivalent due process protections to the procedural requirements of this subpart applicable to a suspension of eligibility".

3. Section 668.90 is amended by removing the word "and" at the end of paragraph (a)(3)(vi); removing the period at the end of paragraph (a)(3)(vii)(F) and inserting in its place a semi-colon, and by adding new paragraphs (a)(3)(viii) and (a)(3)(ix), to read as follows:

§ 668.90 Initial and final decisions—Appeals.

(a) * * *

(3) * * *

(viii) In a termination action against an institution or third-party servicer based on a debarment under Executive Order 12549 or the Federal Acquisition Regulation (FAR), 48 CFR part 9, subpart 9.4, if the hearing official finds that the institution or servicer has been debarred, the hearing official finds that the termination is warranted; and

(ix) In a suspension action against an institution or third- party servicer based on a suspension under Executive Order 12549 or a proposed debarment under the FAR, if the hearing official finds that the institution or servicer has been suspended, the hearing official finds that the suspension is warranted.

* * * * *

PART 682—FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAMS

1. The authority citation for part 682 continues to read as follows:

Authority: 20 U.S.C. 1071 to 1087–2, unless otherwise noted.

2. Section 682.705 is amended by removing the cross-reference "(c)(8)" in paragraph (b)(2)(v), and adding, in its place "(c)(9)", by redesignating paragraphs (c)(6), (7), and (8) as paragraphs (c)(7), (8), and (9), respectively, and adding a new paragraph (c)(6), to read as follows:

§ 682.705 Suspension proceedings.

* * * * *

(c) * * *

(6) In a suspension action against a lender or third-party servicer based on a suspension under Executive Order 12549 or a proposed debarment under the FAR, if the presiding officer finds that the lender or servicer has been suspended, the presiding officer finds that the suspension is warranted.

* * * * *

3. Section 682.706 is amended by redesignating paragraphs (b)(7), (8), and (9) as paragraphs (b)(8), (9), and (10), respectively, and adding a new paragraph (b)(7), to read as follows:

§ 682.706 Limitation or termination proceedings.

* * * * *

(b) * * *

(7) In a termination action against a lender or third-party servicer based on a debarment under Executive Order 12549 or a proposed debarment under the FAR, if the presiding officer finds that the lender or servicer has been debarred, the presiding officer finds that the termination is warranted.

* * * * *

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

36 CFR Part 1209

RIN 3095–AA38

FOR FURTHER INFORMATION CONTACT: Mary Ann Hadyka, Policy and Information Resources Management, 301–713–6730.

List of Subjects in 36 CFR Part 1209

Contract programs, Grant programs—Archives and Records.

It is proposed that title 36, chapter XII of the Code of Federal Regulations be amended as follows.

Trudy Huskamp Peterson,

Acting Archivist of the United States.

PART 1209—GOVERNMENT DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 1209 continues to read as follows:

Authority: E.O. 12549; sec. 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, title V, subtitle D; 41 U.S.C. 701 *et seq.*); 44 U.S.C. 2104(a).

§§ 1209.100, 1209.105, 1209.110, 1209.200, 1209.225 and Appendix [Amended]

2. Sections 1209.100, 1209.105, 1209.110, 1209.200, and 1209.225 and Appendix A to Part 1209 are amended as set forth at the end of the common preamble.

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 44

FOR FURTHER INFORMATION CONTACT: Ms. Judith A. Caden, Assistant Director for Loan Policy (264), Loan Guaranty Service, Veterans Benefits Administration, Department of Veterans Affairs, Washington, DC 20420, (202) 273–7368.

List of Subjects in 38 CFR Part 44

Contract programs, Grant programs, Housing, Loan Programs-housing and community development, Reporting and recordkeeping requirements, Veterans.

It is proposed that title 38, chapter I of the Code of Federal Regulations be amended as follows.

Dated: December 9, 1994.

Jesse Brown,

Secretary of Veterans Affairs.

PART 44—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

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

Authority: 38 U.S.C. 501(a) and 3703(c); E.O. 12549; E.O. 12689.

§§ 44.100, 44.105, 44.110, 44.200, 44.225 and Appendix A [Amended]

2. Sections 44.100, 44.105, 44.110, 44.200, and 44.225 and Appendix A to Part 44 are amended as set forth at the end of the common preamble.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 32

RIN 2030–AA39

FOR FURTHER INFORMATION CONTACT: Robert F. Meunier, Director, Suspension and Debarment Division (3902F), 401 M Street, S.W., Washington, D.C. 20460. Telephone: (202) 260–8025.

List of Subjects in 40 CFR Part 32

Administrative practice and procedure, Contract programs, Grant programs, Debarment and suspension,

Reporting and recordkeeping requirements.

It is proposed that title 40, chapter I of the Code of Federal Regulations be amended as follows.

Dated: December 9, 1994.

Carol M. Browner,

Administrator.

PART 32—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 32 continues to read as follows:

Authority: E.O. 12549; 41 U.S.C. 701 et seq.; 7 U.S.C. 136 et seq.; 15 U.S.C. 2601 et seq.; 20 U.S.C. 4011 et seq.; 33 U.S.C. 1251 et seq.; 42 U.S.C. 300f, 4901, 6901, 7401, 9801.

§§ 32.100, 32.105, 32.110, 32.200, 32.225 and Appendix A [Amended]

2. Sections 32.100, 32.105, 32.110, 32.200, and 32.225 and Appendix A to Part 32 are amended as set forth at the end of the common preamble.

GENERAL SERVICES ADMINISTRATION

41 CFR Part 105–68

RIN 3090–AF65

FOR FURTHER INFORMATION CONTACT: Donald Suda (202) 501–1224.

List of Subjects in 41 CFR Part 105–68

Debarment and suspension (nonprocurement), Drug abuse, Grant programs.

It is proposed that title 41, Chapter 105 of the Code of Federal regulations be amended as follows:

Dated: December 6, 1994.

Ida M. Ustad,

Associate Administrator for Acquisition Policy.

PART 105–68—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG FREE WORKPLACE (GRANTS)

1. The authority for part 105–68 continues to read as follows:

Authority: E.O. 12549; sec. 5151–5160 of the Drug Free Workplace Act of 1988 (Pub. L. 100–690, Title V, Subtitle D; 41 U.S.C. 701 et, seq); 40 U.S.C. 486(c).

§§ 105–68.100, 105–68.105, 105–68.110, 105–68.200, 105–68.225 and Appendix A [Amended]

2. Sections 105–68.100, 105–68.105, 105–68.110, 105–68.200, 105–68.225 and Appendix A to Part 105.68 are amended as set forth at the end of the common preamble.

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 12

RIN 1090–AA49

FOR FURTHER INFORMATION CONTACT: Dean A. Titcomb, (Chief, Acquisition and Assistance Division), (202) 208–6431.

ADDITIONAL SUPPLEMENTARY INFORMATION: The Department published an agency-specific preamble as part of the final nonprocurement debarment and suspension common rule on May 26, 1988 (53 FR 19159), which indicated that, due to the expanded scope of transactions covered under the rule, coverage of its nonprocurement debarment and suspension system was limited to transactions included in section 12.110(a)(1) of its proposed rule (52 FR 39042).

The Department also indicated that a review of the Department's other nonprocurement program activities would be made to determine whether such activities would be included in the coverage. The review was made; however, plans to issue a notice of proposed rulemaking to obtain public comment on covered transactions on or before October 1, 1988, were dropped.

Issues of concern to the Department were addressed through the subcommittee of the Interagency Committee on Debarment and Suspension which reviewed the scope of the nonprocurement debarment system. Although the revision of the common rule being proposed does not address the issue of scope, the Department is proposing to include the results of the resolution of this issue as part of the publication of this proposed revision as discussed below.

New exceptions for certain types of transactions under natural resource management programs are being proposed. These exceptions would make clear that permits, licenses, exchanges and other acquisitions of real property, rights-of-way, and easements, under natural resource management programs would be excluded from coverage.

For example, when the Federal Government seeks to acquire real property, including through use of an exchange of real property elsewhere, the transaction will not be subject to these regulations. In such cases, where the success of the agency program depends on a specific parcel of land, the application of the debarment and suspension system could harm the public interest. Moreover, public land management activities require the use of certain transactions for land and resource management without regard to the identity of the recipient. Accordingly, range management transactions, such as grazing permits and rights-of-way, are excluded by the proposed exception language. Similarly, virtually all recreation management and public land access transactions are not covered.

In addition, the Department is proposing to amend section 12.110(a)(3) of its final rule to include nonprocurement debarment system coverage for Federal acquisition of a leasehold interest or any other interest in real property, concession contracts, and disposition of Federal real and personal property and natural resources.

The scope of the Department's nonprocurement debarment system will include transactions associated with natural resources management programs and the disposition of natural resources with the following exceptions: permits, licenses, exchanges and other acquisitions of real property, rights-of-way, easements, mineral patent claims administered by the Bureau of Land Management and water service contracts and repayment contracts awarded by the Bureau of Reclamation. Patents issued under the Mining Law of 1872, 30 U.S.C. 22 et seq., as amended are statutory entitlements and, therefore, are exempt under the terms of Executive Order 12549. The award of water service contracts and repayment contracts is mandatory, provided by the Reclamation Project Act of 1939, as amended, set forth at 43 U.S.C. 485.

Therefore, the Department proposes to exclude all transactions concerning permits, licenses, exchanges and other acquisitions of real property, rights-of-way, easements, mineral patent claims, water service contracts, and repayment contracts from its nonprocurement debarment and suspension system.

A corresponding change is also being proposed in Section 12.200(c) to add a reference to these excluded transactions.

List of Subjects in 43 CFR Part 12

Administrative practice and procedures, Cooperative agreements, Grants administration, Grant programs, Reporting and recordkeeping requirements.

It is proposed that title 43, part 12 of the Code of Federal Regulations be amended as follows.

Dated: December 8, 1994.

Bonnie R. Cohen,

Assistant Secretary-Policy, Management and Budget.

PART 12—ADMINISTRATIVE AND AUDIT REQUIREMENTS AND COST PRINCIPLES FOR ASSISTANCE PROGRAMS

1. The authority for part 12 continues to read as follows:

Authority: E.O. 12549; E.O. 12689; Sec. 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub.L. 100–690, Title V, Subtitle D; 41 U.S.C. 701 *et seq.*); U.S.C. 301; Pub.L. 98–502; OMB Circular A–102; OMB Circular A–110; OMB Circular A–128; and OMB Circular A–133.

§§ 12.100, 12.105, 12.110, 12.200, 12.225 and Appendix A [Amended]

Subpart D—Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)

2. Sections 12.100, 12.105, 12.110, 12.200, and 12.225 and Appendix A to Subpart D of part 12 are amended as set forth at the end of the common preamble.

3. Section 12.110 is further amended by adding paragraphs (a)(2)(ix), (x), and (xi), and revising paragraph (a)(3) to read as follows:

§ 12.110 Coverage.

(a) * * *

(2) * * *

(ix) Under natural resources management programs, permits, licenses, exchanges and other acquisitions of real property, rights-of-way, and easements.

(x) Transactions concerning mineral patent claims entered into pursuant to 30 U.S.C. 22 *et. seq.*

(xi) Water service contracts and repayment contracts entered into pursuant to 43 U.S.C. 485.

(3) *Department of the Interior covered transactions.* These Department of the Interior regulations apply to the Department's domestic assistance covered transactions (whether by a Federal agency, recipient, subrecipient, or intermediary) including, except as noted in paragraph (a)(2) of this section: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements, Federal acquisition of a leasehold interest or any other interest in real property, concession contracts, dispositions of Federal real and personal property and natural resources, subawards, subcontracts and transactions at any tier that are charged as direct or indirect costs, regardless of type (including subtier awards under awards which are statutory entitlement or mandatory awards), and any other nonprocurement transactions between the Department and a person.

* * * * *

4. Section 12.200 is further amended by adding paragraphs (c)(9), (10), and (11) to read as follows:

§ 12.200 Debarment or suspension.

* * * * *

(c) * * *

(9) Under natural resources management programs, permits, licenses, exchanges and other acquisitions of real property, rights-of-way, and easements.

(10) Mineral patent claims entered into pursuant to 30 U.S.C. 33 *et. seq.*

(11) Water service contracts and repayment contracts entered into pursuant to 43 U.S.C. 485.

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 17

FOR FURTHER INFORMATION CONTACT: Robert R. Boyer, Operations Support Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4168.

List of Subjects in 44 CFR Part 17

Administration practices and procedures, Contract programs, Drug abuse, Grant programs, Loan programs, Reporting and recordkeeping requirements.

It is proposed that title 44, Chapter I of the Code of Federal Regulations be amended as follows:

Dated: December 9, 1994.

Harvey G. Ryland,

Deputy Director.

PART 17—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 17 is proposed to be revised to read as follows:

Authority: E.O. 12549, 51 FR 6370, 3 CFR, 1987 Comp., p.; E.O. 12689, 54 FR 34131, 3 CFR, 1990 Comp., p. 235; Secs. 5151–5160 of the Drug-Free Workplace Act of 1968 (Pub. L. 100–690, Title V, Subtitle D; 41 U.S.C. 701 et seq.).

§§ 17.100, 17.105, 17.110, 17.200, 17.225 and Appendix A [Amended]

2. Sections 17.100, 17.105, 17.110, 17.200, and 17.225 and Appendix A to Part 17 are amended as set forth at the end of the common premable.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 76

RIN 0991–AA78

FOR FURTHER INFORMATION CONTACT: Neil Steyskal, Office of Grants and Acquisition Management, 202–690–5729; TDD 202–690–6415.

List of Subjects in 45 CFR Part 76

Contract programs, Grant programs.

It is proposed that title 45, part 76 of the Code of Federal Regulations be amended as follows.

Dated: December 9, 1994.

Donna E. Shalala,

Secretary.

PART 76—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 76 is revised to read as follows:

Authority: E.O. 12549 and E.O. 12689; sec. 2455 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355); sec. 5151–5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, Title V, Subtitle D; 41 U.S.C. 701 et seq); 5 U.S.C. 301.

§§ 76.100, 76.105, 76.110, 76.225 and Appendix A [Amended]

2. Sections 76.100, 76.105 (except amendment to definition for "Legal proceedings"), 76.110, and 76.225 and Appendix A to Part 76 are amended as set forth at the end of the common preamble.

NATIONAL SCIENCE FOUNDATION

45 CFR Part 620

RIN 3145–AA28

FOR FURTHER INFORMATION CONTACT: Anita Eisenstadt, Assistant General Counsel, Office of the General Counsel, 703–306–1060.

List of Subjects in 45 CFR Part 620

Contract Programs, Grant programs.

It is proposed that title 45, chapter VI of the Code of Federal Regulations be amended as follows.

Lawrence Rudolph,

Acting General Counsel.

PART 620—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 620 is revised to read as follows:

Authority: 42 U.S.C. 1870 (a).

§ 620.100, 620.105, 620.110, 620.200, 620.225 and Appendix A [Amended]

2. Sections 620.100, 620.105, 620.110 620.200, and 620.225 and Appendix A to Part 620 are amended as set forth at the end of the common preamble.

NATIONAL FOUNDATION OF THE ARTS AND THE HUMANITIES

National Endowment for the Arts

45 CFR Part 1154

RIN 3135–AA12

FOR FURTHER INFORMATION CONTACT:

Ms. Donna DiRicco, Acting Grants Officer, National Endowment for the Arts, (202) 682–5403.

List of Subjects in 45 CFR Part 1154

Contract Programs, grant programs.

It is proposed that title 45, chapter XI, subchapter B of the code of Federal Regulations be amended as follows.

Laurence Baden,

Deputy Chairman for Management.

PART 1154—GOVERNMENT DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 1154 is revised to read as follows:

Authority: 20 U.S.C. 959(a)(1).

§§ 1154.100, 1154.105, 1154.110, 1154.200, 1154.225 and Appendix A [Amended]

2. Sections 1154.100, 1154.105, 1154.110, 1154.200, and 1154.225 and Appendix A to Part 1154 are amended as set forth at the end of the common preamble.

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Humanities

45 CFR Part 1169

RIN 3136–AA20

FOR FURTHER INFORMATION CONTACT:

David C. Fisher, Deputy General Counsel, National Endowment for the Humanities, Room 530, Washington, DC 20506, (202) 606–8322.

List of Subjects in 45 CFR Part 1169

Contract programs, Grant programs.

It is proposed that title 45, chapter XI, subchapter D of the Code of Federal Regulations be amended as follows.

Sheldon Hackney,

Chairman.

PART 1169—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 1169 is revised to read as follows:

Authority: Executive Orders 12549 and 12689; 20 U.S.C. 959(a)(1).

§§ 1169.100, 1169.105, 1169.110, 1169.200, 1169.225 and Appendix A [Amended]

2. Sections 1169.100, 1169.105, 1169.110, 1169.200 and 1169.225 and Appendix A to Part 1169 are amended as set forth at the end of the common preamble.

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum Services

45 CFR Part 1185

FOR FURTHER INFORMATION CONTACT:

Rebecca Danvers, Program Director, 202–606–8539.

List of Subjects in 45 CFR Part 1185

Contract programs, Grant programs.

It is proposed that title 45, Chapter 1185 of the Code of Federal Regulations be amended as follows.

Diane B. Frankel,

Director.

PART 1185—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 1185 is revised to read as follows:

Authority: 20 U.S.C. 961–968.

§§ 1185,100, 1185,105, 1185,110, 1185,200, 1185,225 and Appendix A [Amended]

2. Section 1185.100, 1185.105, 1185.110, 1185.200, and 1185.225 and Appendix A to Part 1185 are amended as set forth at the end of the common preamble.

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

45 CFR Part 2542

RIN 3045–AA11

FOR FURTHER INFORMATION, CONTACT:

Michael Kenefick, Director of Grants and Contracts, 202–606–5000 ext. 101.

List of Subjects in 45 CFR Part 2542

Administrative practice and procedure, Contract programs, Grant programs, Drug abuse, Reporting and recordkeeping requirements.

It is proposed that title 45, chapter XXV of the Code of Federal Regulations be amended as follows:

Gary Kowalczyk,

Acting Chief Financial Officer.

PART 2542—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 2542 continues to read as follows:

Authority: 42 U.S.C. 12501 et seq.

§§ 2542.10 [_____.100], 2542.20 [_____.105], 2542.30 [_____.110], 2542.150 [_____.225], and Appendix A [Amended].

2. Sections 2542.10 [_____.100], 2542.20 [_____.105] (except for amendments removing paragraph designations and alphabetizing the definitions and amendments to definitions for "Affiliate" and "Legal proceedings"), 2542.30 [_____.110], and 2542.150 [_____.225] and Appendix A to Part 2542 are amended

as set forth at the end of the common preamble.

[FR Doc. 94–30996 Filed 12–19–94; 8:45 am]

BILLING CODE 6325–01–M
BILLING CODE 3410–01–M
BILLING CODE 6450–01–M
BILLING CODE 8025–01–M
BILLING CODE 3510–FA–M
BILLING CODE 3180–02–M
BILLING CODE 4710–24–M
BILLING CODE 6116–01–M
BILLING CODE 6050–01–M
BILLING CODE 8230–01–M
BILLING CODE 7025–01–M
BILLING CODE 6117–01–M
BILLING CODE 4210–32–P
BILLING CODE 4410–18–M
BILLING CODE 4510–23–M
BILLING CODE 6372–01–M
BILLING CODE 4810–25–M
BILLING CODE 5000–04–M
BILLING CODE 4000–01–P
BILLING CODE 7515–01–M
BILLING CODE 8320–01–M
BILLING CODE 6560–50–M
BILLING CODE 4310–RF–P
BILLING CODE 6718–01–M
BILLING CODE 4150–04–M
BILLING CODE 7555–01–M
BILLING CODE 7537–01–M
BILLING CODE 7536–01–M
BILLING CODE 7036–01–M
BILLING CODE 6050–28–M

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9, 22, 28, 44, and 52

[FAR Case 94–801]

RIN 9000–AG22

Federal Acquisition Regulation; Debarment, Suspension, and Ineligibility (Ethics)

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: This proposed rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994, Public Law 103–355 (the Act). The Federal Acquisition Regulatory Council is considering amending Federal Acquisition Regulation (FAR) Subpart 9.4, Debarment, Suspension, and Ineligibility, the clause at 52.209–6, Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended or Proposed for Debarment, and provisions in parts 22, 28, and 44, respectively. This includes information required to support the policy of ensuring that suspensions, debarments, and other exclusions from procurement and nonprocurement activities receive reciprocal Government-wide effect as directed by Executive Order (E.O.) 12689, dated August 16, 1989, and Section 2455, Uniform Suspension and Debarment, of the Act. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: Comments should be submitted on or before February 21, 1995 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS),18th & F Streets, NW, Room 4037, Washington, DC 20405.

Please cite FAR case 94–801 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Julius Rothlein, Ethics Team Leader, at (703) 697–4349 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501–4755. Please cite FAR case 94–801.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103–355 (the Act), provides authorities that streamline the acquisition process and minimize burdensome government-unique requirements. Major changes that can be expected in the acquisition process as a result of the Act's implementation include changes in the areas of Commercial Item Acquisition, Simplified Acquisition Procedures, the Truth in Negotiations Act, and introduction of the Federal Acquisition Computer Network. In order to promptly achieve the benefits of the provisions of the Act, the Government is issuing implementing regulations on an expedited basis. We believe prompt publication of proposed rules provides the public the opportunity to participate more fully in the process of developing regulations.

FAR case 94–801 originated because Section 2455 of Public Law 103–355 was enacted to remedy the current situation where suspensions, debarments and other exclusions from procurement and nonprocurement activities do not have reciprocal Government-wide effect. The concept of reciprocity for procurement and nonprocurement suspension and debarment actions is not new. Since August 1989 there has been an effort to do by executive order (*i.e.*, E.O. 12689), what section 2455 now prescribes by law. That earlier effort was worked on by a committee known as the "Interagency Committee on Debarment and Suspension." This Interagency Committee is made up of 16 Federal executive agencies that impose nonprocurement suspensions and debarments. By October 1994 the agencies in an ad hoc group reached agreement on the language that would implement the concept of reciprocity and be consistent with the principles of the National Performance Review. The language proposed for FAR 9.401, Applicability, has been coordinated with the ad hoc group of agencies. The proposed changes to the procurement and nonprocurement rules will implement Section 2455 and E.O. 12689 by ensuring that suspensions, debarments, and other exclusions from procurement and nonprocurement activities have reciprocal Government-wide effect.

The FAR Council is interested in an exchange of ideas and opinions with respect to the regulatory implementation of the Act. For that reason, the FAR Council is conducting a series of public meetings. However, the FAR Council has not scheduled a public meeting on this rule (FAR case 94–801) because of the clarity and non-controversial nature of the rule. If the public believes such a meeting is needed with respect to this rule, a letter requesting a public meeting and outlining the nature of the requested meeting shall be submitted to and received by the FAR Secretariat (see **ADDRESSES** caption) on or before January 19, 1995.

The FAR Council will consider such requests in determining whether a public meeting on this rule should be scheduled.

B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Only a very small percentage of Federal contractors are debarred or suspended. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subpart will also be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite FAR case 94–801 in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 9, 22, 28, 44, and 52

Government procurement.

Dated: December 8, 1994.

Capt. Barry L. Cohen,

SC, USN, Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Therefore, it is proposed that 48 CFR Parts 9, 22, 28, 44, and 52 be amended as set forth below:

1. The authority citation for 48 CFR Parts 9, 22, 28, 44, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 9—CONTRACTOR QUALIFICATIONS

2. Section 9.105–1(c)(1) is revised to read as follows:

9.105–1 Obtaining information.

* * * * *

(c) * * *

(1) The List of Parties Excluded from Federal Procurement and Nonprocurement Programs maintained in accordance with Subpart 9.4.

* * * * *

3. Section 9.207(a)(9) is revised to read as follows:

§ 9.207 Changes in status regarding qualification requirements.

* * * * *

(a) * * *

(9) The source is on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs (see Subpart 9.4); or

* * * * *

4. Section 9.401 is revised to read as follows:

9.401 Applicability.

In accordance with Public Law 103–355, Section 2455 (31 U.S.C. 6101 note), and Executive Order 12689, any debarment, suspension or other Government-wide exclusion imposed under the Nonprocurement Common Rule implementing Executive Order 12549 after effective date of final rule shall be recognized by and effective for Executive Branch agencies as a debarment or suspension under this subpart. Similarly, any debarment, suspension, proposed debarment or other Government-wide exclusion imposed under this subpart shall also be recognized by and effective for those agencies and participants as an exclusion under the Nonprocurement Common Rule.

5. Section 9.403 is amended by removing the definition *Parties Excluded from Procurement Programs* and adding, in alphabetical order, the definitions *List of Parties Excluded from Federal Procurement and Nonprocurement Programs* and *Nonprocurement Common Rule* to read as follows:

9.403 Definitions.

* * * * *

List of Parties Excluded from Federal Procurement and Nonprocurement Programs means a List compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about parties debarred, suspended, or voluntarily excluded under the Nonprocurement Common Rule or the Federal Acquisition Regulation, parties who have been proposed for debarment under the Federal Acquisition Regulation, and parties determined to be ineligible.

Nonprocurement Common Rule means the procedures used by Federal Executive Agencies to suspend, debar, or exclude individuals or entities from participation in nonprocurement transactions under Executive Order 12549. Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements.

* * * * *

6. Section 9.404 is amended—

a. By revising the section heading to read as set forth below;

b. By revising paragraphs (a)(1), (b) introductory text, (c)(5), (d) introductory text, (d)(3); and

c. In paragraph (c)(3) by removing the word "consolidated".

The revised text reads as follows:

9.404 List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

(a) * * *

(1) Compile and maintain a current list of all parties debarred, suspended, proposed for debarment, or declared ineligible by agencies or by the General Accounting Office;

* * * * *

(b) The List of Parties Excluded from Federal Procurement and Nonprocurement Programs shall indicate—

* * * * *

(c) * * *

* * * * *

(5) Establish procedures to provide for the effective use of the List of Parties Excluded from Federal Procurement and Nonprocurement Programs, including internal distribution thereof, to ensure that the agency does not solicit offers from, award contracts to, or consent to subcontracts with contractors on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs, except as otherwise provided in this subpart; and

* * * * *

(d) Information on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs is available as follows:

* * * * *

(3) A telephone inquiry service to answer general questions about entries on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs is also available by calling GSA at (202) 501–4873 or 501–4740. The inquiry will be answered within one working day.

9.405 [Amended]

7. Section 9.405 is amended—

a. In paragraph (b) by removing the words "Parties Excluded from Procurement Programs" and inserting in its place "List of Parties Excluded from Federal Procurement and Nonprocurement Programs";

b. In paragraph (d)(1) by removing the words "Procurement Programs" and inserting in its place "Federal Procurement and Nonprocurement Programs".

9.405–2 [Amended]

8. Section 9.405–2 is amended in the third sentence of paragraph (b) introductory text, and paragraphs (b)(2) and (b)(3) by removing the words "list of Parties Excluded from Procurement Programs" and inserting in its place "List of Parties Excluded from Federal Procurement and Nonprocurement Programs".

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1025 [Amended]

9. Section 22.1025 is amended in the first sentence by removing the word "lists" and inserting in its place "List".

PART 28—BONDS AND INSURANCE

28.203–7 [Amended]

10. Section 28.203–7 is amended in paragraphs (c) and (d) by removing the words "list entitled Parties Excluded from Procurement Programs" and inserting in its place "List of Parties Excluded from Federal Procurement and Nonprocurement Programs".

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

44.202–2 [Amended]

11. Section 44.202–2 is amended in paragraph (a)(13) by removing the words "Consolidated List of Debarred, Suspended, and Ineligible Contractors" and inserting in its place "List of Parties Excluded from Federal Procurement and Nonprocurement Programs".

44.303 [Amended]

12. Section 44.303 is amended in paragraph (c) by removing the words "list of Parties Excluded from Procurement Programs" and inserting in its place "List of Parties Excluded from Federal Procurement and Nonprocurement Programs".

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.209–6 [Amended]

13. Section 52.209–6 is amended in paragraphs (c) introductory text, (c)(2), and (c)(3) by removing the words "Procurement Programs" and inserting in its place "Federal Procurement and Nonprocurement Programs".

[FR Doc. 94–30995 Filed 12–19–94; 8:45 am]

BILLING CODE 6820–34–P

federal register

Tuesday
December 20, 1994

Part IV

Securities and Exchange Commission

17 CFR Part 210 et al.
Selection of Reporting Currency for Financial Statements of Foreign Private Issuers, et al.; Final Rules and Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210 and 249

[Release Nos. 33–7117; 34–35093; FR43; International Series Release No. 757; File No. S7–11–94]

RIN 3235–AD70

Selection of Reporting Currency for Financial Statements of Foreign Private Issuers and Reconciliation to U.S. GAAP for Foreign Private Issuers With Operations in a Hyperinflationary Economy

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Commission is announcing the adoption of amendments to Regulation S–X and Form 20–F to facilitate registration and reporting by foreign private issuers. The amendments allow foreign issuers flexibility in the selection of the reporting currency used in filings with the Commission, and streamline financial statement reconciliation requirements for foreign private issuers with operations in countries with hyperinflationary economies.

EFFECTIVE DATE: December 20, 1994.

FOR FURTHER INFORMATION CONTACT: Wayne E. Carnall, Deputy Chief Accountant, Division of Corporation Finance at (202) 942–2960, Mail Stop 3–13, U.S. Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: As described in detail below, the Commission is adopting amendments to Rule 3–20[1] of Regulation S–X[2] and Form 20–F[3] under the Securities Exchange Act of 1934.[4]

I. Introduction

The Commission is adopting amendments to facilitate registration and reporting by foreign private issuers by allowing flexibility in the selection of the reporting currency used in filings with the Commission and by streamlining financial statement reconciliation requirements for foreign private issuers with operations in countries with hyperinflationary economies. Under the amended rules, a foreign private issuer can state amounts in its financial statements in any currency which it deems appropriate. In addition, a foreign private issuer that accounts in its primary financial statements for its operations in a hyperinflationary economy in accordance with *International Accounting Standards No. 21*, "The Effects of Changes in Foreign Exchange Rates," as amended in 1993 ("IAS 21"), using the historical cost/constant currency method would not need to reconcile the differences that would result from application of the U.S. standard, *Statement of Financial Accounting Standards No. 52*, "Foreign Currency Translation" ("SFAS 52"). The amendments adopted today were proposed by the Commission on April 19, 1994.[5]

Most of the comment letters received regarding the proposals were supportive of the Commission's efforts to increase flexibility in the selection of the reporting currency and to streamline the reconciliation process for foreign private issuers.[6] The Commission believes that this flexibility can be provided to foreign private issuers with no loss of material information that is necessary for a U.S. investor to make an informed investment decision. The amendments are being adopted largely as proposed, with certain modifications and clarifications in response to public comments.

II. Reporting Currency of Foreign Private Issuers

A. Selection of a Reporting Currency

The amendments adopted today permit a foreign private issuer to state the amounts in its primary financial statements using any currency which it deems appropriate. The proposed requirement that the reporting currency also be used to report to a majority of the issuer's nonaffiliated securityholders has been deleted in response to comments, as discussed below.

Commenters generally agreed with the Proposing Release on the need to increase flexibility in the selection of the reporting currency. Commenters agreed that rules regarding reporting currency have been troublesome for some foreign issuers that operate in various currencies. Compliance with the rule previously governing selection of the reporting currency was problematic for some issuers because no primary economic environment could be identified, and the country of incorporation had minimal significance to operations. In addition, several commenters cited the preference of U.S. investors for financial statements prepared using the U.S. dollar as the reporting currency.

A number of commenters expressed the view that, as proposed, the rule was overly restrictive in requiring that the reporting currency used in filings with the Commission also be used in financial statements that are distributed to the majority of the issuer's nonaffiliated shareholders. Commenters believed that requirement would force some foreign issuers to distribute an additional set of financial statements, stated in the currency used for reporting to the Commission, to securityholders outside the U.S. who would find the additional material of no interest or benefit. Mandating delivery of financial statements in foreign countries is not appropriate or necessary for the protection of U.S. investors. Accordingly, the restriction has been deleted from the rule as adopted.

Several commenters favored increased flexibility but suggested various limiting criteria for determining the appropriate currency. A few commenters indicated a view that an issuer should use the same reporting currency for all external reporting. One commenter suggested that the Commission ask the Financial Accounting Standards Board ("FASB") to undertake a project on the selection of reporting currency. The Commission does not believe that a need for new restrictions on a registrant's choice of reporting currency has been demonstrated, and does not believe reporting currency is an issue that needs to be addressed by the FASB. Moreover, restricting an issuer that chooses to sell its securities in U.S. public markets to a single reporting currency in all external reports in any jurisdiction is not practical or necessarily helpful to U.S. investors. Foreign law or custom may require an issuer to publicly distribute financial statements in a currency that is not as meaningful and relevant to U.S. investors as another currency. The Commission believes management and its advisors should be free to select the reporting currency that is most useful for U.S. markets. Of course, reporting practices will continue to be monitored to assess the practiced application of today's amendments.

One commenter that generally supported increased flexibility in the selection of the reporting currency indicated that issuers should not be permitted to report in U.S. dollars if the currency of its primary economic environment or the currency in which

[1] 17 CFR 210.3–20.

[2] 17 CFR 210.

[3] 17 CFR 249.220f.

[4] 15 U.S.C. 78a *et seq.*

[5] See Securities Act Release No. 7054 (April 19, 1994) (59 FR 21644) (the "Proposing Release").

[6] Fourteen comment letters on the proposal were received. Those letters and a summary of the comments are available for public inspection and copying in File No. S7–11–94 at the Commission's Public Reference Room in Washington, DC.

dividends are paid is a currency of a hyperinflationary economy or is subject to material exchange restrictions. That suggestion has not been followed. Domestic issuers that conduct substantial operations in countries whose currency is hyperinflationary consolidate those operations and present them in U.S. dollars. While translation from a currency of a hyperinflationary environment into a more stable currency presents some practical problems, the accounting profession has addressed these situations. SFAS 52 provides guidance on the translation of operations in hyperinflationary economies under U.S. GAAP, and IAS 21, as discussed in a separate section of this release, also prescribes a method of translation.

The rule has not been revised, as suggested by one commenter, to address material foreign exchange restrictions and controls because the resolution of such issues typically is dependent on the particular facts and circumstances. Registrants are encouraged to discuss unique issues regarding exchange restrictions or controls involving the registrant and its subsidiaries and other affiliates with the Commission's staff prior to filing.

The amended rule requires, as was proposed, specific disclosure in a note to the financial statements if the currency in which the issuer expects to declare dividends is different from the reporting currency, or there are material exchange restrictions affecting the reporting currency or the currency in which dividends are paid. Registrants are reminded that to the extent that depicted trends and reported results are affected by exchange rate fluctuations, explanatory disclosure should be provided in filings with the Commission as part of the explanation of the material changes from year to year required by management's discussion and analysis in Regulation S–K[7] as well as the comparable sections presented in Item 9 of Form 20–F.[8]

The adopted rule applies to financial statements of the registrant. Financial statements furnished with respect to equity investees or acquired businesses may be prepared using the same reporting currency as the registrant's primary financial statements or the currency in which that entity normally prepares its financial statements. If the currency selected for the separate financial statements of acquisitions and investees differs from that of the registrant, pro forma information and condensed financial data of an investee should be prepared using the reporting currency of the registrant.[9]

B. Measurement

The Proposing Release requested comment on two alternative approaches to measuring transactions that would then be translated into the reporting currency. Commenters, with one exception, supported the method described as Approach A. Under that approach, the issuer would measure separately its own transactions, and those of each of its material operations (for example, branch, division, subsidiary, or joint venture) that are included in the issuer's consolidated financial statements and located in a non-hyperinflationary environment, using the particular currency of the primary economic environment in which the issuer or the operation conducts its business.[10] Financial statement amounts so determined would be translated to the reporting currency using the methodology that is prescribed by SFAS 52 for translation of financial statements from a functional currency to a reporting currency. Under that method, (a) all assets and liabilities are translated into the reporting currency at the exchange rate at the balance sheet date, (b) all revenues, expenses, gains, and losses are translated at the exchange rate existing at the time of the transaction or, if appropriate, a weighted average of the exchange rates during the period or year, and (c) all the translation effects of exchange rate changes are included as a separate component ("cumulative translation adjustment") of shareholders' equity.

Commenters generally objected to Approach B because measurement of reported results of operations and financial position would be dependent on the issuer's particular reporting currency, rather than the economic environment in which the business operated. Pursuant to Approach B, all transactions of the issuer and its subsidiaries would be measured (or remeasured if not so measured initially) using reporting currency, except that transactions of each of its material foreign operations (for example, branch, division, subsidiary, or joint venture) included in the consolidated financial statements and located in a non-hyperinflationary environment would be measured using the particular currency of the primary economic environment in which the foreign operation conducts its business. Financial statement amounts determined for the material foreign operations of the issuer would be translated using the methodology prescribed by SFAS 52 for translation of financial statements from a functional currency to a reporting currency, as described above. Commenters also opposed Approach B because it could not be readily implemented by foreign issuers that report in several currencies due to the significant data and computational requirements of the remeasurement process. While the Commission has determined not to adopt Approach B in the amendment, issuers that have historically presented results using that method are encouraged to discuss with the staff possible resolutions of any particular problems that may be encountered by the issuer as a result of the Commission's adoption of Approach A.

C. Changes of Reporting Currency

As was proposed, the final amendments provide that changes in the reporting currency require the financial statements of periods prior to the change be comprehensively recast as if the new reporting currency had been used.[11] To comprehensively recast prior financial statements, a methodology consistent with SFAS 52 should be applied. That is, the income statement and statement of cash flows should be translated into the new reporting currency using an appropriately weighted average exchange rate for the applicable period, and assets and liabilities should be translated using the exchange rate at the end of the applicable period. Registrants that encounter unusual or complex problems

[7] 17 CFR 229.303.

[8] 17 CFR 249.220f.

[9] In circumstances where a registrant furnishes separate financial statements of an equity investee pursuant to Rule 3–09 of Regulation S–X, the staff has not required the registrant to also furnish summarized financial data of the investee pursuant to Rule 4–08(g) of Regulation S–X (17 CFR 210.4–08(g)) (*See* Staff Accounting Bulletin No. 44, Topic 6:K (March 3, 1983) (47 FR 10789). However, if the separate financial statements of an equity investee are not prepared in the same reporting currency as the issuer, the summarized financial data pursuant to Rule 4–08(g) of Regulation S–X should be provided in the primary financial statements.

[10] An issuer with a material operation in a hyperinflationary environment would measure the transactions of the operation in the reporting currency pursuant to SFAS 52, except that no reconciliation to that method will be required in the circumstances discussed in Section III of this release.

[11] A change in the reporting currency may or may not be coincidental with a change in the currency of the primary economic environment in which the operations exist. The U.S. accounting guidance applicable to a change in an entity's functional currency appears in paragraph 9 of SFAS 52. The effects of differences between the method of accounting in the primary financial statements for a change in functional currency and the method of accounting prescribed by U.S. GAAP should be explained and quantified where reconciliation is required pursuant to Item 17 or Item 18 of Form 20–F.

in the implementation of a change in reporting are encouraged to discuss those issues with the staff prior to filing.

While the number of periods for which retroactive recasting of results is computed generally does not affect relationships among balance sheet or income statement amounts, it may affect the allocation of amounts between the cumulative translation adjustment and other stockholder equity accounts. As proposed, the adopted rule specifies that financial statements of prior periods need be comprehensively recast as if the new reporting currency had been used only since the earliest period presented in the filing that initially reflects the change in reporting currency.

In response to requests for views regarding the need to disclose the reasons for a registrant's change in its reporting currency, several commenters questioned the need for the disclosure or doubted that the information would be useful. Comments of financial analysts supported such a disclosure. The Commission agrees with those commenters that indicated that disclosure of the reason for the change would be informative, and accordingly, the adopted rule requires that disclosure.

III. Foreign Issuer Operations in a Hyperinflationary Economy

As adopted, the rules eliminate the requirement that a foreign private issuer quantify the effects of a translation methodology for operations in a hyperinflationary environment which differs from SFAS 52 so long as the method used in the financial statements conforms with IAS 21, provided that the method is used consistently for all periods. IAS 21, as amended in 1993, requires that amounts in the financial statements of the hyperinflationary operations be restated for the effects of changing prices using a methodology permitted by *International Accounting Standard No. 29*, "Financial Reporting in Hyperinflationary Economies" ("IAS 29"), and then translated to the reporting currency. The adopted rule differs from the proposal in that it limits the permissible method for restating for effects of changing prices to the historical cost/constant dollar method, as discussed below

Commenters supporting the Commission's proposal cited various reasons including the high cost of reconciliation for differences in accounting for hyperinflationary operations, support for harmonization of international accounting standards, and the view that IAS 21 is theoretically superior to SFAS 52. In addition, commenters observed that acceptance of IAS 21 without reconciliation is consistent with the Commission's existing rule that does not require the elimination of the effects of inflation in price level adjusted financial statements in the reconciliation to U.S. GAAP. One commenter opposed the proposal, suggesting that the Commission was abandoning the objective of providing the market with comparable information about issuers. The Commission's acceptance of IAS 21 for purposes of foreign issuers is based, in part, on the recognition that financial information reported about the hyperinflationary operations of a foreign issuer will not necessarily be comparable to a U.S. issuer or to another foreign issuer if that information is determined on a basis consistent with SFAS 52. Since SFAS 52 requires the use of the reporting currency as the currency of measurement for hyperinflationary operations, reported results are dependent on the reporting currency under SFAS 52. IAS 29 addresses that problem by adjusting measurements in the local currency for inflation before translation to the reporting currency.

IAS 29 permits two methods of adjusting for the effects of changing prices: (a) Restatement of historical cost amounts into units of currency that have the same general purchasing power (historical cost/constant currency method), or (b) measurement as current cost, with amounts for prior periods restated for changes in the general level of prices (current cost method). In response to a request for comments concerning the appropriateness of accepting either method under IAS 29, two commenters indicated that the flexibility permitted by IAS 29 would not promote consistency or an understanding of the financial statements. In recognition of this concern, the adopted rule does not allow the use of the current cost approach. The Commission believes that the historical cost/constant currency method is the preferable choice of the two because it is more likely to facilitate comparison among similarly situated companies. Under the historical cost/constant currency method, amounts in the financial statements of the hyperinflationary operation are restated for the effects of changing prices, and then translated to the reporting currency.

The elimination of the alternative of using the current cost method is not expected to have a significant effect on many registrants. Issuers from several countries currently prepare financial statements filed with the Commission that are adjusted for inflation. With the exception of Mexico, it is the predominant practice in most of these countries to use a method consistent with the historical cost/constant currency method in IAS 29.[12] The elimination of the availability of using the current cost method does not apply to situations in which the issuer's reporting currency comprehensively includes the effects of price level changes. Such entities can continue to use the current cost method. That is, the current cost method is eliminated only for those issuers whose reporting currency is not adjusted for inflation (stable reporting currency), but have operations in a hyperinflationary economy. Issuers that use the current cost method for operations in a hyperinflationary economy should discuss their particular circumstances with the staff.

As proposed, a hyperinflationary environment is defined in the adopted rule as one experiencing cumulative inflation of approximately 100% or more over the most recent three year period, as measured using an appropriate inflation index which measures general price levels in the country This definition is consistent with that used to define a hyperinflationary entity under SFAS 52.[13] Accordingly, foreign private issuers may omit reconciliation of accounting differences arising from the use of IAS 21 for hyperinflationary operations only when they would have been required to comply with the comparable provisions of SFAS 52.

Consistent with the rule prior to amendment, foreign private issuers that prepare their financial statements in a reporting currency that comprehensively includes the effects of price level changes are not required to eliminate such effects in the reconciliation to US GAAP Item 17(c)(2)(iv)(A) and Item 18(c)(2)(iv)(A) of Form 20–F does not require that the entity operate in a hyperinflationary environment

One commenter questioned whether the proposed rule only applies to a subsidiary that operates in a hyperinflationary environment, or if it would apply equally to a parent company that operated in a hyperinflationary environment.

The adopted rules would apply equally to the parent company It would also be acceptable for a parent company to apply the remeasurement principles

[12] The Commission has been advised that the Mexican Institute of Public Accountants recently approved an amendment to eliminate the use of the current cost method

[13] *See* paragraph 11 of SFAS 52

of SFAS 52. The legal structure of an entity should not affect the financial statements.

IV. Cost-Benefit Analysis

No specific data were provided in response to the Commission's request regarding the costs and benefits of the amendment being adopted today. Several issuers did indicate, however, that if the Commission adopted the method to measure transactions described as Approach B in the Proposing Release that significant additional recordkeeping would be required. In addition, commenters supporting the proposal with respect to hyperinflationary accounting noted that the current reconciliation requirements did not meet the cost benefit test because of the complexities of preparation. The Commission believes that the amendments will reduce costs and that the adoption of these rules will be beneficial to U.S. investors, as it will encourage more foreign companies to list their securities and raise capital in the United States and will be consistent with investor protection.

V. Regulatory Flexibility Act Certification

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Chairman of the Commission has certified that the revisions to rules and forms will not have a significant impact on a substantial number of small entities. Members of the public who wish to obtain a copy of the Regulatory Flexibility Certification should contact Wayne E. Carnall, (202) 942–2960, Deputy Chief Accountant, Division of Corporation Finance, Mail Stop 3–13, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549.

VI. Statutory Bases

The Commission's rules and forms are amended pursuant to section 19 of the Securities Act of 1933 and sections 3(b), 4A, 12, 13, 14, 15, 16, and 23 of the Securities Exchange Act of 1934.

VII. Effective Date

The final rule and amendments to the Commission's rules and forms shall be effective immediately upon publication in the **Federal Register**, in accordance with the Administrative Procedure Act, which allows effectiveness in less than 30 days after publications for, *inter alia*, "a substantive rule which grants or recognizes an exemption or relieves a restriction." 5 U.S.C. 553(d)(1).

List of Subjects in 17 CFR Parts 210 and 249

Accounting, Reporting and recordkeeping requirements, Securities.

Text of Rule and Form Amendments

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975.

1 The authority citation for part 210 is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77aa(25), 77aa(26), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*(d), 79e(b), 79j(a), 79n, 79t(a), 80a–8, 80a–20, 80a–29, 80a–30, 80a–37a, unless otherwise noted.

2. By revising § 210.3–20 to read as follows:

§ 210.3–20 Currency for financial statements of foreign private issuers.

(a) A foreign private issuer, as defined in § 230.405 of this chapter, shall state amounts in its primary financial statements in the currency which it deems appropriate.

(b) The currency in which amounts in the financial statements are stated shall be disclosed prominently on the face of the financial statements. If dividends on publicly-held equity securities will be declared in a currency other than the reporting currency, a note to the financial statements shall identify that currency. If there are material exchange restrictions or controls relating to the issuer's reporting currency, the currency of the issuer's domicile, or the currency in which the issuer will pay dividends, prominent disclosure of this fact shall be made in the financial statements. If the reporting currency is not the U.S. dollar, dollar-equivalent financial statements or convenience translations shall not be presented, except a translation may be presented of the most recent fiscal year and any subsequent interim period presented using the exchange rate as of the most recent balance sheet included in the filing, except that a rate as of the most recent practicable date shall be used if materially different.

(c) If the financial statements of a foreign private issuer are stated in a currency of a country that has experienced cumulative inflationary effects exceeding a total of 100 percent over the most recent three year period, and have not been recast or otherwise supplemented to include information on a historical cost/constant currency or current cost basis prescribed or permitted by appropriate authoritative standards, the issuer shall present supplementary information to quantify the effects of changing prices upon its financial position and results of operations.

(d) Notwithstanding the currency selected for reporting purposes, the issuer shall measure separately its own transactions, and those of each of its material operations (*e.g.*, branches, divisions, subsidiaries, joint ventures, and similar entities) that is included in the issuer's consolidated financial statements and not located in a hyperinflationary environment, using the particular currency of the primary economic environment in which the issuer or the operation conducts its business. Assets and liabilities so determined shall be translated into the reporting currency at the exchange rate at the balance sheet date; all revenues, expenses, gains, and losses shall be translated at the exchange rate existing at the time of the transaction or, if appropriate, a weighted average of the exchange rates during the period; and all translation effects of exchange rate changes shall be included as a separate component ("cumulative translation adjustment") of shareholder's equity For purposes of this paragraph, the currency of an operation's primary economic environment is normally the currency in which cash is primarily generated and expended; a hyperinflationary environment is one that has cumulative inflation of approximately 100% or more over the most recent three year period. Departures from the methodology presented in this paragraph shall be quantified pursuant to Items 17(c)(2) or 18(c)(2) of Form 20–F (§ 249.220f of this chapter).

(e) The issuer shall state its primary financial statements in the same currency for all periods for which financial information is presented. If the financial statements are stated in a currency that is different from that used in financial statements previously filed with the Commission, the issuer shall recast its financial statements as if the newly adopted currency had been used since at least the earliest period presented in the filing. The decision to change and the reason for the change in the reporting currency shall be disclosed in a note to the financial statements in the period in which the change occurs.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted;

* * * * *

§ 249.220f [Amended]

4. By amending Form 20–F (referenced in § 249.220f) by revising paragraph (c)(2)(iv) of Item 17 and adding Instruction (5) to Item 17, by revising paragraph (c)(2)(iv) of Item 18 and adding Instruction (4) of Item 18 to read as follows:

Note: The form 20–F does not and the amendments will not appear in the Code of Federal Regulations.

Form 20–F

* * * * *

Item 17 Financial Statements

* * * * *

(c) * * *

(2) * * *

(iv) (A) Issuers that prepare their financial statements on a basis of accounting other than U S. generally accepted accounting principles in a reporting currency that comprehensively includes the effects of price level changes in its primary financial statements using the historical cost/constant currency or current cost approach, may omit the disclosures specified by paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii) of this item relating to affects of price level changes. The financial statements should describe the basis of presentation, and that such effects have not been included in the reconciliation.

(B) Issuers that prepare their financial statements on a basis of accounting other than U S generally accepted accounting principles that translates amounts in financial statements stated in a currency of a hyperinflationary economy into the issuer's reporting currency in accordance with International Accounting Standards No. 21, "The Effects of Changes in Foreign Exchange Rates," as amended in 1993, using the historical cost/constant currency approach, may omit the disclosures specified by paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii) of this Item relating to the effects of the different method of accounting for an entity in a hyperinflationary environment.

(C) If the method of accounting for an operation in a hyperinflationary economy complies with IAS 21, a statement to that effect must be included in the financial statements. The reconciliation shall state that such amounts presented comply with Item 17 of Form 20–F and are different from that required by U.S. GAAP

* * * * *

Instructions

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(5) For purposes of this Item, a hyperinflationary economy is one that has cumulative inflation of approximately 100% or more over the most recent three year period.

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Item 18. Financial Statements

* * * * *

(c) * * *

(2) * * *

(iv) (A) Issuers that prepare their financial statements on a basis of accounting other than U S. generally accepted accounting principles in a reporting currency that comprehensively includes the effects of price level changes in its primary financial statements using the historical cost/constant currency or current cost approach, may omit the disclosures specified by paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii) of this item relating to effects of price level changes. The financial statements should describe the basis of presentation, and that such effects have not been included in the reconciliation.

(B) Issuers that prepare their financial statements on a basis of accounting other than U S. generally accepted accounting principles that translates amounts in financial statements stated in a currency of a hyperinflationary economy into the issuer's reporting currency in accordance with International Accounting Standards No 21, "The Effects of Changes in Foreign Exchange Rates," as amended in 1993, using the historical cost/constant currency approach, may omit the disclosures specified by paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii) of this Item relating to the effects of the different method of accounting for an entity in a hyperinflationary environment.

(C) If the method of accounting for an operation in a hyperinflationary economy complies with IAS 21, a statement to that effect must be included in the financial statements The reconciliation shall state that such amounts presented comply with Item 18 of Form 20–F and are different from that required by U.S. GAAP

* * * * *

Instructions

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(4) For purposes of this Item, a hyperinflationary economy is one that has cumulative inflation of approximately 100% or more over the most recent three year period.

* * * * *

By the Commission.

Dated: December 13, 1994

Margaret H. McFarland,

Deputy Secretary

[FR Doc. 94–31035 Filed 12–19–94, 8:45 am]

BILLING CODE 8010–01–P

17 CFR Parts 210, 229, and 249

[Release Nos. 33–7118; 34–35094; IC–20766; FR44; International Series No. 758; File No. S7–12–94]

RIN 3235–AG17

Financial Statements of Significant Foreign Equity Investees and Acquired Foreign Businesses of Domestic Issuers and Financial Schedules

AGENCY: Securities and Exchange Commission

ACTION: Final rules.

SUMMARY: The Commission is announcing the adoption of amendments to Regulation S–X, which governs the form and content of financial statements and schedules furnished by public companies in filings with the Commission, and Form 20–F, which is applicable to foreign private issuers. The amendments extend accommodations adopted recently with respect to financial statements of foreign issuers to filings by domestic issuers that are required to include financial statements of foreign equity investees or acquired foreign businesses. The accommodations relate to the age of financial statements and the reconciliation of financial statements to U S. generally accepted accounting principles. In addition, the amendments revise the tests for determining whether financial statements of an equity investee must be provided, and they eliminate the requirement to furnish certain supplemental financial schedules.

EFFECTIVE DATES: December 20, 1994.

FOR FURTHER INFORMATION CONTACT: Wayne E. Carnall, (202) 942–2960, Deputy Chief Accountant, Division of Corporation Finance, Mail Stop 3–13, or, with respect to investment company matters, Jim Volk, (202) 942–0637, Office of Disclosure and Review, Division of Investment Management, U S Securities and Exchange Commission, Mail Stop 10–5, 450 Fifth Street, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to the following rules and forms: Rules 1–02,[1] 3–05,[2] 3–09,[3] 3–12,[4] 4–08,[5] 5–02,[6]

[1] 17 CFR 210 1–02
[2] 17 CFR 210.3–05
[3] 17 CFR 210 3–09
[4] 17 CFR 210 3–12
[5] 17 CFR 210.4–08
[6] 17 CFR 210 5–02

5–04,[7] 6–07,[8] 6–10,[9] 7–05,[10] 9–07,[11] 12–01,[12] of Regulation S–X,[13] and Items 404[14] and 601[15] of Regulation S–K.[16] In addition, the Commission is amending Form 20–F[17] under the Securities Exchange Act of 1934 ("Exchange Act").[18]

I. Introduction

The Commission today is adopting several amendments that will extend financial statement accommodations available to foreign issuers to filings by domestic issuers that are required to include financial statements of foreign equity investees or acquired foreign business.[19] The accommodations relate to the age of financial statements[20] and the reconciliation of financial statements to U.S. generally accepted accounting principles ("GAAP") for those foreign entities.[21] In addition, the adopted amendments revise the tests of significance for determining whether financial statements of an equity investee must be provided. The amendments also eliminate certain supplemental financial schedules that were eliminated recently for foreign issuers,[22] as well as eliminate two additional schedules that foreign and domestic issuers have been required to include in annual reports and registration statements filed with the Commission.

The amendments adopted today were proposed by the Commission on April 19, 1994.[23] Comment letters received from registrants, accounting firms, and related professional membership associations generally supported the proposals and frequently commented that the schedules were generally redundant to information already required in the financial statements and that the costs of preparing the schedules therefore outweighed the benefit. Comments by financial analysts were critical of the proposed amendments, expressing a general concern about a perceived relaxation of disclosure requirements.[24] The Commission believes concerns regarding the revised requirements do not consider fully the offsetting effects of other disclosure requirements that must be met by reporting companies. The amendments are being adopted substantially as proposed because the Commission believes they will result in reduced costs of registration and reporting by public companies without loss of material basic disclosure for the protection of investors.

II. Financial Statements of Significant Business Acquisitions and Equity Investees

The changes to Regulation S–X and Form 20–F adopted today revise the tests of significance which determine whether financial statements of an equity investee must be provided, and modify the requirements for reconciliation to U.S. GAAP of the financial statements of the significant foreign business acquisitions and foreign investees of domestic registrants.

A. Tests of Significance of Equity Investees

Separate audited financial statements of a company accounted for by the registrants using the equity method of accounting (an "equity investee") must be provided if the investee is "significant" as measured pursuant to Rule 3–09 of Regulation S–X. The amendments adopted today eliminate one of the three tests of significance made pursuant to that rule. Pursuant to the adopted rule, significance of an investee is measured by comparison of the registrant's proportionate share of the investee's pretax income to that of the registrant and of the registrant's investment in the investee to the registrant's total assets. The determination of significance will no longer require comparison of the investee's total assets to the total assets of the registrant.

While generally favored by commenters, several financial analysts observed that the two tests retained under the adopted rule may lead to the omission of financial statements of highly leveraged investees because the registrant's investment and proportion of earnings will be minimized as a result of the investee's debt. However, exclusion of separate audited financial statements appears reasonable given that the unfavorable financial impact of the investee is generally limited to the registrant's investment in that entity; losses in excess of that investment generally are not recognized under GAAP. To the extent that a registrant has guaranteed an investee's debt or is otherwise committed to fund its operations, the registrant must continue to recognize losses of the investee,[25] and such losses would continue to be considered in one prong of the two-pronged test for significance. If there are other material consequences of a registrant's investment in a highly leveraged investee, the Commission believes discussion of these will be elicited by Item 303 of Regulation S–K, "Management's Discussion and Analysis."[26] In addition, summarized financial information, pursuant to Rule 4–08(g) of Regulation S–X,[27] that would be required to be provided in a note to the financial statements if the significance of the investees individually or in aggregate exceeds the 10% level under any of the three tests, would generally provide sufficient information in these or similar circumstances.

B. Reconciliation of Financial Statements of Significant Foreign Equity Investees and Foreign Acquirees

The amendments adopted today permit domestic issuers to furnish financial statements of significant foreign business acquisitions and foreign equity investees on substantially the same basis as may foreign private issuers. That is, the financial statements of foreign acquirees, furnished pursuant to Rule 3–05 of Regulation S–X as amended,[28] or investees, furnished pursuant to Rule 3–09 of Regulation S–X as amended, in periodic reports or registrations statements of domestic issuers need only comply with Item 17 of Form 20–F. Although some commenters questioned whether the cost of compliance with existing requirements justified the accommodation, most commenters cited the significant compliance costs incurred under the prior rule and strongly favored the proposal.

Pursuant to Item 17, the financial statements may be prepared on a comprehensive basis other than U.S. GAAP. Quantitative reconciliation of

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[7] 17 CFR 210.5–04.
[8] 17 CFR 210.6–07.
[9] 17 CFR 210.6–10.
[10] 17 CFR 210.7–05.
[11] 17 CFR 210.9–07.
[12] 17 CFR 210.12–01.
[13] 17 CFR Part 210.
[14] 17 CFR 229.404.
[15] 17 CFR 229.601.
[16] 17 CFR 229.
[17] 17 CFR 249.220f.
[18] 15 U.S.C. 78a *et seq.*
[19] The amendments regarding acquired foreign businesses adopted today would also apply to issuers that file under Regulation S–B.
[20] *See* Securities Act Release No. 7026 (November 3, 1993) (58 FR 60304) regarding the age of financial statements for foreign private issuers.
[21] *See* Securities Act Release No. 7053 (April 19 1994) (59 FR 21644) regarding the modification of the reconciliation requirements for foreign equity investees and foreign acquired businesses.
[22] Id.
[23] *See* Securities Act Release No. 7055 (April 19 1994) (59 FR 21814) (the "Proposing Release").
[24] Forty-one comment letters on the Proposing Release were received. Those letters and a summary of comments are available for public inspection and copying in File No. S7–12–94 at the Commission's Public Reference Room in Washington, DC.
[25] Accounting Principles Board Opinion No. 18, "The Equity Method of Accounting for Investments in Common Stock."
[26] 17 CFR 229.303.
[27] 17 CFR 210.4–08(g).
[28] 17 CFR 210.3–05.

net income and material balance sheet items is required, but the additional information specified by U.S. GAAP for disclosure in notes to financial statements is not necessary. However, no reconciliation is required at all if the foreign business does not exceed the 30% level under the tests of significance which call for the inclusion of its financial statements of a significant business acquisition [29] or significant investee.[30]

The adopted rules are applicable to a foreign business, as defined. Several commenters recommended that the definition be identical to the definition of a foreign private issuer, but it is adopted as proposed.[31] The adopted definition of a foreign business varies from the definition of a foreign private issuer because the relief available under the rule is intended to be applicable to a branch or other component of an entity, rather than only to a legally recognized business entity. Also, the rule is not intended to be applicable to a business that is incorporated outside the U.S. but that is, prior to the registrant's investment, majority owned by one or more U.S. shareholders, because such an entity can be expected to maintain its books and records on a basis permitting reconciliation to U.S. GAAP without unreasonable cost.[32]

C. Age of Financial Statements of Significant Foreign Equity Investees or Foreign Acquirees

Under the amendments adopted today, the financial statements of significant foreign equity investees and acquired foreign businesses furnished in filings by domestic issuers can be updated on the same time schedule as foreign private issuers.[33] Registration statements of foreign private issuers need not include audited financial statements of the most recently completed fiscal year until six months after the year-end; unaudited interim financial statements are required only to the extent necessary to bring the most recent financial statements included in the filing to a date within ten months of effectiveness.[34]

Although two commenters doubted that there was significant additional cost or difficulty associated with updating foreign investees and acquiree financial statements on the same basis as domestic issuers, most commenters felt that financial reporting practices outside the U.S. varied to such a degree as to present significant obstacles to the preparation of separate financial statements on as timely a basis as is required for U.S. companies.

III. Streamlining of Required Financial Statement Schedules

The amendments adopted today eliminate the following six schedules that had previously been eliminated for foreign private issuers:

(1) Rule 12–02—Marketable Securities—Other Investments including Schedule XIII

(2) Rule 12–03—Amounts Receivable from Related Parties and Underwriters, Promoters and Employees Other Than Related Parties

(3) Rule 12–05—Indebtedness of and to Related Parties—Not Current.

(4) Rule 12–06—Property, Plant and Equipment

(5) Rule 12–07—Accumulated Depreciation, Depletion and Amortization of Property, Plant and Equipment

(6) Rule 12–08—Guarantees of Securities of Other Issuers

Two additional schedules previously required for both foreign and domestic issuers also will be eliminated:

(1) Rule 12–10—Short-term Borrowings

(2) Rule 12–11—Supplementary Income Statement Information

A. Schedules Previously Eliminated From Foreign Issuer Filings

1. Marketable Securities—Other Investments

The rules adopted today eliminate this schedule. All of the issuers and accountants supported elimination of this schedule, but several financial analyst commenters did not favor elimination because they believed that the schedule provided information facilitating comparisons among companies whose accounting is affected by the classification of investments as either current or noncurrent.

Elimination of this schedule was proposed because much of its information is required to be disclosed in financial statements by *Statement of Financial Accounting Standards No. 115*, "Accounting for Certain Investments in Debt and Equity Securities" ("SFAS 115"), issued in May 1993 by the Financial Accounting Standards Board ("FASB") and effective for fiscal years beginning after December 15, 1993. Under SFAS 115, the designation as current or noncurrent no longer affects the carrying value of a security.

Some commenters favored retention of the schedule's requirement for identification of securities of individual issuers exceeding 2% of the registrant's total assets. The Commission believes retention of the specific disclosure is unnecessary because other rules applicable to filings by public companies should lead to appropriate disclosure if a particular investment is material. Disclosures required by Item 303 of Regulation S–K, "Management's Discussion and Analysis," include discussion of the material effects and uncertainties associated with concentrations and risks in the investment portfolio.[35] In addition, *Statement of Financial Accounting Standards No. 105*, "Disclosure of Information about Financial Instruments with Off-Balance-Sheet Risk and Financial Instruments with Concentrations of Credit Risk," ("SFAS 105") requires disclosure of all significant concentrations of credit risk arising from an individual counterparty or groups of counterparties that would be similarly affected by changes in economic or other conditions.

2. Amounts Receivable From Related Parties and Underwriters, Promoters and Employees Other Than Related Parties and Indebtedness of and to Related Parties

The Commission has eliminated these schedules as proposed. None of the commenters cited the need to retain these schedules, as similar information is required to be furnished pursuant to *Statement of Financial Accounting Standards No. 57*, "Related Party

[29] Consistent with the recently adopted amendments for foreign private issuers (*See* Securities Act Release No. 7053 (April 19, 1994)), reconciliation to U.S. GAAP would continue to be required for pro forma financial information depicting the effects of a registrant's acquisition of a foreign business.

[30] In circumstances where a registrant furnishes separate financial statements of an equity investee pursuant to Rule 3–09 of Regulation S–X, the staff has not required the registrant to also furnish summarized financial data of the investee pursuant to Rule 4–08(g) of Regulation S–X. (*See* Staff Accounting Bulletin No. 44, Topic 6:K (March 3, 1983) (47 FR 10789). However, consistent with the recently adopted amendments for foreign private issuers (*See* Securities Act Release No. 7053 (April 19, 1994)), a domestic registrant that furnishes separate financial statements of a foreign investee that are not reconciled pursuant to the proposed rule should furnish the summarized financial data pursuant to Rule 4–08(g) in accordance with U.S. GAAP in its primary financial statements.

[31] If the acquired business or investee does not meet the definition of a foreign business, the issuer can file financial statements prepared in accordance with a basis of accounting other than US GAAP provided a reconciliation to US GAAP under Item 18 of Form 20–F is included regardless of the level of materiality. This is consistent with current staff practice.

[32] Ownership is measured prior to the acquisition of the business.

[33] If the acquired business or investee does not meet the definition of a foreign business, financial statements would need to be updated pursuant to Rule 3–12 of Regulation S–X.

[34] 17 CFR 210.3–19.

[35] *See* Securities Act Release No. 6835 (May 18, 1989).

Transactions" ("SFAS 57") and Regulation S–K, Item 404 "Certain Relationships and Related Transactions."

3. Property, Plant, and Equipment, and Accumulated Depreciation, Depletion, and Amortization

Although comments from financial analysts were generally opposed to elimination of these schedules, most commenters supported the proposal, citing the cost of their preparation and audit, and their limited usefulness. Financial analysts reported that they sometimes use the schedules to estimate the age, relative age, and average depreciable life of each class of a company's depreciable assets. Other commenters agreed with observations in the proposing release that estimates based on the schedules would not be reliable if the issuer has significant foreign operations (due to the effects of currency translation on depreciation expense), or if a depreciation method other than straight line is used. The Commission believes that adequate quantitative disclosure regarding property, plant and equipment is elicited by *Accounting Principle Board Opinion No. 12*, ("Omnibus Opinion—1967"), which requires disclosure of total depreciation expense for each period and the balances of major classes of depreciable assets. Where the age of capital assets may be indicative of increasing maintenance and replacement budgets, the registrant would be expected to disclose the material reasonably likely effects on operating trends, capital expenditures and liquidity pursuant to Item 303 of Regulation S–K.

4. Guarantees of Securities of Other Issuers

The Commission has eliminated these schedules as proposed. None of the commenters cited the need to retain this schedule, as similar information is required to be disclosed by *Statement of Financial Accounting Standards No. 5*, "Accounting for Contingencies," ("SFAS 5").

B. Additional Schedules Eliminated for Both Foreign and Domestic Issuers

1. Short Term Borrowings

The adopted amendments eliminate this schedule. However, as proposed, weighted average interest rate on borrowings outstanding as of each of the dates for which balance sheets are presented will be required to be disclosed in a note to the financial statements. In addition, for investment companies, although the schedule requirement has been eliminated, the information formerly required by § 210.12–10 will now be required to be provided in the body of the financial statements or in the footnotes. While two of the financial analysts indicated that the year end rates may not be indicative of the average rate during the period, they did not address the computational problems arising from foreign currency translation and other factors, as discussed in the proposing release. A number of other commenters cited those computational problems and indicated that the information disclosed in the schedule frequently was not meaningful. The Commission concluded that the costs of furnishing the information outweighs its usefulness.

2. Supplementary Income Statement Information

The Commission has eliminated this schedule by today's amendments. While the amounts of the items formerly referenced by this schedule (maintenance and repairs; depreciation and amortization of the cost of intangible assets, preoperating costs and similar deferred costs; taxes other than payroll; royalties; and advertising costs) need not be disclosed on an ongoing basis by registrants, discussion of discretionary expenses and other items in the schedule, quantified to the extent practicable, will be required in the company's Management's Discussion and Analysis where necessary to explain material trends and uncertainties that affected operating results, liquidity or financial condition of the registrant, or that may be reasonably likely to affect future results, liquidity or financial condition.[36]

IV. Cost-Benefit Analysis

Several registrants provided quantified estimates of the cost reductions which would vary from registrant to registrant. All of the registrants and accounting firms that addressed the cost-benefit of the amendments indicated that the cost of preparation and audit of the schedules and other information that have been eliminated today exceeded their benefit. Several financial analysts indicated that they thought that the actual costs of providing this information is small, and that the benefits exceeded such costs. They suggested that the reduced disclosures could lead to an increase in the costs of capital due to an increase in investor uncertainty.

For reasons discussed above, the Commission believes that the adoption of these rules will reduce the regulatory burden and costs of the vast majority of the registrants without a loss of information that is necessary for investor protection.

[36] *See* Financial Reporting Release 36.

V. Availability of Final Regulatory Flexibility Analysis

A Final Regulatory Flexibility Analysis in accordance with the Regulatory Flexibility Act has been prepared with respect to the final amendments. A summary of a corresponding Initial Regulatory Flexibility Analysis was included in the Proposing Release. Members of the public who wish to obtain a copy of the Final Regulatory Flexibility Analysis should contact Wayne E. Carnall, Deputy Chief Accountant, Division of Corporation Finance, Securities and Exchange Commission, Mail Stop 3–13, 450 5th Street, N.W., Washington, D.C. 20549, (202) 942–2960.

VI. Statutory Basis for Rules

The Commission's rules and forms are amended pursuant to section 19 of the Securities Act of 1933 and sections 3(b), 4A, 12, 13, 14, 15, 16, and 23 of the Securities Exchange Act of 1934.

VII. Effective Date

The final rule and amendments to the Commission's rules and forms shall be effective immediately upon publication in the **Federal Register**, in accordance with the Administrative Procedure Act, which allows effectiveness in less than 30 days after publications for, *inter alia*, "a substantive rule which grants or recognizes an exemption or relieves a restriction." 5 U.S.C. 553(d)(1).

List of Subjects in 17 CFR Parts 210, 229, and 249

Accounting, Reporting and recordkeeping requirements, Securities.

Text of Amendments

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

1. The authority citation for Part 210 is continued to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77aa(25), 77aa(26), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*(d), 79e(b), 79j(a), 79n, 79t(a),

80a–8, 80a–20, 80a–29, 80a–30, 80a–37a, unless otherwise noted.

2. By amending § 210.1–02 by redesignating paragraphs (l) through (aa) as paragraphs (m) through (bb), and adding paragraph (l) to read as follows:

§ 210.1–02 Definitions of terms used in Regulations S–X (17 CFR 210).

(l) *Foreign business.* A business that is majority owned by persons who are not citizens or residents of the United States and is not organized under the laws of the United States or any state thereof, and either:

(1) More than 50 percent of its assets are located outside the United States; or

(2) The majority of its executive officers and directors are not United States citizens or residents

* * * * *

3. By amending § 210.3–05 by revising the last sentence of the introductory text of paragraph (b)(1) and adding paragraph (c) to read as follows:

§ 210.3–05 Financial statements of businesses as acquired or to be acquired.

* * * * *

(b) *Periods to be presented.*

(1) * * * The periods for which such financial statements are to be filed shall be determined using the conditions specified in the definition of significant subsidiary in § 210.1–02(w) as follows:

* * * * *

(c) *Financial statements of foreign business.* If the business acquired or to be acquired is a foreign business, financial statements of the business meeting the requirements of Item 17 of Form 20–F (§ 249.220f of this chapter) will satisfy this section.

4. By amending § 210.3–09 by revising the last sentence of paragraph (a), revising the last two sentences of paragraph (b) and adding paragraph (d) to read as follows:

§ 210.3–09 Separate financial statements of subsidiaries not consolidated and 50 percent or less owned persons.

(a) * * * Similarly, if either the first or third condition set forth in § 210.1–02(w), substituting 20 percent for 10 percent, is met by a 50 percent or less owned person accounted for by the equity method either by the registrant or a subsidiary of the registrant, separate financial statements of such 50 percent or less owned person shall be filed.

(b) * * * However, these separate financial statements are required to be audited only for those fiscal years in which either the first or third condition set forth in § 210.1–02(w), substituting 20 percent for 10 percent, is met. For purposes of a filing on Form 10–K (§ 249.310 of this chapter), if the fiscal year of any 50 percent or less owned person ends within 90 days before the date of the filing, or if the fiscal year ends after the date of the filing, the required financial statements may be filed as an amendment to the report within 90 days, or within six months if the 50 percent or less owned person is a foreign business, after the end of such subsidiary's or person's fiscal year.

(c) * * *

(d) If the 50 percent or less owned person is a foreign business, financial statements of the business meeting the requirements of Item 17 of Form 20–F (§ 249.220f of this chapter) will satisfy this section.

5. By amending § 210.3–12 by adding a second sentence to paragraph (f) to read as follows:

§ 210.3–12 Age of financial statements at effective date of registration statement or at mailing date of proxy statement.

* * * * *

(f) * * * Financial statements of a foreign business which are furnished pursuant to §§ 210.3–05 or 210.3–09 because it is an acquired business or a 50 percent or less owned person may be of the age specified in § 210.3–19.

6. By amending § 210.4–08 by revising paragraph (g) to read as follows:

§ 210.4–08 General notes to financial statements.

* * * * *

(g) *Summarized financial information of subsidiaries not consolidated and 50 percent or less owned persons.* (1) The summarized information as to assets, liabilities and results of operations as detailed in § 210.1–02(bb) shall be presented in notes to the financial statements on an individual or group basis for:

(i) Subsidiaries not consolidated; or

(ii) For 50 percent or less owned persons accounted for by the equity method by the registrant or by a subsidiary of the registrant, if the criteria in § 210.1–02(w) for a significant subsidiary are met:

(A) Individually by any subsidiary not consolidated or any 50% or less owned person; or

(B) On an aggregated basis by any combination of such subsidiaries and persons.

(2) Summarized financial information shall be presented insofar as is practicable as of the same dates and for the same periods as the audited consolidated financial statements provided and shall include the disclosures prescribed by § 210.1–02(bb). Summarized information of subsidiaries not consolidated shall not be combined for disclosure purposes with the summarized information of 50 percent or less owned persons.

* * * * *

7. By amending § 210.5–02 by adding a sentence following the first sentence to paragraph 19.(b) to read as follows:

§ 210.5–02 Balance sheets.

* * * * *

19. Accounts and notes payable * * *

(b) * * * The weighted average interest rate on short term borrowings outstanding as of the date of each balance sheet presented shall be furnished in a note. * * *

* * * * *

8. By amending § 210.5–04: Revise paragraph (a); remove Schedule I, Schedule II, Schedule IV, Schedule V, Schedule VI, Schedule VII, Schedule IX, Schedule X, and Schedule XIII of paragraph (c) and redesignate the remaining schedules in paragraph (c) to read as follows: Schedule III as Schedule I, Schedule VIII as Schedule II, Schedule XI as Schedule III, Schedule XII as Schedule IV, and Schedule XIV as Schedule V.

§ 219.5–04 What Schedules are to be filed.

(a) Except as expressly provided otherwise in the applicable form:

(1) The schedules specified below in this Section as Schedules II and III shall be filed as of the date of the most recent audited balanced sheet for each person or group.

(2) Schedule II shall be filed for each period for which an audited income statement is required to be filed for each person or group.

(3) Schedules I and IV shall be filed as of the date and for periods specified in the schedule.

* * * * *

9. By amending § 210.6–07 by adding the following sentence to paragraph 3. to read as follows:

§ 210.6–07 Statements of operations.

* * * * *

3. *Interest and amortization of debt discount and expense.* Provide in the body of the statements or in the footnotes, the average dollar amount of borrowings and the average interest rate.

§ 210.6–10 [Amended]

10. By amending § 210.6–10 by: Removing Schedule IV and Schedule VII from paragraph (c) and redesignating the remaining schedules in paragraph (c) as follows: Schedule V as Schedule IV and Schedule VI as Schedule V; remove Schedule VI, Schedule VII, Schedule VIII, Schedule IX, and Schedule X in paragraph (e)(2) and redesignate Schedule XI as Schedule VI and Schedule XII as Schedule VII.

11. By amending § 210.7–05 by: Revising paragraph (a), removing Schedule II, Schedule IV, Schedule VII, and Schedule IX of paragraph (c) and redesignating the remaining schedules in paragraph (c) as follows: Schedule III as Schedule II, Schedule V as Schedule III, Schedule VI as Schedule IV, Schedule VIII as Schedule V, and Schedule X as Schedule VI.

§ 210.7–05 What Schedules are to be filed.

(a) Except as expressly provided otherwise in the applicable form:

(1) The schedule specified below in this section as Schedules I shall be as of the date of the most recent audited balance sheet for each person or group.

(2) The schedules specified below in this section as Schedule IV and V shall be filed for each period for which an audited income statement is required to be filed for each person or group.

(3) Schedules II, III and V shall be filed as of the date and for periods specified in the schedule.

* * * * *

§ 210.9–07 [Removed and Reserved]

12. By removing and reserving § 210.9–07.

13. By revising § 210.12–01 to read as follows:

§ 210.12–01 Application of §§ 210.12–01 to 210.12–29.

These sections prescribe the form and content of the schedules required by §§ 210.5–04, 210.6–10, 210.6A–05, and 210.7–05.

§§ 210.12–02, 210.12–03, 210.12–05, 210.12–06, 210.12–07, 210.12–08, 210.12–10, and 210.12–11 [Removed and Reserved]

14. By removing and reserving §§ 210.12–02, 210.12–03, 210.12–05, 210.12–06, 210.12–07, 210.12–08, 210.12–10, and 210.12–11.

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

15. The authority citation for Part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78n*i*, 78n, 78*o*, 78w, 78*ll*(d), 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

* * * * *

16. By revising instructions 2.C and 3 C of the Instructions to Paragraph (b) of § 229.404 to read as follows:

§ 229.404 (Item 404) Certain relationships and related transactions.

Instructions to Paragraph (b) of Item 404

* * * * *

2. * * *

C. Payments made or received by subsidiaries other than significant subsidiaries as defined in Rule 1–02(w) of Regulation S–X [§ 210.1–02(w) of this chapter], provided that all such subsidiaries making or receiving payments, when considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary as defined in Rule 1–02(w).

3. * * *

C. Indebtedness incurred by subsidiaries other than significant subsidiaries as defined in Rule 1–02(w) of Regulation S–X [§ 210.1–02(w) of this chapter], provided that all such subsidiaries incurring indebtedness, when considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary as defined in Rule 1–02(w).

* * * * *

17. By revising the second sentence in paragraph (b)(21)(ii) of § 229.601 to read as follows:

§ 229.601 (Item 601) Exhibits.

* * * * *

(b) * * *

(21) *Subsidiaries of the registrant.*

(i) * * *

(ii) * * * (See the definition of "significant subsidiary" in Rule 1–02(w) (17 CFR 210.1–02(w)) of Regulation S–X.) * * *

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

18. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted;

* * * * *

§ 249.220f [Amended]

19. amending Form 20–F (referenced in § 249.220f) by revising paragraph (a) to Item 17 and paragraph (a) to item 18 to read as follows:

Note: The text of Form 20–F is not and the amendments will not appear in the Code of Federal Regulations.

Form 20–F

* * * * *

Item 17. Financial Statements

(a) The registrant shall furnish financial statements for the same fiscal years and accountants' certificates that would be required to be furnished if the registration statement were on Form 10 or the annual report on Form 10–K. Schedules designated by §§ 210.12–04, 210.12–09, 210.12–15, 210.12–16, 210.12–17, 210.12–18, 210.12–28, and 210.12–29 of this chapter shall be furnished if applicable to the registrant.

* * * * *

Item 18. Financial Statements

(a) The registrant shall furnish financial statements for the same fiscal years and accountants' certificates that would be required to be furnished if the registration statement were on Form 10 or the annual report on Form 10–K. Schedules designated by §§ 210.12–04, 210.12–09, 210.12–15, 210.12–16, 210.12–17, 210.12–18, 210.12–28, and 210.12–29 of this chapter shall be furnished if applicable to the registrant.

* * * * *

By the Commission.

Dated: December 13, 1994.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–31036 Filed 12–19–94; 8:45 am]

BILLING CODE 8010–01–P

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17 CFR Part 249

[Release Nos. 33–7119; 34–35095; FR 45; International Series Release No. 759; File No. S7–13–94]

RIN 3235–AG16

Reconciliation of the Accounting by Foreign Private Issuers for Business Combinations

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Commission is announcing the adoption of amendments to Form 20–F to streamline the financial statement reconciliation requirements for foreign private issuers that have entered into business combinations. The amendments eliminate the requirement to reconcile to U.S. generally accepted accounting principles certain differences attributable to the method of accounting for a business combination or the amortization period of goodwill and negative goodwill, provided the financial statements comply with *International Accounting Standard No. 22*, "Business Combinations," as amended, regarding those items.

EFFECTIVE DATE: December 20, 1994.

FOR FURTHER INFORMATION CONTACT: Wayne E. Carnall, Deputy Chief Accountant, Division of Corporation Finance at (202) 942–2960 U.S. Securities and Exchange Commission, Mail Stop 3–13, 450 Fifth Street NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to

Form 20–F [1] under the Securities Exchange Act of 1934 (the "Exchange Act").[2]

I. Introduction

The Commission is adopting amendments to streamline the financial statement reconciliation requirements for foreign private issuers that have entered into business combinations. The amendments eliminate the requirement to reconcile to U.S. generally accepted accounting principles ("GAAP") certain differences attributable to the method of accounting for a business combination or the amortization period of goodwill and negative goodwill, provided the financial statements comply with *International Accounting Standard No. 22*, "Business Combinations," as amended ("IAS 22"), regarding those items.

The amendments adopted today were proposed by the Commission on April 19, 1994.[3] Comments received on the proposing release were divided almost evenly in their views.[4] Commenters questioning the proposal expressed concern about the lack of comparability to U.S. GAAP that would result from adoption of the proposal, and observed that the reconciled balance sheet and net income information furnished under the proposed rule would be a hybrid of U.S. GAAP and International Accounting Standards ("IAS"). Those supporting the proposal cited the cost and complexity of reconciling the pervasive differences attributable to an issuer's method of accounting for business combinations and, in the case of a supporting letter from financial analysts, the lack of comparability which exists presently under the U.S. accounting rules applicable to business combinations.

The Commission believes that acceptance of the guidance in IAS 22 with respect to the particular matters addressed by the amendment, without reconciliation to U.S. GAAP, will not result in the loss of material information that is necessary for a U.S. investor to make an informed investment decision. Accordingly, the amendments are being adopted substantially as proposed, although certain modifications and clarifications are included in response to recommendations and other comments received.

[1] 17 CFR 249.220f.

[2] 15 U.S.C. 78a *et seq.*

[3] See Securities Act Release No. 7056 (April 19, 1994) (59 FR 21821) (the "Proposing Release").

[4] Nine comment letters on the proposal were received. Those letters and a summary of the comments are available for public inspection and copying in File No. S7–13–94 at the Commission's Public Reference Room in Washington, DC.

II. Method of Accounting for Business Combinations

As adopted, the amendments eliminate the requirement that foreign private issuers quantify the effects of differences arising solely from the different criteria applied to the selection of the basic method of accounting for a business combination if the criteria used in the primary financial statements for determining the method are consistently applied and are consistent with IAS 22. The two basic methods of accounting can be summarized as either "pooling of interests" or "purchase" as determined under U.S. GAAP primarily pursuant to *Accounting Principles Board Opinion No. 16*, "Accounting for Business Combinations" ("APB 16"), or "uniting of interests" and "acquisition" under IAS 22.

APB 16 and IAS 22 have a similar conceptual framework underlying the particular conditions they establish for determining which of the two basic accounting methods should be applied to a business combination. Both standards acknowledge limited circumstances under which remeasurement of an acquired company's assets and liabilities pursuant to the purchase or acquisition method is not appropriate, but the particular criteria qualifying a transaction for pooling of interests (under APB 16) and uniting of interests (under IAS 22) are different, with IAS 22 being generally more restrictive.

The Commission believes that the criteria articulated in IAS 22 are sufficiently clear so that companies and their auditors can be expected to apply the guidance in a consistent manner to similar transactions. Although different from the criteria in U.S. GAAP, the criteria in IAS No. 22 provide a rational and effective basis for distinguishing the substantively unique transactions for which the special accounting treatment is appropriate. The criteria in IAS No. 22 appear sufficiently rigorous to restrict the use of uniting of interests accounting to a relatively small class of similar transactions. The Commission believes that financial statements of foreign private issuers that distinguish business combinations on the basis specified by IAS No. 22 will provide information that is sufficiently informative and useful to investors without a reconciliation of that departure to U.S. GAAP.

In evaluating the concerns expressed about the effects on comparability of the proposed use of IAS 22, the level of comparability under current U.S. accounting principles needs to be examined. Although the two accounting methods of "purchase" and "pooling" prescribed by U.S. GAAP produce very significant financial reporting differences, many transactions that are accounted for in the U.S. as poolings of interests are difficult to distinguish economically or structurally from transactions accounted for as purchases Because the criteria qualifying a transaction for pooling under U.S. GAAP are restrictive, a registrant is rarely if ever compelled to account for a transaction as a pooling if it does not want to do so. The registrant may elect to avoid pooling accounting through essentially nonsubstantive modifications of merger terms or other insignificant actions. Under IAS 22, it is even more difficult to qualify a business combination as a uniting of interests, or pooling. Many transactions that would quality for pooling under U.S. GAAP would be accounted for as purchases under IAS 22. As under the U.S. rule, issuers could elect to avoid pooling accounting by the essentially subjective designation of an acquirer. On balance, it would appear that using the provisions of IAS 22 to determine whether a combination is accounted for as a purchase or pooling will not materially affect the comparability of financial statements.

A substantial degree of comparability will be retained under the rules adopted today because they provide that the effects of differences in amounts determined upon application of either the purchase or pooling methods of accounting would continue to be quantified. For example, if the acquisition method is applicable to a business combination under IAS 22, differences between the amounts assigned in the issuer's primary financial statements to tangible and intangible assets and liabilities and those amounts as would be determined using the purchase method applied in accordance with U.S. GAAP must be identified and quantified in the reconciliation. If a determination has been made pursuant to the criteria in IAS 22 that the uniting of interest method is appropriate, then differences between the accounting used in the primary financial statements and the accounting that would be required for a pooling of interests under U.S. GAAP must be included in the reconciliation to U.S. GAAP. In response to comments, language in the amendment has been modified to more clearly describe the continuing requirement to reconcile the amounts that would be reported under U.S. GAAP for the particular method of accounting that was determined to be

applicable using the criteria contained in IAS 22.

As suggested by many commenters, the new provisions will not be available with respect to business combinations that are promoter transactions, leveraged buyouts, mergers of entities under common control, or reverse acquisitions. The final rule indicates that those types of transactions would continue to be required to be reconciled in full to U.S. GAAP. The rule also states that other business combinations that are not addressed by IAS 22 are not eligible for relief from reconciliation.

III. Accounting for Goodwill and Negative Goodwill

The amendments also eliminate the requirement that foreign private issuers quantify the effects of differences arising from the period of amortization of both goodwill and negative goodwill, as proposed. Under IAS 22, goodwill and negative goodwill is amortized over a period not exceeding five years unless a longer period, not exceeding twenty years, can be justified. *Accounting Principles Board Opinion No. 17*, "Accounting for Intangibles" (AFB 17"), requires the amortization of goodwill or negative goodwill over its useful life, except that the period cannot exceed forty years.

Some commenters raised concerns about the proposed rule because the resulting amount would not be comparable to U.S. GAAP. However, if the primary financial statements reflect an amortization period that complies with IAS 22, a reconciliation of differences in goodwill amortization periods does not necessarily improve the comparability of financial statements in a material fashion. U.S. companies presently exercise substantial judgment in selecting an amortization period for goodwill, and significant differences among similarly situated companies can be seen among companies reporting to the Commission. The accounting differences between IAS 22 and APB 17 are not so opaque as to result in the loss of material information to investors. If the useful life of goodwill or amortization period of negative goodwill exceeds five years, justification of the longer period is required by paragraph 72 of IAS 22 to be furnished in a note to the primary financial statements. Registrants will continue to be required under both Item 17 and 18 of Form 20–F to describe the accounting differences, even where relief from quantification of differences is granted by this rule.

The relief from reconciliation permitted under the adopted rule is applicable only to differences in the amortization period as it applies to aggregate amount of goodwill or negative goodwill that would be determined under U.S. GAAP. For example, negative goodwill under IAS 22 (the amount by which the fair value of acquired net assets exceeds the purchase price) must be reconciled to negative goodwill determined under U.S. GAAP (the amount remaining after the excess over the purchase price has been applied to reduce the carrying value of non-monetary noncurrent assets). In response to commenter's suggestion, Items 17 and 18 of Form 20–F have been modified to clarify that point.

IV. Implementation and Transition

Issuers will be permitted by the adopted rule to elect to apply the provisions of IAS 22 in the determination of the method of accounting for business combinations but not adopt its provisions for amortization of goodwill and negative goodwill. Similarly, issuers could adopt the provisions of IAS 22 with respect to goodwill amortization periods, but need not adopt that standard with respect to any other aspect of accounting for business combinations.

Transition guidance in the 1993 amendment of IAS 22 calls for its new provisions to be implemented in financial statements for periods beginning on or after January 1, 1995, with retroactive application encouraged but not required. As originally proposed, the relief from reconciliation afforded by the rule would be available only to an issuer that implemented IAS 22, as amended, in its financial statements with respect to all current and prior business combinations for all financial reporting periods presented. At the suggestion of a commenter and in consideration of the difficulty of retroactive implementation of IAS 22, the rule as adopted would also provide relief from reconciliation for business combinations consummated on or after January 1, 1995, if, commencing by that date, the issuer accounts for all business combinations in its primary financial statements in accordance with IAS 22. For an issuer that does not retroactively implement IAS 22, full reconciliation to U.S. GAAP would be required with respect to business combinations consummated prior to January 1, 1995.

As requested by several commenters, the adopted rules clarify how issuers and their auditors should describe the balance sheet and income statement amounts which do not reflect full reconciliation to U.S. GAAP. Amounts reported in the reconciliation should be referred to as determined in accordance with U.S. GAAP except for the specific items for which there is a deviation; exceptions should be stated to be in accordance with Item 17 or 18 of Form 20–F, as applicable, and different than that required by U.S. GAAP.[5]

The reconciliation provided pursuant to Item 17 or 18 of Form 20–F must be included in notes to the financial statements and, accordingly, must be considered by the auditor when expressing an opinion on the financial statements taken as a whole. The auditor's report is required to comply with Rule 2–02 of Regulation S–X, and need not refer specifically to the note containing the reconciliation. However, if the reconciliation furnished in the notes to the financial statements fails to include disclosure of all material departures from U.S. GAAP or the quantification of the effects of accounting differences is materially misstated, or, where applicable, is incorrectly stated to be determined pursuant to the special provisions afforded under Item 17 or 18 by the rules adopted today, the financial statements would be presumed to be materially misleading and an exception should be cited in the auditor's report.

V. Cost-Benefit Analysis

No specific data were provided in response to the Commission's request regarding the costs and benefits of the amendment being adopted today. Several commenters noted that the proposal would address to a large extent the time and cost of additional recordkeeping and reporting resulting from having to reconcile different accounting methods for business combinations. The Commission believes costs will be reduced by this amendment. The Commission believes that the adoption of these rules will be beneficial to U.S. investors, as it will encourage more foreign companies to list their securities and raise capital in the United States and will be consistent with investor protection.

VI. Regulatory Flexibility Act Certification

Pursuant to the Regulatory Flexibility Act (5 Act U.S.C. 605(b)), the Chairman of the Commission has certified that the proposed amendments will not have a significant impact on a substantial number of small entities. Members of the public who wish to obtain a copy of

[5] The accommodation provided under the adopted rule is an exception to the requirement to reconcile to U.S. GAAP that is similar to the accommodation that had been provided previously to foreign private issuers that prepare price level adjusted financial statements. See Securities Act Release No. 7117

the Regulatory Flexibility Certification should contact Wayne E. Carnall, (202) 942–2960, Deputy Chief Accountant, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

VII. Statutory Bases

The Commission's rules and forms are amended pursuant to section 19 of the Securities Act of 1933 and sections 3(b), 4A, 12, 13, 14, 15, 16, and 23 of the Securities Exchange Act of 1934.

VIII. Effective Date

The amendment to Form 20–F shall be effective immediately upon publication in the **Federal Register**, in accordance with the Administrative Procedure Act, which allows effectiveness in less than 30 days after publications for, *inter alia*, "a substantive rule which grants or recognizes an exemption or relieves a restriction." 5 U.S.C. 553(d)(1).

List of Subjects in 17 CFR Part 249

Accounting, Reporting and recordkeeping requirements, Securities.

Text of Rule and Form Amendments

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted;

§ 249.220f [Amended]

2. By amending Form 20–F (referenced in § 249.220f) by adding paragraph (viii) to Item 17(c)(2) and adding Instruction (6) to Item 17 and adding paragraph (viii) to Item 18(c)(2) and adding Instruction (5) to Item 18 to read as follows:

Note: The Form 20–F does not appear and the amendments will not appear in the Code of Federal Regulations.

Form 20–F

Item 17. Financial Statements

* * * * *

(c) * * *

(2) * * *

(viii) Issuers that prepare financial statements on a basis of accounting other than U.S. generally accepted accounting principles and which basis conforms with the guidance in International Accounting Standards No. 22, as amended in 1993, with respect to the period of amortization of goodwill and negative goodwill may omit the disclosures specified by paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii) of this Item regarding the effects of differences attributable solely to the period of amortization. Goodwill and negative goodwill that is subject to the amortization period under IAS 22 is based on the amount determined in accordance with U.S. GAAP

Instructions

* * * * *

(6)(a) A business combination which would be deemed a uniting of interests under International Accounting Standards No. 22, as amended in 1993 ("IAS 22"), and was accounted for using that method in the primary financial statements may be deemed to be, for purposes of the reconciliation to U.S. GAAP, a pooling of interests. A business combination which would be deemed an acquisition under IAS 22 and was accounted for using that method in the primary financial statements may be deemed to be, for purposes of the reconciliation to U.S. GAAP, a purchase. This paragraph is not applicable for promoter transactions, leveraged buyouts, mergers of entities under common control, reverse acquisitions and other transactions not addressed by IAS 22. Once the method of accounting is determined, the reconciliation to U.S. GAAP should quantify differences between the balances in the primary financial statements and the amounts determined in accordance with U.S. GAAP as required by this Item.

(b) To obtain relief from the reconciliation requirement regarding the method of accounting, or the amortization period of goodwill or negative goodwill, the primary financial statements should apply the respective provisions of IAS 22 to all business combinations consummated on or after January 1, 1995. issuers can either retroactively adopt IAS 22 in the primary financial statements for all business combinations consummated prior to January 1, 1995, or provide a full reconciliation to U.S. GAAP for such prior business combinations.

(c) If the method of accounting for a business combination and/or the provisions for amortization of goodwill or negative goodwill complies with IAS 22, a statement to that effect must be included in the financial statements. The reconciliation shall state that the amounts presented comply with Item 17 of Form 20–F and are different from that required by U.S. GAAP

Item 18. Financial Statements

* * * * *

(c) * * *

(2) * * *

(viii) Issuers that prepare financial statements on a basis of accounting other than U.S. generally accepted accounting principles and which basis conforms with the guidance in International Accounting Standards No. 22, as amended in 1993, with respect to the period of amortization of goodwill and negative goodwill may omit the disclosures specified by paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii) of this Item regarding the effects of differences attributable solely to the period of amortization. Goodwill and negative goodwill that is subject to the amortization period under IAS 22 is based on the amount determined in accordance with U.S. GAAP

* * * * *

Instructions

* * * * *

(5)(a) A business combination which would be deemed a uniting of interests under International Accounting Standards No. 22, as amended in 1993 ("IAS 22"), and was accounted for using that method in the primary financial statements may be deemed to be, for purposes of the reconciliation to U.S. GAAP, a pooling of interests. A business combination which would be deemed an acquisition under IAS 22 and was accounted for using that method in the primary financial statements may be deemed to be, for purposes of the reconciliation to U.S. GAAP a purchase. This paragraph is not applicable for promoter transactions, leveraged buyouts, mergers of entities under common control, reverse acquisitions and other transactions not addressed by IAS 22. Once the method of accounting is determined, the reconciliation to U.S. GAAP should quantify differences between the balances in the primary financial statements and the amounts determined in accordance with U.S. GAAP as required by this item.

(b) To obtain relief from the reconciliation requirement regarding the method of accounting, or the amortization period of goodwill or negative goodwill, the primary financial statements should apply the respective provisions of IAS 22 to all business combinations consummated on or after January 1, 1995. Issuers can either retroactively adopt IAS 22 in the primary financial statements for all business combinations consummated prior to January 1, 1995, or provide a full reconciliation to U.S. GAAP for such prior business combinations.

(c) If the method of accounting for a business combination and/or the provisions for amortization of goodwill or negative goodwill complies with IAS 22, a statement to that effect must be included in the financial statements. The reconciliation shall state that the amounts presented comply with Item 18 of Form 20–F and are different from that required by U.S. GAAP

By the Commission.

Dated: December 13, 1994.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–31037 Filed 12–19–94; 8:45 am]

BILLING CODE 8010–01–P–M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33–7120; International Series Release No. 760; File No. S7–36–94]

RIN 3235–AG26

Amendments To Clarify Safe Harbors for Broker-Dealer Research Reports

AGENCY: Securities and Exchange Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Commission is proposing today amendments relating to the safe harbor provisions of Rules 138 and 139 under the Securities Act of 1933. The proposed amendments are intended to clarify the availability of the safe harbor provisions of Rule 138 relating to broker-dealer research reports on individual companies and the availability of the safe harbor provisions of Rule 139 for broker-dealer industry research reports which include sizable, first-time foreign registrants.

DATES: Comments should be received on or before January 19, 1995.

ADDRESSES: Comment letters should refer to File Number S7–36–94 and be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. The Commission will make all comments available for public inspection and copying in its Public Reference Room at the same address.

FOR FURTHER INFORMATION CONTACT: Annemarie Tierney, (202) 942–2990, Office of International Corporate Finance, Division of Corporation Finance, U.S. Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: As described in detail below, the Commission is proposing amendments to Rule 138[1] and Rule 139[2] under the Securities Act of 1933 (the "Securities Act").[3]

I. Availability of Research Report Safe Harbors

A. Rule 139 Safe Harbor

Rule 139 under the Securities Act provides safe harbor protection from the registration requirements of that Act for the distribution by broker-dealers of information, opinions or recommendations concerning issuers in the process of registering securities under the Securities Act.

Prior to April 1994, reliance on the safe harbor for research reports concerning a foreign private issuer were conditioned on eligibility of the foreign private issuer for use of Form F–3.[4] On April 19, 1994, the Commission adopted amendments to Rule 139 that make the rule available for offerings by foreign private issuers that would be eligible to use Form F–3 but for the 12-month reporting requirement if the issuer meets an alternative offshore trading history test.[5] Under the alternative test, a foreign private issuer must have been listed or quoted on a designated offshore securities market[6] for a period of at least 12 months.

In adopting these amendments, the Commission intended that broker-dealers would be able to rely upon Rule 139 for sizable foreign private issuers with respect to which there is a stream of corporate information available in the marketplace, including qualifying foreign issuers registering securities with the Commission for the first time. As drafted, however, the amendments did not make clear that the elimination of the reporting history requirement included the elimination of the requirement that a foreign issuer be previously reporting pursuant to the Securities Exchange Act of 1934 (the "Exchange Act")[7] and have filed at least one annual report.

The amendments proposed today revise Rule 139 to make clear that the special provisions adopted last year for sizable foreign issuers are also available for those issuers' initial public offerings in the United States.[8]

B. Rule 138 Safe Harbor

Rule 138 under the Securities Act permits publication of information, opinions and recommendations concerning qualifying issuers by broker-dealers that are participants in a distribution, so long as the reports contain information, opinions or recommendations regarding a specified class of the issuer's securities which is not the subject of the offering in which the broker-dealer is a participant. The rule defines eligible issuers as those that may register securities on Forms S–2[9] or F–2.[10] The reference to Forms S–2 and F–2 is intended to include issuers eligible to register on Forms S–3 and F–3 as well. Questions have arisen as to the availability of the Rule 138 safe harbor for offerings registered on Form S–3 where issuers have not been subject to reporting requirements for 36 months. The Commission did not intend to change the availability of Rule 138 for those offerings when it reduced the reporting history requirements for Form S–3[11] and is of the view that Rule 138 is still available for offerings registered on Form S–3. Rule 138 is proposed to be amended to clarify this point. The Commission is also proposing to amend the rule to clarify that Form F–3 eligible issuers would qualify for the rule, as would qualifying first-time foreign issuers that meet the alternative offshore trading history test proposed for Rule 139.[12]

In addition, in light of the fact that shelf registration statements often register both debt and equity securities (on an either allocated or unallocated basis), the Commission is proposing to add an instruction to Rule 138 to codify the staff interpretation that the rule should be applied on an offering-by-offering basis for issuers which are eligible to use Forms S–3 or F–3 and are using the Commission's shelf registration procedures.

II. Cost-Benefit Analysis

To fully evaluate the costs and benefits associated with the proposed amendments to Rule 138 and Rule 139, the Commission requests commenters to provide views and empirical data as to the costs and benefits associated with such proposals.

III. Regulatory Flexibility Act Certification

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Chairman of the Commission has certified that the proposed amendments to Securities Act Rules 138 and 139 relating to broker-dealer research reports (17 CFR 230.138 and 17 CFR 230.139) will not, if adopted, have a significant impact on a

[1] 17 CFR 230.138.

[2] 17 CFR 230.139.

[3] 15 U.S.C. 77a *et seq*

[4] 17 CFR 239.33.

[5] Release No. 33–7053 (Apr 19, 1994), 59 FR 21644.

[6] "Designated offshore securities market" is defined in Rule 902(a) of Regulation S (17 CFR 230.902(a)).

[7] 15 U.S.C. 78a *et seq*.

[8] In order to make the rule available to first-time sizable foreign registrants, the Commission is proposing to amend the first sentence of the rule to provide that a foreign private issuer that meets the requirements of paragraph (a)(2) of the Rule need not previously have been reporting pursuant to the Exchange Act. In addition, language would be added to paragraph (a)(2) to provide that such foreign private issuer need not have filed an annual report as a condition of eligibility for the rule.

[9] 17 CFR 239.12.

[10] 17 CFR 239.32.

[11] 17 CFR 239.13 as amended by Release No. 33–6964 (Oct. 22, 1992) 57 FR 48970.

[12] In Release No. 33–6550 (Sept. 19, 1984) 49 FR 37569 at footnote 26, the Commission stated that "[b]ecause the markets for nonconvertible senior securities and common stock differ, Rule 138 provides a somewhat broader safe harbor [than Rule 139] in circumstances where the opportunity to condition the market is lessened."

substantial number of small entities. This certification, including the reasons therefor, is attached as Appendix A to this release.

IV. General Request for Comments

Any interested person wishing to submit written comments on any aspect of the amendments to the rules that are subject to this release are requested to do so. Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549 and should refer to file number S7–36–94.

V. Statutory Bases

The amendments to the Commission's rule are being proposed pursuant to sections 6, 7, 8, 10 and 19(a) of the Securities Act of 1933, as amended.

List of Subjects in 17 CFR Part 230

Reporting and recordkeeping requirements, securities

Text of Proposed Amendments

In accordance with the foregoing, Title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The general authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79t, 80a–8, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

2. By revising § 230.138 to read as follows:

§ 230.138 Definition of "offer for sale" and "offer to sell" in sections 2(10) and 5(c) in relation to certain publications.

(a) Where a registrant which meets the requirements of paragraph (c)(1), (c)(2) or (c)(3) of this section proposes to file, has filed or has an effective registration statement under the Act relating solely to a nonconvertible debt security or to a nonconvertible, nonparticipating preferred stock, publication or distribution in the regular course of its business by a broker or dealer of information, opinions or recommendations relating solely to common stock or to debt or preferred stock convertible into common stock of such registrant shall not be deemed to constitute an offer for sale or offer to sell the security to which such registration statement relates for purposes of sections 2(10) and 5(c) of the Act (15 U.S.C. 77a *et seq.*) even though such broker or dealer is or will be a participant in the distribution of the security to which such registration statement relates.

(b) Where a registrant which meets the requirements of paragraph (c)(1), (c)(2) or (c)(3) of this section proposes to file, has filed or has an effective registration statement under the Act relating solely to common stock or to debt or preferred stock convertible into common stock, the publication or distribution in the regular course of its business by a broker or dealer of information, opinions or recommendations relating solely to a nonconvertible debt security, or to a nonconvertible nonparticipating preferred stock shall not be deemed to constitute an offer for sale or offer to sell the security to which such registration statement relates for purposes of sections 2(10) and 5(c) of the Act (15 U.S.C. 77a *et seq.*), even though such broker or dealer is or will be a participant in the distribution of the security to which such registration statement relates.

(c)(1) The registrant meets all of the conditions for the use of Form S–2 (§ 239.12 of this chapter) or Form F–2 (§ 239.32 of this chapter);

(2) The registrant meets the registrant requirements of Form S–3 (§ 239.13 of this chapter) or Form F–3 (§ 239.33 of this chapter); or

(3) The registrant is a foreign private issuer which meets all the registrant requirements of Form F–3 (§ 239.33 of this chapter), other than the reporting history provisions of paragraph A.1. and A.2.(a) of General Instruction I of such form, and meets the minimum float or investment grade securities provisions of either paragraph B.1. or B.2. of General Instruction I. of such form and the registrant's securities have been traded for a period of at least 12 months on a designated offshore securities market, as defined in § 230.902(a).

Instruction to Rule 138

When a registration statement relates to securities which are being registered for an offering to be made on a continuous or delayed basis pursuant to Rule 415(a)(1)(x) under the Act (§ 230.415(a)(1)(x)) and the securities which are being registered include classes of securities which are specified in both paragraph (a) and (b) of this section on either an allocated or unallocated basis, a broker or dealer may nonetheless rely on:

(1) Paragraph (a) of this section when the offering in which such broker or dealer is or will be a participant relates solely to classes of securities specified in paragraph (a) of this section, and

(2) Paragraph (b) of this section when the offering in which such broker or dealer is or will be a participant relates solely to classes of securities specified in paragraph (b) of this section.

3. By revising the introductory text to § 230.139 and paragraph (a)(2) to read as follows:

§ 230.139 Definition of "offer for sale" and "offer to sell" in sections 2(10) and 5(c) in relation to certain publications.

Where a registrant which is required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) or which is a foreign private issuer meeting the conditions of paragraph (a)(2) of this section proposes to file, has filed or has an effective registration statement under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) relating to its securities, the publication or distribution by a broker or dealer of information, an opinion or a recommendation with respect to the registrant or any class of its securities shall not be deemed to constitute an offer for sale or offer to sell the securities registered or proposed to be registered for purposes of sections 2(10) and 5(c) of the Act (15 U.S.C. 77a *et seq.*), even though such broker or dealer is or will be a participant in the distribution of such securities, if the conditions of paragraph (a) or (b) of this section have been met:

(a)(1) * * *

(2) The registrant is a foreign private issuer that meets all the registrant requirements of Form F–3 (§ 239.33 of this chapter), other than the reporting history provisions of paragraphs A.1. and A.2.(a) of General Instruction I of such form, and meets the minimum float or investment grade securities provisions of either paragraph B.1. or B.2. of General Instruction I of such form, and the registrant's securities have been traded for a period of at least 12 months on a designated offshore securities market, as defined in § 230.902(a), and such information, opinion or recommendation is contained in a publication which is distributed with reasonable regularity in the normal course of business.

* * * * *

By the Commission.

Dated: December 13, 1994.

Margaret H. McFarland,

Deputy Secretary.

Note: This Appendix to the Preamble will not appear in the Code of Federal Regulations.

Appendix A

Securities and Exchange Commission Regulatory Flexibility Act Certification

I, Arthur Levitt, Chairman of the United States Securities and Exchange Commission (the "Commission"), hereby certify pursuant to 5 U.S.C. 605(b) that proposed revisions to Rules 138 and 139 under the Securities Act of 1933 (the "Securities Act"), if promulgated, will not have a significant economic impact on a substantial number of small entities. The reason for this certification is that the proposed revisions to the rules are intended to clarify the availability of the safe harbor provisions of the rules with respect to large domestic and foreign issuers. Any incidental impact on small U.S. entities is not expected to be significant.

Dated: December 12, 1994.

Arthur Levitt,

Chairman.

[FR Doc. 94–31038 Filed 12–19–94; 8:45 am]

BILLING CODE 8010–01–P

federal register

Tuesday
December 20, 1994

Part V

Department of Labor

Employment and Training Administration

20 CFR Part 655

Wage and Hour Division

29 CFR Part 507

Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

RIN 1205–AA89

Wage and Hour Division

29 CFR Part 507

RIN 1215–AA69

Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models

AGENCIES: Employment and Training Administration, Labor; and Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: The Employment and Training Administration (ETA) and the Employment Standards Administration (ESA) of the Department of Labor (DOL or Department) are promulgating regulations governing the filing and enforcement of labor condition applications filed by employers seeking to employ foreign workers in specialty occupations and as fashion models of distinguished merit and ability under the H–1B nonimmigrant classification. Under the Immigration and Nationality Act (INA), as amended by the Immigration Act of 1990 (IMMACT), an employer seeking to employ a nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability is required to file a labor condition application with DOL before the Immigration and Naturalization Service (INS) may approve an H–1B visa petition. The labor condition application process is administered by ETA; complaints and investigations regarding labor condition applications are the responsibility of ESA.

The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA) amended the INA and the IMMACT to change substantially the H–1B labor condition application program, retroactive to October 1, 1991.

EFFECTIVE DATE: January 19, 1995.

FOR FURTHER INFORMATION CONTACT: On 20 CFR part 655, subpart H, and 29 CFR part 507, subpart H, contact Flora T. Richardson, Chief, Division of Foreign Labor Certifications, U.S. Employment Service, Employment and Training Administration, Department of Labor, Room N–4456, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 219–5263 (this is not a toll-free number).

On 20 CFR part 655, subpart I, and 29 CFR part 507, subpart I, contact Solomon Sugarman, Wage and Hour Division, Employment Standards Administration, Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 219–7605 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the information collection requirements included in this rule have been submitted to the Office of Management and Budget (OMB). A technical amendment will be issued following OMB PRA approval.

II. Background

On November 29, 1990, the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*) (INA or Act) was amended by the Immigration Act of 1990 (IMMACT), Public Law 101–649, 104 Stat. 4978. On December 12, 1991, the INA was further amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Public Law 102–232, 105 Stat. 1733. These amendments assign responsibility to the Department of Labor (Department or DOL) for the implementation of several provisions of the Act relating to the entry of certain categories of employment-based immigrants, and to the entry and temporary employment of certain categories of nonimmigrants. One of the major provisions of the Act governs the entry temporarily of foreign "professionals" to work in "specialty occupations" in the U.S. under H–1B nonimmigrant status. 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184(c).

Before the Immigration and Naturalization Service (INS) will approve H–1B status for a foreign worker, the employer which intends to employ the alien, must have on file with the Department's Employment and Training Administration a Labor Condition Application for H–1B Nonimmigrants (LCA), Form ETA 9035. Pursuant to the Interim Final Rule, in filling out the LCA, an employer must specifically indicate, among other things, the H–1B nonimmigrant's job title, the number of H–1B nonimmigrant(s) sought, the rate of pay to be paid the nonimmigrant(s), the nonimmigrant's anticipated period of employment, and the location where the H–1B nonimmigrant(s) will work. Additionally, the employer attests to four statements:

1. H–1b nonimmigrants will be paid at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question or the prevailing wage level for the occupation in the area of employment, whichever is higher;

2. The employment of H–1B nonimmigrants will not adversely affect the working conditions of workers similarly employed in the area of employment;

3. On the date the application is signed or submitted, there is not a strike, lockout, or work stoppage in the course of a labor dispute in the occupation in which H–1B nonimmigrants will be employed at the place of employment.

4. As of this date, notice of this application has been provided to workers employed in the occupations in which H–1B nonimmigrants will be employed.

The H–1B category of specialty occupations consists of those occupations which require the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree (or its equivalent) in the specific specialty as a minimum for entry into the occupation in the U.S. 8 U.S.C. 1184(i)(1). In addition, a nonimmigrant in a specialty occupation must possess full State licensure to practice in the occupation (if required), completion of the required degree, or experience equivalent to the degree and recognition of expertise in the specialty. 8 U.S.C. 1184(i)(2). The category of "fashion model" requires that the nonimmigrant be of distinguished merit and ability. 8 U.S.C. 1101(a)(15)(H)(i)(b). INS identifies and defines the occupations covered by the H–1B category and determines an alien's qualifications for such occupations. DOL only administers and enforces the labor condition applications relating to the employment.

The rulemaking history, as published in the **Federal Register**, is as follows:

March 20, 1991, Advance Notice of Proposed Rulemaking, 56 FR 11705.

August 5, 1991, Proposed Rule, 56 FR 37175.

October 22, 1991, Interim Final Rule, 56 FR 54720.

January 13, 1992, Interim Final Rule, 57 FR 1316.

October 6, 1993, Proposed Rule, 58 FR 52152.

December 30, 1993, Interim Final Rule, 58 FR 69226.

III. Analysis of Comments

A. Comments to the Proposed Rule

Comments regarding the October 6, 1993, Notice of Proposed Rulemaking (NPRM) were received from 264 entities. Over half (157) were submitted by businesses; 33 by educational facilities; 23 by attorneys; and 21 by the general public. The rest of the commenters were distributed among members of Congress (3), the AFL–CIO (1), the Embassy of India (1), Federal Government employees (5), State governments (6), and trade associations (15).

The proposals eliciting the most comments were those regarding the job contractor concept and the related requirement of posting notice at the place of employment or worksite(s). Of the 157 business comments, 128 concerned the job contractor proposal. In total, there were 171 comments concerning the job contractor proposal, of which 153 (nearly 90%) opposed the proposal.

Educational institutions commented primarily on the proposal to require the employer to identify the prevailing wage source on the labor condition application. These commenters uniformly advocated a check-off system, whereby the LCA-filing employer would check a block on the form to indicate whether the prevailing wage source was a State Employment Service Agency (SESA) determination, an authoritative source, or another legitimate source.

The majority of the general public commenters were critical of the H–1B program in general, and suggested that businesses utilizing H–1B nonimmigrants should pay user fees and should be assessed substantial fines if found in violation. In further opposition to the H–1B program, several commenters (in addition to the general public) advocated that the proposed regulations did not go far enough and that LCA employers should be required to report the H–1B nonimmigrant's wage earnings to the Internal Revenue Service and to trade associations in order to facilitate better monitoring of the LCA employer's activities.

B. Comments to the Interim Final Rule Dated January 13, 1992

There were 45 comments to this rule. Three issues commented on are germane to this Final Rule: The movement among worksites of H–1B nonimmigrants, in-kind perquisites, and the definition of "aggrieved party" Worksite movement of H–1B nonimmigrants is discussed in item 2.a below; in-kind perquisites in item 2.b; and definition of aggrieved party in item 1.f.

C. Additional Discussions and Comments

On December 8, 1994, a meeting was held at OMB pursuant to E.O. 12866. Other than representatives from the Department and OMB the organizations represented were the American Immigration Lawyers Association, the American Council on International Personnel, the Information Technology Association of America, the National Association of Foreign Student Advisors, and the American Council on International Priorities. Written comments were subsequently received by the Department from the American Council on International Personnel, the Information Technology Association of America and the American Immigration Lawyers Association.

D. Matters Addressed in the Final Rule

While the Department maintains its discretion to engage in additional rulemaking, and such proposed rulemaking is presently under consideration, this final rule culminates this series of rulemaking activities.

1 Provisions Adopted as Proposed

a. Geographic/Occupational Scope of the LCA (See § _____.730(c)(2).) The Department and the public presently are not receiving a true indication of the valid job openings for which employers anticipate the need for H–1B nonimmigrants. EPA's operating experience indicates that some employers have been filing LCA's containing "laundry lists" of occupations and areas where an H–1B nonimmigrant might be needed, in many cases on a single labor condition application. When this practice is coupled with the potential 6-year validity period of the applications, the information disclosed to the Department and to the public can be substantially misleading with respect to the amount of hiring activity actually occurring pursuant to this program.

The Department proposed to limit an individual labor condition application to a single occupation and to geographic areas only within the jurisdiction of a single ETA regional office. The Department expressed its view that, under such a rule, employers would be more likely to file LCA's for the actual number of job openings for which H–1B workers are sought, ETA would be able to better manage and collect data on the H–1B program, INS could exercise more control over the petitions filed pursuant to a labor condition application, and the Department would be better positioned to carry out enforcement activities under this program. Additionally, the Department requested comments on this proposal with specific reference to whether and to what extent this change should promote the objective of receiving applications which more accurately represent actual job openings for which H–1B nonimmigrants are being sought, and whether the change might occasion any unintended operational consequences.

Nearly all of the 39 commenters on this issue indicated that if the Department wanted to get a truer picture of actual practice, instead of limiting the LCA to one occupation and ETA regional area, the Department should limit the number of workers who could be "procured" on one LCA.

Of the 39 commenters, there were 23 against the proposal and 16 for it. One commenter recommended that the LCA be limited to one occupation, but with a nationwide filing. Several commenters from the general public advocated that each user of this program should have to pay fees in order to participate.

Concerning user fees, the Department has taken no action in the Final Rule. Concerning the "single occupation" LCA filing requirement, the Department has carefully considered the comments and its own program experience and has concluded that—without any significant additional burden for employers—the proposed provision, combined with other clarifications in this Final Rule, such as changing the LCA validity period (item 1.d below) and LCA filing dates (item 4.d below), will promote the Department's desired result: a truer indication of valid job openings. Therefore, the proposal is adopted as it appeared in the NPRM. However, concerning the "single region" LCA filing requirement, the Department has concluded, based on program experience and the comments on the NPRM, that it is possible to achieve the Department's goals (under statutory obligations) without modifying the Interim Final Rule's provisions permitting the employer to file the LCA with the ETA regional office having jurisdiction over the initial place of employment if the H–1B nonimmigrant is to be employed sequentially in various places in more than one ETA regional jurisdiction.

b. Notification (See § _____.734(a)(2).) Section 212(n)(1)(C) of the INA requires that an employer seeking to hire an H–1B nonimmigrant shall notify, at the time of filing the application, the bargaining representative of its employees of the filing of the labor condition application

or, if there is no bargaining representative post notice of filing in conspicuous locations at the place of employment. 8 U.S.C. 1182(n)(1)(C). The interim final regulations at §_____.730(h)(1) implement this statutory requirement.

In the course of investigations under this program, the Wage and Hour Division has found that some employers have made false statements regarding wages and worksite locations and have failed to fulfill the obligations attested on the applications (for example, by not paying the H–1B nonimmigrants the rate specified). As a means of curbing such abuses, the Department proposed that employers also be required to provide to each H–1B nonimmigrant a copy of the labor condition application, no later than the date the H–1B nonimmigrant reports to the place of employment.

Of the 29 commenters on this issue, 26 supported the proposal. Several suggestions as to the appropriate timing of the notice to the H–1B workers were made by commenters: the employer should be allowed 10 days to meet this requirement; the employer could fulfill the requirement by providing the H–1B nonimmigrant a copy of the certified LCA; the employer should comply with this requirement at the time the visa petition is filed, before the H–1B nonimmigrant reports for work; and the employer should have the H–1B nonimmigrant sign the notification. One commenter opposing the proposal said that the notice should be provided only if the nonimmigrant requests it.

After careful consideration of the comments and the Department's program experience, the Department is promulgating this proposal as it appeared in the NPRM, in order to better assure the protections intended by Congress and to better safeguard workers (both foreign and domestic) against abuses by employers. The Department is of the view that notification at the time the H–1B worker begins work and receives other employment related documents, such as tax withholding and I–9 information, is the most appropriate time to provide the copy of the LCA.

A further clarification of the regulation, based on program experience, is being made in recognition of abuses and to better assure the protections of workers which Congress intended the notice requirement to achieve. The Department has become aware that some employers which place H–1B nonimmigrants at new worksites within areas covered by existing LCA's have failed to fulfill their LCA obligations, but, because no notices were posted at the new worksites, the adversely affected workers were not informed of the LCA standards or of their own rights to examine certain documents and to file complaints. The Department recognizes that it could take the position that an employer may employ H–1B nonimmigrants only at worksites where notice had been given, and therefore could require an employer to take two steps before placing H–1B nonimmigrants at a new worksite within the same area of intended employment: post a notice *and* file a new LCA. However, such a dual requirement appears to the Department to be burdensome. The protections intended by Congress can be afforded by having a notice posted by the employer at each new worksite within the same area of intended employment at the time the H–1B nonimmigrants are sent there to work, without the employer being required to file new LCA's. The Final Rule, therefore, imposes a less burdensome but equally worker-protective standard, by providing that the employer shall provide such worksite notices on the first day of work by an H–1B nonimmigrant at that worksite which will remain posted for at least ten days.

A clarification of the regulation, based upon program experience, is also being made in recognition of potential abuses with regard to the timing of an employer's provision of notice of filing an LCA. The Department has become aware of confusion and potential adverse effects in situations in which employers provide the required notice of filing the application to the bargaining representative, or to its employees by posting at the place of employment, considerably in advance of the date the application is filed (*e.g.*, six months prior to filing). In order to alleviate confusion and to better assure the achievement of Congressional intent that U.S. workers who will be working side-by-side with H–1B nonimmigrants be notified of the employer's intent and their ability to file complaints if they believe violations have occurred, the Final Regulation requires that notice, provided by the employer under the fourth labor condition statement, must be provided on or within 30 days prior to the date the labor condition application is filed.

c. Prevailing Wage Identification on the LCA (See §_____.730(c)(1)(vi).) Pursuant to the H–1B interim final regulations, employers must file with ETA a completed and dated original labor condition application and one copy. No documentation of the attestation elements must be submitted to ETA.

The Department proposed that employers be required to identify (on the LCA) the prevailing wage rate and the source utilized to obtain the wage information. This would impose no additional burden on an employer acting in compliance with the program's requirements and would provide additional impetus for compliance by those employers who might not properly determine the prevailing wage prior to filing the LCA. ETA would continue to certify an LCA where all items on the LCA have been completed and information submitted on the form is not obviously inaccurate. However, an LCA which fails to contain this additional information or which indicates a prevailing wage date source not consistent with regulatory requirements would be rejected.

Forty-four commenters specifically addressed this issue: 31 opposing the proposal and 13 supporting it. Generally, opposition was based on the commenters' concern that ETA would reject LCA's more frequently and/or would refer the LCA to ESA which would initiate an investigation. Eighteen representatives of educational institutions, the most frequent commenters on this issue, advocated a check-off system whereby the employer merely would check whether its prevailing wage source was a SESA determination, independent authoritative source, or another legitimate source of information.

The Department has considered fully the views of the commenters and has reviewed the experience and information obtained through the program. The Department is modifying the proposed form to incorporate the suggestions of commenters to some extent. The form will provide that if the employer obtains a prevailing wage rate from a SESA, the employer may check the box for SESA and enter the prevailing wage rate obtained. When the prevailing wage rate is obtained from any other source, the employer must enter the identity of the source and the wage rate.

Some commenters have expressed concern regarding this change in apprehension that there will be a greater rejection rate of LCAs on the part of ETA. ETA will continue to follow the guidance of the statute and the regulation and will not reject an LCA unless there are obvious omissions or errors. Of course if the employer fails to enter the identity of the source of a prevailing wage rate, or enters a source that is obviously not an acceptable source, ETA will reject the LCA.

d. LCA Validity Period (See §_____.750(a).) Pursuant to section

214(g)(4) of the Act, the period of authorized admission as an H–1B nonimmigrant may not exceed 6 years. Section _____.750 of the interim final H–1B regulations published at 57 FR 1316 (January 13, 1992) provides that a certified labor condition application shall be valid for the period of employment indicated on Form ETA 9035; in no event can the validity period of a labor condition application (LCA) exceed 6 years. However, the INS's regulations, at 8 CFR 214.2(h)(9)(iii)(B) (*1*) and (*3*), limit the validity of a certified petition to 3 years or the expiration of the validity period of the labor condition application, whichever comes sooner. The Department proposed to bring the validity period of LCA's into conformity with INS's regulations by reducing the validity period of a labor condition application from 6 years to 3 years. The validity period would begin with the starting date entered by the employer in the "Period of Employment" section of Item 7 on the LCA or the date ETA certifies the LCA, whichever is later. Any LCA previously filed with and certified by ETA, however, would remain valid for up to six years or the ending date of employment as certified.

Thirty commenters addressed this issue—16 opposing the proposal (primarily businesses and attorneys) and 14 advocating the proposal (primarily educational institutions and State governments). Trade associations were divided—4 pro and 4 con. Those opposing the proposal generally expressed concerns that there would be too much paperwork, that the proposal was burdensome, and that the proposal would hamper valid users. Several of those supporting the proposal expressed the view that the LCA should not be valid for more than 1 year.

While the Department is mindful of the concerns expressed by commenters opposed to the proposal, the need for uniformity in the DOL and INS administration of the program and avoidance of confusion among H–1B employers and nonimmigrants outweigh any potential burdens. Therefore, the Department is promulgating this proposal as it appeared in the NPRM. This proposal, in conjunction with the deletion of the prevailing wage update provision, should reduce the burden on employers by providing a consistent timetable for DOL and INS filing requirements.

e. Strike-Lockout (See § _____.733(a)(1).) Section 212(n)(1)(B) of the INA requires that an employer seeking to hire H–1B nonimmigrants shall file an application with the Secretary stating that "[t]here is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment." The Department's interim final H–1B regulations at § _____.730(g) provide that:

> [A]n employer seeking to employ H–1B nonimmigrants shall state on Form ETA 9035 that there is not at that time a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment. A strike or lockout which occurs after the labor condition application is filed by the employer with DOL is covered by INS regulations at new 8 CFR 214.2(h)(17).

The Department became aware that this regulatory provision did not address the potentially abusive situation in which an employer with a certified labor condition application could petition for additional H–1B nonimmigrants in the event of a labor dispute subsequent to the filing and certification of the application, and thus use H–1B nonimmigrants to break a strike or to weaken the bargaining position of U.S. workers. Such use of H–1B nonimmigrants to weaken U.S. workers' bargaining position contrary to the clear intent of the law could be achieved by employers hiring H–1B nonimmigrants directly or obtaining such workers from job contractors. Therefore, to prevent this potential abuse, the Department proposed to amend the regulations to prohibit an employer from using a certified labor condition application to file visa petitions with INS for an occupation in which a strike, lockout, or work stoppage in the course of a labor dispute occurs at the H–1B nonimmigrant's worksite.

Further, to prevent employers from obtaining H–1B nonimmigrants in the event of a labor dispute, the Department proposed, through the proposed new § _____.733, to prohibit employers from placing H–1B nonimmigrants in employment at worksites in occupations that are involved in a strike, lockout, or work stoppage in the course of a labor dispute. Modification of Form ETA 9035 was proposed so that employers would be required to attest that they would not use the labor condition application in support of any petition filed with INS for H–1B nonimmigrants if a strike, lockout, or work stoppage in the course of a labor dispute involves the occupation covered by the LCA at the place of employment at any time during its validity period after the labor condition application is certified.

The Department also proposed to amend the regulations to require employers to notify DOL within 3 days of the start of a strike, lockout, or other work stoppage in the course of a labor dispute in the occupation of the H–1B nonimmigrant(s) at any worksite. Upon receiving such a notification, the Department would undertake the necessary factfinding to determine whether the Secretary shall issue a strike determination to the INS pursuant to the INS's regulations at 8 CFR 214.2(h)(17).

Comments from 18 parties addressed this issue specifically, with over half against the proposal. However, all those comments opposing this proposal were conditional, suggesting that the restriction would be acceptable if it is limited to the occupation in which the H–1B nonimmigrant is employed (*i.e.*, nonimmigrant's employment would be permitted in an occupation other than one(s) subject to strike/lockout). Since the proposal was, in fact, so limited, these commenters' concerns would be alleviated by careful attention to the regulatory language.

After careful consideration of the comments, the Department is promulgating this proposal as it appeared in the NPRM, applicable not only to job contractors but to all employees, and relative to strikes, lockouts or other work stoppages in the occupational classification of a potential H–1B nonimmigrant at a given worksite. See also pages 31–32 regarding the provision for placement of H–1B nonimmigrants in an area of employment for which the employer does not have a valid LCA on file.

f. "Interested Party" and "Aggrieved Party" definitions (See § _____.715.) In section 212(n)(2) of the INA, Congress directed the Department to establish a process to respond to complaints from "aggrieved" parties and to provide opportunities for administrative hearings for "interested" parties following investigative determinations. 8 U.S.C. 1182(n)(2). The legislative history reflects Congress' intention that the Department's enforcement process would be the means for protecting both U.S. and foreign workers; no comprehensive pre-admission screening or review process was established. The Department concluded, in order to comply with the Congressional mandate for effective enforcement, that the terms "aggrieved" and "interested" party should be defined broadly in a manner consistent with their common meaning.

In the NPRM, the Department proposed that "aggrieved party or organization" would be defined as one whose operations or interests are adversely affected by the alleged violation(s). Based on the Department's experience regarding the scope and nature of adverse effects of violations, as well as the sources for reliable,

actionable allegations of violations, the Department proposed that the definition of the term "aggrieved party or organization" would encompass not only private-sector persons and organizations (*e.g.*, workers, their representatives, competitors of the allegedly violating employer), but also government agencies and officials (*e.g.*, Department of State consular officers, State Employment Security Agency Officials).

The Department also proposed that "interested party" would be defined to include persons and entities who are affected by the employer's action or the investigative determination at issue. The Department did not propose that such an individual need be adversely affected. By using the term "interested" (rather than "aggrieved") to identify the parties for whom hearing opportunities would be offered, Congress clearly mandated a broader class of persons for these rights than for investigations in response to complaints. The Department's broad definition, based on the Department's experience, would encompass both private and public entities.

Twenty-three NPRM commenters addressed these proposed definitions—18 opposed and 5 in support. All 10 business commenters and half of the trade association commenters were opposed to the proposal. Almost all commenters expressed the view that there was a connection between the Department's proposed definition of an aggrieved party and the Department's proposal regarding directed investigations; commenters viewed complaints from government agencies as an alternative avenue to achieving the opportunity to conduct directed investigations. See 1.g. (Directed Investigations) below. Two commenters to the Interim Final Rule proposed that the term "aggrieved party" should not include someone who provides frivolous or harassment complaints against an employer; these commenters also suggested that if the complainant's allegation is not sustained in a DOL proceeding, the complainant should be liable for any administrative costs incurred for the proceeding(s).

The statute at 8 U.S.C. 1182(n)(2)(A) provides that the Secretary of Labor shall conduct an investigation if there is reasonable cause to believe that an LCA-filing employer failed to meet a condition specified in the labor condition application or misrepresented a material fact in the application. A complainant providing such information has a right to provide it to the Secretary of Labor regardless of the complaint's resolution. Consequently, the Department cannot accept the proposal that the complainant should be liable for any administrative costs incurred from the proceeding(s).

After reviewing the comments, legislative intent, and programmatic experience, the Department is promulgating these proposals to add these definitions as they appeared in the NPRM, in order to achieve the Congressional intent of protection for workers and other affected parties through fair and effective post-admission investigations and administrative hearings.

g. Directed Investigations (See §_____.710.) As a result of its experience in operating the H–1B program and after consideration of the comments on the proposed rule, the Department has determined that it is neither necessary nor appropriate to limit its post-admission investigation of possible LCA violations to those where complaints have been filed by aggrieved parties. Thus the Final Rule allows post-admission investigations which the Department may conduct on its own initiative. This has no impact on the pre-admission LCA approval process.

The change in no way contravenes the Congressional intent. Labor condition applications, as required under the INA, continue to be accepted and certified unless incomplete or obviously inaccurate. No extensive weighing of evidence or investigation is added to the pre-admission LCA process, and the entry of the H–1B workers to the United States and to the employment is in no way slowed. The change, however, facilitates enforcement by removing a regulatorily-imposed impediment from the Department's post-approval investigative authority, so that the program's purposes can be better served and covered workers better protected.

The authority to conduct non-complaint investigations is not viewed nor intended by the Department as a mandate to conduct sweeping enforcement actions. Rather, in light of resource constraints and compelling enforcement priorities, the Department anticipates that its discretion for self-initiated investigations will be exercised sparingly, in circumstances where the Wage and Hour Administrator has reason to believe that H–1B violations may be occurring or have occurred. An investigation of an H–1B employer could be undertaken, for example, where the Administrator becomes aware of a possible violation of an employer's LCA as the result of information obtained in the course of an investigation of another employer, in the course of an investigation of the employer under another statute or another LCA, or as the result of the receipt of public information.

The Final Rule brings the H–1B program in line with regulations and practice under the H–1A nonimmigrant nurses' program. See, *e.g.*, 20 CFR 655.400(b) and 655.405(a). Under the H–1A program, which has statutory enforcement language similar to the H–1B program, investigations have been conducted since the initiation of that program as a result of a complaint or otherwise, and there has been no sweeping directed enforcement program as a result. *Id.*; see also 8 U.S.C. 1182 (m) and (n).

Originally, the Department questioned its authority to conduct post-admission directed investigations under the H–1B program, because discussion of the enforcement aspects of the H–1B program in the legislative history spoke of it as being "complaint-driven." However, re-examination of those statements—in context—shows that they consistently were made for the purpose of limiting DOL pre-acceptance review and investigation of the labor condition application; the statements were not directed to the scope of the Department's authority to investigate the LCA *after* it has been certified and the H–1B workers begin their employment. See, *e.g.*, 137 Cong. Rec. S18242, S18244 (November 26, 1992).

In addition to being consistent with the Department's regulations and practice under the similar H–1A program, post-admission directed enforcement in the H–1B program clearly is not prohibited by and can be supported under an analysis of the language of the statute.

Section 212(n)(2)(A) of the INA directs the Secretary to establish a process for the receipt, investigation, and disposition of complaints. 8 U.S.C. 1182(n)(2)(A).

Section 212(n)(2)(B) states that, "[u]nder such process [established pursuant to subparagraph (A)], the Secretary shall provide, within 30 days after such a complaint is filed, for a determination as to whether or not a reasonable basis exists to make a finding described in subparagraph (C)." 8 U.S.C. 1182(n)(2)(B).

Unlike subparagraph (B), subparagraphs (C) and (D) of section 212(n)(2), which provide for notice and opportunity for a hearing for failure to meet a condition, for sanctions, and for back pay orders, do not refer back to "such process" as must be established pursuant to subparagraph (A). 8 U.S.C. 1182(n)(2) (C) and (D). Thus, subparagraphs (C) and (D) stand on their own as processes for sanctioning employers which violate the terms of

certified labor condition applications. Such employers may be placed in the subparagraphs (C) and/or (D) notice and hearing processes either as a result of a complaint and investigation under subparagraphs (A) and (B) or as a result of some other action, such as a post-admission investigation undertaken by the Department on its own accord.

As indicated above, this is essentially the same statutory framework under which the Department investigates and sanctions H–1A program violations in the absence of a complaint. See 8 U.S.C. 1182(m)(2)(E) (ii), (iii), (iv), and (v).

In addition to making enforcement more consistent across these programs, the Department's directed investigations of possible violations of certified H–1B labor condition applications would enhance compliance under the program and better assure protection of U.S. and foreign workers. Such protection is consistent with a general Congressional principle in enacting immigration laws—to provide for the admission of foreign workers under terms and conditions of employment that do not adversely affect the wages and working conditions of similarly employed U.S. workers. See, *e.g.*, 8 U.S.C. 1182(a)(5)(A), 1182(m)(2)(A)(ii), 1182(n)(1)(A), and 1188(a)(1)(B); see also 20 CFR 655.0(a)(3). It is not consistent with that principle for the Department to be required to ignore—after approval of an LCA—information or evidence on possible H–1B violations received other than through a complaint.

Fifty-three commenters addressed this proposal—43 opposing and 10 advocating. Those opposing suggest that the statute does not allow this proposal and that to permit directed investigations would be too disruptive, intrusive, and problematic.

The Department is keenly aware of the regulated community's concern and has carefully considered the views expressed by commenters. However, in light of the statutory language and purpose, the legislative history, the Department's experience in the program, and the Department's intentions as to the limited use of directed investigations, the Department has determined to promulgate the directed investigation proposal in this Final Rule.

2. Proposed Provisions Adopted With Modification

a. Short-term placement of H–1B nonimmigrants at worksites outside the location(s) listed on the LCA (See §_____.735.) Until the NPRM, the Department had indicated that job contractors would be treated like any other employer under the H–1B program. After obtaining considerable programmatic experience regarding the operations and effects of job contractors using H–1B nonimmigrants, the Department proposed to clarify how LCA's should be completed by job contractors, and proposed to amend the regulations to create certain additional standards for such employers.

In the NPRM, as part of the proposal to develop special procedures for job contractors, the Department defined the term "job contractor" and the proposed requirements to be met, including the general requirement to assure that the information to be provided on the LCA in Item 7 (occupational information) must pertain to the location(s) (city and State) of any and all worksite entities. The Department further proposed that a job contractor filing an LCA must indicate thereon the place of employment at which the H–1B nonimmigrant will actually work (and for which the prevailing wage must be determined) as opposed to the employer's headquarters or office location if such location is different from the place of employment. The Department also proposed that, if the contractor wishes to relocate the H–1B nonimmigrant to work at any location not listed on a certified LCA, an appropriate LCA shall be filed and certified (and the appropriate prevailing wage determined) before any H–1B nonimmigrant may be employed at that location. The NPRM addressed other job contractor matters, such as the contractor's actual wage obligation.

Of the 264 comments received in response to the NPRM, 171 commented on the job contractor proposal and 153 (nearly 90%) opposed it—128 of those 153 coming from business commenters. The negative comments related to the concept as a whole or related to a part of it such as the nationwide actual wage, worksite posting, and place of employment designation on the labor condition application.

Senator Alan K. Simpson expressed concern for the employer's ability to find workers to fill real health care needs, especially in the physical therapist occupation. Other commenters expressed concern that the proposed rule would impose special hardships on job contractors, would be onerous, and would be discriminatory. Several commenters suggested that the Department consider a time test methodology, rather than a "job contractor" concept, in identifying the responsibilities of an employer who places H–1B nonimmigrants at worksites owned or controlled by entities other than the employer. Suggestions for the duration of temporary placement ranged from 30 days to 180 days.

Of the comments received in response to the January 13, 1992 Interim Final Rule, concerning the worksite movement of H–1B nonimmigrants, 13 commenters (11 of which were businesses) expressed the view that the initial LCA filing should be sufficient when an H–1B nonimmigrant is transferred between temporary worksites such as branch offices or customer offices. These comments advanced the position that an employer should be able to move H–1B nonimmigrants to worksites where it is anticipated that the tour of duty will be of a short or temporary nature.

The Department has considered carefully the comments concerning the job contractor concept as proposed and has decided—at this time—not to establish special procedures applicable only to those businesses operating as job contractors. At present, based on the overwhelming weight of the comments and the Department's experience in the program, the Final Rule contains a modification of the proposed rule, to implement a "time test" for short-term assignments of H–1B nonimmigrants to worksite(s) outside the area(s) of employment covered by already-certified LCA's whether the new worksite is another establishment of the employer or is the worksite of another entity (*e.g.*, customer of a job contractor providing H–1B nonimmigrants or services provided by H–1B nonimmigrants at the customer's location). The Final Rule is both less burdensome for employers and more protective of workers than was the provision as proposed in the NPRM.

The Department recognizes that it is common practice for employers—not only job contractors, but also other employers which operate in more than one place of employment within the United States—to move H–1B nonimmigrants from one place of employment (worksite) to another for short periods of time in response to demands of business. The Final Rule takes into consideration the practical and real world experience of short-term placement of employees.

The Final Rule applying to all LCA-filing employers includes a 90-workday placement option within a three-year period, beginning with the first work day at any worksite in a new area of intended employment, for an employer who shifts H–1B nonimmigrants to any worksite(s) outside the location listed on the employer's already-certified LCA. The 90-day option would apply separately for each area of intended

employment (*e.g.*, 90 cumulative days for Los Angeles, 90 cumulative days for San Francisco). Under this option, an employer may place H–1B nonimmigrant(s) at such worksite(s)—without filing a new LCA (and thus without meeting the notice, prevailing wage, and actual wage requirements for such area of intended employment)—provided that:

1. No H–1B nonimmigrant continues to work at a worksite in such area beyond 90 cumulative workdays by H–1B nonimmigrants at all worksites within the area (starting with the first day on which any H–1B nonimmigrant worked at any worksite in the area) and makes no further placement of such worker(s) in such area within the three-year period which began with the first day of placement, and

2. The H–1B nonimmigrant(s) working in the area is (are) compensated at the required wage rate applicable under the employer's already-certified LCA plus expenses for the placement area of employment at no less than the per diem rate for such area and transportation reimbursement for Federal Government employees as published in the Code of Federal Regulations at 41 CFR part 301 (the Department has used the regulations promulgated by the General Services Administration for Federal employees, as we are unaware of any other universally available source of this information for employers), and

3. Does not place an H–1B nonimmigrant at a worksite where there is a strike or lockout in the same occupational classification as the H–1B nonimmigrant.

Of course at any time an employer may file a new LCA covering the new area of intended employment (complying with all LCA requirements, including determination of actual and prevailing wage rates as well as notice to employees). This can be done in advance of the placement or, if such new LCA is filed and certified after placement, the employer can cease payment of per diem and transportation rates. If, at the accumulation of 90 workdays, the employer has H–1B nonimmigrants at any worksite(s) in the new area of intended employment, the employer must have filed and received approval of a new LCA and complied with all requirements for such filing.

This 90-workday placement option does not apply to the placement of H–1B nonimmigrants at any worksite(s) within an area covered by an already-certified LCA filed by the employer. Such worksite(s) would be encompassed within and fully subject to the requirements of that LCA, including prevailing wage and worksite notice(s) (see § c.1.b Notification, above, regarding notification at new worksites). The only additional action required of the employer in this circumstance is to post the notice for a period of 10 days at the new worksite.

b. Payment of wages; deductions from wages (See §_____.731 (c).) At several stages in the rulemaking process, the Department has addressed the issue of what constitutes the payment of wages for purposes of an employer satisfying the required wage obligation under the H–1B program. This matter was discussed in some detail in the Preambles to the January 13, 1992, Interim Final Rule (57 FR 1316, 1322) and the October 6, 1993, Proposed Rule (58 FR 52152, 52154). The rulemaking has also dealt with the related issue of guidelines or standards for allowable deductions from employee wages under the program. Based on careful consideration of the comments, the legislative intent, and extensive program experience, the Department in the Final Rule is adopting a "bright line" test for "payment of wages," coupled with a three-part standard for authorized deductions. Taken together, these standards enable employers to determine, with certainty, their obligations and options, assure employees will be afforded their rights under the law, and better enable the Department, in its enforcement proceedings, to identify violations, while leaving bona fide, valid pay practices unhampered.

The principal focal point in the rulemaking, with regard to payment of wages, has been the matter of whether "in-kind" perquisites or direct or indirect payments other than cash constitute wages. On this point, the Department has taken the position in the interim final and the Proposed Rule, as well as in the administration and enforcement of the program, that such wage credit is not permitted. However, in the Preamble to the Interim Final Rule, the Department set out possible standards for wage credit, and invited comments as to the appropriateness of these, or some other, tests. A total of 39 commenters on the interim final and the Proposed Rule responded to this point. Six of these submitted comments to both Rules, with two of the six modifying their views in their second comments. Eight of the 39 commenters (including the AFL–CIO) suggested that the Department should not permit any in-kind wage credit. The other 31 commenters urged the Department to permit such wage credit. While none of these commenters endorsed the tests set out in the Interim Final Rule's Preamble, several of them suggested that the regulatory standard should be a flexible test that would take into account the peculiarities of the employment of H–1B nonimmigrants (*e.g.*, family relocation expenses). Several others (including Senators Alan K. Simpson and David Durenberger) suggested that the regulatory standard should focus on the employer's actual costs in employing the H–1B nonimmigrant, as well as on the comparative costs of employing such a worker and a U.S. worker. Seven of the 39 commenters (including a multinational computer software company, a multinational pharmaceutical company, a national association of computer businesses, and a national association on international personnel concerns) suggested that, as a regulatory standard, the Department should permit the employer to credit as wages any payment or perquisite which is reported to the Internal Revenue Service as the employee's wages.

The Department has considered carefully all the comments, and has found many of them persuasive and helpful with regard to appropriate regulatory standards. In addition, the Department has reviewed thoroughly the information obtained through administration and enforcement of the program regarding various pay practices and expenditures in the employment of nonimmigrants in the U.S. Based on these considerations and review, the Department has concluded that, in determining the "wages paid" for purposes of the employer's satisfaction of the H–1B required wage, it is not necessary or appropriate to focus on the issue of in-kind wages. Instead, the Department has concluded the regulatory standard should consider the broader picture of compensation to employees and costs to employers in the employment of H–1B nonimmigrants. Further, in the Department's view, the regulation should provide a practical, predictable, and somewhat flexible standard, so that the regulated community, as well as the Department, can act with confidence in assuring compliance with the Act's requirements.

Thus, the Department is promulgating a Final Rule which modifies the NPRM provision to create a less burdensome, more effective, "bright line" test for "wages paid." Under this test, any compensation which is treated as the H–1B nonimmigrant employee's earnings for income tax and FICA (Federal Insurance Contributions Act—social security tax) proposes will be considered to be wages paid for purposes of the H–1B program. Amounts to be treated as "wages paid"

shall be paid to the employee free and clear when due, except that certain deductions from wages may be made by the employer in accordance with the restrictions set forth in the regulation and discussed below. In order to claim such "wages paid," the employer shall document that all required earnings reports have been filed and withholdings (including the employer's FICA tax) have been paid to appropriate governmental entities, in accordance with applicable laws (including any payments in the employee's home country pursuant to any totalization arrangement between the social security systems of the U.S. and such home country, as authorized by section 233 of the Social Security Act, 42 U.S.C. 433). The wages of salaried employees are due in pro-rata installments, except that some limited flexibility with regard to pro rata installments is provided for the employer which clearly documents the use of supplemental payments (such as quarterly bonuses) as described in the regulation.

On the closely related matter of deductions from wages, in the Proposed Rule the Department set out a multi-part test, and requested public comment as to the appropriateness of that or some other standard and as to whether the H–1B nonimmigrant's international travel expenses to initially come and finally return from employment should be considered a business expense not susceptible to recoupment by the employer through wage deductions. Ten commenters responded on the deductions issue. Seven of the 10 opposed the proposed test, for a variety of reasons. On the transportation expense sub-issue, five commenters asserted that the costs should be considered a business expense, and two commenters took the opposite position (with one arguing that the Department lacked statutory authority to impose such costs on an employer).

Based on a careful review of these comments and the information which the Department has obtained through the administration and enforcement of the program, the Department has concluded that a flexible, three-part test on allowable deductions will be promulgated, so as to be less burdensome for employers but fair and protective for workers. Under this test, three categories of deductions are authorized: those required by law; those that are reasonable and customary in the occupation and area of intended employment; and those that are voluntary on the part of the H–1B nonimmigrant. While each of these categories has regulatory restrictions, the test, taken as a whole, affords significant latitude for employers and H–1B nonimmigrants to achieve any bona fide arrangement to facilitate the employment situation. The flexible test does *not* permit the employer situation. The flexible test does *not* permit the employer to impose the burden of business expense(s) on the worker.

Based upon the comments and the Department's reading of the statute, for purposes of this regulation, the Department has determined that for this final rule, international travel costs to the job initially and from the job at the conclusion of employment will not be considered to be employer's business expense. Section 212(n) of the INA (8 U.S.C. 1182(n)), which contains the LCA requirements, is silent regarding international travel. In § 214(c)(5)(A) of the INA (8 U.S.C. 1184(c)(5)(A)), however, Congress specifically addressed international travel by providing that "in the case of an [H–1B] alien * * * who is dismissed from employment by the employer before the end of the period of authorized admission, the employer shall be liable for the reasonable costs of return transportation of the alien abroad." The Department has concluded that by making the employer liable for international travel costs under specific circumstances, and not addressing any other circumstances, Congress intended that the employer be liable for international travel costs only under the specified circumstances. Of course, this does not preclude an employer from paying the H–1B nonimmigrant's international travel expenses. Further, if the employer and employee enter into a bona fide, *voluntary* agreement whereby the employer advances monies to cover the employee's cost of international travel subject to recoupment through wage deductions, such deductions would be allowable provided that the deductions do not exceed the amount of money advanced by the employer—*i.e.*, not subject to interest or any other form of surcharge. Such deductions must comply with all other applicable Federal/State laws.

c. Prevailing Wage 5% Provision (See § _____.731(d)(4).) In the Preamble to the Proposed Rule, the Department described its program experience and its concern regarding apparent confusion as to the Interim Final's provision dealing with what has been called a 5% variable on the payment of the prevailing wage. The provision in question was incorporated into the H–1B regulation from the permanent program regulations at 20 CFR 656.40(a)(2)(i). As explained in the Preamble and set out in the proposed regulatory language, it is and has been the Department's position, in the H–1B program, that although an employer will not be considered to be in violation if found to have paid 95% or more of the prevailing wage, the employer found to have paid less than 95% will not only be cited for violation but also be assessed back wages based on 100% of the prevailing wage.

Seven commenters expressed views regarding the proposed clarification of the regulation. A labor organization expressed opposition to the Department's toleration of any variable, and suggested that an employer found to have paid less than 100% should be required "to pay in full once the error is detected." A law firm, stating the concerns of employers, advocated that no change should be made in this provision. Two government officials (one State, one Federal) favored the continued application of a 5% variable, although one of these commenters (Federal official) suggested that no variable should be allowed for users of published wage surveys that are statistically valid. Two business commenters (computer software corporations) recognized the proposal as a clarification of the Department's position, and one described the new provision as "very helpful." A member of the general public described the proposed regulatory language as "a fair compromise."

3. *Provisions Proposed But Not Adopted*

a. Prevailing wage update. A number of commenters to the proposed rule published in the **Federal Register** on August 5, 1991, and the Interim Final Rule published October 22, 1991, and January 13, 1992, respectively, objected to the requirement that an employer must obtain prevailing wage information at any time other than when the application is first filed. These commenters pointed to § 212(n)(1)(A)(i) of the INA (as amended by MTINA) which states that the employer is offering wages that are at least "* * * the prevailing wage level * * * based on the best information available as of the time of filing the application * * * ." The Department indicated that it recognized that the language could be construed to mean that the prevailing wage should be determined only once, at the time of filing the application. Further, the Department seriously considered requiring that the employer determine the prevailing wage only at the time of filing the application, but concluded that in the case of an application with a 6-year validity period, such procedure would render the prevailing wage requirement virtually meaningless.

The Department also considered, alternatively, requiring that the validity period of the labor condition application be shortened to 1 or 2 years, with an attendant prevailing wage determination every time the application was filed. The Department decided, in the October 22, 1991, Interim Final Rule, that this approach would be unnecessarily burdensome and opted instead for what it considered a less burdensome and more sensible approach, *i.e.*, one application for up to six years but with a prevailing wage determination every two years starting from the date the labor condition application is certified.

In the NPRM of October 6, 1993, the Department indicated that, in the context of the proposed reduction in the validity period from six to three years, the 24-month update would be unduly burdensome on an employer. With a three year application validity and a 24-month prevailing wage update requirement, an employer could be required to obtain current prevailing wage information twice in a short time frame: once, 24 months from the filing of the initial application and again upon the filing of the new application prior to the 3-year deadline. Consequently, in the NPRM the Department proposed to adopt an 18-month prevailing wage update requirement. In response to the NPRM, the Department received 60 comments on this issue of which all but five were opposed to the proposal.

Commenters' major objections to the NPRM's approach were as follows: the Department does not have the statutory authority to require any prevailing wage update; the 18-month update proposal is burdensome on employers and will not substantively increase protections for U.S. workers; the proposal is inconsistent with normal hiring and compensation cycles which operate on an annual basis; the proposal will place an undue burden on the SESA's; and wages change very little in an 18-month period (especially in today's economy).

Five commenters expressed concern that requiring infrequent prevailing wage updates will allow an employer to use "stale" data and will undermine wage protections for U.S. workers. The Department is cognizant of these concerns. However, the "actual wage rate" has been and will continue to be a "safety net" for the H–1B nonimmigrant. Assuming the actual wage is higher than the prevailing wage and thus is the required wage rate, if an employer normally gives its employees a raise at year's end, or the employer's system provides for other adjustments, H–1B nonimmigrants must also be given the raise (consistent with employer-established criteria such as level of performance, attendance, *etc.*)

After careful consideration of all the comments received on this issue, the Department has determined that the proposal suggested by the majority of commenters is the most prudent approach. Under the Final Rule, employers are required to obtain current prevailing wage information every time a new labor condition application is filed (*i.e.*, every three years or sooner, if specified).

As noted by commenters, this requirement will ensure maximum consistency. Unless a lesser period is specified by the employer, a new labor condition application, prevailing wage update, and I–129 petition will all be required at the end of a 3-year period.

b. Documentation of the wage statement. After careful review the Department believes that it is essential to require the employer to maintain documentation regarding wage rates for all that employer's employees in the specific employment in question at the place of employment. This information is ordinarily maintained by the employer for purposes of showing compliance with other applicable statutes (*e.g.*, the Fair Labor Standards Act) and will permit the Department to determine whether in fact the required wage has been paid. Consequently, the language limiting the documentation to individuals with experience and qualifications similar to the H–1B nonimmigrant has been deleted.

4. Other Matters

a. Regulation re-numbering (See §§_____.731 through .734.) Based on experience in administering and enforcing the H–1B program, the Department recognized that §_____.730 of the Interim Final Rule, which contains general information on filing LCA's as well as the four elements of the LCA, is too lengthy and unwieldy. Therefore, for the sake of clarity, the Department, in this Final Rule, is redesignating §_____.730 into five sections. The new §_____.730 will retain the general information contained in paragraphs (a) through (d) of the Interim Final's §_____.730, regarding the filing of LCA's. However, paragraphs (e) through (h) of the Interim Final's §_____.730, which correspond to requirements relative to wages, working conditions, notice, and strike/lockout, respectively, have each been redesignated as a new section: former paragraph (e), *The first labor condition statement: wages.* is now §_____.731; former paragraph (f), *The second labor condition statement: working conditions.* is now §_____.732; former paragraph (g), *The third labor condition statement: no strike or lockout.* is now §_____.733; and former paragraph (h), *The fourth labor condition statement; notice.* is now §_____.734. Citations throughout the rule to paragraphs (e) through (h) have been amended to reflect the redesignation.

In addition, the Department has also corrected various technical and typographical errors throughout the rule. An example of a technical error is the replacement in §_____.855(c), of the word "suspend" with the word "invalidate" to conform with §_____.750(c); an example of a typographical error is the replacement of the word "proceding" with the word "preceding" in former §_____.730(e)(2)(iii)(C)(2), now §_____.731(b)(3)(iii)(B).

b. Clarification of the definition of "area of intended employment" (See §_____.715.) As a clarification, the Department is deleting the last sentence in the definition of "area of intended employment" which was published in the Interim Final Rule. That sentence which states that "(i)f there is no MSA then the area of intended employment is the area with normal commuting distance of the place of employment," does not appear in the definition of "area of intended employment" at 20 CFR 656.3 quoted above. Since this concept is already included in the first sentence of the definition, the sentence in question is being deleted to avoid confusion.

c. Validity period of a SESA prevailing wage (See §_____.731(a)(2)(iii)(A)(*1*).) Through administration and enforcement of the program, the Department has become aware of confusion and potential adverse effects on wages in situations in which employers, in filing their LCA's, rely on SESA prevailing wage determinations which were obtained on dates considerably in advance of the time of the filing (*e.g.*, six months prior to LCA date). Data used in prevailing wage rate determinations may be up to four years old. Employers were obtaining prevailing wage rates and holding them indefinitely before using them in conjunction with filing an LCA. The Department concluded that a practicable limit should be set on the use of prevailing wage rates. The Department concludes that 90 days is a reasonable practicable limit.

In order to alleviate confusion and to better assure the achievement of the Congressional purposes of protecting the wages of U.S. workers, the Department is clarifying the regulation to set a deadline for an employer's

reliance on a SESA prevailing wage determination. An employer that obtains a SESA prevailing wage determination must file the labor condition application under which that rate will be paid within 90 days from the date of the SESA's determination.

d. Labor condition application filing dates (See §_____.730(b).) Through administration and enforcement of the program, the Department has become aware that some employers are filing labor condition applications for periods of anticipated employment which are well in the future (*e.g.*, one year after the application filing date). This practice poses dangers of abuse and may frustrate Congressional intent for the protection of the jobs and wages of U.S. workers. The prevailing wage, strike/lockout, and notice obligations are based, in large part, upon actions taken and conditions which exist at the time the labor condition application is filed. Therefore, the Department is clarifying the amount of time in advance of the beginning date of the period of employment that an employer may file a labor condition application. This Final Rule requires that a labor condition application can be filed no earlier than 6 months before the beginning date of the period of employment. Labor condition applications which are received by an ETA regional office more than 6 months prior to the beginning date of the period of employment will be returned to the employer as unacceptable for filing. This procedural change will impose few, if any, additional burdens on employers and will facilitate the achievement of the statutory purposes.

e. Actual wage (See §_____.731(a)(1) & Appendix.) As the program has evolved, the Department is aware that inconsistent and perhaps confusing interpretations have, on occasion, been provided to public inquiries concerning the Department's enforcement position on the employer's responsibilities under the "actual wage" provisions of the statute and regulation. To rectify any misunderstanding with the regulated community, the Department is providing the following guidance regarding its enforcement policy concerning the determination of the actual wage under the Final Rule.

In determining the required wage rate, the employer must not only obtain the prevailing wage, but also establish the actual wage for the occupation in which the H–1B nonimmigrant is employed by the employer. For purposes of establishing its compensation system for workers in an occupational category, of course, an employer may take into consideration objective standards relating to experience, qualifications, education, specific job responsibility and function, specialized knowledge, and other legitimate business factors. The use of any or all these factors is at the discretion of the employer. The employer must have and document an objective system used to determine the wages of non-H–1B workers, and apply that system to H–1B nonimmigrants as well. It is not sufficient for the employer simply to calculate an average wage of all non-H–1B employees in an occupation; the "actual wage" is not an "average wage."

The documents explaining the system must be maintained in the public disclosure file. The explanation of the compensation system must be sufficiently detailed to enable a third party to apply the system to arrive at the actual wage rate computed by the employer for any H–1B nonimmigrant. The computation of the H–1B nonimmigrant's individual actual wage rate shall be documented in the H–1B nonimmigrant's personnel file.

In the event the employer has not developed and documented an objective system and/or has not calculated the actual wage rate for an H–1B nonimmigrant, the Administrator—in determining the actual wage rate for enforcement and back wage computation purposes—Wage and Hour may need to average the wages of all non-H–1B workers who are employed in the same occupation, rather than make determinations for each individual H–1B nonimmigrant; the employer in such circumstances would be cited for failure to comply with the requirements for determination of the actual wage.

Assuming the actual wage is higher than the prevailing wage and thus is the required wage rate, if an employer gives its employees a raise at year's end, or if the system provides for other adjustments in wages, H–1B nonimmigrants must also be given the raise (consistent with legitimate employer-established criteria such as level of performance, attendance, etc.). This is consistent with Congressional intent that H–1B nonimmigrants and similarly employed U.S. workers be provided the same wages.

Where the employer's pay system or scale provides adjustments during the validity period of the labor condition application—*e.g.*, cost-of-living increase or other annual adjustment, increase in the entry-level rate for the occupation due to market forces, or the employee moves into a more advanced level in the same occupation—the employer shall retain documentation explaining the changes and clearly showing that, after such adjustments, the wages paid to the H–1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation in the area of intended employment.

In the Final Rule, guidance for employers regarding the essential aspects of the foregoing discussion, along with several examples which are substantially the same as appeared in the preamble to the Interim Final Rule are being promulgated as Appendix A to Subpart H.

f. Prevailing working condition standard (See §_____.732.) The Act requires employers to attest in their LCA's that the employment of H–1B nonimmigrants will not adversely affect the working conditions of U.S. workers similarly employed. The regulation provides that "working conditions" include such matters as working hours, shifts, vacation periods, and fringe benefits. The employer's obligation in this regard extends for the longer of two periods: The validity period of the certified labor condition application or the period during which the H–1B nonimmigrant(s) is (are) employed by the employer.

In previous stages of H–1B rulemaking, the Department stated its position that Congress intended prevailing working condition determinations to be made in the same manner as the current regulations for the permanent alien labor certification (immigrant worker) program. See, *e.g.*, 57 FR 1316 (January 13, 1992); 56 FR 54720 (October 22, 1991); 56 FR 37175 (August 5, 1991); and 56 FR 11705 (March 10, 1991); see also 20 CFR part 656. There has been some confusion expressed, however, regarding the Department's interpretation of this LCA element. While the regulation itself is clear and is not being amended, the Department is providing the following additional guidance.

The H–1B regulation permits the employer to file an LCA without making any pre-filing determination or documentation of working conditions; the regulation requires that a prevailing working condition determination be made only in the event of an investigation. See §_____.732 of the final Rule; see also 20 CFR 656.24(b)(3).

The public should be aware that the Department is carefully reviewing its program experience, as well as information received from members of the public and other sources, regarding the impact of the employment of H–1B nonimmigrants on the working conditions of U.S. workers.

g. Challenges of prevailing wage determinations only through employment service complaint system.

Former §_____.730(e)(1)(ii)(C)(1), new §_____.731(a)(1)(iii)(A), lists the State Employment Security Agency (SESA) as one source for obtaining a prevailing wage determination. Although DOL regulations provide an avenue for an employer to challenge a SESA determination through the Employment Service (ES) complaint process (under 20 CFR part 658, subpart E), the Interim Final Rule did not make it sufficiently clear that challenges to prevailing wage determinations were to be made *only* through that process. In designing the program, the Department had envisioned that the ES complaint process would be used for all prevailing wage challenges. However, after substantial enforcement litigation experience, the Department has found that some employers are instead attempting to contest such determinations through the hearing provided under §_____.835. Such enforcement was not intended to handle such challenges.

The Final Rule provides needed clarification by directing the employer to the ES complaint process and alerting the employer that a challenge of a SESA prevailing wage determination may be made only prior to filing an LCA in which that SESA determination is used. Implicit and essential in this process is the requirement that once an employer obtains a prevailing wage determination from the SESA and files the LCA without challenging the SESA's determination through the ES complaint process, the employer, in effect, has accepted the determination and waived its right to challenge the determination. Permitting an employer to operate under a SESA prevailing wage determination and later contest it in the course of an investigation or enforcement action is contrary to sound public policy; such a delayed, disruptive challenge would have a harmful effect on U.S. and H–1B employees, competing employers, and other parties who may have received notice of and/or relied on the prevailing wage at issue. Section _____.731(a)(2)(iii)(A) of the Final Rule explicitly states the Department's clarification of the use and consequences of the ES complaint process. Challenges to SESA prevailing wage determinations are made only through the State agency's ES process. See 20 CFR 658.410 *et seq.*

Where the prevailing wage determination is made by the SESA prior to the filing of the LCA, the employer's avenue of appeal is through the ES complaint system, entering the system at the State level. See 20 CFR 658.410 *et seq.* However, where the prevailing wage determination is made by ETA (with or without consultation with the SESA) during the course of a Wage and Hour Division enforcement action, the employer's avenue of appeal also is through the ES complaint system, but the employer enters the system at the ETA regional office level. The employer will be notified where to file any appeal. For purposes of the H–1B program only, this is a collateral change to the ES complaint system regulations, which generally require all complaints to be filed at the SESA level (see 20 CFR 658.420 *et seq.*) and is notwithstanding the provisions of 20 CFR 658.421(a) and 658.426. Similarly, §_____.731(d) provides that, where the employer does not have a valid prevailing wage determination, the Administrator, during the course of an investigation, may obtain a prevailing wage determination from ETA, which, in turn, may consult with the SESA and then determine the appropriate prevailing wage. Some employers also are contesting these ETA prevailing wage determinations at the Wage and Hour enforcement hearing provided under §_____.835. The Department believes that the proper forum for *all* prevailing wage determination challenges—whether the wage determination was obtained by the employer or by the Administrator (where the employer does not have a valid prevailing wage determination)—is the ES complaint process. Once the prevailing wage determination is final, either through the lack of a timely challenge or through the completion of the ES process, the determination shall be conclusive for purpose of enforcement. In such cases where the prevailing wage determination is made by ETA at the Administrator's request, any challenge must be initiated at the ETA regional office level within 10 days after the employer receives the ETA prevailing wage determination. Section _____.731(d) has been amended to reflect this clarification.

Finally, §_____.840(c) provides that where the Administrator has found a wage violation based on a prevailing wage determination obtained by the Administrator from ETA, the Administrative Law Judge (ALJ) in the enforcement proceeding "shall not determine the prevailing wage *de novo*, but shall * * * either accept the wage determination or vacate the wage determination." This provision has been interpreted by some employers as permitting the challenge of prevailing wage determinations obtained by the Administrator from ETA. Section _____.840(c) was not intended to function as a forum for such challenges. Accordingly, §_____.840(c) has been clarified to reflect that once the Administrator obtains a prevailing wage determination from ETA and the employer either fails to challenge such determination through the ES complaint process within the specified time of 10 days, or, after such a challenge, the determination is found to be accurate by the ES complaint process, the ALJ must accept the determination as accurate and cannot vacate it. As with other final decisions of the Department, the employer continues to have access to the Federal district court if the issues are not satisfactorily resolved.

h. Enforcement of wage obligation (See §_____.731(c)(5).) The Act requires employers to state that the employer is offering and will offer the H–1B nonimmigrant, during the period of authorized employment, wages that are at least the required wage rate—the actual wage rate or the prevailing wage rate, whichever is greater. Furthermore, the employer is required to indicate on the LCA whether and H–1B nonimmigrant will work full-time or part-time. Under the Secretary's statutory authority to implement the Act, the regulations do not authorize an employer to decrease the payment of the required wage rate. In enforcement proceedings, however, the Department has encountered confusion over the employer's obligations where the H–1B nonimmigrant is in a nonproductive status or circumstance. To alleviate such confusion, the following guidance is provided.

There is no statutory or regulatory authorization for a reduction in the prescribed wage rate for any H–1B nonimmigrant who is not engaged in productive work for the LCA-filing employer due to employment related conditions such as training, lack of work, or other such reasons. The H–1B program was not intended to provide an avenue for nonimmigrants to enter the U.S. and await work at the employer's choice or convenience. Compare 8 U.S.C. 1101(a)(15)(H)(iii). Instead, the H–1B program's purpose is to enable employers to employ fully-qualified workers for whom employment opportunities currently exist. The employer, having attested to the duration and scope of the intended employment (*i.e.*, beginning and ending dates; full or part-time), has total control of the nonimmigrant's employment status. The Immigration and Nationality Act (8 U.S.C. 1182(n)(1)) requirements are such that once the H–1B status has been approved for the period specified by the employer, the employer controls the status and work of the H–1B nonimmigrant, who is unable to accept

employment elsewhere without a certified labor condition application and approved I–129 petition filed on the worker's behalf by another employer. For the purpose of DOL administration and enforcement of the H–1B program pursuant to these regulations, and H–1B nonimmigrant is considered to be under the control or employ of the LCA-filing employer from the time of arrival in the United States and throughout the period of his or her employment—regardless of whether the nonimmigrant is in training or other nonproductive status, *except* that if during the period of employment an H–1B nonimmigrant experiences a period of nonproductive status due to conditions which are unrelated to the employment and render the nonimmigrant unable to work—e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant, caring for an ill relative—then the employer shall not be obligated to pay the required wage rate during that period, provided that the INS permits the employee to remain in the U.S. without being paid and provided further that such period is not subject to payment under other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 *et seq.*) or the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*).

As clarification, it is the Department's position that the LCA-filing employer has no prerogative—other than in circumstances described above—but to pay the required wage beginning no later than the day the H–1B nonimmigrant is in the United States under the control and employ of that LCA-filing employer, and continuing throughout the nonimmigrant's period of employment. Any H–1B nonimmigrant employed under an LCA in a full-time capacity (the part-time block not having been checked on Item 7(b) of the LCA) shall be guaranteed full-time pay (ordinarily 40 hours' pay) each week, or the weekly equivalent if paid a monthly or annual salary. If the employer's LCA shows "part-time employment," the employer will be required to pay the nonproductive employee for at least the number of hours to be worked per week indicated on the I–129 petition filed by the employer with the INS. If the employer indicates on the LCA that an employee is to work only part-time and subsequent investigation discloses that in fact the employee was working full-time in a majority of the weeks during the period covered by the investigation, the employer will be held responsible for full-time pay including during nonproductive periods for which the worker received either no pay or less than the required wage.

i. Time bar on investigation of complaints and on imposition of remedies (See §_____.805(d)(5).)

Through enforcement experience, the Department has become aware that the Interim Final Rule's provision regarding timeliness of complaints, §_____.805(c)(5) (now §_____.805(d)(5)), does not give sufficient guidance concerning the implementation of the statutory directive that "[n]o investigation or hearing shall be conducted on a complaint concerning * * * a failure [to meet a condition specified in an LCA] or misrepresentation [of material facts in such an application] unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively." 8 U.S.C. 1182(n)(2)(A). The Interim Final Rule states that "[t]he complaint must be filed no later than 12 months after the date of the alleged violation(s)." In enforcement proceedings some employers have argued that this time bar falls on all alleged violations 12 months from the date of the filing of the LCA, which embodies all the employer's obligations and against which any failure or misrepresentation would be determined. It is the Department's continuing position that the statutory language, taken in its plain meaning, ties the 12-month time bar to the date of the employer's wrongful action (*e.g.*, failure to pay the required wage) and not to the date of the LCA. If Congress had intended the LCA date to be controlling, the statute easily could have been written to so specify. Thus, the Interim Final Rule speaks of "the date of the alleged violation(s)." In order to resolve any possible confusion, the regulation is being clarified. The Final Rule specifies that "[t]he complaint must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA, or allegedly took an action or failed to take an action which, through such action or inaction, demonstrates a misrepresentation of a material fact in the LCA regarding such action or inaction."

The Department does not consider this statutory provision to be applicable to the scope of available remedies (particularly, the back wage remedy); Congress dealth with remedies in a separate provision (8 U.S.C. 1182(n)(2)(C)) which neither contains nor references the 12-month time bar. Thus, neither the Interim Final Rule nor the Final Rule contains a 12-month limitation regarding the scope of remedies, and the rule has been clarified to expressly so provide.

j. Debarment timing (notice to Attorney General) (See §_____.855(a).) The statute requires that the Secretary notify the Attorney General of an employer's violation(s). Pursuant to §_____.855(a) of the Interim Final Rule, the Administrator is required to notify the Attorney General (AG) and ETA of the final determination of a violation by an employer upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no timely request for hearing is made pursuant to §_____.820 of this part; or

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer; or

(3) Where the administrative law judge finds that there was no violation by an employer, and the Secretary, upon review, issues a decision pursuant to §_____.845 of this part, holding that a violation was committed by an employer.

This regulatory construct creates a situation where the Administrator notifies the AG of a violation upon a finding of a violation by an ALJ, even though such finding subsequently may be appealed to the Secretary and eventually overturned. An employer thus could be debarred after a finding of violation by an ALJ, serve part or all of the debarment period, and subsequently be found by the Secretary not to have committed a violation. To correct this anomaly, §_____.855(a) has been amended to require notification to the AG after a finding of a violation by an ALJ only under the following circumstances: (a) where there is no appeal from the ALJ's finding to the Secretary; (b) where, upon such appeal, the Secretary declines to review the ALJ's finding; and (c) where, upon review, the Secretary affirms the ALJ's finding.

k. Prevailing wage computation (See §_____.731(a)(2)(iii).) As clarification, the first sentence in §_____.731(a)(2)(iii) is amended to conform to the wording at 20 CFR 656.40(a)(2)(i). As stated in the Preamble to the Interim Final Rule published on October 22, 1991, the regulation "incorporates the language of 20 CFR 656.40, as required by the Conference Report (see 56 FR 54723)." The change in this Final Rule is not substantive in nature, but provides more detailed guidance in the correct procedure to compute a valid average or arithmetic mean.

l. Conforming regulatory language on violations to the statutory language regarding levels of employer culpability (See §_____.805(a).) In the MTINA amendments to the INA, Congress created different culpability standards for the imposition of civil money penalties and debarment for the different violations of the statute; *e.g.*, a violation of the working condition and wage elements of the LCA requires "willfulness," while a violation of the notice element must be "substantial." In the January 13, 1992, Interim Final Rule, which modified the earlier Interim Final Rule to implement the MTINA amendments, the Department inadvertently erred with regard to the culpability standards for two types of violations. In §_____.805(a), which lists the various violations with their particular culpability standards, the Department omitted the "substantial" failure to specify the number of workers sought, the occupational classification in which the workers will be employed, and the wage rate and conditions under which they will be employed. This violation has been added at §_____.805(a)(5).

Similarly, in the Interim Final Rule at §_____.805(a)(5), which specifies a "substantial" failure to make available for public examination the application and necessary documents at the employer's place of business or worksite, the Department identified an incorrect standard of culpability; this provision should have carried a simple failure standard, *i.e.*, a failure to make available the required documents for public examination need *not* be substantial. Section §_____.805(a) has been amended to conform with the statute.

m. Labor condition application (LCA) withdrawal and subsequent Attorney General notification (See §_____.750(b).) The Interim Final Rule contains a provision at §_____.750(b)(3) (57 FR 1332) whereby ETA will promptly notify the Attorney General (AG) of the withdrawal of an employer's certified labor condition application, unless reasonable cause had been found to commence an investigation. The purpose of this provision is to alert the AG and the Immigration and Naturalization Service (INS) that the employer's certified LCA is no longer valid and can not be used to petition for an H–1B nonimmigrant. Based on interagency discussions between the Department and INS, it has been determined that such notification does not provide a practical means for INS to adjudicate (and disapprove) any petitions an employer might file based on a certified but subsequently withdrawn LCA. While such action by an employer (*i.e.*, filing a petition based on a withdrawn LCA) may be subject to civil or criminal sanction initiated by the INS, the Department considers it to be essential that the labor protections afforded by the H–1B LCA provisions not be frustrated by such action. Therefore, only for the purpose of assuring the labor standards protections afforded under the H–1B program, this Final Rule establishes that where an employer files a petition with INS under the H–1B classification pursuant to a certified LCA that had been withdrawn by the employer, such petition filing will bind the employer to all the obligations under the withdrawn LCA effective immediately upon receipt of such petition by INS. This revised procedure will reduce the paperwork burden on the Department and INS and the Department believes this change will maintain the worker protections afforded under the H–1B program. Of course, the employer may always file a new LCA.

n. Regularizing the hearing process (See §_____.820(d) and §_____.840(a).) The statute requires that the Secretary provide interested parties an opportunity for a hearing on investigative determinations regarding alleged violations. Such proceedings are provided in §_____.820 through §_____.840. Through program experience, the Department has recognized the need for greater specificity in the regulation regarding the participation of interested parties who did not file the initial request for hearing but, nonetheless, desire to participate.

While remaining consistent with Congressional intent regarding timely hearings for interested parties, the Department seeks to better assure orderly and fair proceedings by providing in the Final Rule that, once the deadline for requesting a hearing has expired, an interested party may participate in an administrative law judge proceeding only with the approval of the judge.

In addition, to ensure that the regulation comports with the Administrative Procedures Act and the most recent decision of the Supreme Court in *Darby* v. *Cisneros*, 113 S.Ct. 2539, 2547 (1993), §_____.840 of the rule has been amended to provide that a party may not seek judicial review of an administrative law judge's decision until such party has exhausted all administrative remedies, and that the decision of the ALJ is inoperative while such remedies are being pursued.

o. Retaliation (See §_____.800(d).) In enforcement proceedings the Department has encountered some confusion as to whether an employer's retaliation against an H–1B nonimmigrant (for accepting back wages, for example) is prohibited activity under the anti-discrimination provision of the regulation (§_____.800(d) *Employer Cooperation)*, which was promulgated as an inherent and essential part of the enforcement process mandated by Congress. The regulatory restriction assures that employers will not take actions against workers to frustrate the Department's enforcement. This provision of the Interim Final Rule puts employers on notice that the employer cannot intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person because such person filed a complaint, *etc.*; however, the specific word "retaliate" does not appear in the regulation.

To alleviate any confusion the Final Rule is clarified by inserting the word "retaliation."

p. TN nonimmigrant classification (See §_____.700(c)(2).) The Interim Final Rule at 58 FR 69226 implemented the provisions of the North American Free Trade Agreement (NAFTA) pertaining to the employment of Mexican citizens as professionals. NAFTA established that the employment of these Mexican citizens is currently subject to the provisions of the H–1B regulations. Currently Mexican professionals entering under this classification are limited to 5,500 annually. This limit can be increased by mutual agreement between the U.S. and Mexico and the numerical limitation will be lifted in 10 years, unless the two countries decide to eliminate it earlier.

The regulations are clarified to show that the nonimmigrant classification for these individuals (subject to all of the LCA requirements and enforcement) is "TN." As in the case of nonimmigrants granted the H–1B classification, the INS makes all determinations about the occupational sufficiency for the classification.

IV. Executive Order 12866

The Department believes that this Final Rule is not an "economically significant regulatory action" within the meaning of Executive Order 12866, in that it will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or

communities. However, the Department has treated this action as "significant" under the President's priorities within the meaning of the principles set forth in E.O. 12866. This rule follows six previous rulemaking initiatives published in the **Federal Register** on the matter (an Advance Notice of Proposed Rulemaking on March 20, 1991; a Proposed Rule on August 5, 1991; an Interim Final Rule on October 22, 1991; an Interim Final Rule on January 13, 1992; a Proposed Rule published on October 6, 1993; and an Interim Final Rule on December 30, 1993).

V. Regulatory Flexibility Act

The Department of Labor previously notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule does not have a significant economic impact on a substantial number of small entities.

Catalog of Federal Domestic Assistance Number

This program is not listed in the Catalog of Federal Domestic Assistance.

List of Subjects

20 CFR Part 655

Administrative practice and procedure, Agriculture, Aliens, Crewmembers, Employment, Enforcement, Fashion models, Forest and forest products, Guam, Health professions, Immigration, Labor, Longshore work, Migrant labor, Nurse, Penalties, Registered nurse, Reporting and recordkeeping requirements, Specialty occupation, Students, Wages.

29 CFR Part 507

Administrative practice and procedures, Aliens, Employment, Enforcement, Fashion models, Immigration, Labor, Penalties, Reporting and recordkeeping requirements, Specialty occupation, Wages, Working conditions.

Text of the Joint Rule

The text of the interim final joint rule as adopted by ETA and the Wage-Hour Division, ESA, in this document appears below:

Subpart H—Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models

Sec.

_____.700 Purpose, procedure and applicability of subparts H and I.
_____.705 Overview of responsibilities.
_____.710 Complaints.
_____.715 Definitions.
_____.720 Addresses of Department of Labor regional offices.
_____.730 Labor condition application.
_____.731 The first labor condition statement: wages.
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_____.735 Special provisions for short-term placement of H–1B nonimmigrants at place(s) of employment outside the area(s) of intended employment listed on labor condition application.
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_____.750 Validity period of the labor condition application.
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Appendix A to Subpart H: Guidance for Determination of the "Actual Wage"

Subpart I—Enforcement of H–1B Labor Condition Applications

Sec.

_____.800 Enforcement authority of Administrator, Wage and Hour Division.
_____.805 Complaints and investigative procedures.
_____.810 Remedies.
_____.815 Written notice and service of Administrator's determination.
_____.820 Request for hearing.
_____.825 Rules of practice for administrative law judge proceedings.
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Subpart H—Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas In Specialty Occupations and as Fashion Models

§ _____.700 Purpose, procedure and applicability of subparts H and I.

(a) *Purpose.* With respect to nonimmigrant workers entering the United States (U.S.) on H–1B visas pursuant to the Immigration and Nationality Act (INA):

(1) Establishes an annual ceiling of 65,000 (exclusive of spouses and children) on the number of foreign workers who may be issued H–1B visas;

(2) Defines the scope of eligible occupations for which nonimmigrants may be issued H–1B visas and specifies the qualifications that are required for entry as an H–1B nonimmigrant;

(3) Requires an employer seeking to employ H–1B nonimmigrants to file a labor condition application (LCA) with and have it certified by the Department of Labor (DOL) before a nonimmigrant may be provided H–1B status by the Immigration and Naturalization Service (INS); and

(4) Establishes a system for the receipt and investigation of complaints, as well as for the imposition of fines and penalties for misrepresentation or for failure to fulfill a condition of the labor condition application. 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), 1184(g)(1)(A), and 1184(i).

(b) *Procedure for obtaining an H–1B visa classification.* Before a nonimmigrant may be admitted to work in a "specialty occupation" or as a fashion model of distinguished merit and ability in the United States under the H–1B visa classification, there are certain steps which must be followed:

(1) First, an employer shall submit to DOL, and obtain DOL certification of, a labor condition application. The requirements for obtaining a certified labor condition application are provided in this subpart. The labor condition application (Form ETA 9035) and instructions may be obtained from DOL Regional Offices listed in § _____.720 of this part.

(2) After obtaining DOL certification of a labor condition application, the employer may submit a nonimmigrant visa petition (INS Form I–129), together with the certified labor condition application, to INS, requesting H–1B classification for the foreign worker. The requirements concerning the submission of a petition to, and its processing by, INS are set forth in INS regulations. The INS petition (Form I–129) may be obtained from an INS district or area office.

(3) If INS approves the H–1B classification, the nonimmigrant then may apply for an H–1B visa abroad at a consular office of the Department of State, or apply to the INS for a change of visa status if already in the United States.

(c) *Applicability.* (1) Subparts H and I of this part apply to all employers seeking to employ foreign workers under the H–1B visa classification in specialty occupations or as fashion models of distinguished merit and ability.

(2) During the period that the provisions of Appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, subparts H and I of this part shall apply to the entry and employment of a nonimmigrant who is a citizen of Mexico under and pursuant to the

provisions of section D or Annex 1603 of NAFTA in the case of all professions set out in Appendix 1603.D.1 of Annex 1603 of NAFTA other than registered nurses. Therefore, the references in this part to "H–1B nonimmigrant" apply to such nonimmigrants, who are classified by INS as "TN." In the case of a registered nurse, the provisions of 20 CFR part 655, subparts D and E, and 29 CFR part 504, subparts D and E, shall apply.

§ _____.705 Overview of responsibilities.

Three federal agencies are involved in the process which leads to H–1B nonimmigrant classification. The employer also has continuing responsibilities under the process. This section briefly describes the responsibilities of each of these entities.

(a) *Department of Labor responsibilities.* DOL administers the labor condition application process and enforcement provisions.

(1) The Employment and Training Administration (ETA), DOL, is responsible for receiving and certifying labor condition applications in accordance with subpart H of this part. ETA is also responsible for compiling and maintaining a list of labor condition applications and makes such list available for public examination at the Department of Labor, 200 Constitution Avenue, NW., room N4456, Washington, DC 20210.

(2) The Employment Standards Administration (ESA), DOL, is responsible, in accordance with subpart I of this part, for investigating and determining, pursuant to a complaint or otherwise, an employer's misrepresentation in or failure to comply with labor condition applications or the employment of H–1B nonimmigrants.

(b) *Immigration and Naturalization Service (INS) and Department of State (DOS) responsibilities.* The Immigration and Naturalization Service (INS) accepts the employer's petition (INS Form I–129) with the DOL-certified labor condition application attached. INS is responsible for approving the nonimmigrant's H–1B visa classification. In doing so, the INS determines whether the occupation named in the labor condition application is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H–1B visa classification. If the petition is approved, INS will notify the U.S. Consulate where the nonimmigrant intends to apply for the visa unless the nonimmigrant is in the U.S. and eligible to adjust status without leaving this country. See 8 U.S.C. 1184(i). The Department of State, through U.S. Embassies and Consulates, is responsible for issuing H–1B visas.

(c) *Employer's responsibilities.* Each employer seeking an H–1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability has several responsibilities.

(1) The employer shall submit a completed labor condition application on Form ETA 9035 and one copy to the regional office of ETA serving the area where the nonimmigrant will be employed. If the labor condition application is certified by ETA, a copy will be returned to the employer.

(2) The employer shall make a filed labor condition application and necessary supporting documentation (as identified under this subpart) available for public examination at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the labor condition application is filed with ETA.

(3) The employer then may submit a copy of the certified labor condition application to INS with a completed petition (INS Form I–129) requesting H–1B classification.

(4) The employer should not allow the nonimmigrant worker to begin work, even though a labor condition application has been certified by DOL, until INS grants the worker authorization to work in the United States for that employer.

(5) The employer shall develop sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its labor condition application and the accuracy of information provided in the event that such statement or information is challenged. The employer shall also maintain such documentation at its principal place of business in the U.S. and shall make such documentation available to DOL for inspection and copying upon request.

§ _____.710 Complaints.

Complaints concerning misrepresentation in the labor condition application or failure of the employer to meet a condition specified in the application shall be filed with the Administrator, Wage and Hour Division (Administrator), ESA, according to the procedures set forth in subpart I of this part. The Administrator, either pursuant to a complaint or otherwise, shall investigate where appropriate, and after an opportunity for a hearing, assess appropriate sanctions and penalties.

§ _____.715 Definitions.

For the purposes of subparts H and I of this part:

Actual wage means the wage rate paid by the employer to all individuals with experience and qualifications similar to the H–1B nonimmigant's experience and qualifications for the specific employment in question at the place of employment. The actual wage established by the employer is *not* an average of the wage rates paid to all workers employed in the occupation.

Administrative Law Judge (ALJ) means an official appointed pursuant to 5 U.S.C. 3105.

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator under subpart H or I of this part.

Aggrieved party means a person or entity whose operations or interests are adversely affected by the employer's alleged non-compliance with the labor condition application and includes, but is not limited to:

(1) A worker whose job, wages, or working conditions are adversely affected by the employer's alleged non-compliance with the labor condition application;

(2) A bargaining representative for workers whose jobs, wages, or working conditions are adversely affected by the employer's alleged non-compliance with the labor condition application;

(3) A competitor adversely affected by the employer's alleged non-compliance with the labor condition application; and

(4) A government agency which has a program that is impacted by the employer's alleged non-compliance with the labor condition application.

Area of intended employment means the area within normal commuting distance of the place (address) of employment where the H–1B nonimmigrant is or will be employed. If the place of employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within normal commuting distance of the place of employment. (*See* definition of "place of employment.")

Attorney General means the chief official of the U.S. Department of Justice or the Attorney General's designee.

Authorized agent and *authorized representative* mean an official of the employer who has the legal authority to

commit the employer to the statements in the labor condition application.

Certification means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Certify means the act of making a certification.

Certifying Officer and *Regional Certifying Officer* mean a Department of Labor official, or such official's designee, who makes determinations about whether or not to certify labor condition applications.

Chief Administrative Law Judge (Chief ALJ) means the chief official of the Office of the Administrative Law Judges of the Department of Labor or the Chief Administrative Law Judge's designee.

Department and *DOL* mean the United States Department of Labor.

Division means the Wage and Hour Division of the Employment Standards Administration, DOL.

Employer means a person, firm, corporation, contractor, or other association or organization in the United States:

(1) Which suffers or permits a person to work within the United States;

(2) Which has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee; and

(3) Which has an Internal Revenue Service tax identification number.

Employment and Training Administration (ETA) means the agency within the Department which includes the United States Employment Service (USES).

Employment Standards Administration (ESA) means the agency within the Department which includes the Wage and Hour Division.

Immigration and Naturalization Service (INS) means the component of the Department of Justice which makes the determination under the INA on whether to grant visa petitions of employers seeking the admission of nonimmigrants under H–1B visas for the purpose of employment.

INA means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

Independent authoritative source means a professional, business, trade, educational or governmental association, organization, or other similar entity, not owned or controlled by the employer, which has recognized expertise in an occupational field.

Independent authoritative source survey means a survey of wages conducted by an independent authoritative source and published in a book, newspaper, periodical, loose-leaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's application. Such survey shall:

(1) Reflect the average wage paid to workers similarly employed in the area of intended employment;

(2) Be based upon recently collected data—*e.g.*, within the 24-month period immediately preceding the date of publication of the survey; and

(3) Represent the latest published prevailing wage finding by the authoritative source for the occupation in the area of intended employment.

Interested party means a person or entity who or which may be affected by the actions of an H–1B employer or by the outcome of a particular investigation and includes any person, organization, or entity who or which has notified the Department of his/her/its interest or concern in the Administrator's determination.

Lockout means a labor dispute involving a work stoppage, wherein an employer withholds work from its employees in order to gain a concession from them.

Occupation means the occupational or job classification in which the H–1B nonimmigrant is to be employed.

Period of intended employment means the time period between the starting and ending dates inclusive of the H–1B nonimmigrant's intended period of employment in the occupational classification at the place of employment as set forth in the labor condition application.

Place of employment means the worksite or physical location where the work actually is performed. (See definition of "Area of Intended Employment.")

Required wage rate means the rate of pay which is the higher of:

(1) The actual wage for the specific employment in question; or

(2) The prevailing wage rate (determined as of the time of filing the application) for the occupation in which the H–1B nonimmigrant is to be employed in the geographic area of intended employment. The prevailing wage rate must be no less than the minimum wage required by Federal, State, or local law.

Secretary means the Secretary of Labor or the Secretary's designee.

Specialty occupation means an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree (or its equivalent) in the specific specialty as a minimum for entry into the occupation in the United States. The nonimmigrant in a specialty occupation shall possess the following qualifications: (1) Full state licensure to practice in the occupation, if licensure is required for the occupation; (2) completion of the required degree; or (3) experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty. 8 U.S.C. 1184(i). Determinations of specialty occupation and of nonimmigrant qualifications are made by INS.

Specific employment in question means the set of duties and responsibilities performed or to be performed by the H–1B nonimmigrant at the place of employment.

State means one of the 50 States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

State Employment Security Agency (SESA) means the State agency designated under section 4 of the Wagner-Peyser Act to cooperate with USES in the operation of the national system of public employment offices.

Strike means a labor dispute wherein employees engage in a concerted stoppage of work (including stoppage by reason of the expiration of a collective-bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operation.

United States Employment Service (USES) means the agency of the Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices.

Wage rate means the remuneration (exclusive of fringe benefits) to be paid, stated in terms of amount per hour, day, month or year (see definition of "Required Wage Rate").

§ _____.720 Addresses of Department of Labor regional offices.

Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont): One Congress Street 10th Floor, Boston, Massachusetts 02114–2023. Telephone: 617–565–4446.

Region II (New York, New Jersey, Puerto Rico, and the Virgin Islands): 201 Varick Street, Room 755, New York, New York 10014. Telephone: 212–337–2186.

Region III (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia): 3535 Market St., Post Office Box 8796, Philadelphia, Pennsylvania 19101. Telephone: 215–596–6363.

Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina,

South Carolina, and Tennessee): 1371 Peachtree Street, NE., Atlanta, Georgia 30309. Telephone: 404–347–3938.

Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin): 230 South Dearborn Street, Room 605, Chicago, Illinois 60604. Telephone: 312–353–1550.

Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, and Texas): 525 Griffin Street, Room 311, Dallas, Texas 75202. Telephone: 214–767–4989.

Region VII (Iowa, Kansas, Missouri, and Nebraska): 1100 Main, Rm. 1050, Kansas City, Missouri 64105. Telephone: 816–426–3796.

Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming): 1999 Broadway, Rm. 1780, Denver, Colorado 80202. Telephone: 303–391–5742.

Region IX (Arizona, California, Guam, Hawaii, and Nevada): 71 Stevenson Street, Room 805, San Francisco, California 94105. Telephone: 415–744–7618.

Region X (Alaska, Idaho, Oregon, and Washington): 1111 Third Avenue, Suite 900, Seattle, Washington 98101–3212. Telephone: 206–553–7700.

§ _____.730 Labor condition application.

(a) *Who must submit labor condition applications?* An employer, or the employer's authorized agent or representative, which meets the definition of employer set forth in § _____.715 of this part and intends to employ an H–1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability shall submit a labor condition application to DOL. Attorneys and agents submitting applications on an employer's behalf shall submit, also, a completed INS Form G–28.

(b) *Where and when should a labor condition application be submitted?* A labor condition application shall be submitted, by U.S. mail, private carrier, or facsimile transmission, to the ETA regional office shown in § _____.720 of this part in whose geographic area of jurisdiction the H–1B nonimmigrant will be employed no earlier than six months before the beginning date of the period of intended employment shown on the LCA. It is the employer's responsibility to ensure that a complete and accurate application is received by the appropriate regional office of ETA. Incomplete or obviously inaccurate applications will not be certified. The regional office shall process all applications sequentially upon receipt regardless of the method used by the employer to submit the application and shall make a determination to certify or not certify the labor condition application within 7 working days of the date the application is received and date-stamped by the Department. If the application is submitted by facsimile transmission, the application containing the original signature shall be maintained by the employer as set forth at § _____.760(a)(1) of this part.

(c) *What should be submitted? Form ETA 9035.*

(1) *General.* One completed and dated original Form ETA 9035 containing the labor condition statements referenced in §§ _____.731 through _____.734 of this part, bearing the employer's original signature (or that of the employer's authorized agent or representative) and one copy of the completed and dated original Form ETA 9035 shall be submitted to ETA (see paragraph (b) of this section and § _____.760(a)(1) of this part with respect to applications filed by facsimile transmission). Copies of Form ETA 9035 are available at the addresses listed in § _____.720 of this part; photocopies of the form (obtained from any source) also are permitted. Each application shall identify the occupational classification for which the labor condition application is being submitted and shall state:

(i) The occupation, by Dictionary of Occupational Titles (DOT) Three-Digit Occupational Groups code and by the employer's own title for the job;

(ii) The number of H–1B nonimmigrants sought;

(iii) The gross wage rate to be paid to each H–1B nonimmigrant, expressed on an hourly, weekly, biweekly, monthly or annual basis;

(iv) The starting and ending dates of the H–1B nonimmigrants' employment;

(v) The place(s) of intended employment; and

(vi) The prevailing wage for the occupation in the area of intended employment and the specific source (*e.g.*, name of published survey) relied upon by the employer to determine the wage. If the wage is obtained from a SESA, the appropriate box must be checked and the wage provided; wages obtained from a source other than a SESA must be identified along with the wage;

(2) *Mutiple positions or places of employment.* The employer shall file a separate LCA for each occupation in which the employer intends to employ one or more H–1B nonimmigrants. All places of employment covered by the application must be located within the jurisdiction of a single ETA regional office, or, if the nonimmigrant(s) is(are) to be employed sequentially in various places of employment, the application is to be submitted to the regional office having jurisdiction over the initial place of employment; and

(3) *Full-time and part-time jobs.* The position(s) covered by the LCA may be full-time or part-time or a mix of both.

(d) *Content of the labor condition application.* An employer's labor condition application shall contain the labor condition statements referenced in §§ _____.731 through _____.734 of this part, which provide that no individual may be admitted or provided status as an H–1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary an application stating that:

(1) The employer is offering and will offer during the period of authorized employment to H–1B nonimmigrants no less than the greater of the following:

(i) The actual wage paid to the employer's other employees at the worksite with similar experience and qualifications for the specific employment in question; or

(ii) The prevailing wage level for the occupational classification in the area or intended employment;

(2) The employer will provide working conditions for such nonimmigrants that will not adversely affect the working conditions of workers similarly employed;

(3) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment;

(4) The employer has provided and will provide notice of the filing of the labor condition application to:

(i)(A) The bargaining representative of the employer's employees in the occupational classification in the area of intended employment for which the H–1B nonimmigrants are sought, in the manner described in § _____.734(a)(1)(i); or

(B) If there is no such bargaining representative, posts notice of the filing of the labor condition application in conspicuous locations in the employer's establishment(s) in the area of intended employment, in the manner described in § _____.734(a)(1)(ii) of this subpart and, in the manner described in § _____.734(a)(2) of this subpart; and

(ii) H–1B nonimmigrants at the time that such nonimmigrants actually report to work; and

(5) The employer has provided the information about the occupation required in paragraph (c) of this section.

§ _____.731 The first labor condition statement: wages.

An employer seeking to employ H–1B nonimmigrants in a specialty occupation or as a fashion model of distinguished merit and ability shall

state on Form ETA 9035 that it will pay the H–1B nonimmigrants the required wage rate.

(a) *Establishing the wage requirement.* The first labor condition application requirement shall be satisfied when the employer signs Form ETA 9035 attesting that, for the entire period of authorized employment, the required wage rate will be paid to the H–1B nonimmigrant's; that is, that the wage shall be the greater of: the actual wage rate (as specified in paragraph (a)(1) of this section) or the prevailing wage (as specified in paragraph (a)(2) of this section).

(1) The actual wage is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be considered: experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. "Legitimate business factors," for purposes of this paragraph (a), means those that it is reasonable to conclude are necessary because they conform to recognized principles or can be demonstrated by accepted rules and standards. Where there are other employees with substantially similar experience and qualifications in the specific employment in question—*i.e.*, they have substantially the same duties and responsibilities as the H–1B nonimmigrant—the actual wage shall be the amount paid to these other employees. Where no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H–1B nonimmigrant by the employer. Where the employer's pay system or scale provides for adjustments during the period of the LCA—*e.g.*, cost of living increases or other periodic adjustments, higher entry rate due to market conditions, or the employee moves into a more advanced level in the same occupation—such adjustments shall be provided to similarly employed H–1B nonimmigrants (unless the prevailing wage is higher than the actual wage). Examples illustrating these principles may be found in appendix A to this subpart H.

(2) The *prevailing wage* for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information available as of the time of filing the application. The employer is not required to use any specific methodology to determine the prevailing wage and may utilize a SESA, an independent authoritative source, or other legitimate sources of wage data. One of the following sources shall be used to establish the prevailing wage:

(i) A wage determination for the occupation and area issued under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (see also 29 CFR part 1), or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (see also 29 CFR part 4) (which shall be available through the SESA);

(ii) A union contract which was negotiated at arms-length between a union and the employer, which contains a wage rate applicable to the occupation; or

(iii) If the job opportunity is in an occupation which is not covered by paragraph (a)(2) (i) or (ii) of this section, the prevailing wage shall be the average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wages paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages. See paragraph (c) of this section, regarding payment of required wages. See also paragraph (d)(4) of this section, regarding enforcement. The prevailing wage rate under this paragraph (a)(2)(iii) shall be based on the best information available. The Department believes that the following prevailing wage sources are, in order of priority, the most accurate and reliable:

(A) *A SESA Determination.* Upon receipt of a written request for a prevailing wage determination, the SESA will determine whether the occupation is covered by a Davis-Bacon or Service Contract Act wage determination, and, if not, whether it has on file current prevailing wage information for the occupation.This information will be provided by the SESA to the employer in writing in a timely manner. Where the prevailing wage is not immediately available, the SESA will conduct a prevailing wage survey using the methods outlined at 20 CFR 656.40 and other administrative guidelines or regulations issued by ETA.

(*1*) An employer who chooses to utilize a SESA prevailing wage determination shall file the labor condition application not more than 90 days after the date of issuance of such SESA wage determination. Once an employer obtains a prevailing wage determination from the SESA and files an LCA supported by that prevailing wage determination, the employer is deemed to have accepted the prevailing wage determination (both as to the occupational classification and wage) and thereafter may not contest the legitimacy of the prevailing wage determination through the Employment Service complaint system or in an investigation or enforcement action. Prior to filing the LCA, the employer may challenge a SESA prevailing wage determination through the Employment Service complaint system, by filing a complaint with the SESA. See 20 CFR 658.410 through 658.426. Employers which challenge a SESA prevailing wage determination must obtain a final ruling from the Employment Service complaint system prior to filing an LCA based on such determination. In any challenge, the SESA shall not divulge any employer wage data which was collected under the promise of confidentiality.

(*2*) If the employer is unable to wait for the SESA to produce the requested prevailing wage determination for the occupation in question, or for the Employment Service complaint system process to be completed, the employer may rely on other legitimate sources of available wage information in filing the LCA, as set forth in paragraph (a)(2)(iii)(B) and (C) of this section. If the employer later discovers, upon receipt of a prevailing wage determination from the SESA, that the information relied upon produced a wage that was below the prevailing wage for the occupation in the area of intended employment and the employer was paying below the SESA-determined wage, no wage violation will be found if the employer retroactively compensates the H–1B nonimmigrant(s) for the difference between the wage paid and the prevailing wage, within 30 days of the employer's receipt of the SESA determination.

(*3*) In all situations where the employer obtains the prevailing wage determination from the SESA, the Department will accept that prevailing wage determination as correct and will not question its validity where the employer has maintained a copy of the SESA prevailing wage determination. A complaint alleging inaccuracy of a SESA prevailing wage determination, in such cases, will not be investigated.

(B) *An independent authoritative source.* The employer may use an independent authoritative wage source in lieu of a SESA prevailing wage determination. The independent authoritative source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(B) of this section.

(C) *Another legitimate source of wage information.* The employer may rely on other legitimate sources of wage data to obtain the prevailing wage. The other legitimate source survey must meet all the criteria set forth in paragraph (b)(3)(iii) of this section. The employer will be required to demonstrate the legitimacy of the wage in the event of an investigation.

(iv) For purposes of this section, "similarly employed" means "having substantially comparable jobs in the occupational classification in the area of intended employment," except that if no such workers are employed by employers other than the employer applicant in the area of intended employment, "similarly employed" means:

(A) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(B) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(v) A prevailing wage determination for labor condition application purposes made pursuant to this section shall not permit an employer to pay a wage lower than that required under any other applicable Federal, State or local law.

(vi) Where a range of wages is paid by the employer to individuals in an occupational classification or among individuals with similar experience and qualifications for the specific employment in question, a range is considered to meet the prevailing wage requirement so long as the bottom of the wage range is at least the prevailing wage rate.

(3) Once the prevailing wage rate is established, the H–1B employer than shall compare this wage with the actual wage rate for the specific employment in question at the place of employment and must pay the H–1B nonimmigrant at least the higher of the two wages.

(b) *Documentation of the wage statement.* (1) The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the wage statement required in paragraph (a) of this section and attested to on Form ETA 9035. The documentation shall be made available to DOL upon request. Documentation shall also be made available for public examination to the extent required by §_____.760(a) of this part. The employer shall also document that the wage rate(s) paid to H–1B nonimmigrant(s) is(are) no less than the required wage rate(s). The documentation shall include information about the employer's wage rate for all other employees for the specific employment in question at the place of employment, beginning with the date the labor condition application was submitted and continuing throughout the period of employment. The records shall be retained for the period of time specified in §_____.760 of this part. The payroll records for each such employee shall include:

(i) Employee's full name;

(ii) Employee's home address;

(iii) Employee's occupation;

(iv) Employee's rate of pay;

(v) Hours worked each day and each week by the employee if paid on other than a salary basis, or the prevailing or actual wage is expressed as an hourly wage;

(vi) Total additions to or deductions from pay each pay period by employee; and

(vii) Total wages paid each pay period, date of pay and pay period covered by the payment by employee.

(2) *Actual wage.* In addition to payroll data required by paragraph (b)(1) of this section (and also by the Fair Labor Standards Act), the employer shall retain documentation specifying the basis it used to establish the actual wage. The employer shall show how the wage set for the H–1B nonimmigrant relates to the wages paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question at the place of employment. Where adjustments are made in the employer's pay system or scale during the validity period of the LCA, the employer shall retain documentation explaining the changes and clearly showing that, after such adjustments, the wages paid to the H–1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation and area of intended employment. See appendix A to subpart H.

(3) *Prevailing wage.* The employer also shall retain documentation regarding its determination of the prevailing wage. This source documentation shall not be submitted to ETA with the labor condition application, but shall be retained at the employer's place of business for the length of time required in §_____.760(c) of this part. Such documentation shall consist of the documentation described in paragraph (b)(3) (i), (ii), or (iii) of this section and the documentation described in paragraph (b)(1) of this section. (i) If the employer used a wage determination issued pursuant to the provisions of the Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (see 29 CFR part 1), or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (see 29 CFR part 4), the documentation shall include a copy of the determination showing the wage rate for the occupation in the area of intended employment.

(ii) If the employer used an applicable wage rate from a union contract which was negotiated at arms-length between a union and the employer, the documentation shall include an excerpt from the union contract showing the wage rate(s) for the occupation.

(iii) If the employer did not use a wage covered by the provisions of paragraph (b)(3) (i) or (ii) of this section, the employer's documentation shall consist of:

(A) A copy of the prevailing wage finding from the SESA for the occupation within the area of intended employment; or

(B) A copy of the prevailing wage survey for the occupation within the area of intended employment published by an independent authoritative source. For purposes of this paragraph (b)(3)(iii)(B), a prevailing wage survey for the occupation in the area of intended employment published by an authoritative independent source shall mean a survey of wages published in a book, newspaper, periodical, loose-leaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's application. Such survey shall:

(*1*) Reflect the average wage paid to workers similarly employed in the area of intended employment;

(*2*) Be based upon recently collected data—*e.g.*, within the 24-month period immediately preceding the date of publication of the survey; and

(*3*) Represent the latest published prevailing wage finding by the independent authoritative source for the occupation in the area of intended employment; or

(C) A copy of the prevailing wage survey or other source data acquired from a legitimate source of wage information that was used to make the prevailing wage determination. For purposes of paragraph (b)(3)(iii)(C) of this section, a prevailing wage provided by another legitimate source of such wage information shall be one which:

(*1*) Reflects the weighted average wage paid to workers similarly employed in the area of intended employment;

(*2*) Is based on the most recent and accurate information available; and

(*3*) Is reasonable and consistent with recognized standards and principles in producing a prevailing wage.

(c) *Satisfaction of required wage obligation.* (1) The required wage must be paid to the employee, cash in hand, free and clear, when due, *except that* deductions made in accordance with paragraph (c)(7) of this section may reduce the cash wage below the level of the required wage.

(2) "Wages paid," for purposes of satisfying the H–1B required wage, shall consist only of those payments that meet all the following criteria:

(i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(7) of this section;

(ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1, *et seq.*);

(iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. 3101, *et seq.* (FICA). The employer must be able to document that the payments have been so reported to IRS and that both the employer's and employee's taxes have been paid *except that* when the H–1B nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. 433 (*i.e.*, an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country

(iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.

(3) For salaried employees, wages will be due in pro-rated installments (*e.g.*, annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly *except that*, in the event that the employer intends to use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay in order to meet the required wage obligation (*e.g.*, a quarterly production bonus), the employer's documentation of wage payments (including such supplemental payments) must show the employer's commitment to make such payment and the method of determining the amount thereof, and must show unequivocally that the required wage obligation was met for prior pay periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period.

(4) For hourly-wage employees, the required wages will be due for all hours worked and/or for any nonproductive time (as specified in paragraph (c)(5) of this section) at the end of the employer's ordinary pay period (*e.g.*, weekly) but in no event less frequently than monthly.

(5)(i) For the purpose of DOL administration and enforcement of the H–1B program, an H–1B nonimmigrant is considered to be under the control or employ of the LCA-filing employer, and therefore shall receive the full wage which the LCA-filing employer is required to pay, beginning no later than the first day the H–1B nonimmigrant is in the United States and continuing throughout the nonimmigrant's period of employment. Therefore if the H–1B nonimmigrant is in a nonproductive status for reasons such as training, lack of license, lack of assigned work or any other reason, the employer will be required to pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for the occupation and area involved) at the required wage for the occupation listed on the LCA. If the employer's LCA carries a designation of "part-time employment," the employer will be required to pay the nonproductive employee for at least the number of hours indicated on the I–129 petition filed by the employer with the INS. If during a subsequent enforcement action by the Administrator it is determined that an employee designated in the LCA as part-time was in fact working full-time or regularly working more hours than reflected on the I–129 petition, the employer will be held to the factual standard disclosed by the enforcement action.

(ii) If, however, during the period of employment, an H–1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which render the nonimmigrant unable to work—*e.g.*, maternity leave, automobile accident which temporarily incapacitates the nonimmigrant, caring for an ill relative—then the employer shall not be obligated to pay the required wage rate during that period *provided that* the INS permits the employee to remain in the U.S. without being paid and provided further that such period is not subject to payment under other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 *et seq.*) or the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*).

(6) If the employee works in an occupation other than that identified on the employer's LCA, the employer's required wage obligation is based on the occupation identified on the LCA, and not on whatever wage standards may be applicable in the occupation in which the employee may be working.

(7) "*Authorized deduction,*" for purposes of the H–1B required wage obligation, means a deduction from wages in complete compliance with one of the following sets of criteria—

(i) Deduction which is required by law (*e.g.*, income tax; FICA); *or*

(ii) Deduction which is authorized by a collective bargaining agreement, or is reasonable and customary in the occupation and/or area of employment (*e.g.*, union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution for plan(s) in compliance with the Employee Retirement Income Security Act, 29 U.S.C. 1001, *et seq.*), *except that* the deduction may not recoup a business expense(s) of the employer; the deduction must have been revealed to the worker prior to the commencement of employment and, if the deduction was a condition of employment, had been clearly identified as such; and the deduction must be made against wages of U.S. workers as well as H–1B nonimmigrants (where there are U.S. workers); *or*

(iii) Deduction which meets the following requirements:

(A) Is made in accordance with a voluntary, written authorization by the employee (Note: an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);

(B) Is for a matter principally for the benefit of the employee (*Note:* housing and food allowances would be considered to meet this "benefit of employee" standard, unless the employee is in travel/per diem status, or unless the circumstances indicate that the arrangements for the employee's housing or food are principally for the convenience or benefit of the employer (*e.g.*, employee living at worksite in "on call" status));

(C) Is not a recoupment of the employer's business expense (*e.g.*, tools and equipment; transportation costs where such transportation is an incident

of and necessary to the employment; living expenses when the employee is traveling on the employer's business) (for purposes of this section, initial transportation from and end-of-employment travel to the worker's home country shall not be considered a business expense);

(D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered (Note: the employer must document the cost and value); and

(E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act, 15 U.S.C. 1673, and the regulations of the Secretary pursuant to that Act, 29 CFR part 870, under which garnishment(s) may not exceed 25% of an employee's disposable earnings for a workweek.

(8) Any unauthorized deduction taken from wages is considered by the Department to be non-payment of that amount of wages, and, in the event of an investigation, will result in back wage assessment (plus civil money penalties and/or disqualification from H–1B and other immigration programs (pursuant to § _____.810(b)), if willful).

(9) Where the employer depresses the employee's wages below the required wage by imposing on the employee any of the employer's business expense(s), the Department will consider the amount to be an unauthorized deduction from wages even if the matter is not shown in the employer's payroll records as a deduction.

(10) Where the employer makes deduction(s) for repayment of loan(s) or wage advance(s) made to the employee, the Department, in the event of an investigation, will require the employer to establish the legitimacy and purpose(s) of the loan(s) or wage advance(s), with reference to the standards set out in paragraph (c)(7) of this section.

(d) *Enforcement actions.* (1) In the event that a complaint is filed pursuant to subpart I of this part, alleging a failure to meet the "prevailing wage" condition or a material misrepresentation by the employer regarding the payment of the required wage, or pursuant to such other basis for investigation as the Administrator may find, the Administrator shall determine whether the employer has the documentation required in paragraph (b)(3) of this section, and whether the documentation supports the employer's wage attestation. Where the documentation is either nonexistent or is insufficient to determine the prevailing wage (*e.g.*, does not meet the criteria specified in this section, in which case the Administrator may find a violation of paragraph (b)(1), (2), or (3), of this section); *or* where, based on significant evidence regarding wages paid for the occupation in the area of intended employment, the Administrator has reason to believe that the prevailing wage finding obtained from an independent authoritative source or another legitimate source varies substantially from the wage prevailing for the occupation in the area of intended employment; *or* where the employer has been unable to demonstrate that the prevailing wage determined by another legitimate source is in accordance with the regulatory criteria, the Administrator may contact ETA, which shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for determining violations and for computing back wages, if such wages are found to be owed. The 30-day investigatory period shall be suspended while ETA makes the prevailing wage determination and, in the event that the employer timely challenges the determination through the Employment service complaint system (see § _____.731(d)(2) of this part), shall be suspended until the Employment Service complaint system process is completed and the Administrator's investigation can be resumed.

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, the employer may challenge the ETA prevailing wage only through the Employment Service complaint system. See 20 CFR part 658, subpart E. Notwithstanding the provisions of 20 CFR 658.421 and 658.426, the appeal shall be initiated at the ETA regional office level. Such challenge shall be initiated within 10 days after the employer receives ETA's prevailing wage determination from the Administrator. In any challenge to the wage determination, neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality.

(i) Where the employer timely challenges an ETA prevailing wage determination obtained by the Administrator, the 30-day investigative period shall be suspended until the employer obtains a final ruling from the Employment Service complaint system. Upon such final ruling, the investigation and any subsequent enforcement proceeding shall continue, with ETA's prevailing wage determination serving as the conclusive determination for all purposes.

(ii) Where the employer does not challenge ETA's prevailing wage determination obtained by the Administrator, such determination shall be deemed to have been accepted by the employer as accurate and appropriate (both as to the occupational classification and wage) and thereafter shall not be subject to challenge in a hearing pursuant to § _____.835 of this part.

(3) For purposes of this paragraph (d), ETA may consult with the appropriate SESA to ascertain the prevailing wage applicable under the circumstances of the particular complaint.

(4) No prevailing wage violation will be found if the employer paid a wage that is equal to or more than 95 percent of the prevailing wage as required by paragraph (a)(2)(iii) of this section. If the employer paid a wage that is less than 95 percent of the prevailing wage, the employer will be required to pay 100 percent of the prevailing wage.

§ _____.732 The second labor condition statement: working conditions.

An employer seeking to employ H–1B nonimmigrants in specialty occupations or as fashion models of distinguished merit and ability shall state on Form ETA 9035 that the employment of H–1B nonimmigrants will not adversely affect the working conditions of workers similarly employed in the area of intended employment.

(a) For purposes of this section, "similarly employed" shall mean "having substantially comparable jobs in the occupational classification at the worksite and in the area of intended employment." If no such workers are employed at the worksite or by employers other than the employer applicant in the area of intended employment "similarly employed" shall mean:

(1) Having jobs requiring a substantially similar level of skills at the worksite or within the area of intended employment; or

(2) If there are no substantially comparable jobs at the worksite or in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(b) *Establishing the working conditions requirement.* The second labor condition application requirement shall be satisfied when the employer signs the labor condition application attesting that for the period of intended employment its employment of H–1B nonimmigrants will not adversely affect the working conditions of workers similarly employed. Working conditions encompass matters including hours,

shifts, vacation periods, and fringe benefits. The employer's obligation regarding working conditions shall extend for the longer of two periods: the validity period of the certified LCA or the period during which the H–1B nonimmigrant(s) is(are) employed by the employer.

(c) *Documentation of the working condition statement.*

(1) In the event an enforcement action is initiated pursuant to subpart I of this part, the employer shall document the validity of its prevailing working conditions statement referenced in paragraph (b) of this section and attested to on Form ETA 9035. The employer must be able to show that the working conditions of similarly employed workers were not adversely affected by the employment of an H–1B nonimmigrant—*e.g.*, that the working conditions are similar to working conditions which preceded the employment of the H–1B nonimmigrant, or, if there are no similarly employed workers working for the employer, are similar to those existing in like business establishments to the employer's in the area of employment.

(2) In the event that an investigation is conducted pursuant to subpart I of this part concerning whether the employer failed to satisfy the prevailing working conditions statement referenced in paragraph (b) of this section and attested to on Form ETA 9035, the Administrator shall determine whether the employer has produced the documentation required in paragraph (c)(1) of this section, and whether the documentation is sufficient to support the employer's prevailing working conditions statement. If the employer fails to produce any documentation to support its burden of proof demonstrating that there is no adverse effect on the working conditions of workers similarly employed, the Administrator shall find a violation of paragraph (c)(1) of this section. Examples of documentation which employers should either maintain or produce include any relevant information which discusses the working conditions for the industry occupation and locale, such as published studies, surveys, or articles and documentation regarding working conditions at the worksite, such as fringe benefit packages, which pre-existed the employment of the H–1B nonimmigrant. If the documentation is insufficient to determine whether the employment of H–1B nonimmigrants has or has not adversely affected the working conditions of workers similarly employed in the area of employment, the Administrator may contact ETA, which shall provide the Administrator with advice regarding the working conditions of similarly employed workers in the area of employment.

§ _____.733 The third labor condition statement: no strike or lockout.

An employer seeking to employ H–1B nonimmigrants shall state on Form ETA 9035 that there is not at that time a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment. A strike or lockout which occurs after the labor condition application is filed by the employer with DOL is covered by INS regulations at 8 CFR 214.2(h)(17).

(a) *Establishing the no strike or lockout requirement.* The third labor condition application requirement shall be satisfied when the employer signs the labor condition application attesting that, as of the date the application is filed, the employer is not involved in a strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification in the area of intended employment. Labor disputes for the purpose of this section relate only to those disputes involving employees of the employer working at the place of employment in the occupational classification named in the labor condition application. See also INS regulations at 8 CFR 214.2(h)(17) for effects of strikes or lockouts in general on the H–1B nonimmigrant's employment.

(1) *Strike or lockout subsequent to certification of labor condition application.* In order to remain in compliance with the no strike or lockout labor condition statement, if a strike or lockout of workers in the same occupational classification as the H–1B nonimmigrant occurs at the place of employment during the validity of the labor condition application, the employer, within three days of the occurrence of the strike or lockout, shall submit to ETA, by U.S. mail, facsimile (FAX), or private carrier, written notice of the strike or lockout. Further, the employer shall not place, assign, lease, or otherwise contract out an H–1B nonimmigrant, during the entire period of the labor condition application's validity, to any place of employment where there is a strike or lockout in the course of a labor dispute in the same occupational classification as the H–1B nonimmigrant. Finally, the employer shall not use the labor condition application in support of any petition filings for H–1B nonimmigrants to work in such occupational classification at such place of employment until ETA determines that the strike or lockout has ended.

(2) *ETA notice to INS.* Upon receiving from an employer a notice described in paragraph (a)(1) of this section, ETA shall examine the documentation, and may consult with the union at the employer's place of business or other appropriate entities. If ETA determines that the strike or lockout is covered under INS's *"Effect of strike"* regulation for "H" visa holders, ETA shall certify to INS, in the manner set forth in that regulation, that a strike or other labor dispute involving a work stoppage of workers in the same occupational classification as the H–1B nonimmigrant is in progress at the place of employment. See 8 CFR 214.2(h)(17).

(b) *Documentation of the third labor condition statement.* The employer need not develop nor maintain documentation to substantiate the statement referenced in paragraph (a) of this section. In the case of an investigation, however, the employer has the burden of proof to show that there was no strike or lockout in the course of a labor dispute for the occupational classification in which an H–1B nonimmigrant is employed, either at the time the application was filed or during the validity period of the LCA.

§ _____.734 The fourth labor condition statement: notice.

An employer seeking to employ H–1B nonimmigrants shall state on Form ETA 9035 that the employer has provided notice of the filing of the labor condition application to the bargaining representative of the employer's employees in the occupational classification in which the H–1B nonimmigrants will be employed or are intended to be employed in the area of intended employment, or, if there is no such bargaining representative, has posted notice of filing in conspicuous locations in the employer's establishment(s) in the area of intended employment, in the manner described in this section.

(a) *Establishing the notice requirement.* The fourth labor condition application requirement shall be established when the conditions of paragraphs (a)(1) and (a)(2) of this section are met.

(1)(i) Where there is a collective bargaining representative for the occupational classification in which the H–1B nonimmigrants will be employed, on or within 30 days before the date the labor condition application is filed with ETA, the employer shall provide notice to the bargaining representative that a labor condition application is being, or will be, filed with ETA. The notice shall

identify the number of H–1B nonimmigrants the employer is seeking to employ; the occupational classification in which the H–1B nonimmigrants will be employed; the wages offered; the period of employment; and the location(s) at which the H–1B nonimmigrants will be employed. Notice under this paragraph (a)(1)(i) shall include the following statement: "Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor."

(ii) Where there is no collective bargaining representative, the employer shall, on or within 30 days before the date the labor condition application is filed with ETA, provide a notice of the filing of the labor condition application to its employees by posting a notice in at least two conspicuous locations at each place of employment where any H–1B nonimmigrant will be employed. The notice shall indicate that H–1B nonimmigrants are sought; the number of such nonimmigrants the employer is seeking; the occupational classification; the wages offered; the period of employment; the location(s) at which the H–1B nonimmigrants will be employed; and that the labor condition application is available for public inspection at the employer's principal place of business in the U.S. or at the worksite. The notice shall also include the statement: "Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor." The posting of exact copies of the labor condition application shall be sufficient to meet the requirements of this paragraph (a)(1)(ii).

(A) The notice shall be of sufficient size and visibility, and shall be posted in two or more conspicuous places so that the employer's workers at the place(s) of employment can easily see and read the posted notice(s).

(B) Appropriate locations for posting the notices include, but are not limited to, locations in the immediate proximity of wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a).

(C) The notices shall be posted on or within 30 days before the date the labor condition application is filed and shall remain posted for a total of 10 days.

(D) Where the employer places any H–1B nonimmigrant(s) at one or more worksites not contemplated at the time of filing the application, but which are within the area of intended employment listed on the LCA, the employer is required to post notice(s) at such worksite(s) on or before the date any H–1B nonimmigrant begins work, which notice shall remain posted for a total of ten days.

(2) The employer shall, no later than the date the H–1B nonimmigrant reports to work at the place of employment, provide the H–1B nonimmigrant with a copy of the labor condition application certified by the Department.

(b) *Documentation of the fourth labor condition statement.* The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the statement referenced in paragraph (a) of this section and attested to on form ETA 9035. Such documentation shall include a copy of the dated notice and the name and address of the collective bargaining representative to whom the notice was provided. Where there is no collective bargaining representative, the employer shall note and retain the dates when, and locations where, the notice was posted and shall retain a copy of the posted notice.

(c) *Records retention; records availability.* The employer's documentation shall not be submitted to ETA with the labor condition application, but shall be retained for the period of time specified in §_____.760(c) of this part. The documentation shall be made available for public examination as required in §_____.760(a) of this part, and shall be made available to DOL upon request.

§_____.735 Special provisions for short-term placement of H–1B nonimmigrants at place(s) of employment outside the area(s) of intended employment listed on labor condition application.

(a) Subject to the conditions specified in paragraph (b) of this section, an employer may place H–1B nonimmigrant(s) at worksite(s) (place(s) of employment) within areas of employment not listed on the employer's labor condition application(s)—whether or not the employer owns or controls such worksite(s)—without filing new labor condition application(s) for the area(s) of intended employment which would encompass such worksite(s).

(b) The following restrictions shall be fully satisfied by an employer which places H–1B nonimmigrant(s) at worksite(s) (place(s) of employment) within areas of employment not listed on the employer's labor condition application(s):

(1) The employer has fully satisfied the requirements of §§_____.730 through _____.734 of this part with regard to worksite(s) located within the area(s) of intended employment listed on the employer's labor condition application(s).

(2) The employer shall not place, assign, lease, or otherwise contract out any H–1B nonimmigrant(s) to any worksite where there is a strike or lockout in the course of a labor dispute in the same occupational classification(s) as the H–1B nonimmigrant(s).

(3) For every day of the H–1B nonimmigrant's(s') placement outside the LCA-listed area of employment, the employer shall pay such worker(s) the required wage (based on the prevailing wage at such worker's(s) permanent work site, or the employer's actual wage, whichever is higher) plus per diem and transportation expenses (for both workdays and non-workdays) at rate(s) no lower than the rate(s) prescribed for Federal Government employees on travel or temporary assignment, as set out in 41 CFR Part 301–7 and Ch. 301, App. A.

(4) The employer's placement(s) of H–1B nonimmigrant(s) at any worksite(s) in an area of employment not listed on the employer's labor condition application(s) shall be limited to a cumulative total of ninety workdays within a three-year period, beginning on the first day on which the employer placed an H–1B nonimmigrant at any worksite within such area of employment. For purposes of this section, "workday" shall mean any day on which one or more H–1B nonimmigrants perform any work at any worksite(s) within the area of employment. For example, one "workday" would be counted for a day on which seven H–1B nonimmigrants worked at three worksites within one city, and one "workday" would be counted for a day on which one H–1B nonimmigrant worked at one worksite within a city. The employer may rotate such workers into worksites within such area of employment or may maintain a constant work force. However, on the first day after the accumulation of 90 workdays, the employer shall not have any such H–1B nonimmigrant(s) at any worksite(s) within such area of employment not included on a certified LCA.

(c) At the accumulation of the 90 workdays described in paragraph (b)(4) of this section, the employer shall have ended its placement of all H–1B nonimmigrant(s) at any worksite(s)

within the area of employment not listed on the labor condition application, *or* shall have filed and received a certified labor condition application for the area(s) of intended employment encompassing such worksite(s) and performed all actions required in connection with such filing(s) (*e.g.*, determination of the prevailing wage; notice to collective bargaining representative or on-site notice to workers).

(d) At any time during the 90-day period described in paragraph (b)(4) of this section, the employer may file a labor condition application for the area of intended employment encompassing such worksite(s), performing all actions required in connection with such labor condition application. Upon certification of such LCA, the employer's obligation to pay Federal per diem rates to the H–1B nonimmigrant(s) shall terminate. (However, *see* §_____.731(c)(7)(iii)(C) regarding payment of business expenses for employee's travel on employer's business.)

§_____.740 Labor condition application determinations.

(a) *Actions on labor condition applications submitted for filing.* Once a labor condition application has been received from an employer, a determination shall be made by the ETA regional Certifying Officer whether to certify the labor condition application or return it to the employer not certified.

(1) *Certification of labor condition application.* Where all items on Form ETA 9035 have been completed, the form is not obviously inaccurate, and it contains the signature of the employer or its authorized agent or representative, the regional Certifying Officer shall certify the labor condition application unless it falls within one of the categories set forth in paragraph (a)(2) of this section. The Certifying Officer shall make a determination to certify or not certify the labor condition application within 7 working days of the date the application is received and date-stamped by the Department. If the labor condition application is certified, the regional Certifying Officer shall return a certified copy of the labor condition application to the employer or the employer's authorized agent or representative. The employer shall file the certified labor condition application with the appropriate INS office in the manner prescribed by INS. The INS shall determine whether each occupational classification named in the certified labor condition application is a specialty occupation or is a fashion model of distinguished merit and ability.

(2) *Determinations not to certify labor condition applications.* ETA shall not certify a labor condition application and shall return such application to the employer or the employer's authorized agent or representative, when either or both of the following two conditions exists:

(i) When the Form ETA 9035 is not properly completed. Examples of a Form ETA 9035 which is not properly completed include instances where the employer has failed to check all the necessary boxes; or where the employer has failed to state the occupational classification, number of nonimmigrants sought, wage rate, period of intended employment, place of intended employment, or prevailing wage and its source; or where the application does not contain the signature of the employer or the employer's authorized agent or representative.

(ii) When the Form ETA ETA 9035 contains obvious inaccuracies. An obvious inaccuracy will be found if the employer files an application in error—*e.g.*, where the Administrator, Wage and Hour Division, after notice and opportunity for a hearing pursuant to subpart I of this part, has notified ETA in writing that the employer has been disqualified from employing H–1B nonimmigrants under section 212(n)(2) of the INA. Examples of other obvious inaccuracies include stating a wage rate below the FLSA minimum wage, submitting a labor condition application earlier than six months before the beginning date of the period of intended employment, identifying multiple occupations on a single labor condition application, identifying places of employment within the jurisdiction of more than one ETA regional office on a single labor condition application, identifying a wage which is below the prevailing wage listed on the LCA, or identifying a wage range where the bottom of such wage range is lower than the prevailing wage listed on the LCA.

(3) *Correction and resubmission of labor condition application.* If the labor condition application is not certified pursuant to paragraph (a)(2) (i) or (ii) of this section, ETA shall return it to the employer, or the employer's authorized agent or representative, explaining the reasons for such return without certification. The employer may immediately submit a corrected application to ETA. A "resubmitted" or "corrected" labor condition application shall be treated as a new application by the regional office (*i.e.*, on a "first come, first served" basis) *except that* if the labor condition application is not certified pursuant to paragraph (a)(2)(ii) of this section because of notification by the Administrator of the employer's disqualification, such action shall be the final decision of the Secretary and no application shall be resubmitted by the employer.

(b) *Challenges to labor condition applications.* ETA shall not consider information contesting a labor condition application received by ETA prior to the determination on the application. Such information shall not be made part of ETA's administrative record on the application, but shall be referred to ESA to be processed as a complaint pursuant to subpart I of this part, and, if such application is certified by ETA, the complaint will be handled by ESA under subpart I of this part.

(c) *Truthfulness and adequacy of information.* DOL is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application. The burden of proof is on the employer to establish the truthfulness of the information contained on the labor condition application.

§_____.750 Validity period of the labor condition application.

(a) *Validity of certified labor condition applications.* A labor condition application which has been certified pursuant to the provisions of §_____.740 of this part shall be valid for the period of employment indicated on Form ETA 9035 by the authorized DOL official; however, in no event shall the validity period of a labor condition application begin before the application is certified or exceed three years. Where the labor condition application contains multiple periods of intended employment, the validity period shall extend to the latest date indicated or three years, whichever comes first.

(b) *Withdrawal of certified labor condition applications.* (1) An employer who has filed a labor condition application which has been certified pursuant to §_____.740 of this part may withdraw such labor condition application at any time before the expiration of the validity period of the application, provided that:

(i) H–1B nonimmigrants are not employed at the place of employment pursuant to the labor condition application; and

(ii) The Administrator has not commenced an investigation of the particular application. Any such request for withdrawal shall be null and void; and the employer shall remain bound by the labor condition application until the enforcement proceeding is completed, at

which time the application may be withdrawn.

(2) Requests for withdrawals shall be in writing and shall be directed to the regional ETA Certifying Officer.

(3) An employer shall comply with the "required wage rate" and "prevailing working conditions" statements of its labor condition application required under §§_____.731 and _____.732 of this part, respectively, even if such application is withdrawn, at any time H–1B nonimmigrants are employed pursuant to the application, unless the application is superseded by a subsequent application which is certified by ETA.

(4) An employer's obligation to comply with the "no strike or lockout" and "notice" statements of its labor condition application (required under §§_____.733 and _____.734 of this part, respectively), shall remain in effect and the employer shall remain subject to investigation and sanctions for misrepresentation on these statements even if such application is withdrawn, regardless of whether H–1B nonimmigrants are actually employed, unless the application is superseded by a subsequent application which is certified by ETA.

(5) Only for the purpose of assuring the labor standards protections afforded under the H–1B program, where an employer files a petition with INS under the H–1B classification pursuant to a certified LCA that had been withdrawn by the employer, such petition filing binds the employer to all obligations under the withdrawn LCA immediately upon receipt of such petition by INS.

(c) *Invalidation or suspension of a labor condition application.*

(1) Invalidation of a labor condition application shall result from enforcement action(s) by the Administrator, Wage and Hour Division, under subpart I of this part—*e.g.*, a final determination finding the employer's failure to meet the application's condition regarding strike or lockout; or the employer's willful failure to meet the wage and working conditions provisions of the application; or the employer's substantial failure to meet the notice of specification requirements of the application; see §§_____.734 and _____.760 of this part; or the misrepresentation of a material fact in an application. Upon notice by the Administrator of the employer's disqualification, ETA shall invalidate the application and notify the employer, or the employer's authorized agent or representative. ETA shall notify the employer in writing of the reason(s) that the application is invalidated. When a labor condition application is invalidated, such action shall be the final decision of the Secretary.

(2) Suspension of a labor condition application may result from a discovery by ETA that it made an error in certifying the application because such application is incomplete, contains one or more obvious inaccuracies, or has not been signed. In such event, ETA shall immediately notify INS and the employer. When an application is suspended, the employer may immediately submit to the certifying officer a corrected or completed application. If ETA does not receive a corrected application within 30 days of the suspension, or if the employer was disqualified by the Administrator, the application shall be immediately invalidated as described in paragraph (c) of this section.

(3) An employer shall comply with the "required wages rate" and "prevailing working conditions" statements of its labor condition application required under §§_____.731 and _____.732 of this part, respectively, even if such application is suspended or invalidated, at any time H–1B nonimmigrants are employed pursuant to the application, unless the application is superseded by a subsequent application which is certified by ETA.

(4) An employer's obligation to comply with the "no strike or lockout" and "notice" statements of its labor condition application (required under §§_____.733 and _____.734 of this part, respectively), shall remain in effect and the employer shall remain subject to investigation and sanctions for misrepresentation on these statements even if such application is suspended or invalidated, regardless of whether H–1B nonimmigrants are actually employed, unless the application is superseded by a subsequent application which is certified by ETA.

(d) *Employers subject to disqualification.* No labor condition application shall be certified for an employer which has been found to be disqualified from participation, in the H–1B program as determined in a final agency action following an investigation by the Wage and Hour Division pursuant to subpart I of this part.

§_____.760 Public access; retention of records.

(a) *Public examination.* The employer shall make a filed labor condition application and necessary supporting documentation available for public examination at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the labor condition application is filed with DOL. The following documentation shall be necessary:

(1) A copy of the completed labor condition application, Form ETA 9035. If the application is submitted by facsimile transmission, the application containing the original signature shall be maintained by the employer;

(2) Documentation which provides the wage rate to be paid the H–1B nonimmigrant;

(3) A full, clear explanation of the system that the employer used to set the "actual wage" the employer has paid or will pay workers in the occupation for which the H–1B nonimmigrant is sought, including any periodic increases which the system may provide—*e.g.*, memorandum summarizing the system or a copy of the employer's pay system or scale (payroll records are not required, although they shall be made available to the Department in an enforcement action).

(4) A copy of the documentation the employer used to establish the "prevailing wage" for the occupation for which the H–1B nonimmigrant is sought (a general description of the source and methodology is all that is required to be made available for public examination, the underlying individual wage data relied upon to determine the prevailing wage is not a public record, although it shall be made available to the Department in an enforcement action); and

(5) A copy of the document(s) with which the employer has satisfied the union/employee notification requirements of §_____.734 of this part.

(b) *National list of applications.* ETA shall compile and maintain on a current basis a list of the labor condition applications. Such list shall be by employer, showing the occupational classification, wage rate(s), number of nonimmigrants sought, period(s) of intended employment, and date(s) of need for each employer's application. The list shall be available for public examination at the Department of Labor, 200 Constitution Avenue, NW., Room N–4456, Washington, DC 20210.

(c) *Retention of records.* Either at the employer's principal place of business in the U.S. or at the place of employment, the employer shall retain copies of the labor condition application, required wage information, and documentation showing provision of notice to bargaining representatives or employees at the place of employment for a period of one year beyond the end of the period of employment specified on the labor

condition application or one year from the date the labor condition application was withdrawn, except that if an enforcement action is commenced, the documentation shall be retained until the enforcement proceeding is completed through the procedures set forth in subpart I of this part. Required payroll records for the H–1B employees and other employees in the occupational classification shall be retained at the employer's principal place of business in the U.S. or at the place of employment for a period of three years from the date(s) of the creation of the record(s), except that if an enforcement action is commenced, all payroll records shall be retained until the enforcement proceeding is completed through the procedures set forth in subpart I of this part.

Appendix A to Subpart H—Guidance for Determination of the "Actual Wage"

In determining the required wage rate, in addition to obtaining the prevailing wage, the employer must establish the actual wage for the occupation in which the H–1B nonimmigrant is employed by the employer. For purposes of establishing its compensation system for workers in an occupational category, an employer may take into consideration objective standards relating to experience, qualifications, education, specific job responsibility and function, specialized knowledge, and other legitimate business factors. The use of any or all these factors is at the discretion of the employer. The employer must have and document an objective system used to determine the wages of non–H–1B workers, and apply that system to H–1B nonimmigrants as well. It is not sufficient for the employer simply to calculate an average wage of all non–H–1B employees in an occupation; the actual wage is not an "average wage".

The documents explaining the system must be maintained in the public disclosure file. The explanation of the compensation system must be sufficiently detailed to enable a third party to apply the system to arrive at the actual wage rate computed by the employer for any H–1B nonimmigrant. The computation of the H–1B nonimmigrant's individual actual wage rate must be documented in the H–1B nonimmigrant's personnel file.

Assuming the actual wage is higher than the prevailing wage and thus is the required wage rate, if an employer gives its employees a raise at year's end or if the system provides for other adjustments in wages, H–1B nonimmigrants must also be given the raise (consistent with legitimate employer-established criteria such as level of performance, attendance, *etc.*). This is consistent with Congressional intent that H–1B nonimmigrants and similarly employed U.S. workers be provided the same wages.

Where the employer's pay system or scale provides adjustments during the validity period of the LCA—*e.g.*, cost-of-living increase or other annual adjustments, increase in the entry-level rate for the occupation due to market forces, or the employee moves into a more advanced level in the same occupation—the employer shall retain documentation explaining the changes and clearly showing that, after such adjustments, the wages paid to the H–1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation in the area of intended employment.

The following examples illustrate these principles:

(1) Worker A is paid $10.00 per hour and supervises two employees. Worker B, who is similarly qualified and performs substantially the same job duties except for supervising other employees, is paid $8.00 per hour because he/she has no supervisory responsibility.

The compensation differential is acceptable because it is based upon a relevant distinction in job duties, responsibilities, and functions: The difference in the supervisory responsibilities of the two employees. The actual wage in this occupation at the worksite for workers with supervisory responsibility is $10.00 per hour; the actual wage in this occupation at the worksite for workers without supervisory responsibility is $8.00 per hour.

(2) Systems Analyst A has experience with a particular software which the employer is interested in purchasing, of which none of the employer's current employees have knowledge. The employer buys the software and hires Systems Analyst A on an H–1B visa to train the other employees in its application. The employer pays Systems Analyst A more than its other Systems Analysts who are otherwise similarly qualified.

The compensation differential is acceptable because of the distinction in the specialized knowledge and the job duties of the employees. Systems Analyst A, in addition to the qualifications and duties normally associated with this occupation at the employer's worksite, is also specially knowledgeable and responsible for training the employer's other Systems Analysts in a new software package. As a result, Systems Analyst A commands a higher actual wage. However, if the employer employs other similarly qualified systems analysts who also have unique knowledge and perform similar duties in training other analysts in their area of expertise, the actual wage for Systems Analyst A would have to be at least equivalent to the actual wage paid to such similarly employed analysts.

(3) An employer seeks a scientist to conduct AIDS research in the employer's laboratory. Research Assistants A (a U.S. worker) and B (an H–1B nonimmigrant) both hold Ph.D's in the requisite field(s) of study and have the same number of years of experience in AIDS research. However, Research Assistant A's experience is on the cutting edge of a breakthrough in the field and his/her work history is distinguished by frequent praise and recognition in writing and through awards. Research Assistant B (the nonimmigrant) has a respectable work history but has not conducted research which has been internationally recognized. Employer pays Research Assistant A $10,000 per year more than Research Assistant B in recognition of his/her unparalleled expertise and accomplishments. The employer now wants to hire a third Research Assistant on an H–1B visa to participate in the work.

The differential between the salary paid Research Assistant A (the U.S. worker) and Research Assistant B (an H–1B nonimmigrant) is acceptable because it is based upon the specialized knowledge, expertise and experience of Research Assistant A, demonstrated in writing. The employer is not required to pay Research Assistant B the same wage rate as that paid Research Assistant A, even though they may have the same job titles. The actual wage required for the third Research Assistant, to be hired on an H–1B visa, would be the wage paid to Research Assistant B unless he/she has internationally recognized expertise similar to that of Research Assistant A. As set out in §_____.731(1)(A) the employer must have and document the system used in determining the actual wage of H–1B nonimmigrants. The explanation of the system must be such that a third party may use the system to arrive at the actual wage paid the H–1B nonimmigrant.

(4) Employer located in City X seeks experienced mechanical engineers. In City X, the prevailing wage for such engineers is $49,500 annually. In setting the salaries of U.S. workers, employer pays its nonsupervisory mechanical engineers with 5 to 10 years of experience between $50,000 and $75,000 per year, using defined pay scale "steps" tied to experience. Employer hires engineers A, B, and C, who each have five years of experience and similar qualifications and will perform substantially the same nonsupervisory job duties. Engineer A is from Japan, where he/she earns the equivalent of $80,000 per year. Engineer B is from France and had been earning the equivalent of $50,000 per year. Engineer C is from India and had been earning the equivalent of $20,000 per year. Employer pays Engineer A $80,000 per year, Engineer B $50,000, and Engineer C $20,000 as the employer has had a long-established system of maintaining the home-country pay levels of temporary foreign workers.

The INA requires that the employer pay the H–1B nonimmigrant at least the actual wage or the prevailing wage, whichever is greater, but there is no prohibition against paying an H–1B nonimmigrant a greater wage. Therefore, Engineer A may lawfully be paid the $80,000 per year. Engineer B's salary of $50,000 is acceptable, since this is the employer's actual wage for an engineer with Engineer B's experience and duties. Engineer C's salary, however, at a rate of $20,000 per year, is unacceptable under the law, even given the employer's "long-established 'home country' system," since $20,000 would be below both the actual wage and the prevailing wage. The latter situation is an example of an illegitimate business factor, *i.e.*, a system to maintain salary parity with peers in the country of origin, which yields a wage below the required wage levels.

Subpart I—Enforcement of H–1B Labor Condition Applications

§_____.800 Enforcement authority of Administrator, Wage and Hour Division.

(a) *Authority of Administrator.* The Administrator shall perform all the Secretary's investigative and enforcement functions under section 212(n) of the INA (8 U.S.C. 1182(n)) and subparts H and I of this part.

(b) *Conduct of investigations.* The Administrator, either pursuant to a complaint or otherwise, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons and gather such information as deemed necessary by the Administrator to determine compliance regarding the matters which are the subject of the investigation.

(c) *Availability of records.* An employer being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No employer subject to the provisions of section 212(n) of the INA (8 U.S.C. 1182(n)) and/or subpart H or I of this part shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to 8 U.S.C. 1182(n) or subpart H or I of this part. Any such interference shall be a violation of the labor condition application and the regulations in subparts H and I of this part, and the Administrator may take such further actions as the Administrator considers appropriate.

(Note: Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 18 U.S.C. 1114.)

(d) *Employer cooperation.* (1) An employer subject to subpart H or I of this part shall at all times cooperate in administrative and enforcement proceedings. No employer shall intimidate, threaten, restrain, coerce, blacklist, discharge, retaliate, or in any manner discriminate against any person because such person has:

(i) Filed a complaint or appeal under or related to section 212(n) of the INA (8 U.S.C. 1182(n)) or subpart H or I of this part;

(ii) Testified or is about to testify in any proceeding under or related to section 212(n) of the INA (8 U.S.C. 1182(n)) or subpart H or I of this part;

(iii) Exercised or asserted on behalf of himself or herself or others any right or protection afforded by section 212(n) of the INA (8 U.S.C. 1182(n)) or subpart H or I of this part;

(iv) Consulted with an employee of a legal assistance program or an attorney on matters related to section 212(n) of the INA (8 U.S.C. 1182(n)) or to subpart H or I of this part or any other DOL regulation promulgated pursuant to 8 U.S.C. 1182(n).

(2) In the event of such intimidation or restraint as are described in this paragraph (d), the conduct shall be a violation of the labor condition application and subparts H and I of this part, and the Administrator may take such further actions as the Administrator considers appropriate.

(e) *Confidentiality.* The Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the Department in confidence in the course of an investigation or otherwise under subpart H or I of this part.

§_____.805 Complaints and investigative procedures.

(a) The Administrator, through an investigation either pursuant to a complaint or otherwise, shall determine whether an H–1B employer has:

(1) Filed a labor condition application with ETA which misrepresents a material fact.

(Note: Federal criminal statutes provide penalties of up to $10,000 and/or imprisonment of up to 5 years for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; see also 18 U.S.C. 1546);

(2) (i) Willfully failed to pay wages as required under §_____.731 of this part;

(ii) Willfully failed to provide the working conditions required under §_____.732 of this part;

(3) Filed a labor condition application for H–1B nonimmigrants during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment (see §_____.733 of this part); or

(4) Substantially failed to provide notice of the filing of the labor condition application as required in §_____.734 of this part;

(5) Substantially failed to be specific on the labor condition application as to the number of workers sought, the occupational classification in which the H–1B nonimmigrants will be employed, or the wage rate and conditions under which the H–1B nonimmigrants will be employed;

(6) Failed to pay wages as required under §_____.731 of this part, for purposes of the assessment of back wages (pursuant to §_____.810(a) of this part);

(7) Failed to make available for public examination the application and necessary document(s) at the employer's principal place of business or worksite as required in §_____.760(a);

(8) Failed to retain documentation as required by §_____.760(c) of this part; or

(9) Failed otherwise to comply in any other manner with the provisions of subpart H or I of this part.

(b) For purposes of this part, "willful failure" means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to Section 212(n)(1)(A) (i) or (ii) of the INA, or §_____.731 or _____.732 of this part. See *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128 (1988); see also *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985).

(c) Pursuant to §§_____.740(a)(1) and _____.750 of this part, the provisions of this part become applicable upon the date of ETA's notification that the employer's labor condition application is certified, whether or not the employer hires any H–1B nonimmigrants in the occupation for the period of employment covered in the labor condition application. Should the period of employment specified in the labor condition application expire or should the employer withdraw the application in accordance with §_____.750(b) of this part, the provisions of this part will no longer apply with respect to such application, except as provided in §_____.750(b) (3) and (4) of this part.

(d) Any aggrieved person or organization (including bargaining representatives and governmental officials) may file a complaint alleging a violation described in paragraph (a) of this section.

(1) No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint.

(2) The complaint shall set forth sufficient facts for the Administrator to determine whether an investigation is warranted, in that there is reasonable cause to believe that a violation as described in paragraph (a) of this section has been committed. This determination shall be made within 10 days of the date that the complaint is received by a Wage and Hour Division official. If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall so notify the complainant, who may submit a new

complaint, with such additional information as may be necessary. No hearing pursuant to this subpart shall be available where the Administrator determines that an investigation on a complaint is not warranted.

(3) If the Administrator determines that an investigation on a complaint is warranted, the complaint shall be accepted for filing; an investigation shall be conducted and a determination issued within 30 calendar days of the date of filing.

(4) In the event that the Administrator seeks a prevailing wage determination from ETA pursuant to § _____.731(d) of this part, or advice as to prevailing working conditions from ETA pursuant to § _____.732(c)(2) of this part, the 30-day investigation period shall be suspended from the date of the Administrator's request to the date of the Administrator's receipt of the wage determination (or, in the event that the employer challenges the wage determination through the Employment Service complaint system, to the date of the completion of such complaint process) or advice as to prevailing working conditions.

(5) A complaint must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA, or allegedly took an action which, through such action or inaction, demonstrates a misrepresentation of a material fact in the LCA regarding such action or inaction. This jurisdictional bar does not affect the scope of the remedies which may be assessed by the Administrator. Where, for example, a complaint is timely filed, back wages may be assessed for a period prior to one year before the filing of a complaint.

(6) A complaint may be submitted to any local Wage and Hour Division office. The addresses of such offices are found in local telephone directories. The office or person receiving such a complaint shall refer it to the office of the Wage and Hour Division administering the area in which the reported violation is alleged to have occurred.

(e) When an investigation has been conducted, the Administrator shall, pursuant to § _____.815 of this part, issue a written determination as to whether or not any violation(s) as described in paragraph (a) of this section has been committed.

§ _____.810 Remedies.

(a) Upon determining that the employer has failed to pay wages as required by § _____.731 of this part, the Administrator shall assess and oversee the payment of back wages to any H–1B nonimmigrant employed by the employer in the specific employment in question. The back wages shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to such nonimmigrant(s);

(b) Upon determining that the employer has committed any violation(s) described in § _____.805(a) of this part (other than a violation of § _____.805(a)(6)), the Administrator may assess a civil money penalty not to exceed $1,000 per violation. In determining the amount of civil money penalty to be assessed, the Administrator shall consider the type of violation committed and other relevant factors. The factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the employer under the INA and subpart H or I of this part;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the violator in good faith to comply with the provisions of 8 U.S.C. 1182(n) and subparts H and I of this part;

(5) The violator's explanation of the violation or violations;

(6) The violator's commitment to future compliance; and

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties.

(c) In addition to back wages and civil money penalties, the Administrator may impose such other administrative remedy(ies) under this subpart as the Administrator deems appropriate.

(d) The civil money penalties, back wages, and/or any other remedy(ies) determined by the Administrator to be appropriate are immediately due for payment or performance upon the assessment by the Administrator, or upon the decision by an administrative law judge where a hearing is timely requested, or the decision by the Secretary where review is granted. The employer shall remit the amount of the civil money penalty by certified check or money order made payable to the order of "Wage and Hour Division, Labor." The remittance shall be delivered or mailed to the Wage and Hour Division office in the manner directed in the Administrator's notice of determination. The performance of any other remedy prescribed by the Administrator shall follow procedures established by the Administrator. Distribution of back wages shall be administered in accordance with existing procedures established by the Administrator.

§ _____.815 Written notice and service of Administrator's determination.

(a) The Administrator's determination, issued pursuant to § _____.805 of this part, shall be served on the complainant, the employer, and other known interested parties by personal service or by certified mail at the parties' last known addresses. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail.

(b) The Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the complaint and the Administrator's determination.

(c) The Administrator's written determination required by § _____.805 of this part shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefor, and in the case of a finding of violation(s) by an employer, prescribe any remedies, including the amount of any back wages assessed, the amount of any civil money penalties assessed and the reason therefor, and/or any other remedies assessed.

(2) Inform the interested parties that they may request a hearing pursuant to § _____.820 of this part.

(3) Inform the interested parties that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, give the addresses of the Chief Administrative Law Judge (with whom the request must be filed) and the representative(s) of the Solicitor of labor (upon whom copies of the request must be served).

(5) Inform the parties that, pursuant to § _____.855 of this part, the Administrator shall notify ETA and the Attorney General of the occurrence of a violation by the employer.

§ _____.820 Request for hearing.

(a) Any interested party desiring to request an administrative hearing in accordance with section 556 of title 5, United States Code, on a determination issued pursuant to §§ _____.805 and _____.815 of this part shall make such request in writing to the Chief

Administrative Law Judge at the address stated in the notice of determination.

(b) Interested parties may request a hearing in the following circumstances:

(1) The complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an employer has committed violation(s). In such a proceeding, the party requesting the hearing shall be the prosecuting party and the employer shall be the respondent; the Administrator may intervene as a party or appear as *amicus curiae* at any time in the proceeding, at the Administrator's discretion.

(2) The employer or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s). In such a proceeding, the Administrator shall be the prosecuting party and the employer shall be the respondent.

(c) No particular form is prescribed for any request for hearing permitted by this section. However, any such request shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the party requesting the hearing believes such determination is in error;

(5) Be signed by the party making the request or by an authorized representative of such party; and

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto.

(d) The request for such hearing shall be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 15 calendar days after the date of the determination. An interested party which fails to meet this 15-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge, either through intervention as a party pursuant to 29 CFR 18.10 (b) through (d) or through participation as an *amicus curiae* pursuant to 29 CFR 18.12.

(e) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting party's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the requestor or authorized representative, shall be filed within ten days.

(f) Copies of the request for a hearing shall be sent by the requestor to the Wage and Hour Division official who issued the Administrator's notice of determination, to the representative(s) of the Solicitor of Labor identified in the notice of determination, and to all known interested parties.

§ _____.825 Rules of practice for administrative law judge proceedings.

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

§ _____.830 Service and computation of time.

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two (2) copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–2716, Washington, DC 20210, and one copy shall be served on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

§ _____.835 Administrative law judge proceedings.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § _____.820 of this part, the Chief Administrative Law Judge shall promptly appoint an administrative law judge to hear the case.

(b) Within 7 calendar days following the assignment of the case, the administrative law judge shall notify all interested parties of the date, time and place of the hearing. All parties shall be given at least fourteen calendar days notice of such hearing.

(c) The date of the hearing shall be not more than 60 calendar days from the date of the Administrator's determination. Because of the time constraints imposed by the INA, no request for postponement shall be granted except for compelling reasons. Even where such reasons are shown, no request for postponement of the hearing beyond the 60-day deadline shall be granted except by consent of all the parties to the proceeding.

(d) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party in accordance with § _____.830 of this part. Posthearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served on each other party in accordance with § _____.830 of this part.

§ _____.840 Decision and order of administrative law judge.

(a) Within 60 calendar days after the date of the hearing, the administrative law judge shall issue a decision. If any party desires review of the decision, including judicial review, a petition for Secretary's review thereof shall be filed as provided in § _____.845 of this subpart. If a petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Secretary issues an order affirming the decision, or, unless and until 30 calendar days have passed after the Secretary's receipt of the petition for review and the Secretary has not issued notice to the parties that the Secretary

will review the administrative law judge's decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision.

(c) In the event that the Administrator's determination(s) of wage violation[s] and computation of back wages are based upon a wage determination obtained by the Administrator from ETA during the investigation (pursuant to §_____.731(d) of this part), and the administrative law judge determines that the Administrator's request was not warranted (under the standards in §_____.731(d) of this part), the administrative law judge shall remand the matter to the Administrator for further proceedings on the issue(s) of the existence of wage violation(s) and/or the amount(s) of back wages owed. If there is no such determination and remand by the administrative law judge, the administrative law judge shall accept such wage determination as accurate. Such wage determination is one made by ETA, from which the employer did not file a timely complaint through the Employment Service complaint system or from which the employer has appealed through the ES complaint system and a final decision therein has been issued. See §_____.731 of this part; see also 20 CFR 658.420 through 658.426. Under no circumstances shall the administrative law judge determine the validity of the wage determination or require source data obtained in confidence by ETA or the SESA, or the names of establishments contacted by ETA or the SESA, to be submitted into evidence or otherwise disclosed.

(d) The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(e) The decision shall be served on all parties in person or by certified or regular mail.

§_____.845 Secretary's review of administrative law judge's decision.

(a) The Administrator or any interested party desiring review of the decision and order of an administrative law judge shall petition the Secretary to review the decision and order To be effective, such petition shall be received by the Secretary within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for Secretary's review permitted by this subpart. However, any such petition shall:

(1) Be dated;

(2) Be typewritten or legibly written,

(3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;

(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Secretary in determining whether review is warranted.

(c) Whenever the Secretary determines to review the decision and order of an administrative law judge, a notice of the Secretary's determination shall be served upon the administrative law judge and upon all parties to the proceeding within 30 calendar days after the Secretary's receipt of the petition for review.

(d) Upon receipt of the Secretary's notice, the Office of Administrative Law Judges shall within fifteen calendar days forward the complete hearing record to the Secretary.

(e) The Secretary's notice shall specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (e.g., briefs);

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210, Attention: Executive Director, Office of Administrative Appeals, Room S–4309. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Secretary until actually received by the Secretary All documents, including documents filed by mail, shall be received by the Secretary either on or before the due date.

(g) Copies of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service upon the Administrator shall be in accordance with §_____.830(b) of this part.

(h) The Secretary's final decision shall be issued within 180 calendar days from the date of the notice of intent to review The Secretary's decision shall be served upon all parties and the administrative law judge.

(i) Upon issuance of the Secretary's decision, the Secretary shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to §_____.850 of this part.

§_____.850 Administrative record.

The official record of every completed administrative hearing procedure provided by subparts H and I of this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge. Upon receipt of a complaint seeking review of the final agency action in a United States District Court, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court.

§_____.855 Notice to the Employment and Training Administration and the Attorney General.

(a) The Administrator shall notify the Attorney General and ETA of the final determination of a violation listed under §_____.805(a) (1) through (5) by an employer upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no timely request for hearing is made pursuant to §_____.820 of this part; or

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer, and no timely petition for review to the Secretary is made pursuant to §_____.845 of this part; or

(3) Where a petition for review is taken from an administrative law judge's decision finding a violation and the Secretary either declines within thirty days to entertain the appeal, pursuant to §_____.845(c) of this part, or the Secretary affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by an employer, and the Secretary, upon review, issues a decision pursuant to §_____.845 of this part, holding that a violation was committed by an employer.

(b) The Attorney General, upon receipt of notification from the Administrator pursuant to paragraph (a)

of this section, shall not approve petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) during a period of at least one year for nonimmigrants to be employed by the employer.

(c) ETA, upon receipt of the Administrator's notice pursuant to paragraph (a) of this section, shall invalidate the employer's labor condition application(s) under subparts H and I of this part, and shall not accept for filing any application or attestation submitted by the employer under 20 CFR part 656 or subparts A, B, C, D, E, H, or I of this part, for a period of 12 months or for a longer period if such is specified by the Attorney General for visa petitions filed by that employer under sections 204 and 214(c) of the INA.

Adoption of the Joint Rule

The agency-specific adoption of the joint rule, which appears at the end of the common preamble, appears below:

TITLE 20—EMPLOYEES' BENEFITS

Accordingly, part 655 of chapter V of title 20, Code of Federal Regulations, is amended as follows:

PART 655—TEMPORARY EMPLOYMENT OF NONIMMIGRANTS IN THE UNITED STATES

1. The authority citation for Part 655 is revised to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H) (i) and (ii), 1182 (m) and (n), 1184, 1188, and 1288(c); 29 U.S.C. 49 *et seq.;* sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); and 8 CFR 214.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.;* and 8 CFR 214.2(h)(4)(i).

Subparts A and C issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.*, and 8 CFR 214.2(h)(4)(i).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*

Subparts D and E issued under 8 U.S.C. 1101(a)(15)(H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 *et seq.;* and sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

Subparts F and G issued under 8 U.S.C. 1184 and 1288(c); and 29 U.S.C. 49 *et seq.*

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 *et seq.;* and sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note).

Subparts J and K issued under 29 U.S.C. 49 *et seq.;* and sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

Subparts H and I [Revised]

2. Part 655 is amended by revising subparts H and I to read as set forth at the end of the common preamble.

Subpart H—Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models

Sec.

655.700 Purpose, procedure and applicability of subparts H and I of this part.
655.705 Overview of responsibilities.
655.710 Complaints.
655.715 Definitions.
655.720 Addresses of Department of Labor regional offices.
655.730 Labor condition application.
655.731 The first labor condition statement: wages.
655.732 The second labor condition statement: working conditions.
655.733 The third labor condition statement: no strike or lockout.
655.734 The fourth labor condition statement: notice.
655.735 Special provisions for short-term placement of H–1B nonimmigrants at place(s) of employment outside the area(s) of intended employment listed on labor condition application.
655.740 Labor condition application determinations.
655.750 Validity period of the labor condition application.
655.760 Public access; retention of records.

Subpart I—Enforcement of H–1B Labor Condition Applications

655.800 Enforcement authority of Administrator, Wage and Hour Division.
655.805 Complaints and investigative procedures.
655.810 Remedies.
655.815 Written notice and service of Administrator's determination.
655.820 Request for hearing.
655.825 Rules of practice for administrative law judge proceedings.
655.830 Service and computation of time.
655.835 Administrative law judge proceedings.
655.840 Decision and order of administrative law judge.
655.845 Secretary's review of administrative law judge's decision.
655.850 Administrative record.
655.855 Notice to the Employment and Training Administration and the Attorney General.

Signed at Washington, DC, this 14th day of December, 1994.

Doug Ross,

Assistant Secretary for Employment and Training.

Bernard E. Anderson,

Assistant Secretary for Employment Standards.

Robert B. Reich,

Secretary of Labor

TITLE 29—LABOR

CHAPTER V—WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

Accordingly, title 29, Code of Federal Regulations is amended as follows:

PART 507—ENFORCEMENT OF H–1B LABOR CONDITION APPLICATIONS

Subparts A, B, C, D, E, F, and G (Reserved)

1. The authority citation for part 507 continues to read as follows:

Authority: 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184, and 29 U.S.C. 49 *et seq.*, and Pub. L. 102–232, 105 stat. 1733, 1748 (8 U.S.C. 1182 note).

Subparts H and I [Revised]

2. Part 507 is amended by revising subparts H and I to read as set forth at the end of the common preamble.

Subpart H—Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models

Sec.

507 700 Purpose, procedure and applicability of subparts H and I of this part.
507 705 Overview of responsibilities.
507 710 Complaints.
507 715 Definitions.
507 720 Addresses of Department of Labor regional offices.
507.730 Labor condition application.
507.731 The first labor condition statement: wages.
507.732 The second labor condition statement: working conditions.
507.733 The third labor condition statement: no strike or lockout.
507.734 The fourth labor condition statement: notice.
507 735 Special provisions for short-term placement of H–1B nonimmigrants at place(s) of employment outside the area(s) of intended employment listed on labor condition application.
507.740 Labor condition application determinations.
507.750 Validity period of the labor condition application
507.760 Public access; retention of records.

Appendix A to Subpart H: Guidance for Determination of the "Actual Wage"

Subpart I—Enforcement of H–1B Labor Condition Applications

Sec.
507.800 Enforcement authority of Administrator, Wage and Hour Division.
507.805 Complaints and investigative procedures.
507.810 Remedies.
507.815 Written notice and service of Administrator's determination.
507.820 Request for hearing.
507.825 Rules of practice for administrative law judge proceedings.
507.830 Service and computation of time.
507.835 Administrative law judge proceedings.
507.840 Decision and order of administrative law judge.
507.845 Secretary's review of administrative law judge's decision.
507.850 Administrative record.
507.855 Notice to the Employment and Training Administration and the Attorney General.

Signed at Washington, D.C., this 14th day of December, 1994.

Doug Ross,

Assistant Secretary for Employment and Training.

Bernard E. Anderson,

Assistant Secretary for Employment Standards.

Robert B. Reich,

Secretary of Labor.

Appendix 1 (Not To Be Codified in the CFR): Form ETA 9035

Printed below is a copy of *Form ETA 9035.*

Appendix 2 (Not To Be Codified in the CFR): DOT Three-Digit Occupational Groups Codes for Professional, Technical and Managerial Occupations and Fashion Models

Printed below is a copy of DOT Three-Digit Occupational Groups Codes for Professional, Technical and Managerial Occupations and Fashion Models.

BILLING CODE 4510–30–M and 4510–27–M

LABOR CONDITION APPLICATION FOR H-1B NONIMMIGRANTS

DRAFT

U.S. Department of Labor
Employment and Training Administration
U.S. Employment Service

1. Full Legal Name of Employer

2. Federal Employer I.D. Number

3. Employer's Telephone No.
( )

4. Employer's FAX No.
( )

5. Employer's Address (No., Street, City, State, ZIP Code)

OMB Approval No.:
Expiration Date:

6. Address Where Documentation is Kept (If different than Item 5)

7. OCCUPATIONAL INFORMATION (Use attachment if additional space is needed.)

(a) Three-digit Occupational Group Code (From Appendix 2): _____ (b) Job Title (Check box if part-time): _____ ☐

(c) No. of H-1B Nonimmigrants	(d) Rate of Pay	(e) Prevailing Wage Rate and its Source (see instructions)	(f) Period of Employment From	To	(g) Locations Where H-1B Nonimmigrants Will Work (see instructions)
_____	$_____	$_____ ☐SESA ☐Other: _____	_____	_____	_____
_____	$_____	$_____ ☐SESA ☐Other: _____	_____	_____	_____

8. EMPLOYER LABOR CONDITION STATEMENTS (Employers are required to develop and maintain documentation supporting labor condition statements 8(a) and 8(d). Employers are further required to make available for public examination a copy of the labor condition application and necessary supporting documentation within one (1) working day after the date on which the application is filed with DOL. Check each box to indicate that the employer will comply with each statement.)

☐ (a) H-1B nonimmigrants will be paid at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question or the prevailing wage level for the occupation in the area of employment, whichever is higher.

☐ (b) The employment of H-1B nonimmigrants will not adversely affect the working conditions of workers similarly employed in the area of intended employment.

☐ (c) On the date this application is signed and submitted, there is not a strike, lockout or work stoppage in the course of a labor dispute in the occupation in which H-1B nonimmigrants will be employed at the place of employment. If such a strike or lockout occurs after this application is submitted, I will notify ETA within 3 days of the occurrence of such a strike or lockout and the application will not be used in support of petition filings with INS for H-1B nonimmigrants to work in the same occupation at the place of employment until ETA determines the strike or lockout has ceased.

☐ (d) A copy of this application has been, or will be, provided to each H-1B nonimmigrant employed pursuant to this application, and, as of this date, notice of this application has been provided to workers employed in the occupation in which H-1B nonimmigrants will be employed: (check appropriate box)

☐ (i) Notice of this filing has been provided to the bargaining representative of workers in the occupation in which H-1B nonimmigrants will be employed; or

☐ (ii) There is no such bargaining representative; therefore, a notice of this filing has been posted and was, or will remain, posted for 10 days in at least two conspicuous locations where H-1B nonimmigrant workers will be employed.

9. DECLARATION OF EMPLOYER: Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the information provided on this form is true and correct. In addition, I declare that I will comply with the Department of Labor regulations governing this program and, in particular, that I will make this application, supporting documentation, and other records, files and documents available to officials of the Department of Labor, upon such official's request, during any investigation under this application or the Immigration and Nationality Act.

Name and Title of Hiring or Other Designated Official _____ Signature _____ Date _____

Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor.

AN APPLICATION CERTIFIED BY DOL MUST BE FILED IN SUPPORT OF AN H-1B VISA PETITION WITH INS.

FOR U.S. GOVERNMENT AGENCY USE ONLY: By virtue of my signature below, I acknowledge that this application is hereby certified and will be valid from _____ through _____.

Signature and Title of Authorized DOL Official _____ ETA Case No. _____ Date _____

Subsequent DOL Action: Suspended _____(date) Invalidated _____(date) Withdrawn _____(date)

The Department of Labor is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application.

Public reporting burden for this collection of information is estimated to average 1¼ hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of IRM Policy, DOL, Room N-1301, 200 Constitution Avenue, NW., Washington, DC 20210; and to OMB, Paperwork Reduction Project (1205-0310) Washington, DC 20503.

DO NOT SEND THE COMPLETED FORM TO EITHER OF THESE OFFICES.

ETA 9035 (Revised December 1994)

INSTRUCTIONS FOR COMPLETING FORM ETA 9035 -- LABOR CONDITION APPLICATION FOR H-1B NONIMMIGRANTS

DRAFT

IMPORTANT: READ CAREFULLY BEFORE COMPLETING FORM

Print legibly in ink or use a typewriter. Sign and date one form in original signature. Citations below to regulations are citations to identical provisions at 20 CFR 655, subparts H and I, and to 29 CFR 507, subparts H and I.

To knowingly furnish any false information in the preparation of this form and any supporting documentation thereto, or to aid, abet or counsel another to do so is a felony, punishable by $ 10,000 fine or five years in the penitentiary, or both (18 U.S.C. 1001). Other penalties apply as well to fraud or misuse of this immigration document (U.S.C. 1546) and to perjury with respect to this form (18 U.S.C. 1546 and 1621).

Employers seeking to hire H-1B nonimmigrants in specialty occupations or as fashion models of distinguished merit and ability must submit the completed and dated original Form ETA 9035 (or a facsimile) and one copy of the completed original Form ETA 9035 to the regional certifying officer in the Department of Labor (DOL), Employment and Training Administration (ETA) regional office having jurisdiction over the State in which the position is located. See 20 CFR 655.720 for ETA regional office addresses. An application which is complete and has no obvious inaccuracies will be certified by DOL and returned to the employer, who may then file it in support of its petition with the Immigration and Naturalization Service.

Item 1. Full Legal Name of Employer. Enter the full legal name of business, firm or organization, or, if an individual, enter name used for legal purposes on documents.

Item 2. Federal Employer I.D. Number. Enter employer's Federal Employer Identification Number (EIN) assigned by the Internal Revenue Service.

Item 3. Employer's Telephone No. Self-explanatory.

Item 4. Employer's FAX No. Self-explanatory.

Item 5. Employer's Address. Self-explanatory.

Item 6. Address Where Documentation is Kept. Self-explanatory.

Item 7. Occupational Information. Enter the information requested under the appropriate subheading. If necessary, continue on an attachment.

Item 7(a). Three-Digit Occupational Group Code. Enter the three-digit code from Appendix 2 which most clearly describes the job to be performed. (DOL purposes only.)

Item 7(b). Job Title. Enter the common name or payroll title of the job being offered. Check box to the right of the blank if position is part-time. A separate labor condition application shall be filed for each occupation in which H-1B nonimmigrants will be employed.

Item 7(c). Number of H-1B Nonimmigrants. Enter the number of H-1B nonimmigrants that will be hired in the three-digit occupational code stated in item 7(a).

Item 7(d). Rate of Pay. Enter the salary to be paid in terms of the amount per hour, week, year, etc. If a wage range is listed for this item, the salary for each H-1B nonimmigrant shall be maintained in support of the application.

Item 7(e). Prevailing Wage Rate and its Source. Enter the prevailing wage rate in terms of the amount per hour, week, year, etc. If the employer is relying on a wage determination obtained from a State Employment Security Agency, check the box marked "SESA." If the employer is using another source, check the "Other" box and specify such other source: i.e., published wage survey, or other source utilized by the employer to determine the prevailing wage for the occupational classification in which H-1B nonimmigrants will be employed – e.g., "collective bargaining agreement," or "Bureau of Labor Statistics Occupational Compensation Survey, Denver, Colorado, Metropolitan Area." (Only 1 box can be checked per line item).

Item 7(f). Period of Employment. Enter the starting and ending dates during which the H-1B nonimmigrants will be employed.

Item 7(g). Locations Where H-1B Nonimmigrants Will Work. Enter the city and State of site or location where the work will actually be performed.

Item 8. Employer Labor Condition Statements. The employer must attest by checking off the conditions listed in (a) through (d) and by signing the application form. Employers must develop and maintain documentation to support labor condition statements 8(a) and 8(d). Documentation in support of a labor condition application shall be retained at the employer's principal place of business or worksite and made available to DOL upon such official's request. See 20 CFR 655.731 through 655.734 for guidance on the documentation that must support each labor condition statement.

Item 8(a). The employer must attest that H-1B nonimmigrants will be paid wages which are at least the higher of the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question or the prevailing wage level for the occupational classification in the area of intended employment.

Item 8(b). The employer must attest that the employment of H-1B nonimmigrants in the occupation named will not adversely affect the working conditions of workers similarly employed in the area of intended employment.

Item 8(c). The employer must attest that on the date the application is signed and submitted, there is not a strike, lockout or work stoppage in the course of a labor dispute in the named occupation at the worksite. If such a strike or lockout occurs after this application is submitted, the employer must notify ETA within 3 days of the occurrence of such a strike or lockout and the application may not be used in support of petition filings with INS for H-1B nonimmigrants to work in the same occupation at the place of employment.

Item 8(d). The employer must attest that as of the date of filing, notice of the labor condition application has been provided to workers employed in the named occupation. The application may be provided to the workers through the bargaining representative, or where there is no such bargaining representative, notice of the filing must be posted in conspicuous places where H-1B nonimmigrants will be employed. Further, the employer must attest that each H-1B nonimmigrant employed pursuant to the application will be provided with a copy of the application. The notification shall be provided no later than the date the H-1B nonimmigrant reports to work at the place of employment.

Item 9. Declaration of Employer. One copy of this form must bear the original signature of the employer. By signing this form, the employer is attesting to the accuracy of the labor condition statements listed in items 8(a) through 8(d) and to compliance with these conditions. False statements are subject to Federal criminal penalties, as stated above. Failure to meet a condition of the application regarding strikes or lockouts, substantial failure to meet a condition of the application regarding notification of the bargaining unit representative, employees, or H-1B nonimmigrants, willful failure to meet a condition of the application regarding wages or working conditions, or misrepresentation of a material fact may result in additional penalties.

THREE-DIGIT OCCUPATIONAL GROUPS
PROFESSIONAL, TECHNICAL AND MANAGERIAL OCCUPATIONS
AND FASHION MODELS

DRAFT

OCCUPATIONS IN ARCHITECTURE, ENGINEERING AND SURVEYING

001 ARCHITECTURAL OCCUPATIONS
002 AERONAUTICAL ENGINEERING OCCUPATIONS
003 ELECTRICAL/ELECTRONIC ENGINEERING OCCUPATIONS
005 CIVIL ENGINEERING OCCUPATIONS
006 CERAMIC ENGINEERING OCCUPATIONS
007 MECHANICAL ENGINEERING OCCUPATIONS
008 CHEMICAL ENGINEERING OCCUPATIONS
010 MINING AND PETROLEUM ENGINEERING OCCUPATIONS
011 METALLURGY AND METALLURGICAL ENGINEERING OCCUPATIONS
012 INDUSTRIAL ENGINEERING OCCUPATIONS
013 AGRICULTURAL ENGINEERING OCCUPATIONS
014 MARINE ENGINEERING OCCUPATIONS
015 NUCLEAR ENGINEERING OCCUPATIONS
017 DRAFTERS
018 SURVEYING/CARTOGRAPHIC OCCUPATIONS
019 OTHER OCCUPATIONS IN ARCHITECTURE, ENGINEERING AND SURVEYING

OCCUPATIONS IN MATHEMATICS AND PHYSICAL SCIENCES

020 OCCUPATIONS IN MATHEMATICS
021 OCCUPATIONS IN ASTRONOMY
022 OCCUPATIONS IN CHEMISTRY
023 OCCUPATIONS IN PHYSICS
024 OCCUPATIONS IN GEOLOGY
025 OCCUPATIONS IN METEOROLOGY
029 OTHER OCCUPATIONS IN MATHEMATICS AND PHYSICAL SCIENCES

COMPUTER-RELATED OCCUPATIONS

030 OCCUPATIONS IN SYSTEMS ANALYSIS AND PROGRAMMING
031 OCCUPATIONS IN DATA COMMUNICATIONS AND NETWORKS
032 OCCUPATIONS IN COMPUTER SYSTEM USER SUPPORT
033 OCCUPATIONS IN COMPUTER SYSTEMS TECHNICAL SUPPORT
039 OTHER COMPUTER-RELATED OCCUPATIONS

OCCUPATIONS IN LIFE SCIENCES

040 OCCUPATIONS IN AGRICULTURAL SCIENCES
041 OCCUPATIONS IN BIOLOGICAL SCIENCES
045 OCCUPATIONS IN PSYCHOLOGY
049 OTHER OCCUPATIONS IN LIFE SCIENCES

OCCUPATIONS IN SOCIAL SCIENCES

050 OCCUPATIONS IN ECONOMICS
051 OCCUPATIONS IN POLITICAL SCIENCE
052 OCCUPATIONS IN HISTORY
054 OCCUPATIONS IN SOCIOLOGY
055 OCCUPATIONS IN ANTHROPOLOGY
059 OTHER OCCUPATIONS IN SOCIAL SCIENCES

OCCUPATIONS IN MEDICINE AND HEALTH

070 PHYSICIANS AND SURGEONS
071 OSTEOPATHS
072 DENTISTS
073 VETERINARIANS
074 PHARMACISTS
076 THERAPISTS
077 DIETITIANS
078 OCCUPATIONS IN MEDICAL AND DENTAL TECHNOLOGY
079 OTHER OCCUPATIONS IN MEDICINE AND HEALTH

OCCUPATIONS IN EDUCATION

090 OCCUPATIONS IN COLLEGE AND UNIVERSITY EDUCATION
091 OCCUPATIONS IN SECONDARY SCHOOL EDUCATION
092 OCCUPATIONS IN PRESCHOOL, PRIMARY SCHOOL, AND KINDERGARTEN EDUCATION
094 OCCUPATIONS IN EDUCATION OF PERSONS WITH DISABILITIES
096 HOME ECONOMISTS AND FARM ADVISERS
097 OCCUPATIONS IN VOCATIONAL EDUCATION
099 OTHER OCCUPATIONS IN EDUCATION

OCCUPATIONS IN MUSEUM, LIBRARY, AND ARCHIVAL SCIENCES

100 LIBRARIANS
101 ARCHIVISTS
102 MUSEUM CURATORS AND RELATED OCCUPATIONS
109 OTHER OCCUPATIONS IN MUSEUM, LIBRARY AND ARCHIVAL SCIENCES

OCCUPATIONS IN LAW AND JURISPRUDENCE

110 LAWYERS
111 JUDGES
119 OTHER OCCUPATIONS IN LAW AND JURISPRUDENCE

OCCUPATIONS IN RELIGION AND THEOLOGY

120 CLERGY
129 OTHER OCCUPATIONS IN RELIGION AND THEOLOGY

OCCUPATIONS IN WRITING

131 WRITERS
132 EDITORS, PUBLICATION, BROADCAST, AND SCRIPT
139 OTHER OCCUPATIONS IN WRITING

OCCUPATIONS IN ART

141 COMMERCIAL ARTISTS: DESIGNERS AND ILLUSTRATORS, GRAF ARTS
142 ENVIRONMENTAL, PRODUCT AND RELATED DESIGNERS
149 OTHER OCCUPATIONS IN ART

OCCUPATIONS IN ENTERTAINMENT AND RECREATION

152 OCCUPATIONS IN MUSIC
159 OTHER OCCUPATIONS IN ENTERTAINMENT AND RECREATION

OCCUPATIONS ADMINISTRATIVE SPECIALIZATIONS

160 ACCOUNTANTS, AUDITORS, AND RELATED OCCUPATIONS
161 BUDGET AND MANAGEMENT SYSTEMS ANALYSIS OCCUPATION
162 PURCHASING MANAGEMENT OCCUPATIONS
163 SALES AND DISTRIBUTION MANAGEMENT OCCUPATIONS
164 ADVERTISING MANAGEMENT OCCUPATIONS
165 PUBLIC RELATIONS MANAGEMENT OCCUPATIONS
166 PERSONNEL MANAGEMENT OCCUPATIONS
168 INSPECTORS AND INVESTIGATORS, MANAGERIAL AND PUBLIC SERVICE
169 OTHER OCCUPATIONS IN ADMINISTRATIVE OCCUPATIONS

MANAGERS AND OFFICIALS

180 AGRICULTURE, FORESTRY, AND FISHING INDUSTRY MANAGERS OFFICIALS
181 MINING INDUSTRY MANAGERS AND OFFICIALS
182 CONSTRUCTION INDUSTRY MANAGERS AND OFFICIALS
183 MANUFACTURING INDUSTRY MANAGERS AND OFFICIALS
184 TRANSPORTATION, COMMUNICATION, AND UTILITIES INDUSTR MANAGERS AND OFFICIALS
185 WHOLESALE AND RETAIL TRADE MANAGERS AND OFFICIALS
186 FINANCE, INSURANCE AND REAL ESTATE MANAGERS AND OFFICIALS
187 SERVICE INDUSTRY MANAGERS AND OFFICIALS
188 PUBLIC ADMINISTRATION MANAGERS AND OFFICIALS
189 MISCELLANEOUS MANAGERS AND OFFICIALS

MISCELLANEOUS PROFESSIONAL, TECHNICAL, AND MANAGERIAL OCCUPATIONS

195 OCCUPATIONS IN SOCIAL AND WELFARE WORK
199 MISCELLANEOUS PROFESSIONAL, TECHNICAL AND MANAGERI OCCUPATIONS

SALES PROMOTION OCCUPATIONS

297 FASHION MODELS

[FR Doc. 94–31114 Filed 12–19–94; 8:45 am]
BILLING CODE 4510–30–C and 4510–27–C

Federal Register

Tuesday
December 20, 1994

Part VI

General Services Administration

41 CFR Chapter 301

Federal Travel Regulation; Maximum Per Diem Rates; Final Rule

GENERAL SERVICES ADMINISTRATION

41 CFR Chapter 301

[FTR Amendment 41]

RIN 3090–AF55

Federal Travel Regulation; Maximum Per Diem Rates

AGENCY: Federal Supply Service, GSA.

ACTION: Final rule.

SUMMARY: An analysis of lodging and meal cost survey data reveals that the listing of maximum per diem rates for locations within the continental United States (CONUS) should be updated to provide for the reimbursement of Federal employees' expenses covered by per diem. This final rule, among other things, increases/decreases the maximum lodging and meals and incidental expenses amounts in certain existing per diem localities, adds new per diem localities, and modifies the defined per diem area for Flagstaff and Grand Canyon, in the state of Arizona and Virginia Beach and Williamsburg, in the state of Virginia.

DATES: This final rule is effective on January 1, 1995, and applies for travel (including travel incident to a change of official station) performed on or after January 1, 1995.

FOR FURTHER INFORMATION CONTACT: Donna Cooke or Karen Kinsella, Transportation Management Division (FBX), Washington, DC 20406, telephone 703–305–5745.

SUPPLEMENTARY INFORMATION: The General Services Administration (GSA) has determined that this rule is not a significant regulatory action for the purposes of Executive Order 12866 of September 30, 1993. This final rule is not required to be published in the **Federal Register** for notice and comment. Therefore, the Regulatory Flexibility Act does not apply.

For the reasons set out in the preamble, under 5 U.S.C. 5701–5709, title 41, chapter 301 of the Code of Federal Regulations is amended by revising Appendix A to chapter 301 to read as follows:

CHAPTER 301—TRAVEL ALLOWANCES

APPENDIX A TO CHAPTER 301—PRESCRIBED MAXIMUM PER DIEM RATES FOR CONUS

The maximum rates listed below are prescribed under §301–7.3(a) of this chapter for reimbursement of per diem expenses incurred during official travel within CONUS (the continental United States). The amount shown in column (a) is the maximum that will be reimbursed for lodging expenses including applicable taxes. The M&IE rate shown in column (b) is a fixed amount allowed for meals and incidental expenses covered by per diem. The per diem payment calculated in accordance with part 301–7 of this chapter for lodging expenses plus the M&IE rate may not exceed the maximum per diem rate shown in column (c). Seasonal rates apply during the periods indicated.

Per diem locality		Maximum lodging amount (a)	+	M&IE rate (b)	=	Maximum per diem rate[4] (c)
Key city[1]	County and/or other defined location[2,3]					
CONUS, Standard rate		$40		$26		$66
(Applies to all locations within CONUS not specifically listed below or encompassed by the boundary definition of a listed point. However, the standard CONUS rate applies to all locations within CONUS, including those defined below, for certain relocation subsistence allowances. See parts 302–2, 302–4, and 302–5 of this subtitle.)						
ALABAMA						
Anniston	Calhoun	42		26		68
Birmingham	Jefferson	52		30		82
Dothan	Houston	43		26		69
Gulf Shores	Baldwin.					
(April 1–September 30)		106		30		136
(October 1–March 31)		52		30		82
Huntsville	Madison	58		34		92
Mobile	Mobile	55		34		89
Montgomery	Montgomery	51		26		77
Sheffield	Colbert	56		30		86
ARIZONA						
Casa Grande	Pinal	50		30		80
Chinle	Apache.					
(April 1–October 31)		93		30		123
(November 1–March 31)		54		30		84
Flagstaff	All points in Coconino County not covered under Grand Canyon per diem area..					
(April 1–October 31)		78		30		108
(November 1–March 31)		58		30		88
Grand Canyon	All points in the Grand Canyon National Park and Kaibab National Forest within Coconino County.	104		30		134
Kayenta	Navajo.					
(May 1–October 14)		80		26		106
(October 15–April 30)		55		26		81
Phoenix/Scottsdale	Maricopa.					
(December 1–April 30)		87		34		121
(May 1–November 30)		61		34		95
Prescott	Yavapai	50		30		80
Sierra Vista	Cochise	46		30		76
Tucson	Pima County; Davis-Monthan AFB.					
(November 1–April 30)		62		30		92
(May 1–October 31)		54		30		84

Per diem locality		Maximum lodging amount (a)	+	M&IE rate (b)	=	Maximum per diem rate [4] (c)
Key city [1]	County and/or other defined location [2, 3]					
Yuma	Yuma	60		26		86
ARKANSAS						
Fayetteville	Washington	45		26		71
Fort Smith	Sebastian	42		26		68
Helena	Phillips	44		26		70
Hot Springs	Garland	54		30		84
Little Rock	Pulaski	52		30		82
Pine Bluff	Jefferson	43		26		69
Texarkana	Miller (See also Texarkana, TX.)	43		30		73
CALIFORNIA						
Bridgeport	Mono.					
(April 1–October 31)		69		34		103
(November 1–March 31)		54		34		88
Chico	Butte	56		30		86
Clearlake	Lake	60		30		90
Death Valley	Inyo	97		38		135
El Centro	Imperial	52		30		82
Eureka	Humboldt	65		30		95
Fresno	Fresno	62		30		92
Gualala/Point Arena	Mendocino	115		38		153
Herlong	Lassen	42		26		68
Los Angeles	Los Angeles, Kern, Orange and Ventura Counties; Edwards AFB; Naval Weapons Center and Ordnance Test Station, China Lake.	102		38		140
Madera	Madera	41		26		67
Merced	Merced	48		34		82
Modesto	Stanislaus	54		34		88
Monterey	Monterey.					
(June 1–October 14)		82		34		116
(October 15–May 31)		74		34		108
Napa	Napa	73		34		107
Oakland	Alameda, Contra Costa and Marin	75		38		113
Ontario/ Victorville/Barstow	San Bernardino	60		34		94
Palm Springs	Riverside.					
(December 1–May 14)		74		34		108
(May 15–November 30)		56		34		90
Palo Alto/San Jose	Santa Clara	75		38		113
Redding	Shasta	60		34		94
Sacramento	Sacramento	71		38		109
San Diego	San Diego	81		38		119
San Francisco	San Francisco	99		38		137
San Luis Obispo	San Luis Obispo.					
(May 1–September 30)		63		34		97
(October 1–April 30)		55		34		89
San Mateo/Redwood City	San Mateo	82		38		120
Santa Barbara	Santa Barbara	81		34		115
Santa Cruz	Santa Cruz.					
(June 1–September 30)		90		34		124
(October 1–May 31)		63		34		97
Santa Rosa	Sonoma	64		38		102
South Lake Tahoe	El Dorado (See also Stateline, NV.).					
(June 1–September 30)		96		38		134
(October 1–May 31)		68		38		106
Stockton	San Joaquin	56		34		90
Tahoe City	Placer.					
(June 1–September 14)		73		38		111
(September 15–May 31)		59		38		97
Vallejo	Solano	46		30		76
Visalia	Tulare	65		34		99
West Sacramento	Yolo	53		30		83
Yosemite Nat'l Park	Mariposa	98		38		136
Yuba City	Sutter	48		30		78
COLORADO						
Aspen	Pitkin.					
(January 15–March 31)		145		38		183
(April 1–January 14)		74		38		112
Boulder	Boulder.					
(May 1–December 31)		79		34		113
(January 1–April 30)		64		34		98
Colorado Springs	El Paso.					

Per diem locality		Maximum lodging amount (a)	+	M&IE rate (b)	=	Maximum per diem rate[4] (c)
Key city[1]	County and/or other defined location[2,3]					
(April 1–October 31)		58		26		84
(November 1–March 31)		51		26		77
Denver	Denver, Adams, Arapahoe and Jefferson	77		38		115
Durango	La Plata.					
(June 1–September 30)		92		34		126
(October 1–May 31)		54		34		88
Fort Collins/Loveland	Larimer.					
(May 1–September 30)		47		26		73
(October 1–April 30)		42		26		68
Glenwood Springs	Garfield	53		30		83
Grand Junction	Mesa	48		30		78
Gunnison	Gunnison.					
(May 1–October 14)		63		26		89
(October 15–April 30)		40		26		66
Keystone/Silverthorne	Summit.					
(January 1–April 30)		137		38		175
(May 1–December 31)		123		38		161
Montrose	Montrose	41		26		67
Pagosa Springs	Archuleta	47		30		77
Pueblo	Pueblo.					
(June 1–August 31)		49		26		75
(September 1–May 31)		44		26		70
Steamboat Springs	Routt.					
(February 1–March 31)		105		34		139
(April 1–January 31)		60		34		94
Trinidad	Las Animas.					
(June 1–September 14)		47		26		73
(September 15–May 31)		40		26		66
Vail	Eagle.					
(January 1–March 31)		166		38		204
(April 1–December 31)		77		38		115
CONNECTICUT						
Bridgeport/Danbury	Fairfield	77		34		111
Hartford	Hartford and Middlesex	69		38		107
New Haven	New Haven	67		34		101
New London/Groton	New London	63		30		93
Putnam/Danielson	Windham	63		26		89
Salisbury	Litchfield	84		38		122
Vernon	Tolland	55		30		85
DELAWARE						
Dover	Kent	50		26		76
Lewes	Sussex.					
(June 1–September 14)		69		34		103
(September 15–May 31)		43		34		77
Wilmington	New Castle	78		34		112
DISTRICT OF COLUMBIA						
Washington, DC (also the cities of Alexandria, Falls Church, and Fairfax, and the counties of Arlington, Loudoun, and Fairfax in Virginia; and the counties of Montgomery and Prince Georges in Maryland) (See also Maryland and Virginia.)		114		38		152
FLORIDA						
Altamonte Springs	Seminole	62		30		92
Bradenton	Manatee.					
(January 1–May 14)		65		26		91
(May 15–December 31)		48		26		74
Clewiston	Hendry	56		26		82
Cocoa Beach	Brevard	74		34		108
Daytona Beach	Volusia.					
(February 1–April 14)		65		30		95
(April 15–January 31)		54		30		84
Fort Lauderdale	Broward.					
(December 15–April 30)		79		34		113
(May 1–December 14)		65		34		99
Fort Myers	Lee.					
(January 1–April 30)		90		34		124
(May 1–December 31)		76		34		110
Fort Pierce	Saint Lucie.					
(January 1–April 30)		57		30		87
(May 1–December 31)		45		30		75
Fort Walton Beach	Okaloosa.					
(April 1–September 14)		66		30		96

Per diem locality		Maximum lodging amount (a)	+	M&IE rate (b)	=	Maximum per diem rate [4] (c)
Key city [1]	County and/or other defined location [2, 3]					
(September 15–March 31)		54		30		84
Gainesville	Alachua	52		34		86
Jacksonville	Duval County; Naval Station Mayport	50		30		80
Key West	Monroe.					
(December 15–April 30)		149		38		187
(May 1–December 14)		102		38		140
Kissimmee	Osceola.					
(January 1–September 14)		68		30		98
(September 15–December 31)		61		30		91
Lakeland	Polk.					
(January 1–April 14)		57		26		83
(April 15–December 31)		50		26		76
Miami	Dade	74		38		112
Naples	Collier.					
(December 15–April 14)		104		34		138
(April 15–December 14)		58		34		92
Orlando	Orange	66		30		96
Panama City	Bay.					
(March 1–September 14)		49		30		79
(September 15–February 29)		44		30		74
Pensacola	Escambia	57		30		87
Punta Gorda	Charlotte.					
(January 1–April 14)		71		30		101
(April 15–December 31)		47		30		77
Saint Augustine	Saint Johns	56		30		86
Sarasota	Sarasota.					
(December 15–April 14)		74		30		104
(April 15–December 14)		46		30		76
Stuart	Martin.					
(January 1–April 30)		63		30		93
(May 1–December 31)		54		30		84
Tallahassee	Leon	63		30		93
Tampa/St. Petersburg	Hillsborough and Pinellas	57		30		87
Vero Beach	Indian River.					
(February 1–April 30)		71		26		97
(May 1–January 31)		55		26		81
West Palm Beach	Palm Beach.					
(December 15–April 30)		69		34		103
(May 1–December 14)		60		34		94
GEORGIA						
Albany	Dougherty	56		30		86
Athens	Clarke	44		26		70
Atlanta	Clayton, De Kalb, Fulton, Cobb (See also Norcross/ Lawrenceville, GA.).	81		38		119
Augusta	Richmond; Savannah River Plant	50		26		76
Brunswick	Glynn	42		26		68
Columbus	Muscogee	48		26		74
Macon	Bibb	47		30		77
Norcross/Lawrenceville	Gwinnett (See also Atlanta, GA.)	81		38		119
Savannah	Chatham	49		30		79
Warner Robins	Houston	43		26		69
IDAHO						
Boise	Ada	49		34		83
Coeur d'Alene	Kootenai.					
(April 1–October 31)		65		26		91
(November 1–March 31)		53		26		79
Idaho Falls	Bonneville	45		30		75
Ketchum/Sun Valley	Blaine.					
(November 15–March 31)		87		34		121
(April 1–November 14)		71		34		105
Lewiston	Nez Perce	48		26		74
McCall	Valley	55		30		85
Pocatello	Bannock	47		30		77
Stanley	Custer.					
(June 1–September 30)		51		30		81
(October 1–May 31)		45		30		75
ILLINOIS						
Alton	Madison	47		30		77
Bloomington	McLean	46		30		76
Champaign/Urbana	Champaign	48		30		78

Per diem locality		Maximum lodging amount (a)	+	M&IE rate (b)	=	Maximum per diem rate[4] (c)
Key city[1]	County and/or other defined location[2,3]					
Chicago	Du Page, Cook and Lake	104		38		142
Danville	Vermilion	44		26		70
Decatur	Macon	45		30		75
Dixon	Lee	45		26		71
East St. Louis	St. Clair	46		26		72
Joliet	Will	54		26		80
Kankakee	Kankakee	50		26		76
Macomb	McDonough	42		26		68
Peoria	Peoria	62		30		92
Rock Island/Moline	Rock Island	71		26		97
Rockford	Winnebago	56		34		90
Springfield	Sangamon	51		30		81
INDIANA						
Anderson	Madison	54		26		80
Bloomington/Crane	Monroe and Martin	52		30		82
Burlington Beach/Valparaiso	Porter	53		26		79
Carmel	Hamilton	68		38		106
Columbus	Bartholomew	46		30		76
Dale	Spencer	45		26		71
Elkhart	Elkhart	52		26		78
Evansville	Vanderburgh	52		30		82
Fort Wayne	Allen	57		30		87
French Lick	Orange	57		26		83
Gary	Lake	52		30		82
Greenwood	Johnson	61		30		91
Indianapolis	Marion County; Fort Benjamin Harrison	71		34		105
Jasper	Dubois	45		26		71
Jeffersonville/Charlestown	Clark County; Indiana Army Ammunition Plant	46		26		72
Lafayette	Tippecanoe	52		30		82
Logansport	Cass	47		26		73
Madison	Jefferson	50		26		76
Marion	Grant	44		26		70
Michigan City	La Porte	46		26		72
Muncie	Delaware	55		26		81
Nashville	Brown.					
(June 1–September 30)		84		30		114
(October 1–May 31)		62		30		92
New Albany	Floyd	46		26		72
Richmond	Wayne	43		26		69
South Bend	St. Joseph	61		26		87
Terre Haute	Vigo	51		26		77
IOWA						
Bettendorf/Davenport	Scott	56		30		86
Cedar Rapids	Linn	48		30		78
Des Moines	Polk	56		30		86
Dubuque	Dubuque	43		30		73
Iowa City	Johnson	48		30		78
Sioux City	Woodbury	47		26		73
Waterloo	Black Hawk	47		30		77
KANSAS						
Hays	Ellis	44		26		70
Kansas City	Johnson and Wyandotte (See also Kansas City, MO.)	67		34		101
Manhattan	Riley	53		26		79
Topeka	Shawnee	47		26		73
Wichita	Sedgwick	63		30		93
KENTUCKY						
Ashland	Boyd	41		26		67
Bowling Green	Warren	44		30		74
Covington	Kenton	48		34		82
Florence	Boone	51		30		81
Frankfort	Franklin	42		26		68
Lexington	Fayette	51		30		81
London	Laurel.					
(June 1–September 30)		49		26		75
(October 1–May 31)		40		26		66
Louisville	Jefferson	60		34		94
Owensboro	Daviess	47		26		73
Paducah	McCracken	42		30		72
Pikeville	Pike	43		26		69
Prestonsburg	Floyd	44		26		70

Per diem locality		Maximum lodging amount (a)	+	M&IE rate (b)	=	Maximum per diem rate [4] (c)
Key city [1]	County and/or other defined location [2,3]					
Somerset	Pulaski	42		26		68
LOUISIANA						
Alexandria	Rapides Parish	44		30		74
Baton Rouge	East Baton Rouge Parish	54		30		84
Bossier City	Bossier Parish	55		26		81
Gonzales	Ascension Parish	51		26		77
Lafayette	Lafayette Parish	52		30		82
Lake Charles	Calcasieu Parish	56		26		82
Monroe	Ouachita Parish	47		30		77
New Orleans	Parishes of Jefferson, Orleans, Plaquemines and St. Bernard.	66		34		100
Shreveport	Caddo Parish	55		30		85
Slidell	St. Tammany Parish	43		30		73
MAINE						
Auburn	Androscoggin.					
(July 1–October 14)		51		26		77
(October 15–June 30)		42		26		68
Augusta	Kennebec	53		30		83
Bangor	Penobscot.					
(July 1–October 31)		60		30		90
(November 1–June 30)		47		30		77
Bar Harbor	Hancock.					
(June 1–September 30)		91		34		125
(October 1–May 31)		69		34		103
Bath	Sagadahoc.					
(June 1–October14)		64		30		94
(October 15–May 31)		53		30		83
Calais	Washington.					
(June 1–October 14)		61		26		87
(October 15–May 31)		44		26		70
Kennebunk/Sanford	York.					
(May 1–September 30)		84		30		114
(October 1–April 30)		52		30		82
Kittery	Portsmouth Naval Shipyard (See also Portsmouth, NH.).					
(June 1–September 30)		68		34		102
(October 1–May 31)		53		34		87
Portland	Cumberland.					
(July 1–October 31)		74		30		104
(November 1–June 30)		56		30		86
Presque Isle	Aroostook	41		26		67
Rockport	Knox.					
(June 1–September 30)		98		30		128
(October 1–May 31)		73		30		103
Wiscasset	Lincoln.					
(June 1–September 30)		79		30		109
(October 1–May 31)		48		30		78
MARYLAND						
(For the counties of Montgomery and Prince Georges, see District of Columbia.)						
Annapolis	Anne Arundel	76		38		114
Baltimore	Baltimore and Harford	78		38		116
Columbia	Howard	87		38		125
Cumberland	Allegany	49		26		75
Easton	Talbot	59		30		89
Frederick	Frederick	55		34		89
Hagerstown	Washington	55		30		85
Lexington Park/St. Inigoes/Leonardtown	Saint Marys	51		26		77
Lusby	Calvert	58		34		92
Ocean City	Worcester.					
(May 1–September 30)		122		38		160
(October 1–April 30)		50		38		88
Salisbury	Wicomico	52		30		82
Tower Garden on Bay	Queen Annes	44		30		74
Waldorf	Charles	44		30		74
MASSACHUSETTS						
Andover	Essex	78		34		112
Boston	Suffolk	101		38		139
Cambridge/Lowell	Middlesex	95		38		133
Hyannis	Barnstable.					
(June 1–September 30)		110		34		144

Per diem locality		Maximum lodging amount (a)	+	M&IE rate (b)	=	Maximum per diem rate [4] (c)
Key city [1]	County and/or other defined location [2,3]					
(October 1–May 31)		71		34		105
Martha's Vineyard/Nantucket	Dukes and Nantucket.					
(June 1–October 31)		149		38		187
(November 1–May 31)		104		38		142
Northampton	Hampshire	59		26		85
Pittsfield	Berkshire	52		30		82
Plymouth	Plymouth.					
(June 15–October 31)		93		26		119
(November 1–June 14)		65		26		91
Quincy	Norfolk	79		30		109
South Deerfield/Greenfield	Franklin	65		30		95
Springfield	Hampden	61		30		91
Taunton/New Bedford	Bristol	58		26		84
Worcester	Worcester	61		30		91
MICHIGAN						
Adrian	Lenawee	48		26		74
Alpena	Alpena	41		26		67
Ann Arbor	Washtenaw	67		30		97
Battle Creek	Calhoun	44		30		74
Bay City	Bay	50		26		76
Bellaire	Antrim	49		26		75
Cadillac	Wexford	52		26		78
Charlevoix	Charlevoix.					
(June 1–September 30)		90		30		120
(October 1–May 31)		40		30		70
Detroit	Wayne	79		38		117
Drummond Island	Chippewa	67		26		93
Escanaba	Delta.					
(June 1–September 30)		51		26		77
(October 1–May 31)		40		26		66
Flint	Genesee	47		30		77
Frankfort	Benzie.					
(June 1–September 14)		48		26		74
(September 15–May 31)		40		26		66
Gaylord	Otsego.					
(June 1–September 30)		59		26		85
(October 1–May 31)		51		26		77
Grand Rapids	Kent	60		30		90
Grayling	Crawford	50		26		76
Hancock	Houghton	49		26		75
Holland	Ottawa.					
(May 1–September 30)		59		26		85
(October 1–April 30)		44		26		70
Houghton Lake	Roscommon	49		26		75
Jackson	Jackson	48		26		74
Kalamazoo	Kalamazoo	59		30		89
Lansing/East Lansing	Ingham	54		30		84
Leland	Leelanau.					
(May 1–September 30)		87		26		113
(October 1–April 30)		77		26		103
Ludington	Mason.					
(June 1–September 14)		63		26		89
(September 15–May 31)		40		26		66
Mackinac Island	Mackinac.					
(June 1–September 30)		106		38		144
(October 1–May 31)		61		38		99
Manistee	Manistee.					
(May 15–October 31)		53		26		79
(November 1–May 14)		40		26		66
Marquette	Marquette	47		26		73
Midland	Midland	57		26		83
Mount Pleasant	Isabella	48		26		74
Muskegon	Muskegon	45		26		71
Ontonagon	Ontonagon	49		26		75
Pontiac/Troy	Oakland	59		38		97
Port Huron	St. Clair	50		34		84
Saginaw	Saginaw	51		30		81
South Haven	Van Buren.					
(May 1–September 30)		71		26		97
(October 1–April 30)		47		26		73
St. Joseph/Benton Harbor/Niles	Berrien	49		30		79

Per diem locality		Maximum lodging amount (a)	+	M&IE rate (b)	=	Maximum per diem rate [4] (c)
Key city [1]	County and/or other defined location [2, 3]					
Tawas City	Iosco.					
(June 1–September 30)		55		26		81
(October 1–May 31)		40		26		66
Traverse City	Grand Traverse.					
(May 1–September 30)		90		30		120
(October 1–April 30)		51		30		81
Warren	Macomb	46		26		72
MINNESOTA						
Albert Lea	Freeborn	43		26		69
Austin	Mower	42		26		68
Bemidji	Beltrami	46		30		76
Brainerd	Crow Wing.					
(May 1–September 14)		50		30		80
(September 15–April 30)		40		30		70
Duluth	St. Louis.					
(June 1–September 30)		54		34		88
(October 1–May 31)		49		34		83
Fergus Falls	Otter Tail	57		26		83
Grand Rapids	Itasca	47		30		77
Hinckley	Pine	43		26		69
Mendota Heights	Dakota	61		30		91
Minneapolis/St. Paul	Anoka, Hennepin, and Ramsey Counties; Fort Snelling Military Reservation and Navy Astronautics Group (Detachment BRAVO), Rosemount.	64		34		98
Rochester	Olmsted	58		30		88
St. Cloud	Stearns	41		30		71
MISSISSIPPI						
Biloxi/Gulfport/Pascagoula/Bay St. Louis.	Harrison, Jackson, and Hancock.					
(May 1–September 14)		71		30		101
(September 15–April 30)		64		30		94
Jackson	Hinds	53		30		83
Natchez	Adams	47		26		73
Oxford	Lafayette	44		26		70
Ridgeland	Madison	48		38		86
Vicksburg	Warren	48		30		78
MISSOURI						
Branson	Taney.					
(May 1–October 31)		85		30		115
(November 1–April 30)		52		30		82
Cape Girardeau	Cape Girardeau	45		26		71
Columbia	Boone	48		26		74
Hannibal	Marion.					
(June 1–September 14)		53		26		79
(September 15–May 31)		40		26		66
Jefferson City	Cole	49		26		75
Joplin	Jasper	43		26		69
Kansas City	Clay, Jackson and Platte (See also Kansas City, KS.)	67		34		101
Lake Ozark	Miller	51		34		85
Osage Beach	Camden.					
(May 15–October 14)		71		30		101
(October 15–May 14)		41		30		71
Springfield	Greene	56		30		86
St. Louis	St. Charles and St. Louis	74		38		112
MONTANA						
Billings	Yellowstone	48		26		74
Great Falls	Cascade	53		26		79
Helena	Lewis and Clark	44		26		70
Kalispell/Polson	Flathead and Lake.					
(April 15–September 30)		48		26		74
(October 1–April 14)		40		26		66
NEBRASKA						
Kearney	Buffalo	42		26		68
Lincoln	Lancaster	47		26		73
North Platte	Lincoln	42		26		68
Omaha	Douglas	57		30		87
NEVADA						
Elko	Elko	51		30		81
Las Vegas	Clark County; Nellis AFB	74		38		112

Per diem locality		Maximum lodging amount (a)	+	M&IE rate (b)	=	Maximum per diem rate [4] (c)
Key city [1]	County and/or other defined location [2, 3]					
Lovelock	Pershing.					
(May 1–September 30)		46		26		72
(October 1–April 30)		40		26		66
Reno	Washoe	56		30		86
Stateline	Douglas (See also South Lake Tahoe, CA.).					
(June 1–September 30)		96		38		134
(October 1–May 31)		68		38		106
Winnemucca	Humboldt	47		26		73
NEW HAMPSHIRE						
Concord	Merrimack	59		26		85
Conway	Carroll.					
(June 15–October 14)		70		34		104
(October 15–June 14)		50		34		84
Cornish	Sullivan (See also Hanover, NH.).					
(June 1–October 31)		67		34		101
(November 1–May 31)		57		34		91
Durham	Strafford	65		26		91
Hanover	Grafton (See also Cornish, NH.).					
(June 1–October 31)		67		34		101
(November 1–May 31)		57		34		91
Laconia	Belknap.					
(June 15–October 14)		69		30		99
(October 15–June 14)		50		30		80
Manchester	Hillsborough	68		30		98
Portsmouth/Newington	Rockingham County; Pease AFB (See also Kittery, ME.).					
(June 1–September 30)		68		34		102
(October 1–May 31)		53		34		87
NEW JERSEY						
Atlantic City	Atlantic.					
(April 1–November 30)		109		38		147
(December 1–March 31)		79		38		117
Belle Mead	Somerset	58		34		92
Camden	Camden	63		34		97
Edison	Middlesex	65		38		103
Freehold/Eatontown	Monmouth County; Fort Monmouth	84		34		118
Millville	Cumberland	50		30		80
Moorestown	Burlington	71		38		109
Newark	Bergen, Essex, Hudson, Passaic and Union	87		38		125
Ocean City/Cape May	Cape May.					
(May 15–September 30)		126		34		160
(October 1–May 14)		74		34		108
Parsippany/Dover	Morris County; Picatinny Arsenal	80		38		118
Princeton/Trenton	Mercer	74		34		108
Salem	Salem	52		26		78
Tom's River	Ocean	78		30		108
NEW MEXICO						
Albuquerque	Bernalillo	60		34		94
Artesia	Eddy	42		26		68
Cloudcroft	Otero	74		26		100
Farmington	San Juan	54		30		84
Gallup	McKinley	52		26		78
Las Cruces/White Sands	Dona Ana	46		30		76
Los Alamos	Los Alamos	66		30		96
Raton	Colfax	47		26		73
Roswell	Chaves	41		26		67
Santa Fe	Santa Fe.					
(May 1–October 31)		109		34		143
(November 1–April 30)		84		34		118
Silver City	Grant	41		26		67
Taos	Taos.					
(December 1–March 31)		69		34		103
(April 1–November 30)		61		34		95
Tucumcari	Quay	44		26		70
NEW YORK						
Albany	Albany	70		34		104
Auburn	Cayuga	50		26		76
Batavia	Genesee.					
(May 1–September 30)		60		26		86
(October 1–April 30)		52		26		78

Per diem locality		Maximum lodging amount (a)	+	M&IE rate (b)	=	Maximum per diem rate [4] (c)
Key city [1]	County and/or other defined location [2, 3]					
Binghamton	Broome	58		34		92
Buffalo	Erie	74		34		108
Catskill	Greene.					
(July 1–September 14)		78		30		108
(September 15–June 30)		57		30		87
Corning	Steuben	62		34		96
Elmira	Chemung	57		30		87
Glens Falls	Warren.					
(June 1–October 31)		71		34		105
(November 1–May 31)		54		34		88
Ithaca	Tompkins	61		30		91
Jamestown	Chautauqua	43		30		73
Kingston	Ulster	53		30		83
Lake Placid	Essex.					
(June 1–November 14)		105		30		135
(November 15–May 31)		69		30		99
Massena/Canton	St. Lawrence	52		26		78
Monticello	Sullivan.					
(June 1–September 14)		67		30		97
(September 15–May 31)		54		30		84
New York City	The boroughs of the Bronx, Brooklyn, Manhattan, Queens and Staten Island; Nassau and Suffolk Counties.	142		38		180
Niagara Falls	Niagara.					
(May 15–September 30)		89		30		119
(October 1–May 14)		56		30		86
Owego	Tioga	49		26		75
Palisades/Nyack	Rockland	61		34		95
Plattsburgh	Clinton.					
(June 1–September 30)		49		30		79
(October 1–May 31)		44		30		74
Poughkeepsie	Dutchess	62		30		92
Rochester	Monroe	68		34		102
Romulus	Seneca	70		26		96
Saratoga Springs	Saratoga.					
(June 1–September 30)		77		38		115
(October 1–May 31)		53		38		91
Schenectady	Schenectady	62		34		96
Syracuse	Onondaga	67		34		101
Troy	Rensselaer	47		34		81
Utica	Oneida	64		30		94
Watertown	Jefferson	59		30		89
Watkins Glen	Schuyler.					
(May 1–October 31)		75		30		105
(November 1–April 30)		50		30		80
West Point	Orange	50		30		80
White Plains	Westchester	104		38		142
NORTH CAROLINA						
Asheville	Buncombe.					
(May 1–October 31)		55		30		85
(November 1–April 30)		48		30		78
Boone	Watauga	44		26		70
Charlotte	Mecklenburg	63		34		97
Duck	Dare.					
(May 1–September 30)		108		30		138
(October 1–April 30)		47		30		77
Elizabeth City	Pasquotank	47		26		73
Fayetteville	Cumberland	45		26		71
Greensboro/High Point	Guilford	58		30		88
Greenville	Pitt	43		30		73
Havelock	Craven	42		26		68
Kinston	Lenoir	48		26		74
Morehead City	Carteret.					
(May 1–September 30)		59		30		89
(October 1–April 30)		40		30		70
Research Park/Raleigh/Durham/Chapel Hill.	Wake, Durham and Orange	72		34		106
Wilmington	New Hanover.					
(May 1–September 14)		56		26		82
(September 15–April 30)		47		26		73
Winston–Salem	Forsyth	55		30		85

Per diem locality		Maximum lodging amount (a)	+	M&IE rate (b)	=	Maximum per diem rate [4] (c)
Key city [1]	County and/or other defined location [2, 3]					
NORTH DAKOTA						
Bismarck/Mandan	Burleigh and Morton	45		30		75
Fargo	Cass	48		30		78
Grand Forks	Grand Forks	46		26		72
Minot	Ward	44		26		70
OHIO						
Akron	Summit	62		34		96
Bellevue/Norwalk	Huron.					
(May 15–September 14)		83		26		109
(September 15–May 14)		40		26		66
Canton	Stark	50		26		76
Chillicothe	Ross	45		26		71
Cincinnati/Evendale	Hamilton and Warren	64		34		98
Cleveland	Cuyahoga	78		38		116
Columbus	Franklin	69		34		103
Dayton/Fairborn	Montgomery and Greene; Wright-Patterson AFB	63		30		93
Defiance	Defiance	49		26		75
East Liverpool	Columbiana	50		26		76
Elyria	Lorain.					
(June 1–September 30)		60		30		90
(October 1–May 31)		40		30		70
Fairfield/Hamilton	Butler	59		26		85
Findlay	Hancock	48		26		74
Geneva	Ashtabula	57		26		83
Jackson	Jackson and Pike	50		26		76
Lancaster	Fairfield	52		26		78
Lima	Allen	41		26		67
Martin's Ferry/Bellaire	Belmont	45		26		71
Port Clinton/Oakharbor	Ottawa.					
(May 1–September 30)		84		30		114
(October 1–April 30)		40		30		70
Portsmouth	Scioto	48		26		74
Sandusky	Erie.					
(May 15–September 14)		91		30		121
(September 15–May 14)		44		30		74
Springfield	Clark	48		30		78
Tinney/Fremont	Sandusky.					
(June 1–September 14)		54		26		80
(September 15–May 31)		42		26		68
Toledo	Lucas	56		30		86
Wapakoneta	Auglaize	42		26		68
Warren	Trumbull	48		30		78
OKLAHOMA						
Ada	Pontotoc	46		26		72
Lawton	Comanche	45		26		71
Muskogee	Muskogee	41		26		67
Norman	Cleveland	47		26		73
Oklahoma City	Oklahoma	56		26		82
Stillwater	Payne	44		26		70
Tulsa/Bartlesville	Osage, Tulsa and Washington	53		30		83
OREGON						
Ashland/Medford	Jackson.					
(June 1–September 30)		63		30		93
(October 1–May 31)		46		30		76
Beaverton	Washington	62		34		96
Bend	Deschutes	57		30		87
Clackamas	Clackamas	59		26		85
Coos Bay	Coos.					
(May 1–September 30)		56		26		82
(October 1–April 30)		51		26		77
Eugene	Lane	52		30		82
Gold Beach	Curry.					
(May 15–October 14)		63		26		89
(October 15–May 14)		42		26		68
Lincoln City/Newport	Lincoln.					
(June 1–October 31)		65		30		95
(November 1–May 31)		57		30		87
Portland	Multnomah	70		30		100
Salem	Marion	51		26		77
Seaside	Clatsop.					

Per diem locality		Maximum lodging amount (a)	+	M&IE rate (b)	=	Maximum per diem rate [4] (c)
Key city [1]	County and/or other defined location [2, 3]					
(May 1–September 30)		87		30		117
(October 1–April 30)		72		30		102
PENNSYLVANIA						
Allentown	Lehigh	61		34		95
Altoona	Blair	46		26		72
Bloomsburg	Columbia	48		30		78
Chester/Radnor	Delaware	88		38		126
Du Bois	Clearfield	45		26		71
Easton	Northampton	50		26		76
Erie	Erie.					
(June 1–August 31)		56		30		86
(September 1–May 31)		46		30		76
Gettysburg	Adams.					
(May 1–September 14)		68		30		98
(September 15–April 30)		42		30		72
Harrisburg	Dauphin	75		34		109
Johnstown	Cambria	48		26		74
King of Prussia/Ft. Washington	Montgomery County, except Bala Cynwyd (See also Philadelphia, PA.).	83		34		117
Lancaster	Lancaster	68		30		98
Lebanon	Lebanon County; Indian Town Gap Military Reservation.	49		30		79
Mechanicsburg	Cumberland	55		30		85
Mercer	Mercer	47		26		73
Philadelphia	Philadelphia County; city of Bala Cynwyd in Montgomery County.	89		34		123
Pittsburgh	Allegheny	75		34		109
Reading	Berks	49		30		79
Scranton	Lackawanna	58		30		88
Shippingport	Beaver	47		30		77
Somerset	Somerset	56		30		86
State College	Centre	53		30		83
Stroudsburg	Monroe	45		30		75
Uniontown	Fayette	61		26		87
Valley Forge/Malvern	Chester	82		38		120
Warminster	Bucks County; Naval Air Development Center	66		30		96
Wilkes-Barre	Luzerne	52		30		82
Williamsport	Lycoming	43		30		73
York	York	59		30		89
RHODE ISLAND						
East Greenwich	Kent County; Naval Construction Battalion Center, Davisville.	80		34		114
Newport	Newport.					
(May 1–October 14)		102		38		140
(October 15–April 30)		62		38		100
Providence	Providence	78		34		112
Quonset Point	Washington.					
(May 15–September 30)		68		26		94
(October 1–May 14)		51		26		77
SOUTH CAROLINA						
Charleston	Charleston and Berkeley	60		34		94
Columbia	Richland	53		30		83
Greenville	Greenville	51		26		77
Hilton Head	Beaufort.					
(May 1–September 30)		73		34		107
(October 1–April 30)		46		34		80
Myrtle Beach	Horry County; Myrtle Beach AFB.					
(May 1–September 30)		104		30		134
(October 1–April 30)		43		30		73
Rock Hill	York	41		26		67
Spartanburg	Spartanburg	49		26		75
SOUTH DAKOTA						
Custer	Custer.					
(June 1–September 30)		62		26		88
(October 1–May 31)		40		26		66
Hot Springs	Fall River.					
(May 1–September 30)		71		26		97
(October 1–April 30)		40		26		66
Rapid City	Pennington.					
(June 1–August 31)		70		30		100

Per diem locality		Maximum lodging amount (a)	+	M&IE rate (b)	=	Maximum per diem rate[4] (c)
Key city[1]	County and/or other defined location[2,3]					
(September 1–May 31)		41		30		71
Sioux Falls	Minnehaha	54		30		84
Spearfish	Lawrence.					
(June 1–September 14)		65		26		91
(September 15–May 31)		40		26		66
TENNESSEE						
Chattanooga	Hamilton	45		26		71
Clarksville	Montgomery	41		26		67
Columbia	Maury	53		26		79
Gatlinburg	Sevier.					
(May 15–October 31)		76		30		106
(November 1–May 14)		55		30		85
Johnson City	Washington	53		30		83
Kingsport/Bristol	Sullivan	43		30		73
Knoxville	Knox County; city of Oak Ridge	54		30		84
Memphis	Shelby	57		34		91
Murfreesboro	Rutherford	42		26		68
Nashville	Davidson	60		30		90
Shelbyville	Bedford	47		26		73
TEXAS						
Abilene	Taylor	44		26		70
Amarillo	Potter	52		30		82
Austin	Travis	67		34		101
Beaumont	Jefferson	45		30		75
Brownsville	Cameron	62		30		92
Brownwood	Brown	44		26		70
College Station/Bryan	Brazos	49		26		75
Corpus Christi/Ingelside	Nueces and San Patricio	64		30		94
Dallas/Fort Worth	Dallas and Tarrant	71		34		105
Denton	Denton	47		30		77
El Paso	El Paso	63		30		93
Fort Davis	Jeff Davis	59		26		85
Galveston	Galveston.					
(May 15–September 14)		74		38		112
(September 15–May 14)		64		38		102
Granbury	Hood	52		26		78
Houston	Harris County; L.B. Johnson Space Center and Ellington AFB.	79		38		117
Kingsville	Kleberg	44		26		70
Lajitas	Brewster	63		30		93
Laredo	Webb	61		30		91
Longview	Gregg	51		26		77
Lubbock	Lubbock	60		26		86
Lufkin	Angelina	43		26		69
McAllen	Hidalgo	60		26		86
Midland/Odessa	Ector and Midland	55		26		81
Nacogdoches	Nacogdoches	49		26		75
Plainview	Hale	42		26		68
Plano	Collin	71		30		101
San Angelo	Tom Green	45		26		71
San Antonio	Bexar	77		34		111
Temple	Bell	49		26		75
Texarkana	Bowie (See also Texarkana, AR.)	43		30		73
Tyler	Smith	51		26		77
Victoria	Victoria	44		26		70
Waco	McLennan	53		26		79
Wichita Falls	Wichita	49		26		75
UTAH						
Bullfrog	Garfield.					
(May 15–September 30)		100		30		130
(October 1–May 14)		54		30		84
Cedar City	Iron.					
(June 1–September 30)		59		30		89
(October 1–May 31)		43		30		73
Moab	Grand.					
(April 1–November 30)		87		26		113
(December 1–March 31)		45		26		71
Provo	Utah	53		30		83
Salt Lake City/Ogden	Salt Lake, Weber, and Davis Counties; Dugway Proving Ground and Tooele Army Depot.	68		30		98

Per diem locality		Maximum lodging amount (a)	+	M&IE rate (b)	=	Maximum per diem rate[4] (c)
Key city[1]	County and/or other defined location[2,3]					
St. George	Washington	49		26		75
Vernal	Uintah	44		26		70
VERMONT						
Burlington	Chittenden	64		30		94
Middlebury	Addison.					
(May 1–October 31)		82		30		112
(November 1–April 30)		66		30		96
Montpelier	Washington.					
(September 1–October 31)		62		26		88
(November 1–August 31)		51		26		77
Rutland	Rutland.					
(December 15–March 31)		60		30		90
(April 1–December 14)		53		30		83
White River Junction	Windsor.					
(September 1–October 31)		67		30		97
(November 1–August 31)		57		30		87
VIRGINIA						
(For the cities of Alexandria, Fairfax, and Falls Church, and the counties of Arlington, Fairfax, and Loudoun, see District of Columbia.)						
Blacksburg	Montgomery	55		26		81
Bristol*		46		26		72
Charlottesville*		53		38		91
Covington*		43		26		69
Fredericksburg*		43		30		73
Lexington*		48		26		74
Lynchburg*		52		30		82
Manassas/Manassas Park*	Prince William	50		30		80
Petersburg*	Fort Lee	44		26		70
Richmond*	Chesterfield and Henrico Counties; also Defense Supply Center.	59		34		93
Roanoke*	Roanoke	55		30		85
Staunton*		42		26		68
Virginia Beach*	Virginia Beach (also Norfolk, Portsmouth and Chesapeake)*.					
(May 1–September 30)		98		34		132
(October 1–April 30)		61		34		95
Wallops Island	Accomack.					
(May 15–September 30)		75		30		105
(October 1–May 14)		47		30		77
Warrenton/Amissville	Fauquier and Rappahannock	49		30		79
Waynesboro*.						
(May 1–October 31)		64		26		90
(November 1–April 30)		45		26		71
Williamsburg*	Williamsburg (also Hampton, Newport News, York County, Naval Weapons Station, Yorktown)*.					
(April 1–October 31)		74		34		108
(November 1–March 31)		66		34		100
Wintergreen	Nelson	98		38		136
*Denotes independent cities.						
WASHINGTON						
Anacortes/Mt. Vernon	Skagit.					
(May 1–August 31)		71		30		101
(September 1–April 30)		58		30		88
Bellingham	Whatcom	56		34		90
Bremerton	Kitsap	44		30		74
Friday Harbor	San Juan.					
(May 1–October 31)		89		38		127
(November 1–April 30)		63		38		101
Kelso/Longview	Cowlitz	46		30		76
Lynnwood/Everett	Snohomish	57		34		91
Ocean Shores	Grays Harbor.					
(April 1–September 30)		60		26		86
(October 1–March 31)		46		26		72
Port Angeles	Clallam.					
(May 15–September 30)		64		34		98
(October 1–May 14)		46		34		80
Port Townsend	Jefferson.					
(April 15–October 14)		71		30		101
(October 15–April 14)		51		30		81
Richland	Benton	46		34		80

Per diem locality		Maximum lodging amount (a)	+ M&IE rate (b)	= Maximum per diem rate[4] (c)
Key city[1]	County and/or other defined location[2,3]			
Seattle	King	83	38	121
Spokane	Spokane	59	30	89
Tacoma	Pierce	55	26	81
Tumwater/Olympia	Thurston	61	34	95
Vancouver	Clark	56	34	90
Whidbey Island	Island	49	30	79
Yakima	Yakima	45	30	75
WEST VIRGINIA				
Beckley	Raleigh	47	26	73
Berkeley Springs	Morgan	72	26	98
Charleston	Kanawha	55	30	85
Harpers Ferry	Jefferson	60	30	90
Huntington	Cabell	53	26	79
Martinsburg	Berkeley	51	30	81
Morgantown	Monongalia	50	30	80
Parkersburg	Wood	45	30	75
Wheeling	Ohio	44	26	70
WISCONSIN				
Appleton	Outagamie	53	30	83
Brookfield	Waukesha	65	34	99
Cable	Bayfield	41	26	67
Eagle River	Vilas	44	26	70
Eau Claire	Eau Claire	52	30	82
Green Bay	Brown	54	26	80
Kewaunee	Kewaunee.			
(June 1–September 14)		47	26	73
(September 15–May 31)		41	26	67
La Crosse	La Crosse	55	30	85
Lake Geneva	Walworth.			
(May 1–October 14)		86	34	120
(October 15–April 30)		57	34	91
Madison	Dane	59	30	89
Marinette	Marinette	43	26	69
Milwaukee	Milwaukee	67	30	97
Mishicot	Manitowoc	54	26	80
Oshkosh	Winnebago	52	30	82
Platteville	Grant	41	26	67
Racine/Kenosha	Racine and Kenosha	51	30	81
Rhinelander/Minocqua	Oneida	58	26	84
Sturgeon Bay	Door.			
(June 1–September 14)		69	26	95
(September 15–May 31)		40	26	66
Tomah	Monroe	43	26	69
Wausau	Marathon	49	26	75
Wautoma	Waushara.			
(June 1–September 30)		51	26	77
(October 1–May 31)		40	26	66
Wisconsin Dells	Columbia.			
(June 1–September 14)		94	34	128
(September 15–May 31)		45	34	79
WYOMING				
Casper	Natrona	41	30	71
Cheyenne	Laramie	50	30	80
Cody	Park.			
(May 1–September 30)		68	26	94
(October 1–April 30)		40	26	66
Gillette	Campbell	42	26	68
Jackson	Teton.			
(June 1–October 14)		90	34	124
(October 15–May 31)		60	34	94
Pinedale	Sublette	52	26	78
Rock Springs	Sweetwater	43	30	73
Thermopolis	Hot Springs.			
(June 1–September 14)		49	26	75
(September 15–May 31)		42	26	68

[1] Unless otherwise specified, the per diem locality is defined as "all locations within, or entirely surrounded by, the corporate limits of the key city, including independent entities located within those boundaries."

[2] Per diem localities with county definitions shall include "all locations within, or entirely surrounded by, the corporate limits of the key city as well as the boundaries of the listed counties, including independent entities located within the boundaries of the key city and the listed counties."

[3] Military installations or Government-related facilities (whether or not specifically named) that are located partially within the city or county boundary shall include "all locations that are geographically part of the military installation or Government-related facility, even though part(s) of such activities may be located outside the defined per diem locality."

[4] Federal agencies may submit a request to GSA for review of the costs covered by per diem in a particular city or area where the standard CONUS rate applies when travel to that location is repetitive or on a continuing basis and travelers' experiences indicate that the prescribed rate is inadequate. Other per diem localities listed in this appendix will be surveyed on an annual basis by GSA to determine whether rates are adequate. Requests for per diem rate adjustments shall be submitted by the agency headquarters office to the General Services Administration, Federal Supply Service, Attn: Transportation Management Division (FBX), Washington, DC 20406. Agencies should designate an individual responsible for reviewing, coordinating, and submitting to GSA any requests from bureaus or subagencies. Requests for rate adjustments shall include a city designation, a description of the surrounding location involved (county or other defined area), and a recommended rate supported by a statement explaining the circumstances that cause the existing rate to be inadequate. The request also must contain an estimate of the annual number of trips to the location, the average duration of such trips, and the primary purpose of travel to the locations. Agencies should submit their requests to GSA no later than May 1 in order for a city to be included in the annual survey.

Dated: December 12, 1994.

Julia M. Stasch,

Acting Administrator of General Services.

[FR Doc. 94–31244 Filed 12-19-94; 8:45 am]

BILLING CODE 6820–24–F

Federal Register

Tuesday
December 20, 1994

Part VII

Department of Housing and Urban Development

Office of the Secretary

24 CFR Parts 25 and 26

Mortgagee Review Board; Proceedings Before a Hearing Officer; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Parts 25 and 26

[Docket No. R–94–1563; FR–3065–P–02]

RIN 2501–AB24

Mortgagee Review Board; Proceedings Before a Hearing Officer

AGENCY: Office of the Secretary, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would make changes in the Department's regulations governing sanctions imposed by the Mortgagee Review Board. The proposed rule would also make conforming changes to the regulations concerning HUD's hearing officers, consistent with the revisions proposed herein and in the proposed revision to 24 CFR part 24 published elsewhere in today's **Federal Register**. The changes to the Mortgagee Review Board actions are intended to follow more closely the statutory provisions set forth at 12 U.S.C. 1708(c). The Department considers these proposed revisions necessary to comply with the President's directive to streamline agency operations throughout the Executive Branch. The proposed revisions are also an element in the Government reinvention process at the Department.

DATES: *Comment due date.* Comments must be submitted on or before February 21, 1995.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: Emmett N. Roden, Assistant General Counsel for Administrative Proceedings, Office of General Counsel, U.S. Department of Housing and Urban Development, 451 7th Street, S.W., Room 10251, Washington, D.C. 20410, telephone (202) 708–2350. The telephone number for the hearing impaired (TDD) is (202) 708–9300. These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: Section 202 of the National Housing Act (12 U.S.C. 1708 (c) and (d)) established the Mortgagee Review Board ("Board"). Section 202(c)(4) directs the Board to "hold a hearing on the record" concerning sanctions it has taken against a mortgagee, if the mortgagee so requests within 30 days notice of the Board's action. However, HUD's current regulations delegate the Board's authority to hold hearings to hearing officers (administrative law judges and Board of Contract Appeals judges). These proceedings have proven extremely time-consuming and expensive. Accordingly, this proposed rule will return the hearing function to the Board, thereby streamlining the hearing process.

The proposed rule also implements the 1992 amendments to Section 202. These amendments limited a suspension issued by the Board to not more than one year, unless extended for not more than six additional months, to protect the public interest, or unless extended with the mortgagee's agreement. The amendments also clarified that the term "mortgagee" included lenders or loan correspondents approved under the National Housing Act.

The proposed rule also would make conforming changes to HUD's regulations governing hearing officers, consistent with the proposed revisions both to the Board's regulations and to 24 CFR part 24, published elsewhere in today's **Federal Register**.

Written comments from the public will be considered prior to issuance of a final rule. No hearing will be conducted with respect to this proposed rule.

Findings and Other Matters

Environmental Impact

A Finding of No Significant Impact with respect to the environment required by the National Environmental Policy Act of 1969 (42 U.S.C. 4331) is unnecessary since the rule addresses administrative decisions whose content does not constitute a development decision nor affect the physical condition of a project area or building.

The Regulatory Flexibility Act

Under 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Secretary by his approval of this rule certifies that this rule would not have a significant economic impact on a substantial number of small entities. The rule would implement statutory authority that is intended to protect the Department's programs from abusive practices, but it should have no adverse or disproportionate economic impact on small businesses.

Executive Order 12866, Regulatory Planning and Review

This rule was reviewed and approved by the Office of Management and Budget as a significant rule, as this term is defined in Executive Order 12866, which was signed by the President on September 30, 1993. Any changes to the rule as a result of that review are contained in the public file for the rule in the Department's Office of the Rules Docket Clerk.

Executive Order 12606, The Family

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this rule does not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order. The rule alters the administrative procedures associated with the prosecution of abuses of HUD programs, but it has no impact on family-related concerns.

Executive Order 12612, Federalism

The General Counsel, as the designated Official under Section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities between them and other levels of government. The rule's major effects are on individuals and businesses.

Semiannual Agenda of Regulations

This rule was listed as sequence number 1718 in the Department's Semiannual Agenda of Regulations published on November 14, 1994 (59 FR 57632, 57640) pursuant to Executive Order 12866 and the Regulatory Flexibility Act.

List of Subjects

24 CFR Part 25

Administrative practice and procedure, Loan programs—housing and community development, Organization and functions (Government agencies).

24 CFR Part 26

Administrative practice and procedure.

Accordingly, 24 CFR parts 25 and 26 would be amended as follows:

PART 25—MORTGAGEE REVIEW BOARD

1. The authority citation for part 25 would be revised to read as follows:

Authority: 12 U.S.C. 1708 (c) and (d), 1709(s), 1715b and 1735(f)–14; 42 U.S.C. 3535(d).

2. Section 25.2 would be revised to read as follows:

§ 25.2 Establishment of Board.

The Mortgagee Review Board was established in the Federal Housing Administration, which is in the Office of the Assistant Secretary for Housing—Federal Housing Commissioner, by section 202(c)(1) of the National Housing Act, (12 U.S.C. 1708(c)(1)), as added by section 142 of the Department of Housing and Urban Development Reform Act of 1989 (Pub. L. 101–235, 103 Stat. 1987). Except as limited by this part, the Mortgagee Review Board shall exercise all of the functions of the Secretary with respect to administrative actions against mortgagees and lenders and such other functions as are provided in this part. The Mortgagee Review Board may, in its discretion, approve the initiation of a suspension or debarment action against a mortgagor or lender by any Suspending or Debarring Official under part 24 of this title. The Mortgagee Review Board shall have all powers necessary and incident to the performance of these functions. The Mortgagee Review Board may redelegate its authority to impose administrative sanctions on the grounds specified in §§ 25.9 (e), (h), and (u), to take all other nondiscretionary acts, and to review submissions and conduct hearings in accordance with § 25.8. With respect to actions taken against Title I lenders, the Mortgagee Review Board may redelegate its authority to take administrative actions on the grounds specified in 24 CFR 202.3(j), 202.5(a), and 202.5(c) of this title (as incorporated in § 202.6(b)(1) of this title).

3. In § 25.3, a definition for *Hearing official* would be added after the definition for *Cease and desist order*, a definition for *Loan correspondent* would be added after the definition for *Letter of reprimand* and the definition of *Mortgagee* would be revised to read as follows:

§ 25.3 Definitions.

* * * * *

Hearing official. The hearing official is a Departmental official designated by the Board to conduct hearings under § 25.8.

* * * * *

Loan correspondent. A financial institution approved by the Secretary to originate direct loans under Title I of the National Housing Act, 12 U.S.C. 1702 *et seq.*, for sale or transfer to a sponsoring lending institution which holds a valid Title I contract of insurance and which is not under suspension.

* * * * *

Mortgagee. (1) For purposes of this part, the term "mortgagee" includes:

(i) The original lender under the mortgage, as that term is defined at sections 201(a) and 207(a)(1) of the National Housing Act, 12 U.S.C. 1707(a) and 1713(a)(1);

(ii) A lender or loan correspondent as defined in this section; or

(iii) A branch office or subsidiary of the mortgagee, lender or loan correspondent.

(2) The term "mortgagee" also includes successors and assigns of the mortgagee, lender or loan correspondent, as are approved by the Commissioner.

* * * * *

4. In § 25.5, paragraphs (c)(1), (c)(2) and (d)(4)(iii) would be revised to read as follows:

§ 25.5 Administrative actions.

* * * * *

(c) *Suspension*—(1) *General.* The Board may issue an order temporarily suspending a mortgagee's HUD/FHA approval if there exists adequate evidence of a violation(s) under § 25.9 and continuation of the mortgagee's HUD/FHA approval, pending or at the completion of, any audit, investigation, or other review, or such administrative or other legal proceedings as may ensue, would not be in the public interest or in the best interests of the Department. Suspension shall be based upon adequate evidence.

(2) *Duration.* A suspension shall last for a specified period of time, but not less than 6 months and generally not more than 1 year. The Board may extend the suspension for an additional 6 months it if determines that the extension is in the public interest. These time limits may also be extended upon the voluntary written agreement of the mortgagee.

* * * * *

(d) * * *

(4) * * *

(iii) Upon receipt of the hearing official's decision under § 25.8.

* * * * *

5. Section 25.7 would be revised to read as follows:

§ 25.7 Notice of administrative action.

Whenever the Board takes an action to issue a letter of reprimand, place a mortgagee on probation, or to suspend or withdraw a mortgagee's approval, the Board shall promptly notify the mortgagee in writing of the determination. Except for a letter of reprimand, the notice shall describe the nature and duration of the administrative action, shall specifically state the violations and shall set forth the findings of the Board. The notice shall inform the mortgagee of its right to a hearing regarding the administrative action (except for a letter of reprimand) and of the manner and time in which to request a hearing pursuant to § 25.8. A supplemental notice may be issued in the discretion of the Board to add or modify the reasons for the action.

6. Section 25.8 would be revised to read as follows:

§ 25.8 Hearings and hearing request.

(a) *Hearing request.* In the case of probation, suspension or withdrawal action, a mortgagee is entitled to a hearing on the record before a hearing official designated by the Board. The mortgagee shall submit its request for a hearing within 30 days of receiving the Board's notice of administrative action. The request shall be addressed to the Board Docket Clerk, Department of Housing and Urban Development, 451 7th Street, S.W., Washington, D.C. 20410. The request shall specifically respond to the violations set forth in the notice of administrative action. If the mortgagee fails to request a hearing within 30 days after receiving the notice of administrative action, the Board's action shall become final.

(b) *Procedural rules.* The hearing official shall hold a *de novo* hearing within 30 days of HUD's receipt of the mortgagee's request, unless the mortgagee requests a later hearing date or requests an informal conference, under paragraph (e) of this section, in addition to the hearing. The mortgagee or its representative shall be afforded an opportunity to appear, submit documentary evidence, present witnesses and confront any witness the agency presents. The parties shall not be allowed to present members of the Board as witnesses. A transcribed record of the hearing shall be made available at cost to the mortgagee.

(c) *Hearing location.* The hearing shall generally be held in Washington, D.C. However, upon a showing of undue hardship or other cause, the hearing official may, in his or her discretion, order the hearing to be held in a location other than Washington, D.C.

(d) *Hearing official's decision.* The hearing official shall make a written decision within 45 days after the conclusion of the hearing, unless the hearing official extends this period for

good cause. If there is any dispute as to material facts, the hearing official shall make written findings of fact. The decision shall be based upon the facts as found, together with any information and argument submitted by the parties and any other information in the administrative record. The hearing official's decision shall be mailed to the mortgagee, and shall serve as the final agency action concerning the mortgagee.

(e) *Informal conference.* The mortgagee may request an informal conference with respect to a notice of withdrawal, suspension, or probation. The conference shall, at the option of the mortgagee, be in lieu of or precede the hearing on the Board action. The mortgagee must submit the request for an informal conference to the Board Docket Clerk within 30 days after receipt of the notice of Board action. If the mortgagee elects to request a hearing in addition to the conference, the mortgagee must include with the request for a conference and hearing an express waiver of the mortgagee's right to the hearing within 30 days after the Department's receipt of the request for hearing. The conference shall be conducted by the hearing official, or another designated official, within 15 days after receipt of the request for a conference.

6. In § 25.9, paragraphs (i) and (w) would be revised to read as follows:

§ 25.9 Grounds for an administrative action.

* * * * * *

(i) Failure or refusal of an approved mortgagee to comply with an order of the Board, the Secretary, or the hearing official;

* * * * * *

(w) Any other reasons the Board, the Secretary, or the hearing official, as appropriate, determines to be so serious as to justify an administrative sanction;

* * * * * *

§ 25.12 [Amended]

7. In § 25.12(a), the words "Hearing Officer" would be removed and in their place, the words "hearing official" would be added, and the last sentence would be removed.

8. Section 25.16 would be revised to read as follows:

§ 25.16 Prohibition against modification of Board orders.

The hearing official shall not modify or otherwise disturb in any way an order or notice by the Board, except after having conducted a hearing in accordance with § 25.8.

§ 25.17 [Removed]

9. Section 25.17 would be removed.

PART 26—PROCEEDINGS BEFORE A HEARING OFFICER

10. The authority citation for part 26 would be revised to read as follows:

Authority: 42 U.S.C. 3535(d).

11. In § 26.1, the second sentence would be revised to read as follows:

§ 26.1 Purpose.

* * * These rules of procedure apply to hearings with respect to determinations by the Multifamily Participation Review Committee pursuant to 24 CFR part 200, subpart H, and to hearings conducted pursuant to a referral by a debarring or suspending official of a dispute with respect to material facts at issue in an administrative sanction matter under 24 CFR part 24, unless such regulations at parts 200 or 24 provide otherwise.

* * *

Dated December 8, 1994.

Henry G. Cisneros,

Secretary

[FR Doc. 94–30912 Filed 12–19–94; 8:45 am]

BILLING CODE 4210–32–P

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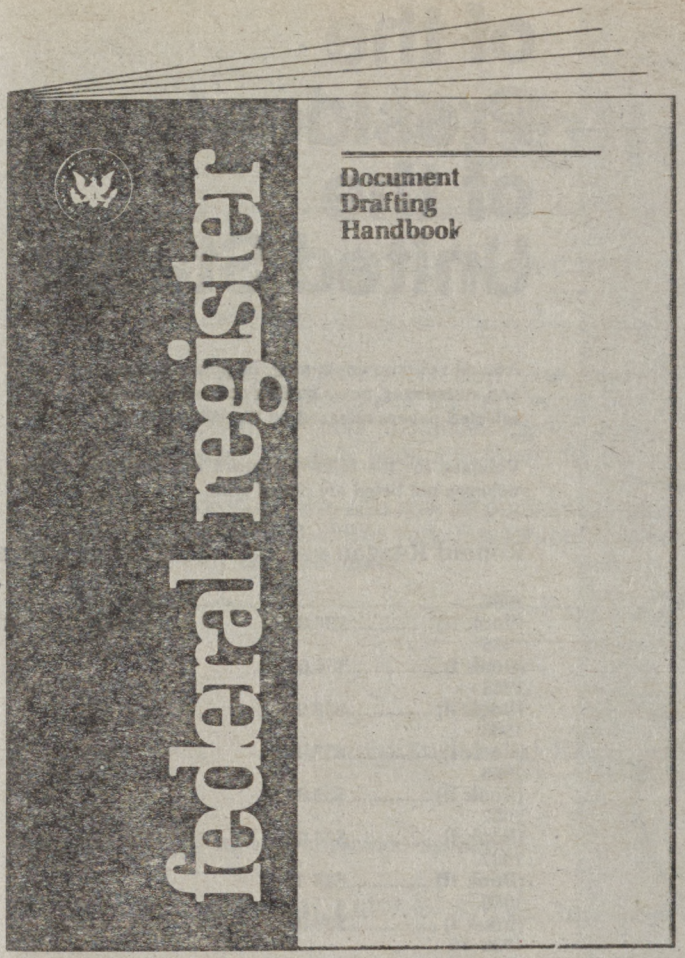
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A cumulative list of Public Laws for the 103d Congress, Second Session, was published in Part II of the **Federal Register** on Monday, December 19, 1994.



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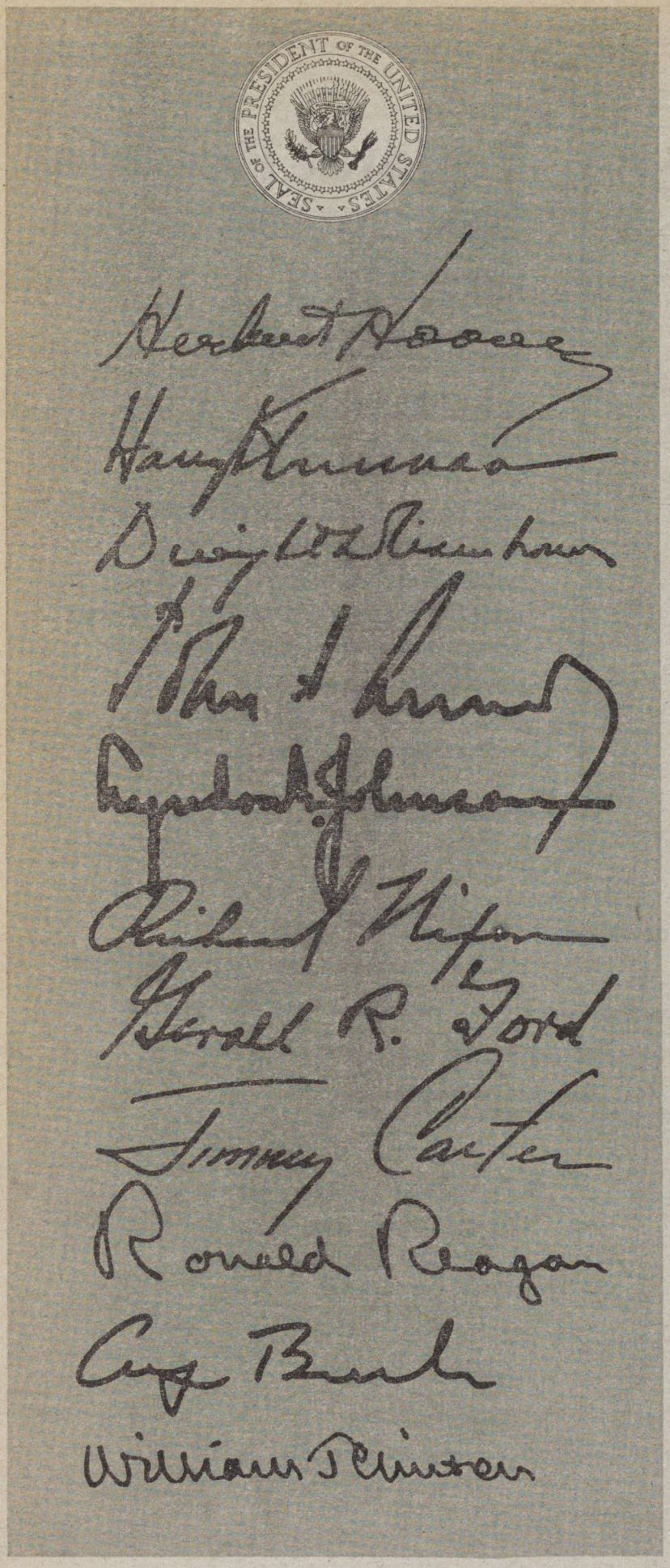
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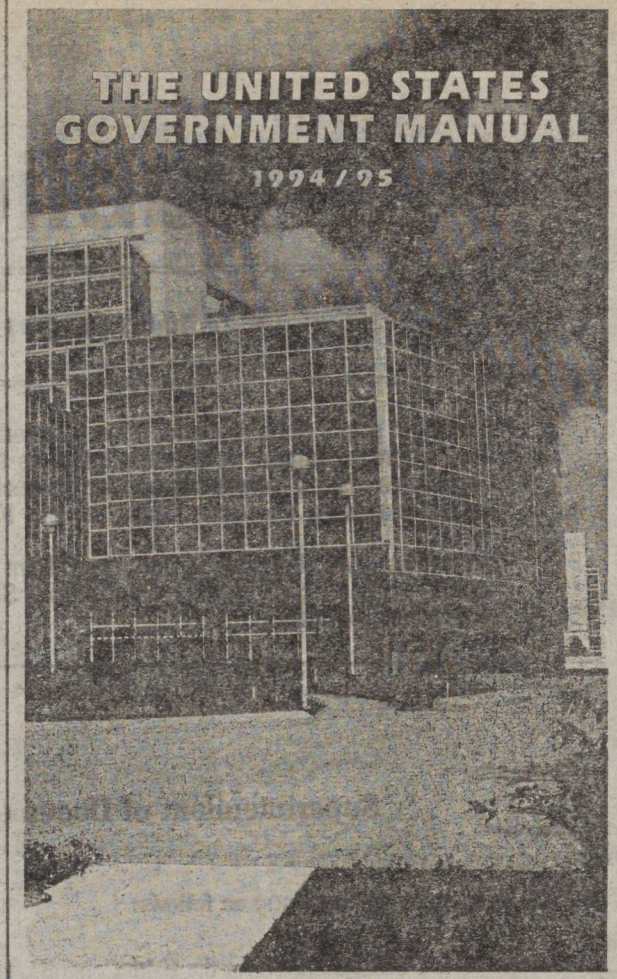
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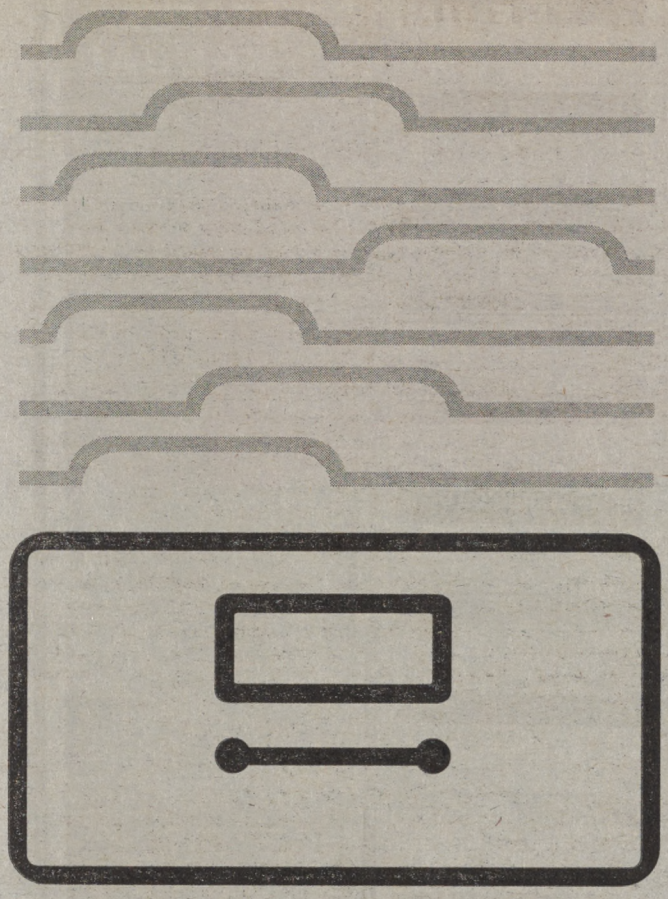
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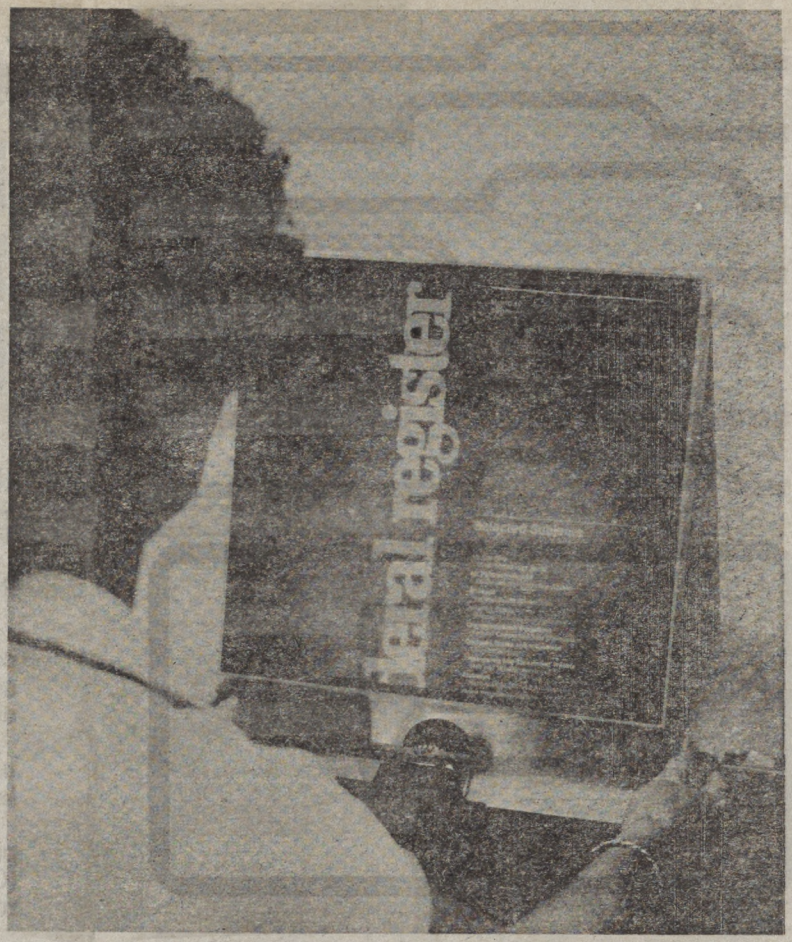
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