microbiological testing of poultry product samples
Attachment 8—July 27, 2001, letter from Dr. Neal Apple, Vice President of Tyson Corporate Laboratory and Research, Tyson Foods, Inc., ''to whom it may concern,'' on laboratory capacity for microbiological testing of poultry product samples
Attachment 9—August 2, 2001, letter from Lee G. Johnson, Chief Microbiologist, Con Agra Refrigerated and Prepared Foods, ''to whom it may concern,'' on laboratory capacity for microbiological testing of product samples
Attachment 10—August 16, 2001, letter from Jason Tisch, Assistant Manager, Deibel Laboratories, on laboratory capacity for microbiological testing of poultry product product samples
Attachment 11—Line graphs showing monthly percentage variation of turkey pre-baste yield and monthly variation of poultry live weight yield in pounds
Attachment 12—Chart showing monthly variability in *Salmonella* incidence on poultry carcasses at some establishments
Attachment 13—Chart showing monthly variability in *Salmonella* incidence on poultry carcasses at some establishments, other than those represented the chart in Attachment 12
Attachment 14—Letter from Mr. Stephen Pretanik, Director of Science and Technology, National Chicken Council, ''to whom it may concern,'' reporting results of membership survey on labels affected by the retained water rule
Attachment 15—Letter from J. Roy Escoubas, Ph.D., Technical Enhancements, Inc., to Mr. Stuart Proctor, President, National Turkey Federation, reporting on number of new printing plates and labels needed to bring turkey processors in compliance with retained water regulations

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to better ensure that minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it and provide copies of this **Federal Register** publication in the FSIS Constituent Update. FSIS provides a weekly FSIS Constituent Update, which is communicated via fax to over 300 organizations and individuals. In addition, the update is available on-line through the FSIS web page located at http://www.fsis.usda.gov. The update is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, recalls, and any other types of information that could affect or would be of interest to our constituents/stakeholders. The constituent fax list consists of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals that have requested to be included. Through these various channels, FSIS is able to provide information to a much broader, more diverse audience. For more information and to be added to the constituent fax list, fax your request to the Congressional and Public Affairs Office, at (202) 720–5704.

Done, at Washington, D.C.: October 12, 2001.

Thomas J. Billy,

Administrator.

[FR Doc. 01–26168 Filed 10–16–01; 8:45 am]

BILLING CODE 3410–DM–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

RIN 3150–AC07

Availability of Official Records

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations on availability of official records in three areas. The proposed rule would require those who submit documents claimed to contain proprietary or other confidential information to mark the information as specified to decrease the chances of inadvertent public release of the information by the NRC, codify NRC's current practices delineating the circumstances under which the agency will not return confidential documents that have been submitted to the NRC, and clarify that the NRC will make as many copies of copyrighted material submitted to the agency as it needs to perform its mission. The proposed rule is necessary to conform the NRC's regulations regarding the availability of official records to existing case law and agency practice.

DATES: The comment period expires December 31, 2001. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Mail written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff. Deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:30 am and 4:15 pm on Federal workdays.

Comments also may be submitted via the NRC's interactive rulemaking Website (http://ruleforum.llnl.gov). This site provides the ability to upload comments as files (any format) if your Web browser supports that function. For information about the interactive rulemaking Website, contact Ms. Carol Gallagher, 301–415–5905 (e-mail *CAG@nrc.gov*). Comments received also may be viewed and downloaded electronically via this interactive rulemaking Website.

Except for restricted information, documents created or received at the NRC after November 1, 1999, also are available electronically at the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/NRC/ADAMS/index.html.* From this site, the public can gain entry into the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. For more information, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Catherine M. Holzle, Senior Attorney, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–1560, email CMH@NRC.GOV.

SUPPLEMENTARY INFORMATION:

I. Background

The NRC first published 10 CFR 2.790 on March 22, 1976 (41 FR 11810). This regulation established procedures governing the submission of proprietary information to the NRC. The regulation provided that material determined to be proprietary generally would be protected by the NRC and would not be released to the public. The agency then

set forth the procedures that submitters could use to challenge an NRC determination that material was not proprietary, or a decision by the agency to release proprietary information to the public. As part of this procedure, the regulation addressed the circumstances under which the agency would (or would not) return a document containing proprietary information to the submitter. The regulation did not address the right of the NRC to make copies of copyrighted material submitted to it.

On December 23, 1992 (57 FR 61013), the Commission published proposed amendments to § 2.790 which would have: standardized the markings on proprietary documents submitted to the NRC; expanded the circumstances under which the NRC would not return proprietary information to the submitter; and made clear that the agency will make copies of copyrighted material submitted to it, as necessary to carry out its mission. These changes were proposed in an effort to update the regulations to reflect judicial decisions on public availability of information, as well as agency practice, to facilitate document handling, and to reflect the status of international copyright law. The proposed changes were not directed toward modification of agency policy or practice regarding the public disclosure of proprietary or other confidential information submitted to the NRC.

The NRC received six comments in response to the request for comments. It became apparent that the commenters' central concern was the potential for increased public disclosure of proprietary submittals, because of the linking in the regulation of the withdrawal procedures with the proprietary determination procedures. The proposed rule has been revised to clarify the separation between these procedures and make the regulation easier to understand. In view of the passage of time since the rule change was proposed in 1992, as well as the need for additional changes and clarifications, we are again seeking public comment before promulgating a final rule. We also are taking this opportunity to propose additional changes to 10 CFR 2.790, which we describe below.

II. Public Comments

The comments received on the 1992 proposed rule were from a public interest organization, a law firm (on behalf of its nuclear power plant clients), a nuclear industry association, and three NRC licensees. One commenter supported the proposed amendments *in toto.* Another commenter did not address the proposed amendments, but raised a general concern regarding the potential for disclosure of proprietary information under § 2.790. The other four commenters were supportive in part, but also raised various concerns regarding the need for, and the appropriateness of, the changes in the proposed regulations, and in some cases suggested alternatives. Most commenters suggested that no change was necessary to the ''long-standing and effectively operating Commission regime governing the submission, review and protection of proprietary information.''

The Commission grouped the comments into 13 general issue areas. For each area, a summary of the comments received and their proposed resolution has been included. Most of the commenters regarded the document marking procedures as cumbersome and unnecessary but considered the copyright procedures reasonable. Some commenters recommended certain fundamental changes to the existing regulation, most notably, the adoption of presubmission procedures for determination of whether documents could be considered to contain proprietary or other confidential information. Some commenters urged determination review deadlines and introduction of an absolute right of document return. Some of the commenters challenged old (preexisting) portions of the regulation, e.g., suggesting elimination of the requirement that proprietary material that forms the basis of a rulemaking cannot be withheld from the public.

The common concern throughout the comments appeared to be, not with document return per se, but with the document disclosure aspect of the rule and the perceived likelihood that the proposed changes would whittle away the protection for proprietary information currently available under § 2.790. This is understandable, in that both the current version of § 2.790(c), and the one proposed in 1992, connect the procedure for requesting document return to an agency denial of a request to withhold a document from public disclosure. Neither version addressed a situation involving a document return request outside these circumstances, wherein the agency might retain a document to satisfy some aspect of its official responsibilities but not necessarily release it to the public.

Therefore, the Commission is reframing the proposed rule to differentiate between the two discrete determinations of document withholding and document return. The proposed rule would add a new and separate paragraph (d) for the document return request procedure that detaches it from the procedure on document withholding. This new paragraph incorporates the additional ''exceptions'' to the document return rule. No changes are proposed to document withholding criteria. The Commission is providing responses to the comments received on the 1992 proposed rule, even though the NRC is issuing a new proposed rule for comment, since some of the revisions to the proposed rule resulted from consideration of the comments. The Commission's responses to these comments should provide additional insight into the bases for the revised proposed rule. A discussion of the comments received follows.

III. Discussion

Currently, 10 CFR 2.790 grants a limited right of withdrawal for proprietary documents submitted to the NRC, provided the information was not submitted in a rulemaking proceeding and did not subsequently form the basis for a final rule. One of the proposed changes to this regulation would modify the regulation to provide specific guidance for marking information the submitter seeks to have withheld from public disclosure on the basis of proprietary content or other confidential information, e.g., to protect personal privacy. This would reduce the Commission's burden in identifying portions of document submittals asserted to be confidential. Also, the use of standardized document marking procedures is expected to decrease the potential for inadvertent release of confidential information that could be caused by oversight, mistake, or confusion about alternative markings.

The Commission's regulations need to be updated to reflect more accurately legal restrictions on the NRC's ability to permit document withdrawal for documents that it must retain to properly conduct its official responsibilities. Part of this responsibility is to maintain the necessary records to document the NRC's actions. For example, during the course of an investigation, the NRC Office of Investigations may obtain documentary evidence, submitted voluntarily or through compelled process, for consideration by NRC and Department of Justice decision makers, which information cannot be returned. Thus, the second proposed change would revise the regulations to clarify the fact that document withdrawal will not be available when the information contained in it forms part of the basis of

any official agency decision, including but not limited to, a rulemaking proceeding or licensing activity, and to reflect the addition of four more exceptions to the submitter's right to withdraw such information, reflecting existing case law and agency practice. These exceptions are when information:

(1) Is contained in documents made available to or prepared for an NRC advisory committee;

(2) Has been revealed or relied upon at an open Commission meeting held in accordance with 10 CFR part 9, subpart C;

(3) Is subject to a request under the Freedom of Information Act (FOIA); or

(4) Has been obtained during the course of an investigation by NRC's Office of Investigations.

The refusal to return documents under § 2.790 does not necessarily mean the information will be disclosed to the public; application of these exceptions would be separate from a disclosure determination on the underlying information. However, it remains that the Commission may balance the public interest in access to the information against the demonstrated concern for protecting legitimate private interests. In some cases, disclosure may be appropriate. Nonetheless, release is not made under this section without affording the submitter notice and an opportunity to object. While the proposed changes do not affect agency standards for withholding information from public disclosure, the proposed rule has been revised to reduce confusion between withdrawal and withholding procedures. The withdrawal procedure has been separated from the other material and placed into a new paragraph (d).

Finally, the third proposed change addresses the NRC reproducing copyrighted material contained in submittals to the Commission. The Commission has received increasing numbers of copyrighted submittals in recent years. Most of the agency's concerns in this area have been handled through *ad hoc* copyright license agreements, or under fair use exceptions to Federal copyright law. However, handling copyrighted material on a case-by-case basis is inefficient because the NRC routinely needs to reproduce copyrighted material to conduct its business. Thus, this proposed change would explicitly state the authority of the NRC to reproduce copyright material, rather than address this authority on a case-by-case basis.

Document Marking

1. Comment. On the proposed document marking changes, two commenters stated that the wording proposed for marking submitted material is unnecessarily prescriptive. The main complaint was that this requirement would result in wasted time and effort. These commenters considered it unnecessary to prescribe explicit document marking language because submitters will have an affirmative interest in making sure proprietary information is clearly marked. One commenter observed that the Commission's goal could be accomplished by using more general language, and noted that other agencies offer alternatives in their regulations regarding document marking. It was suggested that the NRC adopt marking requirements similar to those used by other agencies and allow for variation in the marking language.

Response. The Commission does not believe that requiring standardized language will result in any particular hardship on submitters, especially since it intends to use standardized marking language as a processing tool and not as a means of limiting access to the withholding request procedure. The NRC's intent in prescribing document marking language was to remove the guesswork for employees handling document intake, processing and distribution, primarily at the NRC Document Control Desk. This is expected to reduce the risk of processing errors by administrative personnel who may not recognize unfamiliar markings and consequently, might fail to accord materials the proprietary treatment desired.

This requirement would be established for the protection of the submitter and also to ease the administrative burden on the agency that would result from the necessity of individually interpreting an assortment of legends that might otherwise be received. Moreover, without the prescriptive language, there may be ambiguity about whether a submitter intended to request proprietary treatment. Unnecessary delays can result from the need to refer documents for examination or inquiry to determine the precise intent of the submitter and appropriate handling. Potential burdens associated with applying standardized language are considered to be worth the mutual effort to reduce the risk of inadvertent disclosure.

2. Comment. For the proposed document marking changes, two commenters noted that the proposed rule did not specify the consequences of failing to use the exact wording in the regulation when marking documents containing proprietary information. These commenters claimed that forfeiture of proprietary status for not using the exact words prescribed in the regulation would be overly harsh.

Response. The NRC would not impose a penalty for failure to use the precise wording prescribed. In the preamble of the earlier proposed rule, the Commission did state that it ''would not be accountable for the public release of a document that is not marked in accordance with the Commission's regulations.'' This does not imply forfeiture of proprietary status, nor impose any other penalty for failure to follow the precise format. It is meant only to convey notice that the Commission does not assume responsibility for any unintended consequences resulting from a submitter's failure to comply with the regulatory standards. Naturally, the NRC would not intentionally release such documents, but there is a heightened possibility of potential inadvertent disclosure for proprietary information that is not adequately identified. Language substantially similar to that prescribed would be equally acceptable. The point is not to enforce a standard rigidly for its own sake, but to afford appropriate protection to submitters' confidential information, as economically and efficiently as possible. The NRC would work with submitters, as it always has, to resolve any discrepancies of which it was aware within a particular request.

Document Return

3. Comment. The one comment that was virtually universal concerned the proposed additional exceptions limiting document withdrawal because the existing rule and the original proposed rule seemed to associate document retention directly with document disclosure. Commenters were overwhelmingly concerned with the potential negative impact of document disclosure on affected parties' competitive positions within the nuclear power industry, domestic and international. Specifically, the thrust of comments in this category was that the proposed revision would reduce the protections against the release of proprietary information, increasing the risk that proprietary information would be disclosed. Commenters objected that this would undermine important public policy interests expressed in some of the underlying statutory authority for 10 CFR 2.790.

Some commenters asserted that the proposed changes would have the effect of limiting the availability of technical information to the NRC and thereby impair the Commission's review process. In addition, these commenters

contended that the proposed changes would discourage private research and development and hinder voluntary reporting to the Commission. Some of these commenters mentioned concern over a potential adverse effect on the national security interest underlying technology transfer constraints in 10 CFR part 810, issued by the Department of Energy.

Response. The additional proposed exceptions to the right of withdrawal will not result in reduced protection for proprietary information. The proposed rule does not narrow the criteria for qualifying information as proprietary, which is the threshold for withholding information from public disclosure under applicable law. Information that currently qualifies as proprietary still would qualify as proprietary after the rule is revised and would face no greater risk of disclosure than it did before. If anything, the advent of broader criteria for proprietary information, under the ''voluntary'' submittal standard of *Critical Mass*, may mean that increasing amounts of information might be afforded protection from disclosure. *Critical Mass Energy Project* v. *NRC*, 975 F. 2d 871 (D.C. Cir. 1992), cert. denied, 507 U.S. 984 (1993).

The NRC recognizes the competing public policy tensions inherent in balancing the economic interests of private businesses against the public's right to be informed of the basis for official government actions. Qualifying information will continue to receive protection, except, as has always been the case, where the Commission makes a determination that the right of the public to be ''fully apprised as to the bases for and effects of a proposed action outweighs the demonstrated concern for protection of a competitive position'' (10 CFR 2.790(b)(5)(i)). It is noted, however, that based on past history, the Commission has rarely disclosed information over the objection of a submitter. The NRC is confident that the additional proposed exceptions to the return of submitted documents will neither result in a reduction in the quantity and quality of technical information it receives from outside, nor impact private research and development, since the exceptions do not affect the proprietary determination process. Consequently, the Commission would not expect its review process to be impaired, nor does it believe implementation of the additional exceptions will hinder voluntary reporting. Indeed, the Commission's support of voluntary reporting in the *Critical Mass* case has ensured the continued vitality of that practice.

Regarding the observation about a potential adverse effect on the national security interest underlying technology transfer constraints in 10 CFR 810.10, this provision relates to the production of special nuclear material by ''all persons subject to the jurisdiction of the United States who engage directly or indirectly in the production of special nuclear material outside the United States.'' By its own terms, the Department of Energy rule, 10 CFR 810.2(d), does not apply to exports licensed by the NRC. Although 10 CFR 810.10(b) provides for consultation with the NRC, among others, on the question of approving an application for specific authorization under Part 810, the determination is made by the Secretary of Energy. Thus, the issue of potential adverse affect on the national security interest underlying the technology transfer constraints of 10 CFR Part 810 is neither within the purview of 10 CFR 2.790, nor the jurisdiction of the NRC, and is not relevant to this rulemaking. We note, however, that the proposed changes will not affect our ability to engage in a free exchange of views with DOE or other agencies.

4. Comment. Some of the commenters declared that the proposed exceptions exceed governing law, are not based on corresponding changes in statutory language, and are not reflected in other agencies' regulations. Two commenters stated that the ''FOIA capture'' exception expressed in the proposed rule should not be adopted because the proposed exception was not mandated by the FOIA statute. These commenters contended that the law in this area was ambiguous, and that the Commission's reliance upon *General Electric Co.* v. *NRC*, 750 F. 2d 1394 (7th Cir. 1984), was therefore misplaced. Finally, these commenters asserted that the NRC itself argued opposite positions regarding a submitter's right to withdrawal of proprietary information in *General Electric* and in *Westinghouse Electric Corp.* v. *NRC,* 555 F. 2d 82 (3d Cir. 1977).

Response. This comment suggests that the Commission may not limit return of documents without an explicit statutory mandate. But it is appropriate to consider relevant case law when promulgating regulations bearing on the administrative functioning of the agency. We emphasize that the agency must retain possession of documents under certain circumstances, such as when they are subject to an FOIA request. The Supreme Court articulated the legal principle that a document constitutes an agency record subject to the FOIA when it meets a two-part test: (1) the document is created or obtained by the agency; and (2) it is under agency control at the time of the FOIA request. *U.S. Department of Justice* v. *Tax Analysts*, 492 U.S. 136 (1989). Accordingly, the second part of this test (the timing of receipt of the request) is critical to determining the status of the document as an agency record that must be handled in accordance with statutory requirements. When read together with the *Spannaus* decision, which sets forth the statute of limitations for appealing the denial of information requested under FOIA, these decisions obligate the Commission to preserve and retain the records for the duration of that period in the event of legal action. *Spannaus* v. *Department of Justice*, 643 F. Supp. 698 (D.D.C. 1986), *aff'd*, 824 F. 2d 52 (D.C. Cir. 1987). The effect of this proposed rule change is to give clearer notice to persons contemplating submittals to the NRC of the potential limitations on the agency's ability to honor certain requests for return of documents.

The Commission disagrees with the commenters' characterization of the agency's position in *General Electric* and *Westinghouse Electric Corp* and with the suggestion that the two cases created ambiguity in the law. In fact, the cases decided different issues. The *General Electric* case concerned the issue of document return when the document had been captured by an FOIA request, whereas the *Westinghouse* case involved the issue of proprietary information disclosure. In *General Electric*, the NRC argued that the right of withdrawal by the submitter was inapplicable in the face of an FOIA request for the document. This position, that the right to document return is inapplicable once an FOIA request is received, was upheld by the court in *General Electric Co.*, 750 F. 2d 1394, 1399 (7th Cir. 1984). Therefore, contrary to the commenter's assertion, the Commission's reliance on *General Electric Co.* v. *NRC* is well-placed, in that the *General Electric* opinion is squarely on point with the Commission's action in limiting the right of withdrawal when a document is subject to an FOIA request.

The *Westinghouse* case dealt with the agency's authority to amend its rules of practice under 10 CFR 2.790 setting forth tests for discretionary disclosure of proprietary information. The court upheld the NRC's establishment of these disclosure criteria. That judicial decision did not address the ''FOIA capture'' issue and thus is not relevant to the resolution of these comments.

Finally, the Commission is not persuaded that its regulations need to be based on the rules of other agencies, nor that it should act only after other

agencies have promulgated similar rules. The Commission, as part of its commitment to be a transparent regulator, will continue to provide notice of its practices by modifying its regulations when appropriate.

5. Comment. One commenter charged that the proposed changes make no distinction between documents that the Commission requires applicants, licensees, or others to submit, which are subject to the disclosure criteria set forth in *National Parks*. A suggestion was made that the rule be revised to distinguish between voluntary and ''mandatory'' submittals to reflect the dichotomy in standards applied to the proprietary determination for these documents.

Response. FOIA exemption 4 authorizes agencies to withhold from public disclosure ''trade secrets and commercial or financial information obtained from a person and privileged or confidential'' (5 U.S.C. 552(b)(4)). Until the *Critical Mass* case, the test for whether information could be withheld as confidential under exemption 4 was two-pronged: disclosure had to be likely either to impair the Government's ability to obtain information in the future or to cause substantial harm to the competitive position of the submitter. *National Parks & Conservation Association* v. *Morton,* 498 F. 2d 765 (D.C. Cir. 1974). In *Critical Mass,* the court established a new and broader standard of categorical protection for information voluntarily submitted to an agency. For such information, the court found that there is a governmental interest to be protected, namely that of maintaining the continued and full availability of the information to the agency. In addition, the court held that the exemption also recognizes the submitter's interest in protecting information that ''for whatever reason, 'would customarily not be released to the public by the person from whom it was obtained'.'' *Id.* at 878 (citing *Sterling Drug, Inc.* v. *FTC,* 450 F. 2d 698, 709 (D.C. Cir. 1971)). Thus, the court found that there was broad protection for voluntarily submitted information, provided it is not customarily disclosed to the public by the submitter.

The Commission does not consider it necessary to incorporate a specific standard for voluntarily submitted information because the proposed changes do not purport to alter the standards for withholding proprietary information. Moreover, the regulatory basis for withholding is whether information is determined to be proprietary, by whatever legal criteria that may be applicable. Section 2.790 is written in such a way as to accommodate the applicable legal criteria. The fundamental premise that proprietary information may be withheld from public disclosure would remain valid under the proposed rule. The information required of submitters requesting confidentiality, under affidavit, addresses all matters the Commission must consider in making the determination of whether information is entitled to proprietary status, under the applicable legal standard, whether the submittal is voluntary or mandatory. Any information provided by the submitter that adequately supports a withholding request under the existing rule will easily satisfy the ''voluntary'' standard, which is less demanding. All the information required to be addressed in the affidavit is relevant to the Commission's consideration of the withholding request. Consequently, the Commission believes it is reasonable to have a rule that does not connect itself excessively to particular criteria, as any changes in the criteria would then necessitate further revisions to the rule.

6. Comment. One commenter noted that the regulations should incorporate the predisclosure notification procedures required by Executive Order (E.O.) 12600.

Response. E.O. 12600 on Predisclosure Notification Procedures for Confidential Commercial Information provides submitters certain procedural rights in potential ''reverse'' FOIA situations, i.e., where an individual seeks to prevent an agency from publicly disclosing submitted information. E.O. 12600 requires Federal agencies to establish certain predisclosure notification procedures, including affording submitters an opportunity to object to disclosure of the affected material. Again, the proposed changes do not purport to alter the standards for withholding or disclosing information. Thus, this issue is not pertinent to the proposed rule change. We note, however, that the Commission has had such procedures in place for some time. While the E.O. does not mandate incorporation of these procedures into agencies' regulations, paragraph (c) of both the currently codified requirements in 10 CFR 2.790 and this proposed rule incorporate notice provisions and contemplate opportunity to object, as well as provide for explanation of reasons for a Commission decision to deny a withholding request.

In addition, the NRC includes ''special procedures for processing records containing proprietary information'' in its FOIA Handbook under NRC Management Directive 3.1, ''Freedom of Information Act.'' These procedures require the NRC staff to notify submitters of proposed disclosures and afford an opportunity to object, as well as provide a written explanation of the Commission's decision, in the event of a disagreement between submitters and the NRC. Thus, the Commission implemented the notification provisions of E.O. 12600 by incorporating such procedures into regulations and its internal guidance.

7. Comment. Some commenters objected to the potential for disclosure of proprietary information based on an NRC balancing test. The commenters claimed that balancing is not within the Commission's authority once a determination is made that the submitted information is proprietary and falls within exemption 4 of FOIA. Rather, the commenters asserted, the balance has already been struck by Congress in favor of the protection of proprietary information.

Response. The prerogative of balancing a proprietary interest against the public's interest in understanding the Commission's actions is a right already reserved to the Commission in § 2.790(b)(5) of the regulation. The Commission is not proposing any changes to this section. Current regulations provide for this authority and it has not been enhanced or expanded by the proposed changes. Thus, this is not at issue in the proposed rule change. However, there is nothing in the FOIA statute, FOIA case law, or the Trade Secrets Act, 18 U.S.C. section 1905, that prohibits a balancing of this type.

Moreover, the proprietary determination decisionmaking process provides several opportunities for the submitter to make a case for withholding information from public disclosure. As a practical matter, the final determination may be the outcome of a series of exchanges between the agency and the submitter, usually resulting in protecting the truly sensitive and confidential portions of the material, while making available enough of the rest to inform the public adequately of the vital details that the public needs to understand and inquire into the Commission's actions. Ultimately, if submitters desire official agency consideration of their voluntarily submitted material, they must operate under rules that are applied consistently to all, including information availability. Again, the Commission rarely has released proprietary information over the objection of a submitter.

8. Comment. Two commenters urged that, to protect proprietary information adequately, the NRC should implement presubmission review procedures during which a document would not be considered an ''agency record'' under the FOIA, the Federal Advisory Committee Act (FACA), or the Sunshine Act. The purpose of the procedure would be to allow submitters an absolute right to withdraw documents for which proprietary protection is denied during the ''presubmission'' period. These commenters noted that other agencies, namely the Environmental Protection Agency (EPA) and the Food and Drug Administration (FDA), allow for presubmission review of requests for confidential treatment of proprietary information in their regulations and thus, provide precedent for such a regime.

One commenter stated that the proposed changes accentuate a problem on the timing of proprietary determinations by the Commission. Specifically, the concern was that neither the existing regulation nor the 1992 proposed version of the regulation contains a provision requiring that proprietary determinations be made before the information is circulated within the Commission. According to the commenter, this lack of an explicit timing requirement is more significant in the proposed changes, since the amendments will further reduce the right of submitters to withdraw documents. This commenter considers the lack of a timing requirement to expose the industry to long periods of uncertainty regarding submitted proprietary information, which could lead some parties to be more reluctant to submit information voluntarily to the NRC. Therefore, this commenter suggested that the NRC include definite time limits in its regulations for proprietary determinations with the option for the submitter to retrieve documents denied protection before they are circulated within the Commission.

Response. These comments seek a period of delay before a submitted document would have legal status as an agency record. The proposed changes do not purport to alter the definition of ''agency record,'' so this comment is outside the scope of the proposed changes. In the Commission's view, however, the scheme suggested by the comments would imply that documents may be tendered to the Commission on an informal basis, and a decision deferred about whether to submit them for official action pending the outcome of the proprietary review process, including a Commission determination on whether to grant the withholding request.

The Commission does not believe that implementing presubmission review procedures would produce the commenters' desired legal effect of forestalling a document becoming an agency record. The EPA and FDA regulations referenced in these comments do not provide absolute protection during the presubmission period. The EPA regulations specifically provide for ''capture'' by an FOIA request. *See* 40 CFR 2.206(d). The FDA regulations suggest that, for qualifying voluntary submittals, disclosure only will be made pursuant to court order, but this rule implies that the document will remain in the hands of the agency, in order to allow compliance with any applicable court order. *See* 21 CFR 20.44. This corresponds to the requirement established by FOIA case law that records within the physical custody and control of the agency constitute ''agency records.'' *Tax Analysts* v. *DOJ,* 492 U.S. 136, 146 (1989); *Wolfe* v. *HHS,* 711 F. 2d, 1077, 1079–1082 (D.C. Cir. 1983). (This presumes that the document has not been withdrawn before it is otherwise subject to the jurisdiction of the court, as when official demand is made for the document, in which event it becomes the subject of an FOIA request while in the agency's custody.) Even for these agencies, the presubmission review procedures are limited to voluntary submittals.

The proposition that the ''capture'' of documents as ''agency records'' would be alleviated by adoption of presubmission procedures also misses a point already tested in court: at least one court has held that an agency may not exclude documents from the legal ambit of the FOIA through presubmission procedures. *Teich* v. *Food and Drug Administration*, 751 F. Supp. 243 (D.D.C. 1990). If presubmission procedures were seen as an attempt to evade or circumvent FOIA, the Commission would not expect them to survive judicial scrutiny. In fact, the court discredited procedures similar to those proposed by the commenter, stating that ''presubmission review is nothing more than an attempt to get around the FOIA.'' *Id.* at 248. This alone would be enough to reject this comment. Further, implementation of deliberate obstacles to public information access would erode confidence in the NRC.

Agency timeliness in reviewing submittals and the imposition of time limits on the agency's proprietary determination process are not within the scope of this rulemaking. Nonetheless, it is the Commission's expectation that the staff will promptly address requests for either withholding or return of proprietary documents. Moreover, if proprietary protection is to be denied, the submitter will be so informed before the document is made available to the public. Such documents may be withdrawn in some circumstances, as provided in the regulations. However, this does not extend to submitters any right to withdraw documents whose return is restricted.

9. Comment. For the Commission meeting exception restricting return of documents, two commenters stated that there is no need for the exception because provisions of the Sunshine Act allow for meetings to be closed, should proprietary information be discussed in the meeting.

Response. The Commission does not take issue with the fact that the Sunshine Act permits closed meetings for discussion of proprietary information and for appropriate protection of material exempted from disclosure under the statute. Commission procedures acknowledge the need to provide a confidential forum for the discussion of proprietary information. (As noted in the Supplementary Information of the 1992 proposed rule,10 CFR 9.104 provides for meetings to be closed where proprietary information is discussed.) The pertinent exception in the proposed changes, however, addresses materials used for open meetings. Presumably, if the meeting were open, the information in question (or at least the fact of its existence) already will have been disclosed there. This proposed change is merely to conform the regulations with existing Commission practice, because, as with the FOIA and FACA withdrawal exceptions, the agency is obligated to preserve the records of its official transactions. Thus, it is not an issue of document protection but of document retention. The Commission is not minimizing the concerns manifested by the comments about the need to protect proprietary information and Commission regulations do provide for protection of proprietary information.

10. Comment. Some commenters stated that, for the proposed Advisory Committee exception, the ''absolute bar'' to the return of documents submitted to an Agency Advisory Committee is not required by the FACA, in that the FACA recognizes the FOIA exemptions and procedures. One commenter suggested that the regulations explicitly provide that proprietary documents used by

Commission Advisory Committees will not be disclosed to the public.

Response. The FACA provides for meetings to be open to the public and for the opportunity to appear before or file statements with the committee, as well as for filing detailed records of each meeting, including minutes, complete and accurate discussion of matters discussed and conclusions reached, and copies of all reports received, issued or approved. (5 U.S.C. App. 2, section 10.) By its own terms, FACA sets up a requirement for public access to committee deliberations, including the records of those meetings and documents submitted for use in those meetings. Thus, the FACA clearly imposes an obligation on the Commission for retention of committee records and for public access to those documents not exempt from disclosure. Indeed, the language supports the Commission's position that it may refuse to return documents it considers itself bound to retain.

In addition, the FACA provides that all papers or materials ''made available to or prepared for or by each advisory committee shall be made available for public inspection and copying,'' subject to the FOIA and the exemptions therein. (5 U.S.C. app. 2, section 10(b).) Hence, the comment that FACA recognizes the FOIA certainly is correct; however, it does not follow that application of FOIA exemptions to withhold documents from public disclosure equates to the freedom to return the documents at will. While the FOIA does not contain an express prohibition against return of documents, fundamental FOIA principles developed through case law do limit the agency's ability to return documents subject to an FOIA request. This was explained in response to an earlier comment, i.e., the situation when the Commission is precluded from returning documents captured by an FOIA request. Under the FOIA, the Commission is required to preserve records through the potential period for administrative appeals, and court litigation, should they arise. *Spannaus* v. *Department of Justice*, 643 F. Supp. 698 (D.D.C. 1986), *aff'd,* 824 F. 2d 52 (D.C. Cir. 1987). Ultimately, the Commission must work within the legal framework of the statutes and pertinent case law for the handling and treatment of agency records.

It should be stressed that this exception has no bearing on the nature or quality of documents subject to ultimate protection from public disclosure, only on the question of which documents are subject to withdrawal. Even then, the demonstration (and acceptance by the Commission) of the proprietary character of information carries heavy weight in the Commission's decision whether to make information publicly available. The Commission does not override proprietary determinations lightly or without due deference to the private interests at stake.

11. Comment. For the Commission meeting exception, two commenters stated that the wording in the proposed changes was narrower than the discussion of this exception in the **SUPPLEMENTARY INFORMATION.** The commenters suggested that the description in the **SUPPLEMENTARY INFORMATION** is too vague and confusing, in that it refers to documents considered ''in connection with'' an open meeting versus the information actually discussed at an open Commission meeting. Thus, they sought clarification of the Commission's intent regarding this exception.

Response. This comment highlights a discrepancy between the intent expressed in the **SUPPLEMENTARY INFORMATION** and the actual text of the earlier proposed changes. The text for the earlier version of this exception adopted language directly from the Sunshine Act in an effort to employ the standards set for information availability under that statute, which provides basic rights of public observation in open meetings and procedures for documentation of information withheld under its exemptions. The statutory phrase ''considered in connection with any [Commission] action,'' however, applies to the identification of information withheld under Sunshine Act exemptions for documenting closed Commission meetings. 5 U.S.C. section 552b (f)(1). Detailed procedures for such documentation are found in the agency's regulations at 10 CFR, Subpart C of Part 9 and are not within the scope of this proposed revision.

The NRC's intent was to apply this withdrawal exception to documents being actively addressed or made available in open Commission meetings, subject to the same openness requirements as the meetings themselves. Thus, borrowing the statutory phrase ''considered in connection with'' for the **SUPPLEMENTARY INFORMATION** may have been misleading, was, at the least, ambiguous, and did not capture the Commission's true objective. The Commission's goal was to place workable parameters on the retention requirement by establishing the exception for documents whose contents were revealed in an open meeting or upon which the Commission relied during an open meeting. Thus, the new proposed exception eliminates the inconsistency of the earlier version and reflects the actual intent of the Commission by adoption of a standard that is not excessively broad but captures the requirement for open meetings, since the availability of those documents must be consistent with the statutory requirements of the Sunshine Act.

Material Subject to Copyright Protection

12. Comment. Those commenters who addressed the proposed addition of a copyright provision supported its intent as explained in the preamble of the proposed rule. However, two of the commenters observed that the intent explained in the preamble was not reflected in the actual wording of the proposed rule, particularly with respect to subsequent reproduction of copyrighted documents outside the agency, copyright permission notice on the face of documents, or limitation on the number of copies distributed in response to a request. These commenters stated that, unless modified to comport with the preamble statements, the language of the proposed rule appeared to violate the Federal Copyright Act. Finally, one of the commenters asserted that the proposed rule was ambiguous and difficult to understand.

Response. The Commission acknowledges that copyright matters can be complex. It has attempted to address the issue in a straightforward manner and establish a comprehensible rule. Additionally, the Commission acknowledges that the regulation is not directed toward each and every matter mentioned in the preamble, but it does not find it necessary to include this level of detail in the regulation. In particular, the preamble portion of the proposed rule stated that:

> [t]he proposed regulation authorizes only the NRC to copy and distribute the document and does not extend these rights to other persons receiving copies from NRC. The proposed rule provides that if the document bears a copyright notice or is accompanied by an explicit statement that the document is protected under the copyright law, a notice would be placed on the document indicating that the NRC has the authority to copy the document; however, all copyright markings contained on the submitted document would be retained. * * *
>
> * * * [W]ith respect to the distribution of documents to the public, only one copy per request will be made of documents bearing a copyright notice or documents accompanied by an explicit statement indicating that the document is protected under the copyright law.

The Commission deemed it important that the preamble set forth certain matters of document processing handled under internal administrative procedures, to explain its rationale for the underlying regulation and to reassure submitters that it would not run roughshod over the rights of copyright holders. However, while the preamble may reflect additional details about the subject that are relevant to the process, it does not amount to a legal requirement imposed by the regulation. Moreover, the internal procedures have no effect on the legal rights or responsibilities of any party outside the NRC. They neither purport to expand or restrict the rights of non-NRC parties vis-a-vis copyright holders.

These comments may reflect the mistaken impression that incorporation in the regulation would somehow enhance copyright enforceability or assist in the prosecution of infringement actions. But, under copyright law, reproduction permission comes from the copyright holder; the Commission cannot extend authority for subsequent reproduction of copies without the express permission of the copyright holder. The legal basis for this limitation is independent of the Commission's statement in the preamble. Including this provision in the regulation will make it no more nor less legally binding than it already is by operation of law. (Under the Berne Convention Implementation Act of 1988, P.L. 100–568, materials created after March 1, 1989, no longer require a copyright notice to be protected by copyright law.) Thus, rather than contravening the Federal Copyright Act, the language of the regulation is fully consistent with applicable legal requirements.

13. Comment. One commenter who supported the proposed changes on copyright observed that objections to these changes might signal a desire to ''discourage public scrutiny and * * * public participation in the design certification process.'' This commenter also thought the NRC should consider declaring copyrighted materials used as exhibits in NRC proceedings to be a ''fair use'' for copyright purposes.

Response. This comment demonstrates the basic tension between the public's expectation of access to information in the hands of government and the submitter's desire to control access to information contained in the documents. The main purpose of this proposed change is to reconcile the Commission's regulatory responsibilities, including adequate public notice of the basis for its decisions, with the fact that submittals to the Commission increasingly have been accompanied by notice of copyright restrictions. However, there seems to be some confusion about restricting access to information through copyright authority. Copyright authority does not limit release or dissemination of the material in question; essentially, it only restricts reproducing the material. It is not an appropriate tool to attempt to shield information from disclosure. That is the separate and independent purpose of the withholding request procedure that occupies most of the coverage of 10 CFR 2.790.

As to fair use: under copyright law, protection extends to various items, including ''literary works,'' a term defined to include ''works * * * expressed in words, numbers or other verbal or numerical symbols * * * regardless of the * * * material objects * * * in which they are embodied'' (17 U.S.C. section 101). Among other rights, the copyright holder has the exclusive right to copy the work and the exclusive right to display the work (17 U.S.C. section 106). However, the owner of a lawful copy has the right to display the work to persons present where the copy is located (17 U.S.C. section 109). There are a number of other protections afforded to copyright holders and a large number of other specific grants of authority to holders of copies of the material, including, most notably, the ''fair use'' exception (17 U.S.C. section 107). The specific determination whether a particular use constitutes ''fair use'' is very subjective; however, it may include reproduction for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. ''Fair use'' is determined by considering four statutory factors:

- The purpose and character of the use, such as commercial nature versus non-profit educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used compared to the copyrighted work as a whole; and
- The effect upon the potential market for, or value of, the copyrighted work.

The Commission's exercise of its responsibility to reproduce sufficient copies of a document to carry out its regulatory mission and public information obligations is a reasonable application of the ''fair use'' limitation on exclusive rights under Federal copyright law. However, the Commission has no authority to establish the sort of entitlement requested by the commenter to the detriment of copyright holders. The sort of blanket authorization advocated by the commenter would require a legislative amendment of Federal copyright law to expand the borders of ''fair use,'' because fair use is established by statute, as interpreted by case law. Only the Congress can make a categorical exemption for a particular application and it has not done this. That is not to say that the fair use doctrine would not be available to support the application described for exhibits in NRC proceedings, but this would need to be supported by its own facts on a case-by-case basis and justified under applicable legal standards, as in any other situation.

Document Release

The Commission proposes to change, in the revised subsection 2.790(c), the time period for release of documents whose request for withholding was denied from not less than thirty days from notification of denial of withholding to a ''reasonable time''. The Commission has found through past experience that more flexibility in this area is needed. In some instances, the public interest is best served by a more expeditious release of documents. The Commission expects that it will continue to provide a thirty-day waiting period for most documents, but altering the rule will allow the Commission the flexibility to release documents more expeditiously should, for example, the submitter consent to an earlier release date or the Commission determine that an earlier release date is needed to fulfill the Commission's public health and safety mandate. In all cases the time period will be long enough to allow a submitter to seek judicial relief.

IV. Plain Language

The Presidential Memorandum dated June 1, 1998, entitled, ''Plain Language in Government Writing,'' directed that the Federal government's writing be in plain language (63 FR 31883; June 10, 1998). The NRC specifically requests comments on this proposed rule with respect to the clarity and effectiveness of the language used. Such comments may be sent to the NRC as indicated under the **ADDRESSES** heading.

V. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Pub. L. 104–113, requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless using such a standard is inconsistent with applicable law or otherwise impractical. In the proposed rule the Commission is codifying its practices regarding the treatment of proprietary

information and copyrighted material. This action does not constitute the establishment of a standard that establishes generally applicable requirements, and the use of a voluntary consensus standard is not applicable.

VI. Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental impact assessment has been prepared for the proposed regulation. By its very nature, this regulatory action does not affect the environment, and therefore, no environmental justice issues are raised.

VII. Paperwork Reduction Act Statement

This proposed rule contains no information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

VIII. Regulatory Analysis

This proposed rule seeks to bring NRC's regulations concerning the availability of official records into conformance with existing case law and current Commission practice. The current regulations provide submitters of proprietary information the limited right to have documents returned upon request. This proposed rule informs the public of document marking requirements for submitted information, of four additional exceptions to a submitter's limited right to withdraw submitted information, and of current Commission practice concerning the reproduction and distribution of submitted copyright material. The proposed rule reflects current Commission administrative and procedural practice and would have only minor impact on the benefits or costs associated with the Commission's regulations. Some submitters currently mark documents consistent with the requirements in this proposed rule. For others, this proposed rule would shift some responsibility to the submitter for ensuring that its confidential material is identified and protected. It also codifies the Commission's practices regarding its dissemination of copyrighted material.

IX. Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed rule would advise of new document marking requirements for submitted information, clarify the right of the submitter of information to have certain information returned on request, and provide notice of Commission practice concerning the reproduction and distribution of copyrighted material. The proposed rule does not impose any obligation or have any financial impact on entities, including any regulated entities that may be ''small entities,'' as defined by the Regulatory Flexibility Act (5 U.S.C. 601(3)), or under the Size Standards adopted by the NRC in 10 CFR 2.810.

X. Backfit Analysis

The NRC has determined that a backfit analysis is not required for this proposed rule because these amendments do not include any provisions that would impose backfits as defined in 10 CFR Chapter 1.

List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalties, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 2.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS AND ISSUANCE OF ORDERS

1. The authority citation for Part 2 continues to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87–615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97–425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)), sec. 102, Pub. L. 91–190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183i, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200–2.206 also issued under secs. 161b, i, o, 182, 186, 234, 68 Stat. 948–951, 955, 83 Stat. 444, as amended (42 U.S.C. 2201 (b), (i), (o), 2236, 2282); sec. 206, 88 Stat 1246 (42 U.S.C. 5846). Section 2.205(j) also issued under Pub. L. 101–410, 104 Stat. 90, as amended by section 3100(s), Pub. L. 104–134, 110 Stat. 1321–1373 (28 U.S.C. 2461 note). Sections 2.600–2.606 also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.764 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85–256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Subpart M also issued under sec. 184 (42 U.S.C. 2234) and sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91–560, 84 Stat. 1473 (42 U.S.C. 2135).

2. Section 2.790 is amended by revising the introductory text of paragraph (a); adding introductory text to paragraph (b); revising paragraphs (b)(1) and (c); redesignating paragraph (e) as paragraph (f); and adding new paragraph (e), to read as follows:

§ 2.790 Public inspections, exemptions, requests for withholding.

(a) Subject to the provisions of paragraphs (b), (c), (d), (e), and (f) of this section, final NRC records and documents, including but not limited to correspondence to and from the NRC regarding the issuance, denial, amendment, transfer, renewal, modification, suspension, revocation, or violation of a license, permit, or order, or regarding a rulemaking proceeding subject to this part shall not, in the absence of a compelling reason for nondisclosure after a balancing of the interests of the person or agency urging nondisclosure and the public interest in disclosure, be exempt from disclosure and will be made available for inspection and copying at the NRC Web site, *http://www.nrc.gov*, and/or at the NRC Public Document Room, except for matters that are:

* * * * *

(b) The procedures in this section must be followed by anyone submitting a document to the NRC who seeks to have the document, or a portion of it, withheld from public disclosure because it contains trade secrets, privileged or confidential commercial or financial information, or personal privacy information.

(1) The submitter shall request withholding at the time the document is

submitted and shall comply with the document marking and affidavit requirements set forth in this paragraph. The NRC has no obligation to review documents not so marked to determine whether they contain information eligible for withholding under paragraph (a) of this section. Any documents not so marked may be made available to the public at the NRC Website, *http://www.nrc.gov.*

(i) The submitter shall ensure that the document containing information sought to be withheld is marked as follows:

(A) The top of the first page of the document and the top of each page containing such information must be marked ''Confidential Information Submitted Under 10 CFR 2.790,'' to indicate it contains information the submitter seeks to have withheld.

(B) Each page containing information sought to be withheld from public disclosure must indicate, adjacent to the information, or at the top if the entire page is affected, the basis (i.e., trade secret, personal privacy, etc.) for proposing that the information be withheld from public disclosure under paragraph (a) of this section.

(ii) The request for withholding must be accompanied by an affidavit that—

(A) Identifies the document or part sought to be withheld;

(B) Identifies the official position of the person making the affidavit;

(C) Declares the basis for proposing the information be withheld, encompassing considerations set forth in § 2.790(a);

(D) Includes a specific statement of the harm that would result if the information sought to be withheld is disclosed to the public; and

(E) Indicates the location(s) in the document of all information sought to be withheld.

(iii) In addition, an affidavit accompanying a withholding request based on paragraph (a)(4) of this section must contain a full statement of the reason for claiming the information should be withheld from public disclosure. Such statement shall address with specificity the considerations listed in paragraph (b)(4) of this section. In the case of an affidavit submitted by a company, the affidavit shall be executed by an officer or upper-level management official who has been specifically delegated the function of reviewing the information sought to be withheld and authorized to apply for its withholding on behalf of the company. The affidavit shall be executed by the owner of the information, even though the information sought to be withheld is submitted to the Commission by another person. The application and affidavit shall be submitted at the time of filing the information sought to be withheld. The information sought to be withheld shall be incorporated, as far as possible, into a separate paper. The affiant must designate with appropriate markings information submitted in the affidavit as a trade secret, or confidential or privileged commercial or financial information within the meaning of § 9.17(a)(4) of this chapter, or confidential information within the meaning of § 9.17(a)(6) of this chapter, and such information shall be subject to disclosure only in accordance with the provisions of § 9.19 of this chapter.

* * * * *

(c) The Commission either may grant or deny a request for withholding under this section.

(1) If the request is granted, the Commission will notify the submitter of its determination to withhold the information from public disclosure.

(2) If the Commission denies a request for withholding under this section, it will provide the submitter with a statement of reasons for that determination. This decision will specify the date, which will be a reasonable time thereafter, when the document will be available at the NRC Website, *http://www.nrc.gov.* The document will not be returned to the submitter.

(3) Whenever a submitter desires to withdraw a document from Commission consideration, it may request return of the document, and the document will be returned unless the information—

(i) Forms part of the basis of an official agency decision, including but not limited to, a rulemaking proceeding or licensing activity;

(ii) Is contained in a document that was made available to or prepared for an NRC advisory committee;

(iii) Was revealed, or relied upon, in an open Commission meeting held in accordance with 10 CFR part 9, subpart C;

(iv) Has been requested in a Freedom of Information Act request; or

(v) Has been obtained during the course of an investigation conducted by the NRC Office of Investigations.

* * * * *

(e) Submitting information to NRC for consideration in connection with NRC licensing or regulatory activities shall be deemed to constitute authority for the NRC to reproduce and to distribute sufficient copies to carry out the Commission's official responsibilities. The Commission may waive the requirements of this paragraph on request, or on its own initiative, in circumstances the Commission deems appropriate.

(1) Any person submitting information shall—

(i) Be deemed to represent to the NRC that he or she has legal authority to submit the document and to permit NRC to reproduce and distribute the document; and

(ii) Hold the Commission harmless from damages that result from the Commission's reproduction or distribution of the documents.

(2) Documents will be returned to the submitter and will not be considered by the Commission in the absence of a waiver of this regulation in the following types of situations:

(i) A document bearing a copyright notice not accompanied by a statement authorizing the Commission to make copies of the material in accordance with this section;

(ii) A document containing or accompanied by a statement restricting the copying of the material; or

(iii) A document that bears or is accompanied by a statement representing that the submitter lacks authority to permit NRC to copy and distribute the document.

* * * * *

Dated at Rockville, Maryland, this 11th day of October, 2001.

For the Nuclear Regulatory Commission.

Andrew L. Bates,

Acting Secretary of the Commission.

[FR Doc. 01–26114 Filed 10–16–01; 8:45 am]

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DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 40

[Notice No. 931]

RIN 1512–AC32

Elimination of Application To Remove Tobacco Products From Manufacturer's Premises For Experimental Purposes (2000R–353P)

AGENCY: Bureau of Alcohol, Tobacco and Firearms (ATF), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule eliminates the requirements that manufacturers of tobacco products apply to ATF to remove tobacco products from their factories in bond for experimental purposes and maintain the approved applications for their records. In place of these requirements, manufacturers of