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Tuesday
November 28, 1989

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

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WHAT IT IS AND HOW TO USE IT

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

WHO: The Office of the Federal Register.

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

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

WASHINGTON, DC

WHEN: December 7, at 9:00 a.m.
WHERE: Office of the Federal Register, First Floor Conference Room, 1100 L Street NW., Washington, DC.
RESERVATIONS: 202-523-5240.

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Rules and Regulations

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

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 287

[INS No. 1224-89]

Field Officers; Powers and Duties

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This final rule will permit proof of official records of Canada to be treated in an identical manner as domestic records. This will help expedite the obtaining of records for use in a variety of Service proceedings such as deportation, exclusion and recission. The Service is attempting to accelerate the obtaining of records to quicken the removal of criminal aliens who are citizens or nationals of Canada. In many instances, this will save the Service detention costs while awaiting the receipt of documents authenticated in accordance with 8 CFR 287.6(b).

EFFECTIVE DATE: November 28, 1989.

FOR FURTHER INFORMATION CONTACT: Ira L. Frank, Senior Special Agent, Investigations Division, Room 7240, Immigration and Naturalization Service, 425 I Street NW., Washington, DC 20536, Telephone: (202) 786-4502.

SUPPLEMENTARY INFORMATION: This final rule will aid in expediting the receipt of Canadian governmental records. This is particularly important to the Service when seeking to obtain criminal convictions. Presently, records are requested by an immigration officer through an INS district office closest to the location where the records are located. When the records are received by that office, it is sent to the appropriate American consulate for authentication. It is then returned to INS to be forwarded to the officer originally requesting the record. By eliminating the authentication, one time consuming step is removed. It is deemed that the record keeping system of the Canadian governmental records—federal, provincial and local are comparable to our own and that authentication by an American consulate is an unnecessary step in the process. Shortening the time to obtain records can conserve resources by reducing the time and expense necessary to detain Canadian citizens and nationals facing expulsion from the United States because of their history of criminal conduct.

The Service published a proposed rule in the **Federal Register** on September 18, 1989 at 54 FR 38387. The comment period for the proposed rule ended on October 18, 1989. The Service received only one comment. The commenter stated that the language of the proposed rule would appear to suggest that only records from the federal government of Canada are affected. The commenter recommended that the words "issued by a Canadian governmental entity" appearing in the proposed rule be substituted by the words "issued by the Government of Canada or any political subdivision thereof." It was the intention of the Service that all Canadian governmental entities be included in the rule—federal, provincial and local. In considering the commenter's proposed language, it was felt that local governments were not political subdivisions of Canada but rather subdivisions of the provinces. An analogy might be made that the United States government could not normally interfere with a redrawing of county lines by a State absent some discriminatory purpose since the county is a subdivision of the State and not of the United States federal government. However, to alleviate any conceivable misinterpretation of the proposed rule, it has been amended to read " * * * issued by a Canadian governmental entity within the geographical boundaries of Canada * * * " which should make it clear that federal, provincial and local government documents are included within the reach of the rule.

In accordance with 5 U.S.C. 605(b), the Commissioner certifies that this rule will not have a significant economic impact on a substantial number of small entities. This is not a major rule within the meaning of section 1(b) of E.O. 12992, nor does this rule have federalism implications warranting the preparation of a Federal Assessment in accordance with E.O. 12612.

List of Subjects in 8 CFR Part 287

Administrative practice and procedure, Aliens, Subpoenas, Deportation.

Accordingly, part 287 of Chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 287—FIELD OFFICERS; POWERS AND DUTIES

1. The authority citation for part 287 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1225, 1226, 1251, 1252, 1357; 8 CFR part 2.

2. In § 287.6, a new paragraph (d) is added to read as follows:

§ 287.6 Proof of official records.

* * * * *

(d) *Canada.* In any proceedings under this chapter, an official record or entry therein, issued by a Canadian governmental entity within the geographical boundaries of Canada, when admissible for any purpose, shall be evidenced by a certified copy of the original record attested by the official having legal custody of the record or by an authorized deputy.

Dated: October 31, 1989.

Clarence M. Coster,

Associate Commissioner, Enforcement Immigration and Naturalization Service.

[FR Doc. 89-27853 Filed 11-27-89; 8:45 am]

BILLING CODE 4410-10-M

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 5

[Docket No. 89-15]

Rules, Policies, and Procedures for Corporate Activities; Receivership and Conservatorship

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: This final rule articulates, for the first time in a regulation, certain of

the factors the Office of the Comptroller of the Currency ("OCC") may consider in determining whether to appoint a receiver for a national bank. These factors are a national bank's net worth and/or its liquidity. In addition, this final rule changes the OCC's method of measuring net worth for insolvency purposes. The major change in measuring a bank's net worth is the use of equity capital, rather than primary capital. By using equity capital as the measure, a bank's allowance for loan and lease losses ("ALLL"), also known as the loan loss reserve, is excluded from the calculation of net worth. This change is intended to bring the OCC's measurement of net worth more closely in line with generally accepted accounting principles ("GAAP"). This final rule does not alter the method of determining insolvency on a liquidity basis. In adopting this amendment, the OCC does not limit its discretion to consider other factors in assessing the solvency of a national bank. Further, the OCC expects to continue its long-standing practice of satisfying itself of a bank's insolvency on a case-by-case basis, taking into account all relevant facts and circumstances involving the particular bank under consideration.

EFFECTIVE DATE: December 28, 1989.

FOR FURTHER INFORMATION CONTACT: Ferne Fishman Rubin, Attorney, Legal Advisory Services Division, (202) 447-1882, or Kennard L. Page, National Bank Examiner, Special Supervision Division, (202) 447-1719.

SUPPLEMENTARY INFORMATION:

Background

The OCC published a notice of proposed rulemaking ("NPRM") in connection with this amendment on July 5, 1989 (54 FR 28072). Subsequently, Banking Bulletin 89-26 was issued to bring the NPRM to the attention of the banking community.

The OCC is issuing this rule for two reasons. First, as 12 U.S.C. 191 is not specific as to what constitutes "insolvency," the OCC has great latitude in determining whether a national bank is insolvent. Therefore, the OCC believes it will be helpful to specify, in the form of a regulation, certain of the factors it may consider in determining insolvency. Second, the OCC wants to notify the public of a change in the method by which it will measure national banks' net worth in making insolvency determinations.

The OCC's decision to change its method of measuring a bank's net worth for the purpose of determining solvency is based upon the following considerations:

- The OCC's experience indicates that the public interest will be better served by closing a bank when the institution's equity capital has been depleted. Events during the past several years have shown that once a bank's equity capital is exhausted, the bank has virtually no chance of recovery without government or outside intervention. Recapitalization by existing ownership has been rare. Moreover, it has been the OCC's experience that permitting an institution to continue operations when its owners no longer have any financial interests at stake encourages imprudent operations, including occasional abuse of high-cost funding sources, and results in increased losses. Such continued operations also adversely affect the industry as a whole, placing healthy competitors at a disadvantage.
- The change in calculating net worth is needed to make the OCC's practices conform more directly with GAAP.
- The OCC believes that the final rule will facilitate the sale of insolvent instututions and result in savings to the Federal Deposit Insurance Corporation ("FDIC").
- The OCC believes that banks with no equity capital may experience a loss in customer confidence and therefore may not be influenced by constraints ordinarily imposed by market discipline. By using equity capital to measure a bank's net worth, such situations may occur less frequently.

Legal Discussion

(1) *Statutory Authority*. Under 12 U.S.C. 191, "[w]henever the comptroller * * * become[s] satisfied of the insolvency of a national banking association, he may * * * appoint a receiver, who shall proceed to close up such association." Case law interpreting this authority has established that the Comptroller has a great deal of discretion in reaching a determination of insolvency. *Adams* v. *Nagle*, 303 U.S. 532 (1938) ("*Adams*"); *Liberty National Bank of South Carolina* v. *McIntosh*, 16 F.2d 906 (4th Cir. 1927).

(2) *Insolvency Factors*. The factors the OCC has ordinarily considered in determining whether a national bank is insolvent are net worth and liquidity. Under the net worth factor, a national bank may be declared insolvent when its liabilities exceed its assets. *Commercial National Bank in Shreveport* v. *Connolly*, 176 F.2d 1004 (5th Cir. 1949). Under the liquidity factor, a bank may be declared insolvent when it is unable to meet its obligations as they mature. *Smith* v. *Witherow*, 102 F.2d 638 (3d Cir. 1939) ("*Smith*"); *In re Liquidation of Franklin National Bank*, 381 F. Supp. 1390 (E.D.N.Y. 1974) ("*Franklin*").

In the past, the OCC has considered these factors in declaring banks insolvent, using case-by-case analyses. *See In re Conservatorship of Wellsville National Bank*, 407 F.2d 223 (3d Cir.), *cert. denied*, 396 U.S. 832, *reh. denied*, 396 U.S. 949 (1969) ("*Wellsville*"); *Franklin*, 381 F. Supp. 1390 (E.D.N.Y. 1974) (use of either factor appropriate under 12 U.S.C. 191). A bank can be insolvent under both factors. *See Golden Pacific Bancorp* v. *Clarke*, No. 85-2384 (D.D.C. 1986), *aff'd*, 837 F.2d 809 (D.C. Cir.), *cert. denied*, 109 S. Ct. 233 (1988). The OCC is not limited to these two factors and may employ others to determine insolvency. However, this final rule discusses only the net worth and liquidity factors. In its current form, § 5.49 does not set forth any criteria for determining the insolvency of a national bank.

The Final Rule

This final rule amends the receivership provisions and deletes the conservatorship provisions of 12 CFR 5.49. Section 5.49 deals with the appointment of receivers under 12 U.S.C. 191 and conservators under 12 U.S.C. 201 *et seq.*, the Bank Conservation Act ("BCA").

On August 9, 1989, the BCA was substantially amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Public Law No. 101-73, 103 Stat. 183 ("FIRREA"). The current conservatorship provisions in § 5.49 are inconsistent with the language of the BCA, as amended. Therefore, these provisions are deleted, and the authority citation and title of the regulation are amended accordingly. The OCC may exercise its authority under the BCA without a regulation; thus, this authority is not limited or otherwise affected by the changes implemented by this regulation.

The receivership provisions of § 5.49 set forth the OCC's authority to appoint a receiver. In most cases, the OCC appoints the FDIC as receiver. *See* 12 U.S.C. 1821(c). Section 5.49 also establishes certain procedures for the payment of claims in cases in which the OCC does not appoint the FDIC as receiver.

The final rule changes the receivership provisions of § 5.49 to articulate the net worth and liquidity factors for determining national bank insolvency. In addition, this final rule establishes a new method of measuring a national bank's net worth for insolvency purposes, but does not

change the method of measuring liquidity for insolvency purposes.

Primary Capital and Equity Capital

The OCC has declared national banks insolvent on a net worth basis when primary capital is depleted, *i.e.*, when a bank's liabilities exceed its assets plus its ALLL. For this purpose, the OCC has used the definition of "primary capital" found at 12 CFR 3.2(c). The OCC has considered a bank's primary capital to be a functional substitute for its net worth. This approach has not been required by law, but has been used as an internal guideline.

With this final rule, the OCC is conforming its definition of net worth to GAAP. Now, the OCC will measure net worth as the bank's equity capital, *i.e.*, its assets minus its liabilities. The ALLL will not be counted. Thus, the OCC may declare a bank insolvent when its equity capital (rather than its primary capital) is exhausted. For the purpose of determining insolvency, the bank's equity capital will include:

(1) Common shareholders' equity. "Common shareholders' equity" means common stock, common stock surplus, undivided profits, capital reserves, adjustments for the cumulative effect of foreign currency translation, less any net unrealized loss on marketable equity securities.[1]

(2) Preferred stock and related surplus.

This measure of equity omits items with characteristics of both debt and equity. For example, long-term subordinated debt and mandatory convertible debt instruments are not counted as equity. However, debt may convert to equity capital as defined above; upon conversion, it will be included in a bank's equity capital.

The major difference between the OCC's past use of primary capital for measuring a bank's net worth and the final rule's use of equity capital for the same purpose is the exclusion of the bank's ALLL. This revised measurement of net worth does not alter the OCC's requirement that all national banks maintain an adequate ALLL. A bank's failure to maintain an adequate ALLL is unsafe or unsound banking practice that may result in a cease and desist order under 12 U.S.C. 1818(b). Such failure may also constitute a violation of 12 U.S.C. 161 which may result in the imposition of civil money penalties under 12 U.S.C. 93(b) and 12 U.S.C. 1818(i).

Comments received

The OCC received 15 comments in response to the NPRM. The commenters include national banks, thrift and banking industry trade associations, and a committee comprised of members from academia and the industry. Generally, this committee analyzes numerous issues facing the financial services industry. Nine commenters generally favored the OCC's proposal; six commenters generally opposed the new regulation.

The major issues raised by the commenters fall into five categories. These categories are: (1) The OCC's use of different definitions of capital; (2) exclusion of the ALLL from the net worth calculation; (3) treatment of hybrid debt-equity instruments; (4) case-by-case application of the new rule; and (5) additional comments and suggestions. Each comment category is discussed below.

(1) The OCC's Use of Different Definitions of Capital

A number of commenters objected to the use of different definitions of capital. Some commenters suggested that the OCC should use the definition of capital adopted in the Risk-Based Capital ("RBC") Guidelines for determining insolvency on a net worth basis.

The OCC is aware that differing definitions of capital could cause some confusion, and has considered adopting the RBC definition of capital for the purpose of determining net worth insolvency. For the reasons discussed below, however, the OCC has determined that the definition of capital for determining net worth insolvency serves a different purpose than determining the adequacy of a bank's capital on an ongoing basis. In this regard, the RBC definition of capital is inappropriate as a measure for determining a bank's solvency.

In a net worth calculation, the amount of capital available to a business is one measure of its viability at a specific time. For all businesses, equity capital represents the shareholders' ownership interest. To the extent of this ownership interest, shareholders may participate in losses from business operations.

Unlike most businesses, however, some liabilities of national banks, *i.e.*, deposits up to a statutory limit, are insured. Thus, not only national bank owners risk losses as a result of bank actions; FDIC funds are also at stake. As equity capital is diminished through losses, greater and greater risk of loss is shifted to FDIC funds. By its nature, this shifting of risk occurs in failing banks and may encourage less sound decisions and operations. To minimize the possibility of significant losses to the FDIC funds, the OCC has concluded that a definition of capital that emphasizes equity, and thus, *owner* participation in business losses, is appropriate.

In contrast, the RBC Guidelines consider the amount of capital necessary to support the credit risk inherent in a bank's assets, and require the minimum capital-to-risk-weighted-assets ratio to be met over the operating life of the bank. Thus, the RBC definition includes limits on *some* intangible assets, such as qualifying mortgage servicing rights and goodwill. The definition of equity capital under the net worth factor, however, does not specifically exclude intangible assets. This treatment reflects the fact that all assets—tangible and intangible—are subject to the same GAAP and regulatory accounting requirements for recognizing impairments in their value. Specifically, such an impairment must be recorded as a current charge to earnings, in turn reducing equity capital. Thus, equity capital reflects only unimpaired asset values, the most meaningful measure for insolvency purposes.

Further, unlike the requirements of RBC, it is not necessary or appropriate to make qualitative distinctions or place quantitative limitations on the components eligible to make up net worth for insolvency purposes. Therefore, to calculate the net worth of a national bank, the OCC will consider all of its preferred stock instruments without limitation, regardless of their perpetual or limited life nature. This treatment is appropriate for a determination of the solvency of a bank at a specific time. Limited life preferred instruments that have not matured still represent shareholders' ownership. Thus, these instruments should be included in the measure of the bank's net worth for solvency purposes.

Additionally, under RBC, a bank may include Tier 2 capital components only to the extent of its Tier 1 total. If the bank has Tier 2 elements that exceed its Tier 1 total, it may not include that excess in calculating its risk-based capital ratio. This limitation is unnecessarily restrictive in the context of a solvency determination, because some of the components of Tier 2 represent shareholders' ownership. This final rule does not limit the use of any capital component that qualifies as equity for determining the insolvency of a national bank.

[1] The final clause in this definition, "less any net unrealized loss on marketable securities," has been altered slightly from the language in the NPRM. This change is not substantive. It has been made to conform the final rule with the Instructions for Consolidated Reports of Condition and Income (call report instructions) promulgated by the Federal Financial Institutions Examination Council.

(2) Exclusion of the ALLL from the Net Worth Calculation

Many commenters addressed the OCC's exclusion of the ALLL from the net worth calculation. Most of these commenters supported the exclusion. Commenters who opposed the exclusion argued that the OCC should include at least part of the ALLL in the definition of capital for the purpose of the net worth factor.

Under GAAP and regulatory accounting principles ("RAP"), all banks are required to maintain an ALLL adequate to cover estimated losses inherent in their loan portfolios. The ALLL is a "valuation reserve" account, measuring the amount of impairment over the lives of the loans in a bank's portfolio. Because the ALLL is dedicated to absorbing estimated loan and lease losses, and its level is set to reflect the estimated value impairment in the loan portfolio, it is not appropriate to include any portion of the ALLL in the measure of equity capital used for insolvency purposes.

A number of the commenters preferred using the RBC definition of capital. These commenters apparently assumed that, as a result, ALLL up to a maximum of 1.25% of a bank's risk-weighted assets could be counted toward a bank's equity capital. These commenters may not have fully considered the application of the RBC definition in the context of net worth insolvency. An example may help to illustrate this application, and the accounting treatment of the ALLL.

Assume that a bank experiencing substantial loan losses has depleted its ALLL through charge-offs. To comply with GAAP and RAP requirements, the bank must replenish its ALLL to reflect remaining estimated losses in its loan portfolio. The ALLL is replenished through a provision expense charged against current earnings, and ultimately is reflected as a decrease in undivided profits. Because undivided profits are an element of common shareholders' equity, replenishing the ALLL decreases the bank's equity capital. If the OCC used the RBC definition of capital for the determination of net worth insolvency, this decrease would reduce the amount of the bank's Tier 1 capital. Having reduced its Tier 1 capital, the bank would also have to reduce the amount of any Tier 2 capital that it could use to calculate total capital. Thus, as a bank approaches insolvency, fewer and fewer of its Tier 2 capital components are included in determining net worth, because most of its Tier 1 capital becomes exhausted.[2]

(3) Treatment of Hybrid Debt-Equity Instruments

Hybrid capital instruments such as subordinated, perpetual and mandatory convertible debt combine the characteristics of debt and equity. Some commenters suggested that the OCC count hybrid debt-equity instruments as equity in determining solvency. These commenters pointed to the treatment of these instruments in the RBC Guidelines to support this view.

The OCC recognizes that these instruments often improve the overall strength of a bank's capital position. Thus, the final RBC guidelines allow banks to include hybrid debt-equity instruments in Tier 2 capital. These instruments may be counted as capital (up to a specified proportion of Tier 1 capital) in meeting the RBC requirements. However, as explained above, as Tier 1 disappears due to losses, those hybrid instruments in Tier 2 are no longer included in the sum of capital items for RBC calculations. Thus, excluding these instruments from the sum of accounts that determine a bank's solvency is consistent with their treatment in the RBC guidelines.

Another important consideration for the purpose of determining insolvency is that these instruments are not available to protect against losses while the issuer is operating as a going concern. That is, they do not provide the ability to defer payments, which might be needed when a bank experiences losses or is confronted by other financial pressures. Thus, the OCC has determined that hybrid instruments should not be treated as equity for the purpose of determining solvency. However, as noted above, debt may convert to "equity capital", as that term is defined in the final rule; upon conversion, it will be included in a bank's equity capital.

Finally, hybrid debt-equity instruments should not be included in the definition of equity capital for insolvency purposes because the rights and interests of a bank's debtholders are different from those of its shareholders. Debtholders do not have the voting rights of common shareholders, and therefore exercise little control over the bank. In addition, after their contractual interest payments are received, debtholders have no claim on a bank's residual profits. Thus, the rights and interests of a bank's debtholders are similar to those of its uninsured depositors, rather than its shareholders.

(4) Case-by-Case Application of the New Rule

Several commenters expressed concern that the new rule will be applied in a rigid manner. These commenters suggested that the OCC will not take into account all relevant facts of a particular situation in determining solvency. In this regard, the OCC expects to continue its long-standing practice of making determinations of insolvency on a case-by-base basis, taking into account all relevant facts and circumstances involving the particular bank under consideration.

One commenter expressed the opinion that the OCC's reservation of the right to consider factors other than the two factors set forth in the regulation undermines the OCC's goal of stating the "specific" measurements that it usually uses in determining national bank insolvency. With regard to this point, the OCC is responsible for ensuring the safety and soundness of the national banking system and needs flexibility in its decision-making. That flexibility is granted by the language of 12 U.S.C. 191 and case law, and is merely reaffirmed in this final rule. The OCC will continue its practice of making determinations of insolvency on a case-by-case basis. The OCC anticipates that the two factors set forth in the new regulation will cover the vast majority of situations. Thus, the OCC is being as specific as possible in giving guidance, while maintaining the necessary flexibility to respond to diverse situations.

Two commenters suggested that, under the amended regulation, the OCC might close a bank prematurely before adequate recapitalization or the most advantageous sale, merger or other disposition of the bank could be arranged. Clearly, the submission of an adequate recapitalization plan, or the existence of a feasible merger, purchase and assumption, sale, or other agreement which will likely result in the successful disposition of the bank, may be considered by the OCC as part of its insolvency decision-making process. Twelve U.S.C. 191 provides that when the OCC becomes satisfied of the insolvency of a national bank, it "*may* * * * appoint a receiver." Thus, it is established that the OCC is not required by law to close an insolvent bank

[2] In addition to the issues discussed above, several commenters were concerned over the determination of the adequacy of the ALLL given its exclusion from the net worth factor. In response to this concern, it should be noted that bankers and examiners must follow the guidelines currently set forth in Banking Circular 201, and in section 217 of the *Comptroller's Handbook for National Bank Examiners.*

immediately. *Easton* v. *Iowa*, 188 U.S. 220 (1903). This final rule is consistent with the statute and relevant case law.

Another commenter thought that the new rule would result in the closing of solvent banks, because the ALLL in a particular bank may be more than adequate to cover its estimated loan losses. In this regard, it should be noted that the issue of whether a bank's ALLL is adequate will be one of the factors the OCC will consider in satisfying itself that the bank is insolvent.

Some commenters are concerned that the OCC would close a national bank without notice at the moment the bank exhausts its equity capital. In the absence of fraud, insider abuse or other unusual circumstances, the OCC generally notifies bank management and directors of the need for additional capital in advance of possible closure. This practice gives the bank a chance to raise capital. In fact, in the vast majority of cases, the OCC has worked very closely with bank management and directors in an effort to recapitalize and correct deficiencies cited by national bank examiners. In sum, a determination of insolvency and closing are usually the final actions after the OCC has worked with the bank over time in an effort to help the bank solve its problems and increase its capital.

(5) Additional Comments and Suggestions

In addition to the general categories of comments discussed above, several commenters raised issues that cannot be placed into a particular category. One commenter expressed the opinion that the new rule will apply to savings associations because section 301 of FIRREA provides that the capital standards prescribed by the Director of the Office of Thrift Supervision "shall be no less stringent than the capital standards applicable to national banks." This regulation is being adopted by the OCC to set forth insolvency factors for national banks. The definition of "equity capital" in the regulation is intended to apply only to national banks. Furthermore, this final rule has been developed pursuant to its statutory authority in 12 U.S.C. 191, a statute very different from the insolvency statute which applies to thrifts.

Two commenters suggested a phase-in period for the new regulation. As noted above, this final rule is consistent with the OCC's authority under 12 U.S.C. 191 and relevant case law, which provide the OCC a great deal of discretion in determining whether a national bank is insolvent. The OCC could have implemented this change in its practice without promulgating a formal regulation. The OCC's use of the rulemaking process has effectively served the same purpose as a phase-in period, by notifying the banking community of the proposed change in the OCC's practice and providing an opportunity to comment on the proposal.

Another commenter suggested that the OCC should measure equity capital on the basis of current market values rather than book values. This is not precluded by the amended regulation. The OCC may use market values and other measurements of value, under appropriate circumstances. Further, as noted above, this final rule does not alter the OCC's discretion to consider other factors in assessing the solvency of a national bank.

One commenter requested the deletion of the word "usually" in Banking Bulletin 89–26 and the preamble to the notice of proposed rulemaking. This word had been used in these documents, but not in the proposed regulation itself, in the context of a discussion of the factors "usually" considered by the OCC in determining insolvency of a national bank. The word "usually", like the word "may" used in the proposed and final regulation, is intended to preserve the OCC's flexibility and discretion in making insolvency decisions. The same commenter also felt that different insolvency standards are applied to small and large banks. This perception is inaccurate. While the solvency of each national bank is determined on a case-by-case basis, all banks are judged according to the same insolvency factors, regardless of their size.

Another commenter suggested that the OCC adopt an additional, "profitability" standard of insolvency. In the alternative, the commenter proposed expanding the net worth factor to recognize a profitable going concern. As expressed above, the final rule does not preclude the OCC's consideration of other factors, including profitability. After the final rule is adopted, the OCC will continue its current practice of satisfying itself of a bank's insolvency on a case-by-case basis.

This commenter also proposed that the OCC implement a notice and rebuttal mechanism, whereby banks would be notified when they may be declared insolvent by the OCC, and would be given a right to rebut and appeal the determination of insolvency. In this respect, neither 12 U.S.C. 191 nor case law provides for a hearing and review procedure. It is well-established that the special character of bank insolvencies justifies the absence of pre-insolvency hearings. *See, e.g., Franklin*, 381 F. Supp. at 1392; *Cf. Fahey* v. *Mallonee*, 332 U.S. 245, 253 (1947).

Further, national banks are aware of their level of equity capital and are on notice of the basic factors the OCC usually considers in making insolvency determinations. Moreover, as discussed above, in the absence of fraud, insider abuse or other unusual circumstances, the OCC works with bank management and directors over a period of time in an effort to recapitalize the bank and avoid its insolvency. Thus, numerous mechanisms are already in place to "warn" banks of trouble and to give banks the opportunity to respond to the OCC's concerns.

Similarly, under the better-reasoned authorities, the OCC's declaration of insolvency is not subject to judicial review. *See, e.g., Wellsville*, 407 F.2d 223 (3d Cir.), *cert. denied*, 396 U.S. 832, *reh. denied*, 396 U.S. 949 (1969); *Wannamaker* v. *Edisto National Bank of Orangeburg*, 62 F.2d 696 (4th Cir. 1933); *Munro* v. *Post*, 23 F. Supp. 308 (E.D.N.Y. 1938), *aff'd*, 102 F.2d 686 (2d Cir. 1939). The OCC's insolvency determination involves "agency action * * * committed to agency discretion by law" and, thus, is exempt from judicial review under the Administrative Procedure Act, 5 U.S.C. 701(a)(2).

Moreover, the plain language of 12 U.S.C. 191 places the determination of national bank insolvency within the Comptroller's discretion because insolvency occurs "whenever the comptroller shall become satisfied of" its existence. The need for prompt action and the nature of the decision to close a national bank, involving agency expertise on a wide range of economic and policy matters, strongly support non-reviewability. *See, e.g., Adams*, 303 U.S. at 540–541 (1938); *Suntex Dairy* v. *Block*, 666 F.2d 158, 164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982).

The proposed rule does not change this principle of non-reviewability. Specifically, the OCC is not restricting its discretion with respect to determining insolvency in such a manner as to permit judicial review. The language in the proposed rule has been modified to make clear this intent. Accordingly, the final rule does not articulate definite standards that rigidly define insolvency. Rather, the rule publicly describes factors that may, among others, be considered by the OCC in determining whether it is satisfied that insolvency exists.

A few commenters expressed doubt concerning OCC's reference to a loss in customer confidence as a reason in support of its proposal. The OCC believes that deposit withdrawals have

occurred in banks having no equity capital due to declines in depositor confidence in such institutions.

Certain commenters questioned the impact on the FDIC funds of the proposed regulation. The OCC anticipates that the FDIC will benefit from the new rule in two ways. First, the FDIC receives the benefit of any amounts held in a failed bank's ALLL intended to cover estimated losses in the bank's loan portfolio. This factor should reduce the FDIC's costs connected with the disposition of the institution. Second, the OCC believes that this final rule will increase the number of potential investors for insolvent national banks. Investor interest should be greater in a bank which is closed before it accrues substantial operating losses in excess of its capital.

Finally, one commenter was concerned that the liquidity factor is too imprecise. The language in the final rule for the liquidity factor is consistent with established practice under 12 U.S.C. 191. *See Smith*, 102 F.2d 638 (3d Cir. 1939); *Franklin*, 381 F. Supp. 1390 (E.D.N.Y. 1974).

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605(b), it is certified that this amendment will not have a substantial economic impact on a significant number of small entities. As noted above, the OCC will make each determination of insolvency on a case-by-case basis. Under the new regulations, such determination will be based on a national bank's liquidity or equity position, not its size. The new rule is consistent with the intent of the Regulatory Flexibility Act, and the application of the rule will not be unduly burdensome to small banks.

Executive Order 12291

The OCC has determined that this amendment is not a "major rule" and therefore does not require a Regulatory Impact Analysis.

List of Subjects in 12 CFR Part 5

National banks, Banking, Receivership, Conservatorship, Insolvency.

Authority and Insurance:

For the reasons set forth in the preamble, part 5 of chapter I of title 12 of the Code of Federal Regulations is amended as set forth below:

PART 5—[AMENDED]

1. The authority citation for Part 5 continues to read as follows:

Authority: 12 U.S.C. 1 *et seq.*; 12 U.S.C. 93(a).

2. Section 5.49 is revised to read as follows:

§ 5.49 Receivership.

(a) *Authority.* 12 U.S.C. 191–200.

(b) *Procedures.* Sections 5.8 through 5.14 do not apply to receiverships.

(c) *Receivership.* If the Office becomes satisfied that a national bank is insolvent, it may appoint a receiver for such bank.

(1) *Factors for determining insolvency.* Pursuant to 12 U.S.C. 191, a receiver may be appointed to close up the affairs of a national bank whenever the Office shall become satisfied of the bank's insolvency. In determining whether it is satisfied that a bank is insolvent, the Office may consider the following factors, among others:

(i) *Net worth.* The Office may consiser whether the bank's liabilities exceed its assets. A bank's liabilities shall exceed its assets when its equity capital is eliminated by losses. For the purpose of reaching a determination of insolvency, the bank's equity capital shall consist of:

(A) *Common shareholders' equity.* "Common shareholders; equity" means common stock, common stock surplus, undivided profits, capital reserves, adjustments for the cumulative effect of foreign curency translation, less any net unrealized loss on marketable equity securities.

(B) *Preferred stock and related surplus.*

(ii) *Liquidity.* The Office may deem a national bank insolvent when it is unable to meet its obligations as they mature.

(2) *Federal Deposit Insurance Corporation as receiver.* In cases in which the Office is required to appoint the Federal Deposit Insurance Corporation as receiver, that corporation prescribes the procedures it follows in liquidation of the insolvent bank.

(3) *Other receivers.* In those cases in which the Office does not appoint the Federal Deposit Insurance Corporation as receiver, it may appoint a receiver of its choice. The Office prescribes a form of proof of claim. The receiver appointed by the Office issues a certificate of proof of claim to claimants who prove their claims to the satifisfaction of the Office or establish their claims by litigation.

Dated: November 21, 1989.

Robert L. Clarke,

Comptroller of the Currency.

[FR Doc. 89–27751 Filed 11–27–89; 8:45 am]

BILLING CODE 4810-33-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 89-NM-225-AD; Amdt. 39-6402]

Airworthiness Directives; Boeing Model 737-300 and -400 Series Airplanes Equipped With CFM International CFM56-3 Series Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 737-300 and -400 series airplanes, equipped with CFM International CFM56-3 series engines, which requires modification of the engines idle circuitry to inhibit the in-flight low idle capability. This amendment is prompted by four incidents of engine flameouts that occurred during descent through thunderstorm activity. This condition, if not corrected, could result in additional dual engine flameouts and thus jeopardize safe flight and landing.

EFFECTIVE DATE: December 11, 1989.

ADDRESSES: The applicable service information may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Bray, Propulsion Branch, ANM-140S; telephone (206) 431-1969. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: There have been four incidents, two recent, of engine flameouts of Model 737-300 series airplanes during inadvertent thunderstorm encounters. In the first of the two recent incidents, an airplane experienced a single engine flameout during descent through 18,000 feet after entering sudden rain and hail. At 11,000 feet, the pilots nosed the airplane over and obtained a successful windmill restart. In the second recent incident, an airplane experienced a dual engine flameout after encountering hail and ice (no rain) at 17,000 feet, during the descent into the destination airport. The

airplane was in the vicinity of thunderstorm activity. The engines recovered from their sub-idle condition without pilot action at 14,000 feet. Both of these incidents were caused by airplane immersion into surrounding thunderstorm activity. This condition, if not corrected, could result in additional dual engine flameouts due to an inadvertent encounter with thunderstorm activity.

The FAA has reviewed and approved Boeing Alert Service Bulletins 737-77A1026 (for the Model 737-300), Revision 2, dated October 27, 1989, and 737-77A1025 (for the Model 737-400), dated October 12, 1989, which describe the modification procedures necessary to inhibit the engines' in-flight low idle capability, thus increasing the engine minimum percent N_1 flight idle to the existing High Idle (approximately 28% to 33% N_1). This modification increases the engines' flameout margin approximately 50%, thus significantly reducing the possibility of engine flameout during an inadvertent thunderstorm encounter. These Alert Service Bulletins provide instructions to add the engine high idle control and indication system on the Model 737-300 series airplanes, and incorporate the minimum high idle modification into the existing engine idle control and indication system on the Model 737-400 series airplanes.

Since this condition is likely to exist or develop on other airplanes of the same type design, this AD requires modification of the engine idle circuitry to remove in-flight low idle capability, in accordance with the alert service bulletins previously described.

This is considered further interim action, in conjunction with AD 88-13-51-R1, Amendment 39-6088 (53 FR 49978; December 13, 1988). That previously issued AD is applicable to Model 737-300 series airplanes and requires, among other things, a revision to the Airplane Flight Manual (AFM) to require operation with an minimum N_1 engine speed of 45 percent; engine ignition in the FLIGHT position when flying in or near moderate to heavy rain, hail, or sleet; and the avoidance of flight in moderate to severe thunderstorm activity. The requirements of that AD action were incorporated into the basic Model 737-400 type design prior to its certification. Experimental engine design solution(s) are currently under evaluation. Pending the result of these engineering evaluations and flight tests, the FAA may consider further rulemaking to require incorporation of a final engine design change into the existing Boeing Model 737-300 and 737-400 fleet.

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

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

The FAA has determined that this regulation is an emergency regulation and that it is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been further determined that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the regulatory docket (otherwise, an evaluation is not required). A copy of it, if filed, may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

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

PART 39—[AMENDED]

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

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

§ 39.13 [Amended]

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

Boeing: Applies to Model 737-300 and -400 series airplanes, identified in Boeing Alert Service Bulletins 737-77A1026, Revision 2, dated October 27, 1989, and 737-77A1025, dated October 12, 1989, certificated in any category. Compliance required within 60 days after the effective date of this AD, unless previously accomplished.

To reduce the risk of engine flameout during inadvertent airplane immersion into thunderstorm activity, accomplish the following:

A. For Model 737-300 series airplanes: Modify the engine idle circuitry in accordance with Boeing Alert Service Bulletin 737-77A1026, Revision 2, dated October 27, 1989.

Note: This action is in addition to the actions required by AD 88-13-51-R1, Amendment 39-6088, for the Model 737-300 series airplanes.

B. For Model 737-400 series airplanes: Modify the engine idle circuitry in accordance with Boeing Alert Service Bulletin 737-77A1025, dated October 12, 1989.

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

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who will either concur or comment, and then send it to the Manager, Seattle Aircraft Certification Office.

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

All persons affected by this directive who have not already received the appropriate service information from the manufacturer may obtain copies upon request to Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective December 11, 1989.

Issued in Seattle, Washington, on November 15, 1989.

Steven B. Wallace,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-27832 Filed 11-27-89; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 175 and 177

[Docket No. 88F-0376]

Indirect Food Additives; Adhesives and Components of Coatings and Polymers

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of hydroxybutyltin oxide, monobutyltin tris(2-ethylhexoate), and dibutyltin oxide in the production of polyester resins to be used in resinous and polymeric coatings and cross-linked polyester resins. The polyesters are intended for use in contact with food. This action is in response to a petition filed by M&T Chemicals, Inc.

DATES: Effective November 28, 1989; written objections and requests for a hearing by December 28, 1989.

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

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

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of December 7, 1988 (53 FR 49359), FDA announced that a food additive petition (FAP 8B4113) had been filed by M&T Chemicals, Inc., c/o 1150 17th St. NW., Washington, DC 20036, proposing that § 175.300 *Resinous and polymeric coatings* (21 CFR 175.300) and § 177.2420 *Polyester resins, cross-linked* (21 CFR 177.2420) be amended to provide for the safe use of hydrated monobutyltin oxide, monobutyltin trioctoate, and dibutyltin oxide in the production of polyester resins to be used in resinous and polymeric coatings and cross-linked polyester resins. The polyesters are intended for use in contact with food.

FDA has evaluated data in the petition and other relevant material. The agency finds that monobutyltin tris-(2-ethylhexoate) and hydroxybutyltin oxide are more specific terms for the additives monobutyltin trioctoate and hydrated butyltin oxide, respectively. Thus, the agency is adopting this preferred nomenclature for the proposed food additives. The agency also concludes that the three catalysts, hydroxybutyltin oxide, monobutyltin tris(2-ethylhexoate), and dibutyltin oxide, are safe for use in the production of polyester resins to be used in resinous and polymeric coatings and cross-linked polyester resins. The agency is amending the food additive regulations by listing these three catalysts in new § 175.300(b)(3)(vii)(*e*) and by including these catalysts in the table in § 177.2420(b), as set forth below.

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

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

Any person who will be adversely affected by this regulation may at any time on or before December 28, 1989 file with the Dockets Management Branch (address above) written objections thereto.

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

List of Subjects

21 CFR Part 175

Adhesives, Food additives, Food packaging.

21 CFR Part 177

Food additives, Food packaging.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center the Food Safety and Applied Nutrition, 21 CFR parts 175 and 177 are amended as follows:

PART 175—INDIRECT FOOD ADDITIVES: ADHESIVES AND COMPONENTS OF COATINGS

1. The authority citation for 21 CFR part 175 continues to read as follows:

Authority: Secs. 201, 402, 409, 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 342, 348, 376).

2. Section 175.300 is amended by adding new paragraph (b)(3)(vii)(*e*) to read as follows:

§ 175.300 Resinous and polymeric coatings.

* * * * *

(b) * * *

(3) * * *

(vii) * * *

(*e*) Catalysts:

Dibutyltin oxide (CAS Reg. No. 818-08-6), not to exceed 0.2 percent of the polyester resin.

Hydroxybutyltin oxide (CAS Reg. No. 2273-43-0), not to exceed 0.2 percent of the polyester resin.

Monobutyltin tris(2-ethylhexoate) (CAS Reg. No. 23850-94-4), not to exceed 0.2 percent of the polyester resin.

* * * * *

PART 177—INDIRECT FOOD ADDITIVES: POLYMERS

3. The authority citation for 21 CFR Part 177 continues to read as follows:

Authority: Secs. 201, 402, 409, 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 342, 348, 376).

4. Section 177.2420 is amended in the table in paragraph (b) by alphabetically adding under item "3. Catalysts:", three new entries to read as follows:

§ 177.2420 Polyester resins, cross-linked.

* * * * *

(b) * * *

List of substances	Limitations (limits of addition expressed as percent by weight of finished resin)
* * * * *	
3. Catalysts:	
* * * * *	

List of substances	Limitations (limits of addition expressed as percent by weight of finished resin)
Dibutyltin oxide (CAS Reg. No. 818-08-6).	For use in the polycondensation reaction at levels not to exceed 0.2 percent of the polyester resin.
* * *	* *
Hydroxybutyltin oxide (CAS Reg. No. 2273-43-0).	For use in the polycondensation reaction at levels not to exceed 0.2 percent of the polyester resin.
* * *	* *
Monobutyltin tris(2-ethylhexoate) (CAS Reg. No. 23850-94-4).	For use in the polycondensation reaction at levels not to exceed 0.2 percent of the polyester resin.
* * *	* *

* * * * *

Dated: November 16, 1989.

Fred R. Shank,

Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 89-27809 Filed 11-27-89; 8:45 am]

BILLING CODE 4160-01-M

21 CFR Parts 436 and 442

[Docket No. 89N-0412]

Antibiotic Drugs; Cephalexin Hydrochloride Monohydrate Tablets

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the antibiotic drug regulations to provide for the inclusion of accepted standards for a new antibiotic drug, cephalexin hydrochloride monohydrate tablets. The manufacturer has supplied sufficient data and information to establish its safety and efficacy.

DATES: Effective December 28, 1989; written comments, notice of participation, and request for hearing by December 28, 1989; data, information, and analyses to justify a hearing by January 29, 1990.

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

FOR FURTHER INFORMATION CONTACT: Peter A. Dionne, Center for Drug Evaluation and Research (HFD-520), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4290.

SUPPLEMENTARY INFORMATION: FDA has evaluated data submitted in accordance with regulations promulgated under section 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357), as amended, with respect to a request for approval of a new antibiotic drug, cephalexin hydrochloride monohydrate tablets. The agency has concluded that the data supplied by the manufacturer concerning this antibiotic drug are adequate to establish its safety and efficacy when used as directed in the labeling and that the regulations should be amended in 21 CFR 436.215 by adding a new entry to the table in paragraph (b) and adding new paragraph (c)(11), and by adding new §§ 436.367, 442.28, and 442.128 to provide for the inclusion of accepted standards for this product.

Environmental Impact

The agency has determined under 21 CFR 25.24(c)(6) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Submitting Comments and Filing Objections

This final rule announces standards that FDA has accepted in a request for approval of an antibiotic drug. Because this final rule is not controversial and because when effective it provides notice of accepted standards, FDA finds that notice and comment procedure is unnecessary and not in the public interest. This final rule, therefore, becomes effective December 28, 1989. However, interested persons may, on or before December 28, 1989, submit comments to the Dockets Management Branch (address above). Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Any person who will be adversely affected by this final rule may file objections to it and request a hearing. Reasonable grounds for the hearing must be shown. Any person who decides to seek a hearing must file (1) on or before December 28, 1989, a written notice of participation and request for hearing, and (2) on or before January 29, 1990, the data, information, and analyses on which the person relies to justify a hearing, as specified in 21 CFR 314.300. A request for a hearing may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of the data, information, and factual analyses in the request for hearing that no genuine and substantial issue of fact precludes the action taken by this order, or if a request for hearing is not made in the required format or with the required analyses, the Commissioner of Food and Drugs will enter summary judgment against the person(s) whose request(s) the hearing, making findings and conclusions and denying a hearing. All submissions must be filed in three copies, identified with the docket number appearing in the heading of this order and filed with the Dockets Management Branch.

The procedures and requirements governing this order, a notice of participation and request for hearing, a submission of data, information, and analyses to justify a hearing, other comments, and grant or denial of a hearing are contained in 21 CFR 314.300.

All submissions under this order, except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR

Part 436

Antibiotics.

Part 442

Antibiotics.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 436 and 442 are amended as follows:

PART 436—TESTS AND METHODS OF ASSAY OF ANTIBIOTIC AND ANTIBIOTIC-CONTAINING DRUGS

1. The authority citation for 21 CFR part 436 continues to read as follows:

Authority: Sec. 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357).

2. Section 436.215 is amended by alphabetically adding a new entry to the table in paragraph (b), and by adding a new paragraph (c)(11) to read as follows:

§ 436.215 Dissolution test.

* * * * *

(b) * * *

Dosage form	Dissolution medium	Rotation rate [1]	Sampling time(s)	Apparatus
* * *	* * *	*	*	
Cephalexin hydrochloride monohydrate tablets....	900 mL distilled water	100	45 min	1
* * *	* * *	*	*	

[1] Rotation rate of basket or paddle stirring element (revolutions per minute).

(c) * * *

(11) *Cephalexin hydrochloride monohydrate.* Assay for cephalexin activity of the cephalexin hydrochloride monohydrate as directed in § 442.28 of this chapter, and use U.S.P. dissolution apparatus 1 (10 mesh basket). Use the sample as it is removed from the dissolution vessel.

* * * * *

3. New § 436.367 is added to Subpart F to read as follows:

§ 436.367 Thin-layer chromatographic identity test for cephalexin hydrochloride.

(a) *Equipment*—(1) *Chromatography tank.* Use a rectangular tank approximately 23 X 23 X 9 centimeters, with a glass solvent trough in the bottom and a tight-fitting cover. Line the inside walls of the tank with Whatman #3 MM chromatographic paper or equivalent.

(2) *Plates.* Use 20 X 20 centimeter thin layer chromatographic plates coated with silica gel 60F–254 or equivalent to a thickness of 250 microns.

(b) *Developing solvent.* Mix ethylacetate, acetonitrile, water and glacial acetic acid in volumetric proportions of 42:14:18:14, respectively.

(c) *Preparation of the spotting solutions.* Prepare a solution of the sample containing 25 milligrams per milliliter of cephalexin hydrochloride in water. Prepare a solution of cephalexin monohydrate reference material at a concentation of 25 milligrams per milliliter. Add water and 0.1*N* hydrochloric acid in a dropwise mode until the material is completely dissolved.

(d) *Procedure.* Pour the developing solvent into the glass trough at the bottom of the chromatography tank. Cover and seal the tank. Allow it to equilibrate for 1 hour. Prepare a plate as follows: On a line 2 centimeters from the base of the plate, and at intervals of 2 centimeters, spot approximately 5 microliters of the standard solution to points 1 and 3 and approximately 5 microliters of the sample solution to point 2. After all spots are thoroughly dry, place the plate directly into the glass trough of the chromatography tank. Cover and seal the tank. Allow the solvent front to travel approximately 15 centimeters from the starting line. Remove the plate from the tank and allow it to air dry.

(e) *Evaluation.* View the dry plate under ultraviolet light (254 nanometers). Measure the distance the solvent front traveled from the starting line and the distance the spots are from the starting line. Calculate the R_f value by dividing the latter by the former. The sample and standard should have spots of corresponding R_f values of approximately 0.35.

PART 442—CEPHA ANTIBIOTIC DRUGS

4. The authority citation for 21 CFR Part 442 continues to read as follows:

Authority: Sec. 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357).

5. New § 442.28 is added to Subpart A to read as follows:

§ 442.28 Cephalexin hydrochloride monohydrate.

(a) *Requirements for certification*—(1) *Standards of identity, strength, quality, and purity.* Cephalexin hydrochloride monohydrate is the hydrochloride salt of 7-(*D-alpha*-amino-*alpha*-phenylacetamido)-3-methyl-3-cephem-4-carboxylic acid monohydrate. It is so purified and dried that:

(i) Its potency is not less than 800 micrograms and not more than 880 micrograms of cephalexin per milligram on an "as is" basis.

(ii) Its moisture content is not less than 3.0 nor more than 6.5 percent.

(iii) The pH of an aqueous solution containing 10 milligrams per milliliter is not less than 1.5 nor more than 3.0.

(iv) It gives a positive identity test.

(v) It is crystalline.

(2) *Labeling.* It shall be labeled in accordance with the requirements of § 432.5 of this chapter.

(3) *Requests for certification; samples.* In addition to complying with the requirements of § 431.1 of this chapter, each such request shall contain:

(i) Results of tests and assays on the batch for cephalexin potency, moisture, pH, identity, and crystallinity.

(ii) Samples, if required by the Director, Center for Drug Evaluation and Research: 10 packages, each containing approximately 500 milligrams.

(b) *Tests and methods of assay*—(1) *Cephalexin potency.* Proceed as directed in § 442.40(b)(1)(ii), except that "cephalexin" is substituted at each occurrence of "cephradine".

(2) *Moisture.* Proceed as directed in § 436.201 of this chapter.

(3) *pH.* Proceed as directed in § 436.202 of this chapter, using an aqueous solution containing 10 milligrams per milliliter.

(4) *Identity.* Proceed as directed in § 436.367 of this chapter.

(5) *Crystallinity.* Proceed as directed in § 436.203(a) of this chapter.

6. New § 442.128 is added to subpart B to read as follows:

§ 442.128 Cephalexin hydrochloride monohydrate tablets.

(a) *Requirements for certification*—(1) *Standards of identity, strength, quality, and purity.* Cephalexin hydrochloride monohydrate tablets are composed of cephalexin hydrochloride monohydrate and one or more suitable and harmless lubricants, colorings and coating substances. Each tablet contains cephalexin hydrochloride monohydrate equivalent to 250 milligrams, 333 milligrams or 500 milligrams of cephalexin. Its cephalexin content is satisfactory if it is not less than 90 percent and not more than 120 percent of the number of milligrams of cephalexin that it is represented to contain. Its moisture content is not more than 8.0 percent. The tablets pass the dissolution test. It passes the identity test. The cephalexin hydrochloride monohydrate used conforms to the standards prescribed by § 442.28(a)(1).

(2) *Labeling.* It shall be labeled in accordance with the requirements of § 432.5 of this chapter.

(3) *Requests for certification; samples.* In addition to complying with the requirements of § 431.1 of this chapter, each such request shall contain:

(i) Results of tests and assays on:

(A) The cephalexin hydrochloride monohydrate used in making the batch for cephalexin potency, moisture, pH, identity, and crystallinity.

(B) The batch for cephalexin content, moisture, dissolution, and identity.

(ii) Samples, if required by the Director, Center for Drug Evaluation and Research.

(A) The cephalexin hydrochloride monohydrate used in making the batch: 10 packages, each containing approximately 500 milligrams.

(B) The batch: A minimum of 36 tablets.

(b) *Tests and methods of assay*—(1) *Cephalexin content.* Proceed as directed in § 442.140c(b)(1)(ii), except that "cephalexin" is substituted at each occurrence of "cephradine".

(2) *Moisture.* Proceed as directed in § 436.201 of this chapter.

(3) *Dissolution.* Proceed as directed in § 436.215 of this chapter. The quantity *Q* (the amount of cephalexin dissolved) is not less than 75 percent at 45 minutes.

(4) *Identity.* Proceed as directed in § 436.367 of this chapter.

Dated: November 15, 1989.

Sammie R. Young,

Deputy Director, Office of Compliance, Center for Drug Evaluation and Research.

[FR Doc. 89-27763 Filed 11-27-89; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 725

Release of Official Information for Litigation

AGENCY: Department of the Navy, DOD.

ACTION: Final rule.

SUMMARY: This regulation assigns responsibilities to Department of the Navy (DON) personnel in responding to requests from members of the public for official DON information (testimonial, documentary, or otherwise) in connection with litigation. It does not apply to requests unrelated to litigation or pursuant to the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a. The publication of this DON instruction will assist members of the public in submitting such requests. It implements Department of Defense Directive 5405.2 of July 23, 1985, codified in 32 CFR part 97, regarding the release of official information in connection with litigation. It restates the requirements contained in Secretary of the Navy Instruction 5820.8 of August 11, 1987, and is intended to conform to that instruction in all respects.

EFFECTIVE DATE: December 28, 1989.

FOR FURTHER INFORMATION CONTACT: Commander R.F. Walsh, JAGC, USN, (Program Officer for Litigation Requests), Office of the Judge Advocate General, General Litigation Division, 200 Stovall Street, Alexandria, VA 22332-2400. Telephone: (202) 325-9870.

SUPPLEMENTARY INFORMATION: (a) *Purpose of the regulation.* This regulation establishes policy, assigns responsibilities, and prescribes procedures for responding to requests for the release of official DON information, including testimony by DON personnel as witnesses, in connection with actual or contemplated litigation. In addition to providing an orderly means for obtaining information needed in litigation to members of the public, its provisions also protect the interests of the United States, including the safeguarding of classified and privileged information. This regulation ensures that responses to litigation requests are provided in a manner that does not prevent the accomplishment of the mission of the command or activity affected. It sets forth the proper content of a request received from a member of the public for release of official DON information in connection with litigation and indicates the factors to be considered in deciding whether to authorize the release of official DON information or the testimony of DON concerning official information.

(b) *Impact of the regulation.* The regulation is not a "major rule" as defined by Executive Order 12291. Therefore, no regulatory impact analysis has been prepared. The DON certifies that this regulation will not have an impact on a significant number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Therefore, no regulatory flexibility analysis has been prepared. The regulation has no collection of information requirements and does not require the approval of OMB under 44 U.S.C. 3501 *et seq.* This regulation is not subject to the relevant provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347), and does not contain reporting or recordkeeping requirements under the criteria of the Paperwork Reduction Act of 1980 (Pub. L. 96-511).

(c) *Request for comments.* Because it merely imposed technical requirements in which the public is not particularly interested or involved, this regulation appeared in the **Federal Register** on June 22, 1989 (54 FR 26189), as an interim rule, effective on publication. No comments were received from the public about this regulation in the 30 day period designated for that purpose in the interim rule ending on July 24, 1989. No substantive changes have been made to the regulation. In response to recommendations made by intra-agency personnel, however, § 725.10 dealing with fees has been modified to clarify the guidance to Department of the Navy personnel contained therein. Additionally, several technical errors in titles, addresses, etc., have been corrected. Since these changes involve no new information, and because no comments were recieved from the public in response to the interim rule, no additional period for comment will be made available.

List of Subjects in 32 CFR Part 725

Courts, Government employees.

For the reasons set out in the preamble, title 32, chapter VI, subchapter C, of the Code of Federal Regulations is amended by adopting as final and revising part 725 to read as follows:

PART 725—RELEASE OF OFFICIAL INFORMATION IN LITIGATION AND TESTIMONY BY DEPARTMENT OF THE NAVY PERSONNEL AS WITNESSES

Sec.
725.1 Purpose.
725.2 Policy.
725.3 Authority to act.
725.4 Definitions.
725.5 Applicability.
725.6 Contents of a proper request or demand.
725.7 Considerations in responding to a request.
725.8 Responsibilities of DON personnel.
725.9 Proper forwarding of a request.
725.10 Fees.

Authority: 5 U.S.C. 301, 10 U.S.C. 5013, 31 U.S.C. 9701, 32 CFR part 97.

§ 725.1 Purpose.

This instruction implements 32 CFR part 97 regarding the release of official Department of the Navy (DON) information and provision of testimony by DON personnel for litigation purposes, and prescribes conduct of DON personnel in response to a litigation request or demand. It restates the information contained in Secretary of the Navy Instruction 5820.8 of August 11, 1987, and is intended to conform in all respects with the requirements of that instruction.

§ 725.2 Policy.

(a) It is DON policy that official factual information, both testimonial and documentary, should be made reasonably available for use in federal courts, state courts, foreign courts, and other governmental proceedings unless that information is classified, privileged, or otherwise protected from public disclosure.

(b) DON personnel, as defined in § 725.4(b), shall not provide such official information, testimony, or documents, submit to interview, or permit a view or visit, however, without the authorization required by this instruction.

(c) DON personnel shall not provide, with or without compensation, opinion or expert testimony concerning official DON or Department of Defense (DOD) information, subjects, personnel, or activities, except on behalf of the United

States or a party represented by the Department of Justice, or with the written special authorization required by this instruction.

(d) Paragraphs (b) and (c) of this section constitute a regulatory general order, applicable to all DON personnel individually, and need no further implementation. A violation of those provisions is punishable under the Uniform Code of Military Justice for military personnel and is the basis for appropriate administrative procedures with respect to civilian employees. All DON personnel, military and civilian, present and former, are subject to prosecution under 18 U.S.C. 201–207 for certain violations of this instruction.

(e) Upon a showing by a requester of exceptional need or unique circumstances, and that the anticipated testimony will not be adverse to the interests of the DON, DOD, or the United States, the General Counsel of the Navy, the Judge Advocate General of the Navy, or their respective delegates may, in their sole discretion, and pursuant to the guidance contained in this instruction, grant such written special authorization for DON personnel to appear and testify as expert or opinion witnesses at no expense to the United States.

§ 725.3 Authority to act.

(a) The General Counsel of the Navy, the Judge Advocate General of the Navy, and their respective delegates (hereafter "determining authorities") described in §§ 725.8 and 725.9, shall respond to litigation requests or demands for official DON information or testimony by DON personnel as witnesses.

(b) If required by the scope of their respective delegations, determining authorities' responses may include: consultation and coordination with the Department of Justice or the appropriate United States Attorney as required; referral of matters proprietary to another DOD component to that component; determination whether official information originated by the Navy may be released in litigation; and determination whether DOD personnel assigned to or affiliated with the Navy may be interviewed, contacted, or used as witnesses concerning official DOD information or as expert or opinion witnesses. Following coordination with the appropriate commander, responses may further include whether installations, facilities, ships, or aircraft may be visited or inspected; what, if any, conditions will be imposed upon any release, interview, contact, testimony, visit, or inspection; what, if any, fees shall be charged or waived for access under the fee assessment considerations set forth in § 725.10; and what, if any, claims of privilege, pursuant to this instruction, may be invoked before any tribunal.

(c) The DOD General Counsel may notify DOD components that his or her office will assume primary responsibility for coordinating all litigation requests or demands for official DOD information or testimony of DOD personnel in litigation involving terrorism, espionage, nuclear weapons, and intelligence sources or means. Accordingly, determining authorities who receive requests pertaining to such litigation shall notify the DON Associate General Counsel (Litigation) or the Deputy Assistants Judge Advocate General for International Law or General Litigation, who shall consult and coordinate with DOD General Counsel prior to any response to such requests.

§ 725.4 Definitions.

(a) *Request or Demand (Legal Process).* Subpoena, order, or other request by a federal, state, or foreign court of competent jurisdiction, by any administrative agency thereof, or by any party or other person (subject to the exceptions stated in § 725.5) for production, disclosure, or release of official DOD information or for the appearance, deposition, or testimony of DON personnel as witnesses.

(b) *DON Personnel.* Active duty and former military personnel of the naval service including retirees; personnel of other DOD components serving with a DON component; Naval Academy midshipmen; present and former civilian employees of the DON including non-appropriated fund activity employees; non-U.S. nationals performing services overseas for the DON under provisions of status of forces agreements; and other specific individuals or entities hired through contractual agreements by or on behalf of DON, or performing services under such agreements for DON (e.g., consultants, contractors and their employees and personnel).

(c) *Litigation.* All pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards (including the Armed Services Board of Contract Appeals), or other tribunals, foreign and domestic. This term includes responses to discovery requests, depositions, and other pretrial proceedings, as well as responses to formal or informal requests by attorneys or others in situations involving, or reasonably anticipated to involve, litigation.

(d) *Official Information.* All information of any kind, however stored, in the custody and control of the DOD and its components (including the DON); or relating to information in the custody and control of DOD or its components; or acquired by DOD personnel or its component personnel as part of their official duties or because of their official status within DOD or its components, while such personnel were employed by or on behalf of the DOD or on active duty with the United States Armed Forces. The determination of whether "official information" (as opposed to non-DOD information), in whole or part, is sought, rests with the determining authority rather than the requester. The requester must still comply with the requirements of § 725.6 to support the contention that only non-DOD information is at issue.

(e) *Factual and Expert or Opinion Testimony.* DON policy favors disclosure of factual information if disclosure does not violate the criteria stated in § 725.7 and is not classified, privileged, or otherwise subject to withholding under statute, executive order, or regulation. The distinction between factual matters, and expert or opinion matters (where DON policy favors non-disclosure), is not always clear and involves the exercise of discretion. The following considerations pertain:

(1) DON personnel may merely be percipient witnesses to an incident, in which event their testimony would be purely factual. On the other hand, they may be involved with the matter only through an after-the-event investigation (e.g., investigation under the Manual of the Judge Advocate General), and asking them to identify conclusions in their report would likewise constitute factual matters to which they might testify. In contrast, asking them to adopt or reaffirm their findings of fact, opinions, and recommendations, or asking them to form or express any other opinion, particularly one based upon matters submitted by counsel or going to the ultimate issue of causation or liability, would clearly constitute precluded testimony under the foregoing policy.

(2) DON personnel, by virtue of their training, often form opinions because they are required to do so in the course of their duties. If their opinions are formed prior to, or contemporaneously with, the matter in issue, and are routinely required of them in the course of the proper performance of their professional duties, they essentially

constitute factual matters (i.e., the opinion they previously held). Opinions formed after the event in question, however, generally constitute the sort of opinion or expert testimony which this instruction is intended to restrict severely.

(3) Characterization of expected testimony by a requester as fact, opinion, or expert is not binding on the determining authority. When there is doubt as to whether or not expert or opinion (as opposed to factual) testimony is being sought, advice may be obtained informally from, or the request forwarded, to the Deputy Assistant Judge Advocate General (General Litigation) or the Associate General Counsel (Litigation) for resolution.

(f) *Determining Authority.* The cognizant DON or DOD official designated to grant or deny a litigation request. In all cases in which the United States is, or might reasonably become, a party, or in which expert testimony is requested, the Judge Advocate General or the General Counsel of the Navy, depending on the subject matter of the request, will act as determining authority. In all other cases, the responsibility to act as determining authority has been delegated to certain commands and activities. Further guidance on the essential contents of a request and indicating where members of the public should forward litigation requests is contained in §§ 725.8 and 725.9.

§ 725.5 Applicability.

(a) *Applicable Situations.* This instruction applies to the following personnel and situations:

(1) To all present and former civilian and military personnel of the DON whether employed by, or assigned to, DON, temporarily or permanently. Categories of personnel affected are defined more fully in § 725.4(b).

(2) This instruction applies only to situations involving existing or reasonably anticipated litigation, as defined in § 725.4(c), when DOD or DON information or witnesses are sought, whether or not the United States, the DOD, or its components are parties thereto. It does not apply to formal or informal requests for information in other situations.

(3) This instruction provides guidance for the operation of the DON and for present and former DON personnel in responding to litigation requests. It is not intended, does not, and may not be relied upon, to create any right or benefit, substantive or procedural, enforceable at law or equity against the United States, DOD, or DON.

(4) This instruction is not intended to infringe upon or displace the responsibilities committed to the Department of Justice in conducting litigation on behalf of the United States.

(5) This instruction does not supersede or modify existing laws, DOD or DON regulations, directives, or instructions governing testimony of DON personnel or release of official DOD or DON information during grand jury proceedings.

(6) This instruction does not control release of official information in response to requests unrelated to litigation or under the Freedom of Information Act (FOIA), 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a. It does not preclude treating any written request for DON records not in the nature of legal process as a request under the FOIA or Privacy Act. DON activities are encouraged to process requests for records under the FOIA or Privacy Act if they are invoked by the requester either explicitly or by fair implication as provided in 32 CFR 701.3(d) and 701.103(i).

(b) *Exceptions and Exclusions.* This instruction does not apply to release of official information or testimony by DON personnel in the following situations:

(1) Before courts-martial convened by any DOD component, or in administrative proceedings conducted by, or on behalf of, such a DOD component;

(2) Under administrative proceedings conducted by, or on behalf of, the Equal Employment Opportunity Commission, the Merit Systems Protection Board, the Federal Labor Relations Authority, the Federal Services Impasse Panel, or under a negotiated grievance procedure under a collective bargaining agreement to which the Government is a party;

(3) In response to requests by Federal Government counsel, or counsel representing the interests of the Federal Government, in litigation conducted, in whole or in part, on behalf of the United States (e.g., Medical Care Recovery Act claims, affirmative claims, or subpoenas issued by, or concurred in by, Government counsel when the United States is a party);

(4) As part of the assistance required by the Defense Industrial Personnel Security Clearance Program Under DOD Directive 5220.6; [1]

(5) Release of copies of Manual of the Judge Advocate General (JAGMAN) investigations, to the next of kin (or their representatives) of deceased or incompetent Naval personnel;

(6) Release of information by DON personnel to counsel retained on their behalf for purposes of litigation, unless that information is classified, privileged, or otherwise protected from disclosure. (In the latter event, compliance with 32 CFR Part 97 and this instruction is required);

(7) Cases involving garnishment orders for child support and/or alimony. The release of official information in these cases is governed by 5 CFR part 581 and Secretary of the Navy Instruction 7200.16; [2]

(8) Pursuant to release of information to federal, state, and local prosecuting and law enforcement authorities, in conjunction with an investigation conducted by a DOD component or DON criminal investigative organization;

(9) This instruction does not preclude official comment on matters in litigation in appropriate cases.

§ 725.6 Contents of a proper request or demand

(a) *Written (i.e., routine) requests.* If official information, through testimony or otherwise, is sought, a detailed request must be submitted in writing to the appropriate determining authority far enough in advance to allow prompt and thorough evaluation of the request and avoidance of adverse effects on the mission of the command or activity which must respond. A request that is deficient in providing necessary information may be returned to the requester by the determining authority, with an explanation of the deficiencies and a statement that no further action will be taken until they are corrected. If the circumstances so indicate, the determining authority should provide an information copy to the court issuing legal process as well. Litigation requests must provide the information—as applicable to the case under consideration—as follows:

(1) A statement as to whether the United States is, or is reasonably anticipated to become, a party to the matter;

(2) The caption of the case, including names of the parties, docket number, court, and the date the action commenced;

(3) Name, address, and telephone number of all counsel to the parties, or

[1] Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, Attn: Code 301, 5801 Tabor Avenue, Philadelphia, PA 19120.

[2] See footnote 1 to § 725.5(b)(4).

to other persons likely to become parties;

(4) A brief summary of the facts of the case and the present posture of the case;

(5) A description, in as much detail as possible, of the documents, information, or testimony sought;

(6) A statement of whether factual, opinion, or expert testimony is sought;

(7) If expert or opinion testimony is sought, an explanation of why exceptional need or unique circumstances exist justifying such testimony, including why such testimony is not reasonably available from any other source;

(8) A statement of the relevance of the matters sought to the proceedings at issue;

(9) The name, address, and telephone number of the person, from whom the documents, information, or testimony is sought (if applicable);

(10) The date(s) on which the documents, information, or testimony sought must be produced; the requested location of production; and the estimated length of time that attendance of the DON personnel will be required (if applicable);

(11) A statement of the requester's willingness to pay in advance, in accordance with § 725.10, all reasonable expenses and costs of searching for and producing documents, information, or personnel, including travel expenses and accommodations (if applicable);

(12) A statement of understanding that the search and production will be at no expense to the Government;

(13) In cases in which deposition testimony is sought, a statement of whether later deposition testimony or attendance at trial is anticipated and requested;

(14) Agreement to notify the determining authority at least 10 days in advance of all interviews, depositions, or testimony. Additional time for notification may be required where the witness is located overseas;

(15) Agreement to conduct the deposition at the location of the witness, unless the witness and his commanding officer or cognizant superior, as applicable, stipulate otherwise;

(16) In the case of former DON personnel, a brief description of the length and nature of their duties while in DON employment, and a statement of whether such duties involved, directly or indirectly, the information or matters as to which the person will testify;

(17) An agreement to provide free of charge to any witness a signed copy of any written statement he or she may make, or, in the case of an oral deposition, a copy of that deposition transcript (if taken by a stenographer) or a video tape copy if taken solely by video tape, if not prohibited by applicable rules of court;

(18) An agreement that if the local rules of procedure controlling the litigation so provide, the witness will be given an opportunity to read, sign, and correct the deposition at no cost to the witness or the Government; and

(19) A statement of understanding that the United States reserves the right to have a representative present at any interview or deposition.

(b) *Oral (i.e., emergency) requests.* Written requests allowing reasonable lead time for evaluation and processing are normally required. However, in emergency situations where response time is severely limited and a written request is impractical, the following procedures should be followed:

(1) The determining authority has discretion to waive the requirement of a written request and expedite a response in the event of a bona fide emergency under conditions which could not be anticipated in the course of proper pretrial planning and discovery. Oral (i.e., emergency requests) and subsequent determinations should be reserved for instances where factual matters are sought and insistence on compliance with the requirements of a proper written request would result in the effective denial of the request and cause an injustice in the outcome of the litigation for which the information is sought. No requester has a right to make an oral request and receive a determination, however. Whether to permit such an exceptional procedure is a decision within the sole discretion of the determining authority, unless overruled by the General Counsel or the Judge Advocate General, as appropriate.

(2) If the determining authority concludes that the request, or any portion of it, meets the foregoing criteria, the requester must agree to the applicable conditions set forth in paragraph (a) of this section and § 725.7(c). The determining authority will then orally advise the requester of the approval and seek written confirmation of the oral request. The determining authority will make a written record of the disposition of the oral request, including the grant or denial, the circumstances requiring the procedure, and the conditions to which the requester agreed.

(3) This emergency procedure should not be utilized where the requester refuses to agree to the appropriate conditions set forth in §§ 725.6(a) and 725.7(c) or indicates unwillingness to abide by the limits of the oral grant, partial grant, or denial.

(c) *Visits and views.* A request to visit a DON activity, ship, or unit, or to view materials or spaces located there, will be forwarded to the appropriate determining authority for resolution. Action taken by that authority will be coordinated with the commanding officer of the activity, ship, or unit affected, or with his or her staff judge advocate (if applicable). The authority of the commanding officer of any activity, ship, or unit at issue, over the personnel or property of that activity, ship, or unit is not limited by this instruction. Visits and views involving DON units and activities in connection with litigation requests should not be accompanied by interviews of personnel unless separately requested and granted. The military mission of the unit shall normally take precedence over any visit or view. The commanding officer may independently prescribe reasonable conditions as to time, place, and circumstances to protect against compromise of classified or privileged material, intrusion into restricted spaces, and unauthorized photography.

(d) *Requests for interviews.* No witness may be required by legal process to submit to interview. DON personnel may voluntarily consent to be interviewed on official matters, with the permission of the appropriate determining authority. In deciding whether to agree to an interview, DON personnel should be advised that if a request for an interview is refused, the requester may seek to compel testimony at a deposition or at trial.

(e) *Requests for Privacy Act protected information.* In addition to complying with the requirements of this instruction, litigation requests for official DON records contained in a "system of records" must satisfy the requirements for release imposed by the Privacy Act, 5 U.S.C. 552a. *See* 32 CFR 701.100–701.120. Normally, this is accomplished by producing:

(1) The written consent of the subject of the record,

(2) A court order or subpoena from a court of competent jurisdiction signed by a state or federal judge directing disclosure of the information, or

(3) As indicated in 32 CFR 701.105, a demonstration of the applicability of some other Privacy Act exemption authorizing release of official DON records containing personal information to third parties.

When records contained in a "system of records" are released, disclosure accounting requirements contained in 32 CFR 701.105(c) (Secretary of the Navy

Instruction 5211.5C) [3] must be complied with.

(f) *Service of Process.* 10 U.S.C. 7861 provides that the Secretary of the Navy has custody and charge of all books, records, papers and property of the DON. Under 32 CFR 257.5(c), the Navy's sole delegate for service of process is the General Counsel of the Navy, whose address for this purpose is Office of the General Counsel, Department of the Navy, Washington, DC 20350-1000. To be effective for judicial enforcement purposes, all legal process for official DON documents must be served upon the General Counsel, who will in most cases refer the matter to the proper delegate for action. Process for DON documents directly served on a subordinate officer within any DON activity or command, not also properly served on the General Counsel, is insufficient to constitute an enforceable legal demand but shall be processed and acted upon by DON activities and determining authorities as a litigation request by counsel.

§ 725.7 Considerations in responding to a request.

(a) *General Considerations.* In deciding whether to authorize release of official information and the testimony of DON personnel concerning official information (hereafter referred to as "the disclosure"), under a request satisfying the requirements of § 725.6, the determining authority shall consider the following factors:

(1) The DON policy regarding disclosure set forth in § 725.2 of this instruction;

(2) Whether the request or demand is unduly burdensome or otherwise inappropriate under applicable court rules;

(3) Whether disclosure, including release *in camera* (i.e., to the judge or court alone), is appropriate under procedural rules governing the case or matter in which the request or demand arose;

(4) Whether disclosure would violate or conflict with a statute, executive order, regulation, directive, instruction or notice. In this regard it is noted that this instruction is not intended to place unreasonable restraints upon the post-employment conduct of former military members and civilian employees of DON. Accordingly, requests for expert or opinion testimony by such personnel will normally be granted unless that testimony would constitute a violation of statute (e.g., 18 U.S.C. 201 et. seq.), regulation (e.g., DOD Directive 5500.7 [4] and Secretary of the Navy Instruction 5370.2H [5] (Standards of Conduct)), or disclose properly classified or privileged information;

(5) Whether disclosure, in the absence of a court order or written consent would violate the Privacy Act, as explained previously in § 725.6(e);

(6) Whether disclosure, including release *in camera*, is appropriate or necessary under relevant substantive law concerning privilege (e.g., attorney-client, attorney work-product, deliberative process, or, in the case of civilian personnel, physician-patient);

(7) Whether disclosure, except when *in camera* and necessary to assert a claim of privilege, would reveal information properly classified pursuant to DOD Directive 5200.1-R [6] (Information Security Program Regulation), unclassified technical data withheld from public release pursuant to DOD Directive 5230.25,[7] privileged Naval Aviation Safety Program information (such as mishap investigation report witness statements), matters exempt from disclosure under the Privacy Act, or other matters exempt from unrestricted disclosure. Any consideration of release of classified information for litigation purposes, within the scope of this instruction, must be coordinated within the Office of the Chief of Naval Operations (OP-09N) in accordance with OPNAVINST 5510.1G.[8]

(8) Whether disclosure would unduly interfere with ongoing law enforcement proceedings, violate an individual's constitutional rights, reveal the identity of an intelligence source, informant, or source of confidential information, conflict with United States obligations under international agreement, or would otherwise be inappropriate under the circumstances; and

(9) Whether attendance of the requested witness at deposition or trial will unduly interfere with the military mission of the command.

(b) *Considerations Pertaining to Medical Records of Civilian Employees.* With respect to requests for medical and other records of civilian employees, production of medical certificates or other such records is controlled by the Federal Personnel Manual, chapter 294 and chapter 339.1-4.[9] Records of civilian employees, other than medical records, may be produced upon receipt of a court order and a request complying with § 725.6, provided no classified or for-official-use-only information, such as loyalty or security records, are involved. Disclosure of records relating to compensation benefits administered by the Office of Workers' Compensation Programs of the Department of Labor are governed by Secretary of the Navy Instruction 5211.5C (Privacy Act implementation) and Secretary of the Navy Instruction 5720.42D [10] (Freedom of Information Act implementation), as appropriate. The provisions of § 725.7(e) pertain to the release of original or copies of records in response to a court order, subpoena or litigation request.

(c) *Contents of responses to litigation requests.* (1) The determination letter should respond solely to the specific disclosures requested, stating a specific determination on each particular request. A denial of a request, in whole or part, should fully inform the requester—and ultimately a court if the denial is challenged—of the reasons underlying the determination.

(2) Whenever a litigation request, or compliance with a court order or subpoena duces tecum, is denied, a copy of the denial letter and all associated documents will be promptly forwarded to the Deputy Assistant Judge Advocate General (General Litigation) or to the Associate General Counsel (Litigation), as appropriate. Telephonic notification is particularly appropriate where a judicial challenge or contempt action is anticipated.

(3) The determination letter should state, or adopt by reference, conditions set forth in § 725.6(a)(11)-(a)(19). Reiterating, it should advise the requester of the following conditions, as appropriate:

(i) All costs will be borne and advanced by the parties; no cost to the Government or the witness may result from the grant of disclosure;

(ii) The determination is solely as to the matters stated; no other determination is expressed or implied. No determination as to expert, opinion, or policy matters have been made if none has been requested or implicated;

(iii) Any deposition shall be at the witness's location unless otherwise agreed to by the witness and his or her commanding officer (if applicable);

(iv) The grant is for a single deposition or interview only; subsequent depositions are not encompassed or authorized and normally will not be granted. Permission for subsequent trial testimony must be separately requested and determined;

(v) The determining authority shall be informed at least 10 working days prior to any interview, deposition, or

[3] See footnote 1 to § 725.5(b)(4).

[4] See footnote 1 to § 725.5(b)(4).

[5] See footnote 1 to § 725.5(b)(4).

[6] See footnote 1 to § 725.5(b)(4).

[7] See footnote 1 to § 725.5(b)(4).

[8] See footnote 1 to § 725.5(b)(4).

[9] See footnote 1 to § 725.5(b)(4).

[10] See footnote 1 to § 725.5(b)(4).

testimony, and may appoint counsel therefor. No such deposition or interview may be conducted in the absence of that counsel unless an express waiver of this requirement has been obtained from the determining authority; and

(vi) Other counsel of record will be provided a copy of the determination so they may apply to participate or broaden the request. Failure to so apply within the stated 10 working day period shall constitute waiver of that right.

(vii) If the authority to whom the matter is referred determines that compliance with a court order or subpoena duces tecum is indicated, it will be effected by transmitting certified copies of records to the clerk of the court from which process issued. If, because of unusual circumstances, an original record must be produced by a DON custodian, the original will be retained in the custody of the person producing it, and copies should be placed in evidence.

§ 725.8 Responsibilities of DON personnel.

(a) *Matters proprietary to the DON.* If a litigation request or demand for official DOD information or for testimony concerning such information is presented, the individual to whom the request or demand is made will immediately notify the cognizant DON official, as indicated in this section, who will determine availability and respond to the request or demand.

(b) *Matters proprietary to another DOD component.* If a DON activity receives a litigation request or demand for official information originated by another DOD component or for personnel presently or formerly assigned to another DOD component, the DON activity will forward appropriate portions of the request or demand to the DOD component originating the information, to the components where the personnel are assigned, or to the components where the personnel were formerly assigned, for action under 32 CFR part 97. The forwarding DON activity will also notify the requester and court (if appropriate), or other authority, of its transfer of the request or demand.

(c) *Litigation matters to which the United States is, or might reasonably become, a party and requests for expert or opinion testimony.* Such requests shall be forwarded for a determination to the Judge Advocate General or the General Counsel of the Navy according to their respective areas of cognizance as discussed in § 725.9 and, in more detail, in Secretary of the Navy Instruction 5820.8.[11]

(d) *Litigation matters to which the United States is not, and is reasonably not expected to become a party.* (1) With respect to matters within the purview of the Judge Advocate General, such requests shall be forwarded to and determined by the Navy or Marine Corps officer exercising general court-martial jurisdiction in whose chain of command the prospective witness or requested documents lie. Further guidance in identifying the proper determining authorities can be found at § 725.9 and in Secretary of the Navy Instruction 5820.8.

(2) As to matters within the cognizance of the General Counsel, those requests involving issues of Navy policy shall be forwarded for determination to the Associate General Counsel (Litigation). All other requests shall be forwarded for determination to one or more of the respective counsel for Naval Sea Systems Command, Naval Air Systems Command, Naval Supply Systems Command, Military Sealift Command, Naval Facilities Engineering Command, Space and Naval Warfare Command, Office of the Navy Comptroller, Commandant of the Marine Corps, Office of the Chief of Naval Research, or Civilian Personnel Programs Division (OP-14L), Office of the Chief of Naval Operations, depending upon who has cognizance over the information or personnel at issue. Further guidance with respect to proper determining authorities can be found at § 725.9 and in Secretary of the Navy Instruction 5820.8.

(3) The foregoing guidance shall not prevent a determining authority from referring requests or demands to another determining authority better suited under the circumstances to determine the matter and respond, but the requester shall be notified of the referral. Further, each determining authority specified in this paragraph may delegate his or her decisional authority to a principal staff member, staff judge advocate, or legal advisor.

(e) *Requirement for prompt determination.* A determination to grant or deny should be made expeditiously to provide the requester and the court with the information requested or with a statement of the reasons for denial. The decisional period, absent exceptional or particularly difficult circumstances, should not exceed 10 working days from receipt of a request complying with the requirements of § 725.6. The requester (and if circumstances so indicate, the court) should also be informed promptly of the referral of any portion of the request to another determining authority within DOD for determination.

(f) *Scope of disclosure.* DON personnel shall not produce, disclose, release, comment upon, or testify concerning any official DOD information in response to a litigation request or demand without prior written approval of an appropriate DON official. If a request has been made, and granted, in whole or in part under 32 CFR part 97 and this instruction, DON personnel may only produce, disclose, release, comment upon, or testify concerning those matters specified in the request and properly approved by the determining authority designated.

(g) *Action pending determination.* If, after DON personnel have received a litigation request and submitted it to the appropriate determining authority, a response is required before a determination by the responsible official has been received, the Deputy Assistant Judge Advocate General or Associate General Counsel (Litigation) who has cognizance over the matter shall be notified. That official, as necessary, will furnish the requester, the court, or other authority with a copy of this regulation or Secretary of the Navy Instruction 5820.8, inform the requester, the court, or other authority that the request or demand is being reviewed, and seek a stay pending a final determination.

(h) *Response to court order pending determination.* If a court of competent jurisdiction or other appropriate authority declines to stay the effect of the request or demand in response to action taken under paragraph (g) in this section, or if such court or other authority orders that the request or demand must be complied with, notwithstanding the final decision of the appropriate DON official, the DON personnel upon whom the request or demand was made will, if time permits, notify the determining authority of such ruling or order. That authority will notify the Deputy Assistant Judge Advocate General or the Associate General Counsel (Litigation) having cognizance over the matter. After due consultation and coordination with the Department of Justice, as required by the Manual of the Judge Advocate General, that official will determine whether the individual is required to comply with the request or demand and will notify the requester, the court, or other authority accordingly.

§ 725.9 Proper forwarding of a request.

As indicated in § 725.8(c), in all cases in which the United States is, or might reasonably become, a party, or in which

[11] See footnote 1 to § 725.5(b)(4).

expert or opinion testimony is requested, the Judge Advocate General or the General Counsel of the Navy will act as determining authority on litigation requests. In all other cases, the responsibility to act as determining authority has been delegated to certain subordinate commands and activities. Requests by members of the public for official DON information should be sent directly to the naval command or activity which holds the documents desired or at which the witness is employed or assigned for duty. The guidance contained in 32 CFR 701.31 regarding proper addresses for Freedom of Information Act requests for specific categories of records and information applies equally to litigation requests and should be consulted. The following guidelines also apply in ascertaining the proper addressee of a litigation request. If in doubt, however, requests may be forwarded to either the Associate General Counsel (Litigation) or the Deputy Assistant Judge Advocate General (General Litigation) depending on the subject matter and their respective areas of cognizance in providing legal advice to the DON.

(a) *Matters under the cognizance of the General Counsel.* The General Counsel has cognizance over matters related to the employment and records of present and former DON civilian employees, litigation involving asbestos exposure, and business and commercial law aspects of DON operations including, but not limited to:

(1) Acquisition, custody, management, transportation, taxation, and disposition of real and personal property and the procurement of services for DON;

(2) Operations of the Military Sealift Command, Office of the Comptroller of the Navy, and the Naval Data Automation Command;

(3) All matters in the fields of patents, inventions, trademarks, copyrights, royalty payments, and similar matters;

(4) Procurement aspects of foreign military sales and matters related to the Arms Exports Control Act; and

(5) DON litigation before the Armed Services Board of Contract Appeals.

(b) Requests dealing with subjects under the cognizance of the General Counsel, or known to be within the purview of the commands listed in paragraph (b)(3) in this section, should be forwarded directly for determination to counsel in accordance with the following guidelines:

(1) In all requests involving issues of Navy policy, cases in which the United States or DON is a party, or if expert or opinion testimony is desired (or if in doubt about the proper addressee):

Office of the General Counsel, Department of the Navy, Litigation Office, Washington, DC 20360-5110.

(2) For matters involving asbestos litigation:

Office of Counsel, Naval Sea Systems Command Headquarters, Personnel and Labor Law Section (Code OOLD), Washington, DC 20362-5101.

(3) When the request does not involve issues of Navy policy it should be forwarded directly for determination to one of the following commands having cognizance over the subject matter of the request:

Office of Counsel, Naval Sea Systems Command Headquarters, Department of the Navy, Washington, DC 20362-5101.
Office of Counsel, Naval Air Systems Command Headquarters, Department of the Navy, Washington, DC 20361-0002.
Office of Counsel, Naval Supply Systems Command Headquarters, Department of the Navy, Washington, DC 20376-5000.
Office of Counsel, NAVFAC, Naval Facilities Engineering Command, 200 Stovall Street, Alexandria, VA 22332-2300.
Office of Counsel, Space and Naval Warfare Systems Command, Washington, DC 20363-5100.
Office of Counsel, Navy Comptroller, Department of the Navy, Washington, DC 20350-1100.
Office of Counsel, Naval Research, Chief of Naval Research, Ballston Center Tower #1, 800 North Quincy Street, Arlington, VA 22217-5000.
Office of Counsel, Civilian Personnel Programs Division (OP-14L), Office of the Chief of Naval Operations, Department of the Navy, Washington, DC 20350-2000.
Commandant of the Marine Corps, Office of Counsel, Headquarters Marine Corps, Washington, DC 20380-0001.
Office of Counsel, Military Sealift Command, Department of the Navy, Washington Navy Yard, Bldg. 210, Washington, DC 20398-5100.

(4) For matters involving the Armed Forces Board of Contract Appeals, requests shall be forwarded for determination to the respective counsel set forth in paragraph (b)(3) in this section, except where the determination may involve the assertion of the deliberative process privilege before that Board. In that event, the matter shall be forwarded for determination to the Associate General Counsel (Litigation).

(c) *Matters under the cognizance of the Judge Advocate General*—The Judge Advocate General is responsible for providing legal advice in all matters related to the operations and administration of military shipboard and shore commands and present and former active-duty DON personnel and their records. Requests dealing with the following subjects or known to be within the purview of the following commands should be forwarded directly for determination to the following addresses:

(1) In all cases in which the United States or DON is a party or if expert or opinion testimony is desired (or if in doubt about the proper addressee):

Judge Advocate General, General Litigation Division, Department of the Navy, 200 Stovall St., Alexandria, VA 22332-2400.

(2) For medical and service records of former Navy and Marine Corps personnel:

Director, National Personnel Records Center, National Archives and Records Administration, 9700 Page Blvd., St. Louis, MO 63132.

Litigation requests, including court orders and subpoenas duces tecum, demanding information from, or production of, service or medical records in the custody of the National Personnel Records Center of former Navy and Marine Corps personnel will be served upon the Director at the foregoing address. If records responsive to the request are identified and maintained at the National Personnel Records Center, that Center shall forward such matters, along with the request, in the case of Navy personnel, to:

(1) Commander, Naval Military Personnel Command (Code 06), Washington, DC 20370-5000, or his delegate, who will respond, or

(2) In the case of Marine Corps personnel, to the Commandant of the Marine Corps (MMRB-10), Quantico, VA 22134-0001, who will respond.

(3) For pay records of active-duty, reserve, retired, or former Navy members:

Commanding Officer, Navy Finance Center, 1240 East 9th St., Cleveland, OH 44199-2055.

(4) For pay records of active-duty, reserve, retired, or former Marines:

Commanding Officer, Marine Corps Finance Center, Code OC, Kansas City, MO 64197-0001.

(5) For copies of reports of investigation conducted in accordance with the Manual of the Judge Advocate General (JAGMAN investigation reports);

Judge Advocate General, Investigations Division, Department of the Navy, 200 Stovall St., Alexandria, VA 22332-2400.

(6) The majority of Navy and Marine Corps Commanders in the United States and overseas have been designated as determining authorities. A complete listing of these authorities and their official addresses is contained in

Secretary of the Navy Instruction 5820.8 and can be obtained by writing to the Judge Advocate General at the address indicated in paragraph (c)(1) of this section. Some determining authorities frequently called on to determine litigation requests include:

Chief of Naval Operations (OP-OOJ), Department of the Navy, Washington, DC 20350-2000.
Vice Chief of Naval Operations (OP-09BL), Department of the Navy, Washington, DC 20370-5000.
Commandant of the Marine Corps (Code JAR), Headquarters Marine Corps, Washington, DC 20380-0001.
Chief, Bureau of Medicine and Surgery/Office of the Surgeon General (MED 00D3), Washington, DC 20372-5120.
Commander, Naval Military Personnel Command (06), Washington, DC 20370-5000.
Commander, Naval Investigative Service Command, Washington, DC 20388-5000.
Commander in Chief, U.S. Atlantic Fleet, Norfolk, VA 23511.
Commander in Chief, U.S. Pacific Fleet, Box OOJ, Pearl Harbor, HI 96860-7000.
Commander, Naval Air Force, U.S. Atlantic Fleet, Norfolk, VA 23511-5188.
Commander, Naval Air Force, U.S. Pacific Fleet, Naval Air Station, North Island, San Diego, CA 92135-5100.
Commander, Naval Surface Force, U.S. Atlantic Fleet, Norfolk, VA 23511-6292.
Commander, Naval Surface Force, U.S. Pacific Fleet, Naval Amphibious Base, Coronado, San Diego, CA 92155-5035.
Commander, Submarine Force, U.S. Atlantic Fleet, Norfolk, VA 23511-6792.
Commander, Submarine Force, U.S. Pacific Fleet, Pearl Harbor, HI 96860-6550.
Commander, Naval Reserve Force, New Orleans, LA 70146-5000.
Commanding General, Fleet Marine Force, Atlantic/Europe, Norfolk, VA 23511-5001.
Commanding General, Fleet Marine Force, Pacific, Camp H. M. Smith, HI 96861-5001.

§ 725.10 Fees.

The determining authority shall charge reasonable fees and expenses to parties seeking official DOD and DON information under this instruction. The following guidelines are prescribed for fee assessment:

(a) *Documents.* A complete list of applicable charges is established at 32 CFR 288.10. Fees associated with searching for, reviewing and duplicating documents shall be charged unless waived in accordance with paragraph (f) in this section.

(b) *Witnesses.*—(1) *Witness fees.* The requester shall pay to the witness the fee and expenses prescribed for attendance by the applicable rule of court. If no such fee is prescribed, the applicable Federal rule shall apply. No additional fee will be prescribed for the time spent while testifying or in attendance to do so.

(2) *Witness travel and per diem.* Travel and per diem expenses of witnesses in cases in which the United States is not a party shall be fully reimbursed by the requesting litigant, but shall not be assessed in an amount exceeding the applicable rule of court, or the Federal rule if there is no local rule. In certain cases in which the United States is not a party, but in which it has an official interest, Joint Federal Travel Regulations and Navy Travel Instructions pertaining to entitlements of DON personnel summoned as witnesses should be consulted for guidance in ascertaining whether fees are payable by the United States and, if applicable, to which appropriation costs of travel should be charged.

(3) *Cost of processing and responding to requests for witness testimony and interviews.* As authorized by 31 U.S.C. 9701 and 32 CFR 97.6(d), when a request is granted to permit DON personnel to testify or be interviewed as to factual, expert, opinion, or policy matters, the requester shall pay a fee calculated to fully reimburse the government for the expense of processing the request and providing the witness. Fees and expenses shall include:

(1) Costs of the time expended by DON employees to process and respond to the request or demand;

(2) Costs of attorney time expended in reviewing the request or demand and any information located in connection with the request or demand; and

(3) Expenses generated by materials and equipment used to search for, produce, and copy the responsive information.

All costs for personnel shall be calculated on the hourly pay of the witness (including all pay, allowances, and benefits) plus a three percent rate administrative surcharge as prescribed by 31 U.S.C. 9701 and DOD Instruction 7230.7,[12] and shall include such hourly fee for each hour (or portion) of the normal work day when the witness is in travel, in attendance, testifying or being interviewed.

(c) *Views and Visits.* The requester shall pay a fee calculated to reimburse the command for any expense or effort incurred as a result of the view or visit. Such fees and expenses normally shall include the cost of escort personnel and special preparations (if any). Costs shall be calculated upon the full hourly pay of the personnel necessarily involved (including all pay, allowances, and benefits) plus a three percent administrative surcharge as prescribed by 31 U.S.C. 9701 and DOD Instruction 7230.7.

(d) *Payment.* Fees for documents shall be paid directly to the DON. Witness fees for testimony shall be paid to the witness, who shall endorse the check "pay to the United States," and surrender it to his or her supervisor. It shall be deposited thereafter in the General Fund. If applicable travel regulations allow use of government funds and the government pays for the travel, witnesses are expected to utilize a travel claim to obtain proper reimbursement from the Navy. In all other cases, the private litigant requesting a DON witness shall forward in advance necessary round trip tickets and all requisite travel and per diem funds, with appropriate monitoring by determining authorities, and the DON witness shall be provided with permissive no-cost orders covering the period in which testimony will be provided.

(e) *Matters in Which the United States is a Party.* Fees or expenses, other than those permitted by the Federal Rules of Civil or Criminal Procedure and related case law, shall not be charged in matters to which the United States is a party.

(f) *Waiver.* A waiver of any fees in connection with a litigation request may be granted by the determining authority at his or her discretion provided that waiver is in the interest of the United States. Fee waivers shall not be routinely granted, nor shall they be granted under circumstances which might create the appearance that DON favors one private litigant over another.

Dated: November 21, 1989.

John J. Geer, Jr., JAGC, USN,

Assistant Judge Advocate General, Department of the Navy.

Sandra M. Kay,

Department of the Navy, Alternate Federal Register Officer.

[FR Doc. 89-27800 Filed 11-27-89; 8:45 am]

BILLING CODE 3810-AE

[12] See footnote 1 to § 725.5(b)(4).

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

RIN 1024-AB28

Lake Chelan National Recreation Area and Ross Lake National Recreation Area, WA; Target Practice

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: The regulations set forth below are necessary to designate time and locations where weapons may be carried, possessed and used for target practice within Lake Chelan National Recreation Area and Ross Lake National Recreation Area pursuant to a requirement of the National Park Service General Regulations. The intent of this rulemaking is to allow local residents and occasional visitors to continue the established practice of recreational target practice and sighting-in of hunting weapons while at the same time providing for public safety and protection of park resources.

EFFECTIVE DATE: December 28, 1989.

FOR FURTHER INFORMATION CONTACT: John J. Earnst, Superintendent, North Cascades National Park, 2105 Highway 20, Sedro Woolley, WA 98284, Telephone: (206) 856-5700.

SUPPLEMENTARY INFORMATION:

Background

As stated in the enabling legislation, Public Law 90-544, one of the primary reasons for establishment of the recreation areas was " * * * to provide for the public outdoor recreation use and enjoyment * * * " of these areas. Recreational target shooting is an established outdoor recreational activity in both recreation areas. The legislation also specifically allows hunting in accordance with applicable laws of the United States and of the State of Washington. Hunting weapons must be periodically sighted-in to be used safely and effectively. There are long established facilities for these activities on Federal lands in both recreation areas.

Residents of the communities of Stehekin, Newhalem and Diablo, located within the recreation areas, have no reasonable alternative to these facilities. Private land holdings are generally limited, and no facilities for these activities have been, nor are they likely to be, developed on them. Access to facilities outside the recreation area would be extremely difficult for Stehekin residents since access is only by water, air or trail. It would be a needless and unreasonable burden for residents of Newhalem and Diablo since a facility already exists within the recreation area. The Newhalem range was built by local residents who were members of a local gun club. No facilities for these activities exist within a 55-mile radius of any of these communities.

The existing facility within Ross Lake National Recreation Area is located in the SE ¼ of sec. 19 and the NE ¼ of sec. 30, T. 37 N., R. 12 E., WM, approximately 200 yards northwest of State Route 20 near mile marker 119.

The existing facility within Lake Chelan National Recreation Area is located in the SE ¼ of sec. 8, T. 33 N., R. 17 E., WM, approximately 100 yards east of mile point 7 on the Stehekin Valley Road in a converted borrow pit.

Both of these sites are screened by trees and other vegetation. There are no other recreational developments or activities in their immediate vicinity which would conflict with their proposed use. The ranges are adequately removed from public roads and firing is away from the roads toward hillsides.

The section-by-section analysis of the final rulemaking for 36 CFR 2.4 published in the **Federal Register** on April 30, 1984, page 18446, states that target ranges which have been developed with adequate facilities to provide for public safety and which were in use prior to the effective date of the regulation can be designated for continued use by special regulations. This final rule is based on the intent of that analysis.

The Superintendent has determined that the designation of these locations and facilities is consistent with the purposes for which the recreation areas were established, will not adversely affect park resources and that the design and operation procedures are annually inspected and maintained to assure that adequate safety measures are in place, and that standard range safety rules are posted.

Summary of Comments

The proposed rule was published on May 9, 1985, (50 FR 19547). The public comment period closed on June 10, 1985. Notice of the proposed rule was also published in local news media in May 1985. The National Park Service did not receive any comments regarding the proposed regulations. During this review period, the Superintendent determined that the level of use of these facilities did not warrant the designation of two target ranges in the Lake Chelan National Recreation Area. Therefore, the number of target ranges at Lake Chelan National Recreation Area is reduced to one in the final rule.

Drafting Information

The following persons participated in the writing of these regulations: Jerry D. Lee, Assistant District Manager; Daniel L. Allen, Resource Management Specialist; Curt Sauer, District Manager; James S. Rouse, Assistant Superintendent, North Cascades National Park.

Paperwork Reduction Act

This rulemaking contains no information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

Compliance with Other Laws

The Department of Interior has determined that this document is not a major rule under Executive Order 12291 (February 19, 1981), 46 *FR* 13193, and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The Department makes this finding because the regulations will impose no significant costs on any class or group of small entities.

Pursuant to the National Environmental Policy Act (42 U.S.C. 4332), the National Park Service has prepared an Environmental Assessment and Finding of No Significant Impact on these regulations. Both are available at the address noted above.

List of Subjects in 36 CFR Part 7

National parks; Reporting and recordkeeping requirements.

In consideration of the foregoing, 36 CFR, chapter 1 is amended as follows:

PART 7—SPECIAL REGULATIONS: AREAS OF THE NATIONAL PARK SYSTEM

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

Authority: 16 U.S.C. 1, 3, 9a, 462(k); section 7.96 also issued under D.C. Code 8-137 (1981) and D.C. Code 40-721 (1981).

2. In § 7.62 add a new paragraph (c) as follows:

§ 7.62 Lake Chelan National Recreation Area.

* * * * *

(c) *Weapons.* The following location is designated for target practice between the hours of sunrise and sunset, subject to all applicable Federal, State, and local laws: in the SE ¼ of sec. 8, T. 33 N., R. 17 E., WM, approximately 100 yards east of mile point 7 on the Stehekin Valley Road, a converted borrow pit.

3. In § 7.69 add a new paragraph (c) as follows:

§ 7.69 Ross Lake National Recreation Area.

* * * * *

(c) *Weapons.* The following location is designated for target practice between the hours of sunrise and sunset, subject

to all applicable Federal, State, and local laws: in the SE ¼ of sec. 19, and the NE ¼ of sec. 30, T. 37 N., R. 12 E., WM, approximately 200 yards northwest of State Route 20 near mile marker 119, the area known as the Newhalem rifle range.

Dated: October 16, 1989.

Maryanne C. Bach,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 89-27748 Filed 11-27-89; 8:45 am]

BILLING CODE 4310-70-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[AD-FRL-3526-5]

Requirements for Implementation Plans: Surface Coal Mines and Fugitive Emissions; Approval and Promulgation of Implementation Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final action.

SUMMARY: The EPA is taking final action under section 302(j) of the Clean Air Act (Act) on a rulemaking proposed October 26, 1984 (49 FR 43211) to add surface coal mines (SCM's) to the list of source categories for which fugitive emissions are included in major source threshold applicability determinations (TAD's) regarding EPA's new source review (NSR) permitting requirements, which includes prevention of significant deterioration (PSD) permitting requirements. The EPA is also taking final action to resolve issues concerning the review of fugitive emissions from surface coal mines which are not specifically listed under section 302(j) but which may be subject to review under certain limited circumstances, such as when collocated with other major sources.

EFFECTIVE DATE: December 28, 1989.

ADDRESSES: A docket, number A-84-33, containing information considered by EPA in the development of this rulemaking is available for public inspection between 8:30 a.m. and 3:30 p.m., weekdays, at EPA's Air Docket (LE-131), Room M-1500, Waterside Mall, 401 M Street SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: William Lamason at Mail Drop 15, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541-5374 (FTS 629-5374).

SUPPLEMENTARY INFORMATION: The contents of today's preamble are provided in the following outline:

I. Summary of Today's Action
II. Background
A. The NSR Applicability Determinations and Fugitive Emissions
B. Regulatory Basis
C. DOI Authority to Regulate
III. Discussion of Today's Action
A. No Listing of SCM's
B. Collocated Sources
C. Modifications to Existing Sources
IV. Major Issues
A. Basis for No List Decision
B. Fugitive Dust Issues Related to SCM's
C. Applicability of Section 302(j) to Modifications
E. Miscellaneous
V. Administrative
A. Docket
B. Office of Management and Budget Review
C. Economic Impact Assessment
D. Federalism Implications
E. Regulatory Flexibility Act Compliance

I. Summary of Today's Action

Today, EPA is taking final action on an October 26, 1984 rulemaking proposal (49 FR 43211) to "list" fugitive emissions from SCM's and on related fugitive dust emissions issues. The "list" referred to, found at 40 CFR 51.166(b)(1)(iii) and 52.21(b)(1)(iii), is of those stationary source categories for which fugitive emissions are included in determining whether a prospective new source or modification is "major." New major stationary sources and major modifications to existing major stationary sources are required to obtain major source NSR permits. The EPA is also taking final action to resolve issues concerning the review of fugitive emissions from SCM's which are not specifically listed but which are subject to review under certain limited circumstances.

In this notice, EPA announces its conclusion that SCM's should not be added to the list of sources for which fugitive emissions are considered in TAD's for major source NSR (including PSD) permits. The EPA notes that the extensive authorities and regulations administered by the Department of the Interior (DOI) under the Surface Mining Control and Reclamation Act (SMCRA) and the Federal Coal Management Program (FCMP) adequately address the potential air quality problems in natural resource areas of special concern that a decision to list SCM's affecting these areas would seek to address. Although EPA has considered the effect of DOI authorities in deciding not to list SCM's, EPA is not granting preemptory authority to DOI for the control of air pollution from SCM's. The Act still requires State implementation plans (SIP's) to contain emission limitations, permit programs, and other measures to ensure that ambient standards and PSD increments are attained and maintained and that there is no manmade visibility impairment in any mandatory Federal Class I area (see sections 110, 161, 169A, and 172 of the Act).

Today's notice that EPA will not list SCM's does not preclude EPA from reconsidering listing SCM's at a later date, if sufficient evidence is provided to EPA of a threat of reduced visibility or other adverse air quality impacts in national parks, wilderness areas, national memorial parks, and international parks that are Class I PSD areas. Such evidence should also show that DOI authorities will not protect visiblity and other air quality values within these areas.

The EPA also announces that it is maintaining the status quo regarding inclusion of fugitive emissions from SCM's where SCM's are collocated with listed sources or otherwise presently subject to NSR regulations. The EPA believes that emissions from SCM's will be subject to review in this fashion only in limited circumstances, if at all, since SCM's themselves are not listed. The EPA is also retaining the interpretation that the definition of major source in section 302(j) of the Act does not extend to modifications and would therefore not affect SCM's collocated with an existing major source undergoing modification.

II. Background

This section briefly summarizes the events leading to today's action but does not repeat in detail previous discussions already published in the **Federal Register**. The reader is referred to these previous notices, specifically August 25, 1983 (48 FR 38742), October 26, 1984 (49 FR 43202 and 43211), and February 28, 1986 (51 FR 7090), for a more detailed discussion.

A. *The PSD and NSR Applicability Determinations and Fugitive Emissions*—1. *Scope of Applicability.* The review and permitting requirements of PSD provisions in Part C of the Act apply to "major" new stationary sources and major modifications to existing major sources. Similar NSR requirements under Part D of the Act apply to major sources locating in designated "nonattainment" areas. The EPA and State permitting authorities conduct emissions assessments to determine whether a source is major and therefore subject to the PSD and NSR requirements of Parts C and D of the Act. The EPA refers to these assessments as TAD's. Section 302(j) of

the Act, 42 U.S.C. 7602(j), defines both "major stationary source" and "major emitting facility" as follows:

> Any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).[1]

The EPA regulations define "fugitive emissions" as emissions that could not reasonably pass through a stack or other functionally equivalent opening. (See 40 CFR 52.21(b)(20).)

2. *Importance of Fugitive Emissions.* Sources in many types of industrial categories exceed major source thresholds solely by virtue of their stack emissions. Other source categories, however, such as SCM's, have relatively few stack emissions. Since a source could be major if fugitive emissions are included in TAD's, but nonmajor if fugitive emissions are not included, treatment of fugitive emissions for applicability purposes can be important. A determination that a source is or will be "major" subjects a project to all PSD or nonattainment permit requirements and/or a construction ban under section 110(a)(2)(I) of the Act.[2]

3. *Mines, Strip Mines, and SCM's.* The terms "mine," "strip mines," and "SCM's" are used in this notice to refer to mining operations. Today's action is limited to SCM's, which were proposed for listing in October 1984 (49 FR 43211). The terms mines and strip mines are more general but include SCM's. Strip mining may refer to open surface operations for mining coal and other materials. Mines may refer to all mines, including underground material extraction. Although today's action focuses on SCM's, comments and discussion may refer to issues applicable to other mines. For example, some DOI regulations pertain to all mining activities, above and below ground.

B. *Regulatory Basis*—1. *Clean Air Act Section 302(j).* Following enactment of the Act Amendments of 1977, which added part C and Part D, EPA issued in 1978 and 1979 various regulations and guidelines under 40 CFR parts 51 and 52 to implement these new provisions. In each action, EPA assumed without discussion that the fugitive emissions of a source or modification were to be included in quantifying its emissions rate in order to determine whether it is "major" (see, e.g., 43 FR 26382–83, 26403–04 (June 19, 1978)). The EPA regarded the Part C definition of "major emitting facility" as exclusively governing the meaning of that term for PSD purposes. Since that definition does not distinguish between fugitive and nonfugitive emissions, EPA concluded that fugitive emissions are as eligible for inclusion in the threshold determinations of PSD applicability as nonfugitive emissions.

One of the consequences of this assumption was that sources of predominantly fugitive emissions, such as SCM's, could be "major" and, hence, subject to PSD and NSR permitting requirements or the construction ban.

2. *Alabama Power* v. *Costle.* In December 1979, the U.S. Court of Appeals for the District of Columbia Circuit held that EPA's interpretation of "major emitting facility" in Part C was incorrect, and, thus, EPA may require the inclusion of fugitive emissions in TAD's for projects in a particular category only if it first satisfied the rulemaking requirement of section 302(j) as to that category (*Alabama Power Company* v. *Costle*, 636 F.2d 323, 369). The court did not specify what it thought EPA had to consider in such a rulemaking. It did say, however, that:

> The EPA's regulation of fugitive emissions has been of special concern to the mining and forestry industries which contend, without serious opposition, that they are incapable of meeting the strict limitations on the emission of particulate matter set by the PSD provisions. * * *
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> * * * * *
>
> The legislative history of this rulemaking provision [Section 302(j)] is sparse, but it may well define a legislative response to the policy considerations presented by the regulation of sources where the predominant emissions are fugitive in origin, particularly fugitive dust. Whatever the motivation of the "rule" provision of 302(j), its existence is unmistakable. Even if the origin of this provision is fortuitous, the provision may well be welcomed as serendipitous, for it gives EPA flexibility to provide industry-by-industry consideration and appropriate tailoring of coverage. [id.]

3. *August 7, 1980 Rulemaking.* In response to the U.S. Court of Appeals for the District of Columbia Circuit ruling in *Alabama Power Company* v. *Costle*, EPA proposed amendments to both the PSD and nonattainment regulations that would comply with the rulemaking requirements of section 302(j) by excluding fugitive emissions from TAD's except as to certain specifically listed categories of sources (e.g., 44 FR 51924, 51948 (September 5, 1979)). Most listed categories corresponded generally to those in the Part C definition of "major emitting facility;" the remaining categories encompassed any source subject on August 7, 1980 to an emission standard under either section 111 or 112 of the Act, 42 U.S.C. 7411 or 7412. [The SCM's were not among the listed categories (id. at 51931)]. The EPA explained that it was proposing to require the inclusion of fugitive emissions for the listed categories because (1) emissions from sources in those categories deteriorate air quality regardless of how they emanate, and (2) the Agency's experience in quantifying fugitive emissions from such sources was in general greater than its experience in quantifying fugitive emissions from other sources (id).

Numerous issues were raised in the course of proposal. In response, EPA maintained its initial interpretation of section 302(j) as reflected in the September 1979 proposal and concluded that the rulemaking it was conducting had afforded sources the opportunity to comment on the proposed inclusion of fugitive emissions in threshold calculations (id. at 52961). Hence, in August 1980, EPA promulgated the substance of the amendments it had proposed (e.g., 45 FR 52739).[3]

4. *Chemical Manufacturer's Association* v. *EPA and Settlement Agreement.* In late 1980, the American Mining Congress (AMC) and other industry organizations (collectively, the "industry petitioners") petitioned the D.C. Circuit to review the provisions that require the fugitive emissions of projects in the listed categories to be taken into account in TAD's. These challenges were subsequently consolidated into *Chemical Manufacturer's Association* v. *EPA*, No. 79–1112 (D.C. Circuit) (*CMA*).

The industry petitioners argued that EPA, before it established those

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[1] For PSD purposes, section 169(l) effectively modifies section 302(j) by establishing the threshold amount of emissions as 100 tons per year for certain designated source categories and 250 tons per year for sources in other categories.

[2] A threshold applicability determination is distinct from a pollutant applicability determination, which is a determination of which pollutant streams from a "major" source or "major" modification are subject to the substantive requirements of the regulations in question. The PSD requirements, for instance, apply to each regulated pollutant that a "major" source emits in "significant" amounts, e.g., 40 CFR 52.21(j)(1984). The regulations do not distinguish between stack and fugitive emissions for this purpose. Construction ban regulations are codified at 40 CFR 52.24.

[3] The EPA simultaneously promulgated a wide array of other changes to the various new source review regulations in effect at the time; not only the Part 51 and 52 PSD regulations, the Offset ruling, and the construction ban, but also 40 CFR 51.165(a), which set forth the requirements of the Part D permit program and which EPA had first promulgated in May 1980 (45 FR 31307).

The EPA did not include SCM's on the list of categories, although the Sierra Club in its comments had argued for their inclusion.

provisions, should have considered the problems of measuring, modeling, and controlling fugitive emissions that are peculiar to each category and then provided (in the words of the *Alabama Power* opinion) "appropriate tailoring of coverage." They also contended that the Act required the EPA to consider, on an industry-by-industry basis, the social, economic, health, and welfare impacts of including fugitive emissions in TAD's. They suggested that EPA could decline to require the inclusion of fugitive emissions as to a particular category on the grounds that growth in that industry was important to the economy and that the emissions posed low risks to human health and welfare. Finally, the industry petitioners asserted that EPA entirely failed to meet those requirements of the Act [Petitioners Brief on Fugitive Emissions and Certain Other Issues, at 12–19 (February 11, 1981)]. In June 1981, EPA began negotiations with the industry petitioners to settle the issues relating to fugitive emissions in the *CMA* case. In February 1982, EPA entered into a settlement agreement with these petitioners in which it agreed to propose to delete the requirement for including fugitive emissions and to take final action on that proposal. Subsequently, the court granted a stay of the case pending implementation of the agreement. The EPA proposed the change called for in this portion of the agreement on August 25, 1983 (48 FR 38742).

5. *Sierra Club* v. *Gorsuch*. In addition to challenges by various industry representatives, the Sierra Club and other environmental groups petitioned the D.C. Circuit to review the 1980 regulations, including the provisions relating to fugitive emissions. In response to industry contention that EPA, in requiring the inclusion of fugitive emissions for the listed categories, had failed to conduct the rulemaking the court had contemplated, the Sierra Club countered that EPA, in failing to list SCM's, had acted arbitrarily and capriciously. The court consolidated the industry challenges under *CMA* v. *EPA* (No. 79–1112), and kept the Sierra Club challenge on its own track.

On August 26, 1983, in response to the Sierra Club petition, the D.C. Circuit ruled that under the logic of its 1980 action, EPA appeared to have no good reason for listing categories without including SCM's (715 F.2d 653). The court subsequently ordered EPA to propose to list or not list SCM's.

6. *October 26, 1984—The "Safety Valve."* In the October 26, 1984 **Federal Register**, EPA completed its obligations regarding SCM's under the *CMA* settlement agreement by deciding not to promulgate the fundamental changes proposed in August 1983. The EPA instead determined that its initial 1980 interpretation regarding the nature of the section 302(j) rulemaking requirement was correct (49 FR 43202). On the same day, EPA fulfilled its obligation under *Sierra Club* v. *Gorsuch* by proposing to list SCM's (49 FR 43211). The EPA characterized congressional intent as requiring EPA to make only two determinations before requiring fugitive emissions to be included in TAD's. For sources in a particular category, EPA must show that: (1) The sources have the potential to degrade air quality significantly, and (2) no unreasonable socioeconomic impacts relative to the benefits would result from subjecting the sources to the relevant PSD or nonattainment programs. Thus, a finding that the sources in a category pose a threat of significant air quality degradation is enough to propose listing, though EPA must consider broader-based objections raised by commenters during the rulemaking before taking final action.

The interpretation of section 302(j) that EPA espoused in 1980 and essentially reaffirmed in 1984 reasonably responds to different congressional intents. A determination by EPA that the sources in a category pose a threat of significant air quality degradation, in effect, establishes a presumption that the sources should be subject to PSD and nonattainment review. This is because the primary purpose of that review is to prevent the construction of new projects that would interfere materially with timely attainment and maintenance of the national ambient air quality standards (NAAQS) and PSD increments. Commenters then may seek to rebut this presumption by producing a record that unreasonable social or economic costs relative to the anticipated benefits would occur if PSD or nonattainment review were applied to a particular category of sources. The EPA's role is to resolve any clash of views and, therefore, engage in a deliberative process that can go far beyond the virtually ministerial decision making that some environmental groups advocate. However, the decision-making process need be extensive only if there are legitimate cost-benefit concerns. Under this interpretation, section 302(j) functions as a useful "safety valve," while at the same time minimizing the expenditure of EPA resources. The EPA's position and reasoning is discussed in further detail in **Federal Register** notices published on October 26, 1984 (49 FR 43202) and February 28, 1986 (51 FR 7090.[4]

The October 26, 1984 proposal also reopened the public comment period on the existing list of source categories for which fugitive emissions are included in determining major source status. Further, the notice solicited comment on an interpretive ruling involving section 302(j) of the Act in relation to the review of modifications involving fugitive emissions at sources that are already "major."

7. *AMC Administrative Petition (1984).* Additional petitions for administrative reconsideration of EPA's October 1984 final action were filed by the AMC, Peabody Holding Co., Inc., and the *NCA* (collectively, "AMC"). The petitions expressed several concerns related to the prospect that SCM's could be subjected to PSD and NSR even if EPA made a final determination not to list SCM's as such. The industry concerns included the interaction between the definition of "source" for PSD and NSR purposes and the currently listed fugitive emissions source categories, and the applicability of section 302(j) to major modifications. To the extent that SCM's would be indirectly subject to PSD and NSR, mining interests sought regulatory relief, either through a change in the definition of source, or through deletion of certain currently listed fugitive emissions source categories. By letter dated June 28, 1985, EPA granted the AMC petition and stated that EPA would complete its reconsideration, and dispose of the other petitions, in conjunction with its final action on the listing of SCM's. The EPA's disposition of these petitions is set forth later in this notice.

8. *February 28, 1986—Alternatives Proposed for Listing SCM's.* On February 28, 1986 (51 FR 7090), the EPA reopened the public comment period to solicit comments on four possible regulatory alternatives for fugitive emissions from SCM's. Alternative I maintained the status quo (no listing of SCM's). Alternative II would list all new SCM's but "grandfather" (i.e., not count) increment consumption for existing mines.[5] Alternative III would list all

[4] Both industry and environmental groups petitioned for judicial review of EPA's October 1984 final action setting the criteria for rulemaking under section 302(j). Those cases were consolidated as *National Coal Association (NCA) v. EPA*, No. 84–1609 (D.C. Cir.), and are still pending as of this date.

[5] Increments published in 40 CFR 52.21(c) are the allowable maximum increase in pollutant concentrations over baseline concentrations—ambient levels that existed in an area on the baseline date after August 7, 1977 as defined under 40 CFR 52.21(b) (13 through (15).

new SCM's and not grandfather increment consumption for existing mines. Alternative IV would list only SCM's impacting Class I and mandatory Class II areas.[6] The EPA also proposed to list SCM's unless public comment affirmatively demonstrated that unreasonable socioeconomic impacts would result.

The notice announced that the public comment period with respect to the existing list of source categories and to the relevance of section 302(j) to review of modifications was closed and was not reopened. However, EPA solicited any additional comments on the SCM proposal, the regulatory impact analysis (RIA) of the possible alternatives, and other generic fugitive emissions issues not specifically foreclosed. The EPA noted that other programs, notably the one operated by the DOI pursuant to the SMCRA, 30 U.S.C. 1201 et seq., could address similar problems. The EPA sought comment on the effectiveness of such programs in protecting Class I and mandatory Class II areas and requested an analysis of this issue from DOI.

All comments were placed in the official rulemaking docket [Docket No. A-84-33] and made available for inspection and copying at the EPA offices in Washington, DC. The comment period was extended twice, closing on June 30, 1986.

9. *The RIA.* The EPA prepared an RIA for the proposed SCM rulemaking alternatives, in part, to comply with Executive Order 12291, which provides that major rulemakings consider economic consequences. The EPA has broad discretion in its use of the study, however, since the Act requires many other factors to be considered in this rulemaking. The EPA Administrator relies on the entire rulemaking record in making a final decision.

The RIA evaluated the projected consequences of the proposed alternatives to regulating new and modified SCM's as major sources under PSD and NSR. It considered benefits, costs, and general environmental and economic impacts.

The effects of the four possible regulatory alternatives were considered in the RIA by examining potential impacts at several SCM's typical in size and location for selected coal mining regions. Five important coal basins were investigated to determine the impacts of Alternative II: Powder River, San Juan, Fort Union, Illinois, and Appalachian. Powder River also served as a case study for Alternative III. Impacts of hypothetical mines on Bryce Canyon National Park and Chaco Culture National Historic Park were reviewed relative to Alternative IV. The analysis of costs and benefits for Alternative IV in the RIA was conducted with an assumption that no other regulatory program would protect Class I and mandatory Class II areas from SCM's.

Benefits and costs in these areas were evaluated for the year 1995.[7] The costs evaluated arise from application of best available control technology and, more importantly, from size limitations in SCM's because of ambient constraints. Benefit categories include mortality, morbidity, and soiling for Alternatives II and III, and visibility for Alternative IV. The study also examined national impacts involving coal price and production, and the cost of electricity.

Costs estimated under Alternative II considerably exceed benefits for the five basins analyzed in the RIA and were considered to be unreasonable relative to the costs and benefits of other alternatives. Factors mostly responsible for these results include: the relatively low ambient particulate matter contribution from SCM's nationally and low background particulate matter concentrations around SCM's, the limited distance from SCM's that ambient impacts occur, and the general absence of populations exposed to SCM particulate matter.

The Powder River Basin estimated costs under Alternative III are also considerably larger than benefits. Furthermore, costs for the Powder River Basin increased rapidly under Alternative III relative to Alternative II because existing SCM's would be regulated under the third alternative. Relative cost estimates would presumably be even larger if the five basins analyzed under Alternative II were analyzed similarly to the one coal basin under Alternative III. Therefore, Alternative III costs also appear unreasonable relative to benefits provided by other available lower cost options. As under Alternative II, the results for Alternative III are explained by such factors as relatively low SCM-induced particulate concentrations, the limited size of the ambient impact area, and the general absence of large populations in the vicinity of SCM's.

Because Alternative IV potentially affects far fewer coal reserves than either Alternatives II and III, a different cost approach was undertaken. The social costs of removing the lease tracts at Bryce Canyon and Chaco Culture out of available reserves were estimated. Unlike Alternatives II and III, the benefits considered under Alternative IV reflect only visibility benefits to park users. However, the benefits achieved by Alternative IV are highly variable and depend upon assumptions regarding visibility impacts of mining activities after implementation of this alternative. Also, unlike Alternatives II and III, Alternative IV may yield significant additional benefits not addressed in the RIA. In particular, large potential visibility benefits could not be accurately estimated and were therefore excluded. Other difficult-to-estimate benefits, such as reduced mining noise and water pollution, could further increase benefits realized under Alternative IV. The RIA concludes that the results of the analysis for Alternative IV are ambiguous, but that in any event, the costs of Alternative IV are more nearly in balance with potential benefits than is the case with Alternatives II and III which yielded substantial negative net benefits. However, it is unclear that the costs of Alternative IV are reasonable considering that many if not all of the visibility and other benefits which might accrue from PSD and NSR coverage would already be realized through compliance with DOI regulations.

Several factors limit the precision of the RIA. These limitations are discussed in the February 28, 1986 **Federal Register** and in greater detail in the RIA. The EPA must take account of the RIA limitations and weigh many considerations, including comments on the RIA and proposed alternatives, in making a final decision.

10. *Modified Alternatives.* On May 4, 1987, EPA placed in Docket A-84-33 two additional alternatives based on modifications to Alternative IV. These were identified as Alternatives IV' (IV prime) and IV" (IV double prime). These options were designed to obtain the major benefits expected under Alternative IV, specifically the protection of significant national land areas (e.g., national parks), while limiting the economic costs incurred by focusing NSR coverage more directly on these areas. The EPA specifically solicited the views of several parties who had previously demonstrated an interest in the issue surrounding Alternative IV. Responses were received, placed in the rulemaking docket, and compiled in the summary of comments for the rulemaking which was also placed in the docket. Alternatives

[6] Protected areas created after August 7, 1977 (larger than 10,000 acres) are "mandatory Class II areas" and would have been designated Class I if they had been established as of August 7, 1977. These areas can only be reclassified as Class I or remain Class II but cannot be reclassified to Class III. [40 CFR 52.21(e)].

[7] For Alternative IV, Chaco Culture National Historic Park was evaluated for 1989 and Bryce Canyon was evaluated for 1996.

IV' and IV" are discussed in greater detail in the May 4, 1987 memorandum to the docket (document number IV-C-6).

Alternative IV' proposed that PSD review of a mine be triggered, not by a fixed ambient concentration, but by prediction of adverse impact. Under Alternative IV', an increase in ambient particulate matter (PM) concentration of 1 microgram per cubic meter predicted by modeling would trigger an "ambient impact assessment," not a PSD review. Only if the "ambient impact assessment" indicated a potential adverse impact, as determined by the appropriate Federal land manager (FLM) for the affected mandatory Class I [8] and II PSD areas, would PSD be triggered. The adverse impact assessment is a process already used by FLM's. This alternative was considered a way to protect areas of special natural significance while reducing the number of mines subject to PSD determinations.

Alternative IV" included the same adverse impact test as Alternative IV' but covered only impacts on mandatory Class I PSD areas. To remove uncertainties as to the application of the adverse impact analysis test, the 1 microgram per cubic meter increase in PM concentration test was dropped and all mines within 50 kilometers of a mandatory Class I area would be subject to an "adverse impact assessment." This option would also provide protection of the most important natural areas but only a consultation process between the FLM and the States would be established for many other natural areas designated as mandatory Class II. This proposal would have reduced costs of compliance but would also produce reduced benefits with minimal, if any, protection of mandatory Class II areas.

C. *DOI Authority to Regulate.*—1. *Provisions to Regulate Fugitive Dust From SCM's.* The DOI has demonstrated to the EPA that under existing DOI statutory authorities, regulations, and policies, DOI can adequately protect against adverse effects from SCM's, including fugitive dust emissions. The DOI's authority is particularly effective with respect to national parks and other areas of special concern, which are the focus of Alternative IV. The authorities identified by DOI include the following:

a. SMCRA Performance Standards

Section 515(b)(4) of the SMCRA, 30 U.S.C. 1201 et seq., establishes a performance standard for control of air pollution from all SCM's, wherever located. The SCM's operators must stabilize and protect all surface areas, including spoil piles affected by the mining, and reclaim areas to effectively control erosion and attendant air and water pollution (30 U.S.C. 1265(b)(4)). The DOI has promulgated mandatory performance standards for SCM's under this statutory requirement at 30 CFR 816.95(a). These standards are implemented in turn through 30 CFR 780.15, which provides that each application for a surface coal mining and reclamation permit must include "[a] plan for fugitive dust control practices" describing all measures the applicant proposes to use to stabilize exposed surface areas to control fugitive dust.

Section 515(b)(17) of SMCRA addresses pollution associated specifically with erosion from access roads into and across SCM sites. To implement this provision, and to clarify the reach of 30 CFR 780.15 and 816.95, DOI recently promulgated regulations establishing a performance standard for road dust generated at SCM's:

[b] Performance standards. Each road shall be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to:

[1] Control or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust as well as dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices;

[2] Control or prevent damage to fish, wildlife, or their habitat and related environmental values;

* * * * *

[6] Prevent or control damage to public or private property, including the prevention or mitigation of adverse effects on lands within the boundaries of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including designated study rivers, and National Recreation Areas designated by Act of Congress. [53 FR 45190, 45213 (November 8, 1988) (to be codified at 30 CFR 817.150(b)(1), (2) and (6)].

* * * * *

b. SMCRA Section 522(e) Prohibitions

Section 522(e)(1) of SMCRA, 30 U.S.C. 1272(e), and 30 CFR 761.11 prohibit SCM's in certain designated areas, subject to valid existing rights (VER) and except where SCM's existed on August 3, 1977. Lands designated by section 522(e)(1) and DOI's regulations include any lands within the boundaries of the National Parks System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including designated study rivers, and National Recreation Areas designated by Act of Congress. Subject to VER, and with other exceptions, section 522(e) (2), (4) and (5) likewise prohibits SCM's on Federal lands within National Forests, within 100 feet of public roads and cemeteries, and within 300 feet of occupied dwellings, public buildings, schools, churches, community or institutional buildings, and public parks. In addition, section 522(e)(3) prohibits SCM's in any other location where the SCM will "adversely affect" any publicly-owned park or any place listed in the National Register of Historic Sites. The VER are discussed in detail below.

Provision for a determination of adverse effect under section 522(e)(3) is included in the review process for the SMCRA permit that all SCM's must obtain. Upon receipt of an application for operations that may affect a National Park System Unit (NPSU), the SMCRA regulatory authority (either DOI, or a State acting under an approved program) provides the National Park Service (NPS) written notice and an opportunity to comment (30 CFR 773.13(a)(3)(ii)). Where the regulatory authority preliminarily determines that the proposed operation would adversely affect an NPSU, under 30 CFR 761.12(f)(1) it must request the approval or disapproval of the NPS before it can issue a SMCRA permit.

c. SMCRA Section 522(c) Unsuitability Designations

Section 522(c) of SMCRA grants any person "having an interest which is or may be adversely affected * * * the right to petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations * * *" Section 522(a) and 30 CFR 762.11(b) set out the criteria under which an area may be, but is not required to be, designated as unsuitable for SCM operations. These include a finding that mining would affect fragile, historic, natural hazard, or renewable resource lands. Fragile lands include "areas containing natural, ecologic, scientific, or aesthetic resources that could be significantly damaged" by SCM

[8] Areas listed under section 162(a) of the Act cannot be reclassified and are generally referred to as mandatory Class I areas. The 158 areas are national parks over 6000 acres, national wilderness areas over 5000 acres, and international parks, all in existence on the PSD codification date, August 7, 1977. Only three nonmandatory Class I areas, all in Montana, have been created by redesignation of Class II areas and a fourth area in Washington has been proposed. All are Indian lands.

operations; historic lands include "areas containing historic, cultural, or scientific resources."

d. The Federal Coal Management Program

The Bureau of Land Management (BLM) administers the FCMP, which applies to SCM's on all Federal lands. According to DOI, the BLM effectively controls approximately 80 percent of western coal through the FCMP. During the land-use planning stage of the FCMP, BLM applies four "screens" to public lands where SCM's potentially could be located, including unsuitability criteria and multiple-use decisions (43 CFR 3420.1-4(e)). Under unsuitability Criterion 5, "Class I visual resource management areas," areas of outstanding scenic quality or high visual sensitivity are considered unsuitable for leasing under the FCMP unless the BLM determines that SCM operations will not significantly diminish or adversely affect the scenic quality of the area (43 CFR 3461.1(e)). The multiple-use decision process balances uses and resources to decide if protection is needed (43 CFR 1601.0-5(f)). The DOI rules provide that the BLM "shall place particular emphasis on protecting * * * air and water quality * * *" in making multiple-use decisions. Where coal development on BLM lands may impact lands under the jurisdiction of the NPS and the Fish and Wildlife Service (FWS), the rules direct the BLM to consult with those agencies to jointly determine whether the lands should be acceptable for further consideration for coal leasing.

In addition to the above provisions, DOI identified various other statutory and regulatory provisions that could be used to regulate SCM operations for the purpose of protecting air quality. Some of these authorities are discussed in Section IV.

2. *Proposed VER Rules.* The DOI proposed rules for determining VER on December 27, 1988 (53 FR 52374) which, when final, will effectively grandfather specified mining rights from provisions of SMCRA section 522(e). The EPA reviewed the proposed rule and determined that the grandfathered exemptions from SMCRA, as proposed, do not appear to significantly affect DOI authority to regulate fugitive emissions from SCM's. The DOI will still be empowered to make "unsuitability designations" under section 522(c) and VER will only exempt mines from appeals under section 522(e) by affected interest groups. In any event, SCM's established by a VER determination will still be subject to construction and maintenance standards under 30 CFR 816.95(a) that DOI may use to mitigate fugitive dust emissions.

III. Discussion of Today's Action

A. No Listing of SCM's

Today, EPA announces that SCM's will not be added to the list of source categories for which fugitive emissions must be considered in determining if a source is "major." The effect of this decision is to maintain the status quo for SCM's under the Act. Since nearly all of an SCM's emissions are fugitive, a decision to continue not to consider fugitive emissions means that few, if any, SCM's will be classified as major sources or major modifications. Although they may not be classified as major sources or major modifications, emissions from new or modified SCM's, particularly in areas near national parks and other areas of special natural significance, will continue to be regulated by EPA, under other applicable provisions of the Act, and by the DOI under the SMCRA and all other authorities of the DOI. The EPA has reviewed all relevant information in the rulemaking docket and the regulatory and legislative powers available to DOI in making the determination that DOI has adequate authority to regulate fugitive dust emissions from SCM's. The EPA also finds that while overlapping regulation of SCM's under the Act is possible and not prohibited, such regulation is burdensome to the affected industry while likely achieving limited additional benefits.

Although EPA has considered the effect of DOI authorities in deciding not to list SCM's, EPA is not granting preemptory authority to DOI for the control of air pollution from SCM's. The Act will requires SIP's to contain emission limitations, permit programs, and other measures to ensure that ambient standards and PSD increments are attained and maintained and that there is no manmade visibility impairment in any mandatory Federal Class I area (sections 110, 161, 169A, and 172). The EPA and the States cannot abrogate their responsibility to regulate the emissions from SCM's. The only question here is whether or not new or modified SCM's should, as a category of sources in and of itself, be subject to the PSD/NSR permit programs for "major sources." However, this decision cannot affect the requirement that SIP's regulate "* * * the modification, construction and operation of any stationary source * * *". (section 110(a)(2)(D)). Neither SMCRA nor the Act contain any special dispensations for SCM's that grant them categorical exemptions from having to comply with ambient standards, PSD increments, or visibility protection requirements. Hence, with EPA's decision not to add SCM's to the list of PSD sources, EPA must still ensure that emissions from SCM's comply with all requirements of the Act.

The comments received on the EPA proposals and the EPA analysis of the rulemaking record are summarized below in Section IV and contained in the rulemaking docket.

B. Collocated Sources

In deciding to maintain the "status quo" regulation of SCM's, the EPA also announces that it is not exempting SCM's from review under other circumstances possible under PSD and NSR procedures, specifically SCM's collocated with sources subject to review. The EPA believes these circumstances are limited in number and economic impact and do not warrant establishing the precedent of creating exemptions for specific sources. The EPA has determined to reaffirm its longstanding position that the decision whether to include fugitive emissions from collocated SCM's in these circumstances should be decided on a case-by-case basis, depending on the "primary activity" of the operation as a whole. The EPA also concludes that it has no obligation to depart from its longstanding use of the Standard Industrial Classification (SIC) code and other aspects of the definition of "source" for PSD and NSR purposes in order to satisfy its rulemaking obligations under section 302(j) or to otherwise craft a reasonable and lawful set of PSD and NSR rules. These decisions resolve issues affecting SCM's raised in petitions for reconsideration. Comments and analysis of this issue are summarized below in section IV.

C. Modifications to Existing Sources

In today's action, EPA reaffirms its October 1984 interpretation that section 302(j) does not apply to modifications. Commenters have not persuaded the EPA either that Congress had a contrary specific purpose in adopting section 302(j), or that EPA's interpretation, as explained in the October 1984 proposal, is inconsistent with the Act's purposes. Accordingly, EPA believes that its interpretation is a reasonable one, and thus proper under the law. In any event, EPA believes that this interpretation should have little general impact at this time, because today's central decision to not list SCM's means that few mines should be brought under PSD and NSR solely by virtue of EPA's interpretation of the nonapplicability of section 302(j) to modifications. Comments and

analysis of this issue are summarized in Section IV and the **Federal Register** [October 1984 (49 FR 43202) and February 1986 (51 FR 7090)].

IV. Major Issues

A. *Basis For No Listing Decision*—1. *Comments on The RIA.* Numerous comments were received on the RIA and were summarized into four categories: (1) The presence of health and welfare effects associated with SCM's, (2) air quality impacts, (3) cost estimates, and (4) benefit estimates. Comments from industry and some government entities universally asserted that ambient impacts and costs were understated while benefits were either nonexistent or at least overstated. Comments from environmental groups maintained the opposite point of view and were critical of EPA's use of cost-benefit analysis. Conversely, industry commenters contended that the legislative history of section 302(j), and the D.C. Circuit Court's interpretation of that provision in *Alabama Power Co.* v. *Costle,* 636 F.2d 323 (D.C. Cir. 1979), support EPA's use of cost-benefit analysis. Most of the comments were originally addressed in the RIA under qualification of the various analytical components of the RIA. Those not addressed in the RIA are covered in detail in two reports in the docket: (1) Summary of Comments, and (2) Response to Technical Comments. While these documents can be reviewed for a thorough discussion of comments and responses, a summary of major comments and responses is presented below.

a. Health and Welfare Effects

Several commenters argued that since the NAAQS are set at levels below which there are no known adverse health or welfare effects, there would be no benefits from listing SCM's because they are primarily located in areas where air quality is already better than the NAAQS for PM. The commenters are correct to note that the intent of the NAAQS requirements was to direct the Administrator to set air quality standards at pollution levels below those at which quantifiable adverse health and welfare effects have been found or might be expected to occur in sensitive groups. However, experience with the requirements has shown that the scientific data are often so inconclusive that it is difficult to identify with confidence the lowest pollution level at which an adverse effect will occur. Moreover, in cases such as the present one regarding PM, the evidence suggests that there is a continuum of effects, with the risks, incidence, or severity of harm decreasing, but not necessarily vanishing, as the level of pollution decreases (52 FR 24641, July 1, 1987).

Other commenters argued that fugitive emissions from SCM's do not pose any health risks because such PM is less toxic than particles in urban areas where most of the health and welfare effects information used to establish the PM standards was obtained. This comment has limited merit because the NAAQS for PM nominally 10 micrometers or less in diameter (PM-10) NAAQS focuses on particles capable of penetrating the sensitive thoracic region of the respiratory tract. While the toxicity of various particles differ, the exhaustive review of the available health effects information supporting the PM-10 standards suggests that all particles equal to or less than a nominal 10 micrometers in diameter are of concern regardless of source characteristics. Moreover, it is not clear that coal dust (certainly a constituent of SCM fugitive dust) per se is nontoxic. Indeed, coal dust may contain toxic impurities, such as metals. In any event, "inert" particles may be responsible for a variety of health effects, from deposition throughout the respiratory tract and by several possible mechanisms. For example, nonspecific irritation in the tracheobronchial region may alter respiratory function or clearance mechanisms, clearly of health concern, particularly for sensitive subgroups of the population (e.g., asthmatics and elderly persons with chronic respiratory disease). [52 FR 24641, July 1, 1987]

b. Air Quality Impacts

A number of comments noted deficiencies in the Industrial Source Complex (ISC) model used to estimate ambient impacts around SCM's. While several well-documented analyses have shown that the ISC model has both systematic and random error associated with its use, the model still remains the preferred method for simple terrain stationary source analyses as specified in EPA's *Guideline on Air Quality Models,* Revised (EPA-450/2-78-027R, July 1986). In the RIA, the model was applied consistently, and the EPA believes the results are valid for relative comparisons across regulatory alternatives.

c. Cost Estimates

Different opinions from commenters were noted regarding the RIA cost estimates. For example, costs were asserted to be low by some commenters because the impacts on the largest mines in each basin analyzed were not assessed. Conversely, another set of comments maintained that costs were overstated because such controls as paved haul roads and speed restrictions were not considered. Regarding the first comment above, mine costs were estimated using the average size SCM in each basin. The EPA felt such an approach was better for assessing the most likely costs of listing SCM's. Using either the largest or smallest SCM's for cost assessment would have clearly biased the cost estimates presented.

The recommendation to analyze paving haul roads and speed restrictions was considered in the planning stages of the RIA. However, best engineering judgment based on Wyoming's best available control technology (BACT) analyses was used to eliminate the former from consideration because of the increased cost of paving roads that would support the enormous trucks used to transport coal around a surface mine. Furthermore, continuous construction and demolition of haul roads would be required as the pit changes location. This could exacerbate the pollution problem and would be expensive. Speed restrictions were not considered a viable option since reducing speed, for a constant production rate, would effectively require more equipment which would create more emissions. Therefore, gains from reducing speed would be offset by adding additional trips to maintain production rate (speed and number of trips equally affect SCM emission rates).

More specific concerns were raised by commenters in regard to the quantity of coal reserves, and subsequent cost effects, affected under Alternative IV. Industry maintained that approximately 8.5 billion tons of coal reserves would be affected by Alternative IV—six times larger than EPA's estimate of 1.4 billion tons. It is true that the original EPA estimate is low due to the exclusion of reserves on Indian lands. However, even the industry estimate of 8.5 billion tons affected represents less than 6 percent of the 157 billion tons of total reserves estimated in the RIA. Furthermore, the total reserve estimates in the RIA were selected as a conservative estimate since current estimates of demonstrated coal reserves exceed 400 billion tons.

d. Benefit Estimates

Several commenters maintained that benefit estimates, particularly, visibility benefits, were overstated. For example, it was asserted that willingness to pay (or contingent valuation) studies of visual range improvement were biased upwards because respondents exaggerate their responses when they do not actually have to pay. In response,

EPA notes that recent comparisons between contingent valuation studies and market studies involving actual payments do not support the hypothesis that contingent valuation is consistently upward biased (*Response to Technical Comments on RIA for EPA Proposal to List Surface Coal Mines for New Source Review*, PEI Associates Inc., EPA Contract No. 68-02-4394, January 1989). While these studies have been found to contain potential biases, the direction of bias can be either upward or downward depending on the specifics of the study design.

Other comments argued conversely that benefits estimates presented were understated relative to costs because it is far easier to measure costs than to quantify benefits. There is merit in this comment, but the RIA explicitly recognizes this by listing benefit categories, such as nonresidential soiling, which are currently not quantifiable. Furthermore, where some benefit categories are quantifiable, but highly uncertain, potential magnitude is presented in the text of the RIA. A good example of this is the valuation of existence value benefits for Alternative IV. While the value of this benefit category is not used to compute the net benefit number in the RIA, a first order approximation of the value is presented in the text and is appropriately qualified.

2. *Comments on Proposed Alternatives.* In addition to the comments on the RIA summarized above, comments were received on the viability and legality of SCM regulatory alternatives proposed by EPA. The proposed alternatives were summarized in Section II above. After considering comments on Alternatives II–IV, deferring at that time the question of duplicative regulation under SMCRS, EPA decided to modify Alternative IV in an attempt to design a clearly beneficial rulemaking. Comments on these modified alternatives are also discussed below.

The comments below are organized by several categories: (1) Existing regulations, (2) implementation of alternatives, (3) majority recommendations, (4) minority recommendations, and (5) EPA analysis.

a. Existing Regulations

Most commenters argued that EPA is not legally bound to list SCM's and that SCM's are already subject to sufficient air pollution regulation by State governments and other Federal agencies. Commenters noted that some State laws and regulations require control of emissions from SCM's equivalent to BACT. Comments from the U.S. Department of Agriculture (USDA) asserted that mining operations on Federal lands adjacent to wilderness areas are controllable by USDA administrative policy. The existing authority most frequently cited as providing the protection sought by EPA under the proposed alternatives were programs administered by the DOI. Comments on DOI authorities and EPA analysis of the authorities are discussed below.

b. Implementation of Alternatives

Numerous comments were received on how the proposed alternatives would be implemented. For example, industry claimed that EPA's proposal would effectively create large "buffer zones" around Class I areas which are of no special natural value but where SCM's would be prohibited to prevent possible impacts within the Class I area. A State commenter asserted that some of EPA's proposed regulatory mechanisms were not consistent with State permitting procedures.

Comments on specific procedures were also received. As an example, the USDA suggested that a PSD review trigger, based on acreage disturbed at a specified time, would be simpler to apply than an emissions criteria. The mining industry suggested several changes to Alternative IV″ such as excluding the FLM in the determination of adverse impact, reducing the mine impact review criteria distance to between 10 and 15 kilometers, and excluding any provisions for mandatory Class II PSD areas. Environmental groups also criticized including the FLM in the determination of significant adverse impact and implied that Indian Tribes, States, and EPA were better suited to make such decisions. These groups noted that Alternative IV″ provided no protection for Class II PSD areas and that mines located greater than 50 kilometers from Class I PSD areas would escape review regardless of their impact on these areas. Several commenters from government agencies criticized the 1 microgram PM per cubic meter ambient impact criteria for initiating review in the Alternative IV′ proposal because of uncertainties in the modeling analysis required for estimating the impact. Commenters expressing a preference for Alternative IV″ cited the 50 kilometer distance criterion in IV″ as a solution to the modeling problems associated with the IV ambient impact trigger.

c. Majority Recommendations

Most commenters emphatically supported Alternative I (no listing of SCM's, therefore, fugitive emissions would not be included in the PSD and NSR applicability determinations for SCM's). Some of the commenters supporting Alternative I included industry, State governments, Ute Mountain Indian Tribe, and several Federal agencies. The consensus of these commenters was that the costs of Alternatives II–IV exceeded the benefits of the proposed regulation.

These commenters continued to support Alternative I over modifications to Alternative IV. However, of the options requiring some listing of SCM's Alternative IV″ was favored by a number of commenters. Industry commenters noted that Alternative IV″, with several changes, "* * * more faithfully adheres to the Agency's objective of protecting special resources * * *" (AMC) and, as applied to Class I areas designated by the Act, is the only proposed alternative which may have positive benefits (Sunbelt Mining Co.).

The DOE considered Alternative IV′ (applied only to mandatory Class I PSD areas) to be most consistent with the analytical results. Two environmental regulation agencies in coal mining States expressed similar opinions. Although these commenters expressed some preference for Alterative IV″ among Alternatives II–IV, there was also a consensus that other existing regulatory authorities could provide benefits projected from Alternative IV″.

d. Minority Recommendations

Robust, differing points of view were also expressed by two smaller groups of commenters. One group, composed mostly of environmental groups, favored listing of SCM's under either Alternative II or III, the most stringent regulatory options. These commenters argued that regardless of the costs projected, EPA should tightly limit fugitive emissions from SCM's under PSD and NSR regulations. Environmental groups generally viewed the proposed Alternatives IV′ and IV″ as less acceptable than the original Alternative IV which they rejected. The environmental groups' rejection of proposed variations of Alternative IV was shared with DOI. The DOI emphatically rejected Alternatives IV′ and IV″ and contested the distance criteria of Alternative IV″ for PSD applicability as "legally questionable," arbitrary and lacking any empirical basis. In contrast to the environmental groups' recommendations for stringent EPA regulation, DOI joined the majority in supporting Alternative I, no listing.

e. The EPA Analysis of Comments On Proposed Alternatives

The EPA's review of both the RIA and the comments indicate that Alternatives II and III are economically impractical. Although industry appears to have overestimated costs, the RIA still predicts very substantial adverse socioeconomic impacts from these alternatives. Therefore, EPA rejected Alternatives II and III.

Based on a review of public comments and the RIA, EPA concludes that, while more appealing economically than Alternatives II and III, Alternative IV, as originally proposed, is not clearly beneficial given the uncertainty in benefits and cost estimates. Industry assumptions produced very high impact estimates of as much as 1 microgram per cubic meter up to 100 miles from the source, which resulted in very high industry cost estimates. While EPA does not agree with all of the assumptions used in the industry studies, EPA does agree that, in some locations, costs of Alternative IV may be considerable. However, EPA concludes that on a national basis, benefits and costs cannot be firmly estimated.

The final listing options EPA considered were Alternative I, no listing of surface coal mines, and Alternative IV or some variation of it designed to provide visibility and other benefits for natural areas of special significance (e.g., Yellowstone National Park). In considering these options, EPA placed substantial weight on the legal authorities available to the DOI which could also provide protection for areas of "special natural significance."

The EPA does not necessarily agree with commenters that variations of Alternative IV are impractical from a technical or legal perspective. However, it is not necessary to respond to the merits of these comments, because they are moot with the selection of Alternative I. The reasons for choosing Alternative I are not related to the technical and legal adequacy of Alternatives IV′ and IV″. The EPA did consider the ability of Atlernatives IV′–IV″ to protect NPSU's and other areas of special, natural significance in evaluating the intent and potential benefits of DOI authorities to regulate fugitive dust emissions from SCM's that might affect such areas. Comments concerning the costs of duplicative regulation under the Act and SMCRA are of concern to EPA and are discussed in greater detail below.

3. *DOI Authorities.* Several commenters, including the DOI and industry representatives, urged EPA to not list SCM's on the ground that under existing DOI statutory authorities, regulations, and policies, DOI can adequately protect against adverse effects from SCM's. The commenters stated that these authorities are particularly effective with respect to the national parks and other areas of special concern which are the focus of Alternative IV. The DOI authorities were summarized above in Section II.

a. Government and Industry Comments

Comments submitted by DOI, other Federal agencies, and mining industry groups supported the position that statutes, regulations, and policies administered by DOI would capture most or all of the social benefits that may result from listing SCM's in the vicinity of Class I and mandatory Class II areas. Hence, these commenters opposed Alternative IV and other narrowly focused regulatory options on this basis alone.

Two events in particular involving DOI have resolved any doubts regarding its ability to prevent adverse air quality impacts from SCM operations. First, in *National Wildlife Federation (NWF)* v. *Hodel*, 839 F.2d 694, 765 (D.C. Cir. 1988), the Court of Appeals affirmed that DOI has authority under SMCRA section 515(b)(4) to regulate air pollution that is attendant to erosion. Second, DOI has promulgated a performance standard under SMCRA to control dust due to both wind erosion and dust created by vehicle traffic (53 FR 45190, Nov. 8, 1988).

Regarding SMCRA section 522(e), DOI remarked that it provides significant protection to NPSU's and other publicly owned parks from potential impacts on air quality and related values. Moreover, the term "adversely affect" in section 522(e)(3) is not limited geographically by the location of the prospective mine or the nature of the adverse effect, but is applied on a case-by-case basis in consultation with the manager of the potential affected resource.

As to the unsuitability designation provisions of SMCRA section 522(c), an unsuitability designation could be made for lands inside or *outside* of the boundaries of NPSU's. Furthermore, excessive levels of fugitive dust emissions from potential SCM's could form the basis for an unsuitability designation where those emissions would significantly damage the fragile or historic lands.

b. Comments from Environmental Groups

In comments submitted prior to the decision in *NWF* v. *Hodel* and DOI's promulgation of road dust rules, a coalition of environmental groups argued that there is currently no governmental authority effectively regulating fugitive emissions from SCM's. In particular, the coalition disputed DOI's claimed ability to protect Class I and mandatory Class II areas, asserting that DOI has failed to fully exercise its authority in any meaningful fashion. Regarding the prohibition in SMCRA section 522(e)(3) against SCM's that would adversely affect parklands, the environmental groups pointed out that the SMCRA regulatory authority is required only to consider the views of the NPS, and that NPS has no authority to enforce its recommendations. These groups also noted that no finding of adverse effect or unsuitability under SMCRA has ever been made due to the impacts of mining on air quality.

The environmental groups stated that "[a]ll interested parties agree that the major percentage of fugitive emissions generated by surface coal mining operations occurs as a result of traffic on haul roads." However, the groups focused on the absence of a performance standard for road dust as representative of DOI's purported failure to adopt any substantive regulatory scheme to control fugitive emissions from SCM's.

c. Analysis of Comments

The EPA has carefully considered the presentations made by all interested parties concerning the breadth of DOI's regulatory program for SCM operations. Based on this review, EPA agrees with the views of DOI (and others) that, as a whole, the various DOI authorities governing SCM's, while procedurally quite different from PSD and NSR requirements, have the potential to provide adequate protections against adverse air quality impacts in mandatory Class I and mandatory Class II areas. EPA believes that DOI authorities substantially overlap with those which would be provided under Alternative IV or variations of that regulatory option. Consequently, it would be superfluous to list SCM's for the purpose of protecting the NPSU's and other areas of special concern that are the subject of Alternative IV and its variations. Given the rough equivalence of costs and benefits for Alternative IV that emerged from EPA's RIA and analysis of comments on the RIA, EPA believes that the existence of DOI regulatory authority providing much the same benefits as would be afforded by EPA under the Act, but without the administrative costs that the Clean Air Act coverage could entail, is an adequate basis on which to reject Alternative IV and its variations

pursuant to the rules for listing decisions under section 302(j).

The EPA believes that under the range of authorities discussed above, DOI and State regulatory authorities, have extremely broad powers to prevent the potential harms addressed by Alternative IV and its variations. These powers are at least as broad, and in some instances, broader, than those afforded to DOI and other Federal agencies in their role as FLM's, and to State governments and EPA itself in their role as permitting authorities under the PSD and NSR provisions of Parts C and D of the Act. For example, under Clean Air Act section 165(d)(2)(C)(ii), if the FLM demonstrates to the satisfaction of a permitting authority that emissions from a prospective facility would "have an adverse impact on the air quality-related values (including visibility)" of a Class I area, the State may not issue a PSD permit. Similarly, under SMCRA section 522(e)(3), if the SMCRA regulatory authority determines that a prospective SCM would "adversely affect" a publicly-owned park, the mine cannot be built if the responsible government agency agrees in that finding. Thus, under SMCRA Federal land management agencies are powerful stewards of the public trust, charged with the responsibility and authority to protect public lands of special concern.

The VER could provide some exceptions to SMCRA section 522(e), although the extent of any such exemption is unclear pending completion of DOI rulemaking on VER. However, any mine constructed in areas near NPSU's would still be subject to performance standards under SMCRA section 515 (b)(4) and (b)(17) and codified in 30 CFR 780.15, 816.150 and 816.95. Any mine operating near an NPSU would be expected to meet stringent construction and maintenance standards. Indeed, DOI regulations provide the flexibility to require such stringency for SCM's affecting NPSU's under DOI's policy of control in response to local conditions. In any case, nothing would prevent the Federal government from buying back VER when there is significant public interest in protecting an NPSU and Congress appropriates funds for purchasing VER of concern. DOI has given notice in a statement of policy that to prevent coal mining in areas covered by SMCRA section 522(e), DOI will use available authorities to acquire VER through "exchange, negotiated purchase or condemnation" subject to appropriation (53 FR 52384).

The EPA also concludes that questions raised by comments from environmental groups concerning DOI's ability and willingness to protect the public trust by pursuing regulation of SCM's under the DOI authorities have been adequately answered by events subsequent to the submission of those comments. *NWF* v. *Hodel* upheld DOI's authority to promulgate general SCM performance standards requiring a plan for fugitive dust control practices under SMCRA section 515(b)(4). The reasoning of that decision validates regulations promulgated under other sections of SMCRA to address air pollution attendant to erosion. Thus, DOI cited the *NWF* v. *Hodel* decision in promulgating its road dust rules under SMCRA section 515(b)(17) (53 FR 45202).

In addition, DOI's adoption of road dust rules shows its willingness to take strong regulatory action on air pollution from all SCM's. As the environmental group commenters noted, all parties agree that a significant amount of fugitive dust from SCM operations is generated as a result of haul road traffic. In commenting on the DOI proposed rule, EPA related its understanding that in addition to fugitive dust attributed directly to wind, the rule would cover erosion-related pollution resulting from the movement of overburden and coal haul trucks, light and medium duty vehicles, and other equipment operating outside of the mine pit using on-site roads and surfaces. The DOI accepted this comment and made EPA's suggested change to the final rule clarifying that performance standards apply to dust created by vehicle traffic (53 FR 45203).

Evidence of DOI's specific commitment to protect the air quality related values of national parks and other sensitive areas is evident in the SMCRA programs governing adverse effect determinations and unsuitability designations. As noted above, DOI has interpreted the unsuitability determination process as extending to damages caused by fugitive dust emissions from prospective SCM's. Although the environmental groups are correct that DOI has not designated any Federal lands as unsuitable for mining based on potential adverse effects on air quality, DOI has rarely been called upon to do so.[9] Thus, EPA has every reason to believe that DOI will responsibly pursue petitions alleging that a prospective SCM would adversely affect parklands.

Regarding the FCMP, DOI rules direct the BLM to place particular emphasis on the air quality portion of the multiple use decision, and require the BLM to consult with the NPS and FWS prior to a joint determination of whether BLM lands should be accepted for further consideration for coal leasing (52 FR 46469).

3. *Comparison of Cost and Benefits Under the Act and SMCRA.* The EPA's "safety valve" interpretation of section 302(j) clearly calls for the Agency's deliberative process to address legitimate cost/benefit concerns in reaching a listing decision (49 FR 43202). This approach to listing decisions is under review in *NCA* v. *EPA* and is not at issue here. As discussed elsewhere in this notice, EPA believes that commenters have confirmed that the benefits of adopting Alternatives II or III are greatly outweighed by the costs associated with those options. The EPA disagrees with these commenters' similar arguments regarding Alternative IV. Nevertheless, the EPA is not compelled to adopt Alternative IV or some variation of it. As it addressed Alternative IV, the RIA did not take into account the prospect that DOI could provide equivalent environmental benefits. However, for the reasons set forth above, EPA now believes that the various DOI authorities already in place can provide much the same degree of environmental protection as would PSD under the Act. Thus, few, if any, additional socioeconomic benefits would be provided by a decision to list SCM's under Alternative IV or its variations. Conversely, a decision to list could entail additional costs sufficient to justify not taking that course of action.

By accepting that DOI's programs will provide benefits equivalent to Alternative IV through the mitigation or prevention of adverse effects on air quality related values in national parks and other areas of special concern, EPA is assuming a roughly similar mix of pollution control measures, reductions in SCM size, and SCM relocations as was assumed would accompany Alternative IV. It follows that EPA should also assume that the DOI programs will also entail roughly similar costs to producers and others in realizing those benefits. One might argue that it also follows that the addition of PSD under Alternative IV would add no additional costs beyond those already required by the DOI programs, and, thus, EPA must promulgate regulations under its "safety valve" interpretation of section 302(j). But, in practical terms, this is not true. Such an argument ignores the fact that the DOI programs are already in place, and that the addition of another set of regulatory requirements is inherently

[9] The one instance in which this issue was raised, regarding the Alton Coal Field and Bryce Canyon National Park, resulted in a determination of unsuitability based on other grounds.

costly. Thus, even if the addition of Alternative IV required no sources to meet (or change their plans to avoid) PSD requirements because DOI programs would have already obviated the need for such actions, there would still be the built-in administrative costs of the EPA program to contend with. For example, under Alternative IV the SCM owner might be required to undertake a separate modeling analysis for the sole purpose of demonstrating that it would not exceed the PSD coverage threshold of a 1 microgram per cubic meter ($\mu g/m^3$) impact on a Class I or mandatory Class II area.

To give another example, if pursuant to Alternative IV a prospective SCM were brought under PSD because it exceeded the 1 $\mu g/m^3$ threshold at a Class I national park located at a considerable distance from the SCM site, it would trigger an adverse impact determination by the FLM under the Act, section 165(d)(2)(C)(ii). If the FLM found, and the permitting authority agreed, that an adverse impact would occur, the mine could not be built. However, as discussed above, the responsible State or Federal agency may conduct a similar analysis under SMCRA, and the SCM could not be permitted if that agency and the SMCRA regulatory authority agreed there would be an adverse affect on the park. Thus, in this example also, PSD would entail costs to the prospective source in applying for a PSD permit and to the FLM in making a separate adverse impact determination under the Act, yet these costs would not provide any benefits not already present under the DOI authorities.

In short, nothing in the Act or EPA's interpretation of section 302(j) requires EPA to promulgate regulatory requirements that provide no benefits where there are some, albeit modest, costs. Indeed, under such circumstances, even modest costs are unreasonable precisely because they are not counterbalanced by benefits. In taking due account of the environmental protections provided by SMCRA, the FCMP, and other DOI authorities, EPA believes that today's section 302(j) decision is an appropriate exercise of the "flexibility to provide industry-by-industry consideration and appropriate tailoring of coverage" which the D.C. Circuit envisioned in *Alabama Power Co.* v. *Costle*, 636 F. 2d 323, 369 (D.C. Cir. 1979). At present, EPA has no basis to question the adequacy of DOI's authorities. Of course, if in the future EPA is presented with a petition for rulemaking containing appropriate evidence that the various DOI authorities do not in fact provide environmental protection equivalent to that available under the Act, EPA will carefully reconsider the basis for today's action.

B. Fugitive Dust Issues Related to SCM's

The EPA's actions in October 1984 (49 FR 43202) and February 1986 (51 FR 7090) reaffirmed the Agency's 1980 interpretation regarding the nature of the section 302(j) rulemaking requirement, and retained the list of sources whose fugitive emissions must be considered in making PSD and NSR TAD's. Although EPA believed its 1980 rulemaking met the procedural standards of section 307(d)(8), 42 U.S.C. 7607(d)(8), as a matter of policy the Agency solicited further comment on the listing of source categories. The EPA stated that, consistent with its "safety valve" interpretation of section 302(j), it would not remove a category from the list unless commenters showed adverse consequences to the broad national interest in continuing the listing. Public comment on these matters was generally limited during the initial round of comments. However, mining industry representatives expressed several concerns related to SCM's which could result in a source being subjected to PSD and NSR even if EPA made a final determination not to list SCM's. The industry's concerns included the interaction between the definition of "source" for PSD and NSR purposes and the currently listed fugitive emissions source categories and the applicability of section 302(j) to major modifications. To the extent that SCM's would be indirectly subject to PSD or NSR, several industry representatives filed petitions for administrative reconsideration of EPA's October 1984 action (see "AMC Petitions", section II above) seeking relief, either through a change in the definition of source, or through deletion of certain, currently listed fugitive emissions source categories. Accordingly, in reopening the public comment period in February 20, 1986 Federal Register, EPA solicited comment on whether, if EPA decided not to list SCM's, some exemption from or interpretation of the "source" definition as it relates to section 302(j) rulemaking would be appropriate.

The following discussion of the SIC code definition of source and listed source issues constitutes EPA's substantive disposition of industry comments and the applicable petitions for reconsideration.

1. SIC Code Definition of Source

The 1980 PSD and NSR regulations established the SIC Manual as the principal definitional tool for identifying the types of pollutant-emitting activities that shall be considered part of the same industrial grouping for purposes of determining the scope of a stationary source for NSR purposes. Specifically, activities within the same Major Group, i.e., the same two-digit SIC code, are aggregated [see, e.g., 40 C.F.R. 52.21(b)(6)]. As EPA noted in the February 28, 1986 Federal Register (51 FR 7090), use of the SIC code has implications for the mining industry by virtue of the fact that SIC Major Group 12, "bituminous coal and lignite mining," includes not only the mine proper but also coal cleaning and other coal preparation activities. "Coal cleaning plants (with thermal dryers)" are on the list of fugitive emissions source categories [see, e.g., 40 CFR 52.21(b)(1)(iii)(a)]. Coal preparation plants are also listed because a new source performance standard regulating them (40 CFR Part 60, Subpart Y) was promulgated prior to August 7, 1980 [see, e.g., 40 CFR 52.21(b)(1)(iii)(aa)]. The mining industry raised two principal issues stemming from this aspect of the definition of source: applicability of substantive PSD and NSR requirements to SCM's considered to be part of a major source because they are collocated with such sources, and inclusion of fugitive emissions from SCM's in the PSD and NSR threshold applicability determinations of collocated sources.

a. Industry Comments. Mining interests contend that SCM's are not a type of stationary source that Congress intended to be subject to PSD and NSR requirements. In their view, EPA's error in considering regulation at all is compounded by the Agency's attempts to impose on SCM's the SIC code and other attributes of the PSD/NSR definition of source that may be appropriate for other industries but cannot be properly applied to SCM's through a "definitional quirk." Any regulation of SCM's by virtue of the source definition is arbitrary and in excess of EPA's authority, they assert, unless EPA complies with the rulemaking requirements of section 302(j). Industry commenters claimed that consideration of SCM fugitive dust emissions as the "secondary emissions" of an off site support facility in determining the air quality impact of a major stationary source is also precluded absent compliance with section 302(j).

b. Analysis. The EPA disagrees fundamentally with the industry contention that rulemaking under section 302(j) is a broad prerequisite to any regulation of SCM's under the Act and PSD/NSR programs.[10] To the contrary, EPA continues to believe section 302(j) has only a limited "safety valve" function. Once the Administrator determines that sources in a given source category have the potential to degrade air quality significantly, commenters have an opportunity to present factual and policy arguments sufficient to convince the Administrator that it would not be appropriate to include fugitive emissions from sources in that category in TAD's. Section 302(j) is irrelevant in defining the scope of the term "source" and in applying substantive PSD and NSR requirements. Thus, in *Alabama Power* v. *Costle*, the D.C. Circuit upheld EPA's position that section 302(j) has no bearing whatsoever on the applicability of substantive PSD requirements under section 165 after a source is determined to be major (636 F.2d at 369). In addition to establishing the limited reach of section 302(j), the *Alabama Power* decision is highly informative of the limited scope and discretionary nature of those rulemakings which must be conducted under that section. Consequently, in both the 1980 and 1984 final rulemakings, EPA reasonably concluded that Congress consigned any problems of measurement, modeling, and pollution control regarding fugitive emissions to individual permit proceedings (45 FR 52690–92 and 49 FR 43203). Similarly, in its final action on the rulemaking proceeding arising out of Exhibit A of the *CMA* Settlement Agreement, EPA concluded that where SCM's function as off site support facilities for a major stationary source, the mine's reasonably quantifiable fugitive dust emissions must be included in the air quality impact analysis for the major source, and that it is not necessary to conduct a section 302(j) rulemaking to make this finding [54 FR 27286, 27290, (June 28, 1989)].

Based on the above, EPA concludes that it has no obligation to depart from its longstanding use of the SIC code and other aspects of the definition of "source" for PSD and NSR purposes in order to satisfy its rulemaking obligations under section 302(j) or to otherwise craft a reasonable and lawful set of PSD/NSR rules. The EPA also reaffirms its interpretation of section 302(j). Moreover, EPA believes that the results of this conclusion reflect adequate consideration of the particular characteristics of the SCM industry, consistent with EPA's obligation to administer and enforce the Act. In addition, EPA does not believe that the effects of today's action will be unduly burdensome to industry.

2. *Listed Collocated Sources.* As discussed in the February 1986 (51 FR 7090) reopening of the public comment period, EPA's position has been that stack emissions and fugitive emissions from a coal cleaning plant or coal preparation plant must be summed in determining whether it would be a major stationary source. If, standing alone, such a plant were "major," and therefore subject to review, then a collocated SCM generally would also be considered part of the major source and subject to substantive PSD and NSR requirements regardless of whether SCM's are listed. (See Alabama Power, 636 F.2d at 369). Such operations typically must be aggregated as a single source under EPA's rules because they belong to the same SIC two digit code, and typically are located on adjacent or contiguous properties and are under common control.[11]

The EPA believes that the structure and function of its regulations in the above examples are reasonable and appropriate under the Act. Indeed, industry commenters have presented no evidence of adverse practical consequences from this view, because coal preparation plants and coal cleaning plants apparently do not usually exceed major source size thresholds. A more difficult question is presented by whether the fugitive emissions of a collocated SCM must also be considered for threshold applicability purposes. Industry comments and EPA's February 1986 notice pointed out that a strict construction of the regulations with respect to the SIC code could result in the entire operation, including the SCM, being considered as part of the "listed" coal preparation or coal cleaning plant. The EPA has determined to reaffirm its longstanding position that the decision whether to include fugitive emissions from collocated SCM's in these circumstances should be decided for each occurrence, depending on the "primary activity" of the operation as a whole. As stated in the preamble to the 1980 regulations, "[e]ach source is to be classified according to its primary activity, which is determined by its principal product or group of products produced or distributed, or services rendered" (45 FR 52695).[12]

Under this primary activity test, EPA or the permitting authority should review all the facts and circumstances of the particular case to determine what is the main purpose and function of the overall operation, and make an applicability determination based on the status (listed vs. nonlisted) and tonnage threshold (100 tons per year vs. 250 tons per year) of the primary activity. Thus, as SCM's continue to be a nonlisted source category, where coal mining is the primary activity, a mine's fugitive emissions are not considered in determining threshold applicability for a source consisting of the mine and some other collocated activity. In both of the final determinations cited above, EPA concluded that the coal mine was the primary activity, and EPA anticipates that this would be the case in most, if not all, future examples involving coal processing activities. In terms of both the purpose of the enterprise and the economic value of the newly mined coal as compared with the processed coal, it is the mining that is the focus of the overall effort.

3. *Support Facilities—a. Collocating Sources of Differing SIC's.* Mining industry commenters also raised closely related questions arising from the collocation of listed sources and SCM's that are under different two-digit SIC codes. They noted that when EPA articulated the primary activity test in the 1980 regulations, the Agency stated: "one source classification encompasses both primary and support facilities, even when the latter includes units with a different 2-digit SIC code. Support facilities are typically those which convey, store, or otherwise assist in the production of the principal product" (45 FR 52695). These commenters noted, that in 1980, EPA stated, in response to a specific comment, that a power plant and a SCM connected by a 20-mile railroad would be considered separate sources because of the distance and the different two-digit SIC codes, but sought clarification as to a SCM and a closer or adjacent coal-fired power plant. As stated above, these matters must be

[10] Industry representatives must present their arguments on the listed source issues as requests for clarification or reconsideration of EPA's definition of source and current list of fugitive emissions source categories. In so doing, they at least tacitly acknowledge that these issues are separate from the limited question presented by the proposal to list SCM's under section 302(j).

[11] For the same reasons, stack emissions from the mine must also be added to the emissions of the preparation or cleaning plant in determining threshold applicability.

[12] See also Memorandum, Edward E. Reich, Director, Stationary Source Compliance Division, EPA to John M. Daniel, Assistant Executive Director, Virginia Air Pollution Control Board, May 31, 1983; Memorandum, Edward E. Reich to Allyn Davis, Director, Air and Hazardous Materials Division, EPA Region VI, June 8, 1980.

decided on a case-by-case basis. However, EPA anticipates that it would, in most cases, conclude that a SCM and an adjacent mine-mouth power plant controlled by the same entity would be considered a single source, the primary activity of which is either the generation of electrical power or the mining of coal, depending on the most likely overall purpose of the facility. If the mine and power plant were isolated in a remote area, for which the power plant is designed to support mining operations, the primary activity would likely be determined to be mining. However, if the facility is not isolated and service capacity of the power plant obviously exceeds the needs of the mine alone, and the facility will generate power for a public utility, then EPA would likely find that both the central purpose of the enterprise and the principal locus of its economic value is power generation. In the latter example, because power plants in excess of 250 million BTU heat input per hour are listed sources (see, e.g., 40 CFR 52.21(b)(1)(iii)(z)), the fugitive emissions of the SCM would be included in TAD's, and the SCM would be subject to substantive PSD and NSR requirements.

Industry commenters object to this possible outcome for two reasons. First, they contend that unless SCM's are separately listed, use of the factor of geographic proximity to consider a SCM as part of a single source that also includes a power plant violates the rulemaking requirements of section 302(j). However, as suggested above, section 302(j) does not require rulemaking as to SCM's in order to make such a finding. Regarding the listing of fossil-fuel fired steam electric plants as such, commenters have not demonstrated that considering SCM's as part of a source that also includes a power plant is, for the threshold applicability purposes of section 302(j), unreasonable. In practical terms, virtually all power plants in excess of 250 million BTU heat input exceed the major source threshold without consideration of fugitive emissions from collocated SCM's. Also, as discussed previously, *Alabama Power* conclusively determined that once a source is found to be major and subject to review substantive PSD and NSR requirements "apply with equal force to fugitive emissions and emissions from industrial point sources" (636 F.2d at 369). Thus, today's action should have no impact on existing coverage of collocated SCM's and power plants.

b. Economically Forced Relocation Sources. Industry's second objection is that including a SCM and a listed power plant as a single source would encourage relocation of the power plant to a distant location and thereby cause adverse energy and environmental impacts. Although there is some surface plausibility to this notion, commenters did not clearly demonstrate that such a result would occur. More importantly, this objection does not relate to the proper scope of a section 302(j) inquiry, but rather to EPA's definition of "source," and these commenters have not shown that it is unreasonable for EPA to adhere to its consistent and longstanding construction of this term rather than create a special exemption for SCM's. Similarly, the commenters have not shown that it would be unreasonable to retain the current list of fugitive emissions source categories.

4. Continuance of Status Quo. Finally, as to both the support facility issue and the SIC code issue, it is clear that the central thrust of the mining industry's objections to PSD and NSR coverage is the special pleading that SCM's would be unable to meet applicable air quality requirements in an economical fashion. As discussed elsewhere in this notice, it is no longer clear that this is universally the case. Moreover, the net result of today's action is not to add any new regulatory requirements, but merely to retain the status quo, under which only certain SCM's collocated with certain other listed sources must meet substantive PSD and NSR requirements, including ambient impact requirements. However, the need to demonstrate that SCM's collocated with listed sources will not exceed applicable NAAQS and increments, the focus of industry's concerns, is already in place by virtue of EPA's prior action on "secondary emissions." As explained in the preamble to that action, EPA concluded that the Act mandates the inclusion of such secondary emissions as a general matter (54 FR 27290). The EPA today reaffirms that conclusion.

C. *Applicability of Section 302(j) to Modifications*—1. *Background.* In the 1984 rulemking proposal, EPA solicited comment on its interpretation that section 302(j) applies to TAD's only for major new sources, and not for major modifications to existing major stationary sources (49 FR 43213). The EPA pointed out that the language of section 302(j) explicitly attaches the rulemaking requirement only to existing or proposed major sources, and says nothing about major modifications to existing units. The EPA also noted that the PSD and nonattainment NSR definitions of modification in section 169(2)(C), 42 U.S.C. 7479(2)(C), and section 171(4), 42 U.S.C. 7501(4), are both nonsubstantive, and refer to section 111(a)(4) of the Act's new source performance standards (NSPS) provisions, 42 U.S.C. 7411(a)(4). Section 111(a)(4), in turn, defines modification solely in terms of the total amount of pollution that a source change would produce, indicating that Congress intended to establish no qualitative distinction between stack and fugitive emissions. Moreover, EPA stated, the legislative history on section 302(j) does not refer directly to modifications, although the conference report on the PSD construction and modification definitions in section 169(2)(C) does provide that Congress' general intent was "to conform to usage in other parts of the Act" [123 Cong. Rec. H 11957, col. 3 (daily ed.) (November 1, 1977)]. The EPA reasoned that this passage referred not only to section 111(a)(4), but to usage of these terms in extant EPA regulations under the NSPS and PSD/NSR programs. Those regulations did not distinguish between fugitive and stack emissions. Thus, EPA concluded that section 302(j) ran counter to longstanding practice, and that if Congress had intended a legislative change as to modifications, it would have said so explicitly. In addition, EPA related that its interpretation likely would not impose new regulatory burdens because fugitive emissions from modifications would still be excluded from TAD's unless the modifications occurred at a major stationary source. Thus, if SCM's continue to be nonlisted, and therefore generally deemed not to be major sources, a modification that significantly increased fugitive emissions at a SCM still would not trigger PSD and NSR.

In reopening the comment period in February 1986, EPA reiterated its view that the nonapplicability of section 302(j) to modifications would not affect PSD and NSR applicability in the general case, but pointed out that resolution of the "listed source" issues could affect this outcome (51 FR 7093).

2. *Industry Comments.* Mining industry representatives commented that section 302(j) should apply to modifications. They disagreed with EPA's interpretation of the legislative history, believing instead that congressional silence on the subject disclosed a lack of guidance. The AMC asserted that since new sources and modifications are generally treated the same in most respects under the Act, there is no basis to treat them differently under section 302(j).

Industry commenters also argued that EPA must resolve, in the context of a separate rulemaking under section

302(j), certain ambiguities as to what "physical change or change in the method of operation" would result in a "significant net emissions increase" at a major stationery source and therefore constitute a major modification subject to NSR. (See, e.g., 40 CFR 52.52(b)(2)(i).) In their view, EPA's October 1984 proposal was inadequate to apprise the interested public of the purpose and intent of the proposal and how it relates to other existing regulatory requirements.

Peabody Holding Co., pointed out that due to the nature of SCM's, there must constantly be movement of mining operations as mining progresses along the coal deposits, possibly requiring the addition of new equipment or even the development of a new pit as the reserves in the existing pit are mined out. The NCA similarly asserted that physical or operational changes of this nature are a normal part of strip mining. Peabody suggested that EPA adopt a test which provides that any activity or change at a mine that represents a logical mining sequence of the mine's production pursuant to the mining plan used by State authorities in issuing air quality permits, or mining and reclamation permits in instances where air quality permits were not required, can serve as a guide to whether a modification would occur. Thus, activity in conformance with the mining plan should not be considered a modification when the mine owner has previously used that plan as a basis for securing all required permits. Peabody noted, however, that in some cases, especially in the eastern half of the United States, the mining plan will not cover the future movement of the mine for more than a few years because such movement depends upon the future acquisition of mineral rights in adjoining land. The movement of the mine to those sites in the future should not be considered a modification of the existing mine for NSR purposes so long as it represents a logical progression of mining activities. In Peabody's view, changes such as the addition of more haul roads or a change in pit sequences, would be routine and not constitute a modification.

The NCA asserted that increases in production up to maximum design production capacity of a mine and increases in emission up to the maximum allowed in air quality permits should not be considered a major modification. The AMC contended that since many existing mines have not been required to have permits, there is some question as to whether emissions decreases occurring at a mine are "federally enforceable" and, therefore, whether the owner or operator could obtain credit for decreases (such as from a haul road that is no longer in use) in making netting calculations. The AMC also pointed out that actual emissions baseline issues must be addressed.

3. *Environmental Group Comments.* The Sierra Club agreed with EPA that section 302(j) does not apply to modifications. However, this commenter contended that EPA should not "grandfather" modifications that occur prior to today's action, on the ground that EPA's view to the contrary was contained only in the August 1983 proposal and was never promulgated.

4. *EPA Analysis.* Upon consideration of the comments, EPA reaffirms its October 1984 interpretation that section 302(j) does not apply to modifications. Commenters have not persuaded the Agency either that Congress had a contrary specific purpose in adopting section 302(j), or that EPA's interpretation, as explained in the October 1984 proposal, is inconsistent with the Act's purposes. Accordingly, EPA believes that its interpretation is a reasonable one, and thus proper under the law [See *Chevron, U.S.A. Inc.* v. *Natural Resources Defense Council (NRDC)*, 467 U.S. 837 (1984)]. In any event, EPA believes that this interpretation should have little general impact at this time, because today's central decision to not list SCM's means that very few mines should be brought under NSR solely by virtue of EPA's interpretation of the nonapplicability of section 302(j) to modifications.

The EPA's interpretation, in conjunction with today's resolution of the "listed source" issues could in theory have the effect of subjecting certain modifications at existing SCM's to PSD and NSR in some fashion. For example, increases in fugitive emissions resulting from physical or operational changes at mines collocated with coal preparation plants and coal cleaning plants that are deemed to be major sources would be considered in determining whether there was a "significant net increase in emissions," and, hence, a major modification. However, industry commenters have identified no instances in which coal preparation or cleaning plants would, under EPA's resolution of the "listed source" issues, be considered major sources. Even if there are such cases, EPA's interpretation would have a practical effect on the ambient impact analysis requirements of PSD and NSR only in those instances, if any, where there were changes in mining operations that increase fugitive emissions significantly without associated significant increases in emissions from the coal preparation or coal cleaning facilities standing alone.

Significant increases in fugitive emissions at mine collocated with power plants also could result in PSD and NSR coverage by virtue of the reaffirmation of the current list of fugitive emissions source categories. However, as is the case with major new sources as explained above in the discussion of the "listed source" issues, this result does not flow from any decision as to the application of section 302(j) to SCM's. In addition, as a practical matter, today's decision would have an impact only in those instances, if any, where significant increases in fugitive emissions from mines were not accompanied by significant increases at collocated power plants.

The EPA also rejects industry comments that the Agency must engage in a separate section 302(j) rulemaking to resolve issues relating to the application of existing regulatory concepts associated with the definition of modification to the particular circumstances presented by SCM's. These issues do not relate directly to EPA's interpretation of the rulemaking requirements of section 302(j), to the decision whether to list SCM's, to the applicability of section 302(j) to modifications, or to the "listed source" issues that are the principal subject of this rulemaking. Rather, as industry commenters concede, their concerns relate to the interpretation of EPA's existing modification regulations.[13] Accordingly, EPA is under no obligation to address industry's concerns in order to conclude this rulemaking. Moreover, as a general matter, since the comments in question essentially call for an interpretative ruling, the Administrative Procedure Act exempts EPA altogether from any legal obligation to engage in notice-and-comment rulemaking before addressing them.[14] Nevertheless, because these comments do raise questions of potential importance in the event that modifications to SCM's should, in practice, be subject to review, EPA addresses some of them here.

In sum, EPA believes that the general applicability concepts associated with its definition of "major modification" may be readily adapted to SCM's. The EPA rejects the inference of industry commenters that these concepts are

[13] See, e.g., Comments of Peabody Holding Co., Inc., Docket Entry No. A-84-33-IV-L-36 (May 26, 1986), at 38.

[14] In any event, it is evident from the cogent and focused comments summarized above that mining industry representatives have been given ample opportunity to address this matter.

somehow alien to the practical realities of SCM's. Nevertheless, it is appropriate to clarify certain general matters regarding the use of these regulatory concepts in the context of mining operations. Specific application of these concepts can only be addressed from the posture of a particular mine and of necessity are beyond the scope of this discussion.

The EPA agrees with the basic thrust of Peabody's comments as to when changes at an existing SCM should be deemed physical or operational changes for purposes of the PSD and NSR major modification rules. When a prospective new source in a traditional industrial source category receives air quality permits, as, for example, under the Act's PSD provisions, the permit allows construction and operation of specified facilities at specified levels. So long as the source constructs and operates in accordance with the permit terms, the ebb and flow of its activities will not trigger a major modification. Conversely, if, after initial construction and operation under the permit, the source institutes a physical or operational change resulting in a significant net increase in emissions, it will be subject to review as a major modification. These general concepts may be applied to SCM's.

Thus, if there are instances where a specific mining plan specifies the location, methods, and extent of mining activities, and forms the basis of permitting decisions by State or Federal agencies under air quality or surface mining laws and regulations, a source generally could engage in the mining activities set forth in that plan without triggering a major modification. For example, where the mining plan contemplates that the pit will move to specified new areas over time and contemplates the new, extended, or modified haul roads will be constructed to accommodate that movement, such haul roads could in the normal course be considered part of the source as originally constructed, and not as a modification. Likewise, if the original mining plan provides for increases in production over time and discusses in detail associated changes in the mining operations in order to accommodate such increased production, including any changes necessary under applicable law in order to address air quality concerns, such changes generally would not trigger PSD review.

Conversely, where a mining operation moves to a new area not part of the original mine plan, because, for example, mineral rights to the area in question were not secured prior to filing the original plan, construction of a new, modified, or extended haul road would be deemed a physical or operational change that may trigger review. Similarly, a mining operation may move to an area that, while nominally part of the original plan, has not undergone complete consideration of air pollution control requirements or air quality impacts to the extent necessary under applicable laws or regulations. This might occur because, for example, the regulatory authority could not adequately foresee the environmental impact of such future operations at the time of original approval and therefore retained the right to give additional consideration to such matters at some future time. Under such circumstances, changes in the mining operations could be deemed a physical change or change in the method of operation, and potentially trigger review. In addition, an original mining plan may provide for a particular level of production and specify the means by which that production may be achieved. However, if it later becomes the case that physical or operational changes not contemplated by the original mining plan are necessary in order to achieve the maximum production design capacity, emissions increases associated with such increased production may be subject to PSD review.

However, where changed operations such as those discussed above are cognizable for NSR purposes, a mine owner or operator would also be entitled to seek offsetting, federally enforceable decreases in current actual emissions in order to avoid review. This could be accomplished, for example, through a State construction permit acknowledging the cessation of operations on a haul road no longer needed. In general, as this discussion illustrates, EPA believes that the usual concepts by which major modification applicability is determined can be readily applied to SCM operations. Of course, some consideration must be given to the circumstances of the strip mining industry, as often must be done for other specific industries. In addition, the applicability in a particular case must be determined on the basis of the facts and circumstances surrounding that case.

V. Administrative

A. Docket

This regulatory action is subject to the provisions of Clean Air Act section 307(d) [see section 307(d)(1) (i) and (n)]. The docket for this regulatory action is A-84-33. The docket is an organized and complete file of all the information submitted to or otherwise considered by EPA in the development of this proposed rulemaking. The docket allows interested parties a means to identify and locate documents to effectively participate in the rulemaking process and now serves as the record in case of judicial review (except for interagency review materials ([section 307(d)(7)(A)]). The docket is available for public inspection at EPA's Central Docket Section, which is listed under the ADDRESSES section of this notice.

B. Office of Management and Budget (OMB) Review

Under Executive Order 12291 (E.O. 12291), EPA must judge whether a regulation is "major" and therefore subject to the requirement of an RIA. Although the proposed regulation was considered major and an RIA was prepared on the proposal, the final action is not major because it will not result in an adverse economic effect set forth in section 1 of E.O. 12291 as grounds for finding a regulation to be major. This regulation was submitted to the OMB for a 10-day review as required by E.O. 12291. In addition to being considered minor, this action is also subject to a court required publication deadline for final action in *Sierra Club* v. *Thomas*, No. 88-1847 (D.C. Cir.). Any written comments from OMB to EPA and any EPA responses to those comments are included in Docket A-84-33.

No additional reporting and record keeping requirements will occur as a result of today's action. All record keeping and reporting requirements resulting from the Federal PSD and NSR regulations have been submitted to OMB for approval under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501, et seq. and have been assigned OMB clearance No. 2060-0003. Today's action does not add substantively to the existing regulations and focuses primarily on resolving issues which result from EPA not listing a source category for consideration of fugitive dust emissions under section 302(j).

C. Economic Impact Assessment

The requirement for performing an Economic Impact Assessment under section 317 of the Act (42 U.S.C. 7617) does not apply, because this action does not make "substantial revisions" to existing regulations. The action is not substantial because it does not add to the current regulatory burden and simply retains existing provisions.

D. Federalism Implications

Under Executive Order 12612 (E.O. 12612), EPA must determine if a rule has federalism implications. Federalism implications refer to 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. For those rules which have federalism implications, a federalism assessment is to be made.

The E.O. 12612 also requires that agencies, to the extent possible, refrain from limiting State policy options, consult with State prior to taking actions that would restrict State policy options, and take such actions only when there is clear constitutional authority and the presence of a problem of national scope. The E.O. 12612 provides for preemption of State law, however, if there is a clear congressional intent for EPA to do so. Any such preemption, however, is to be limited to the extent possible.

Today's action will not affect States beyond the current requirements under Federal PSD and NSR regulations. Under these existing regulations, States may adopt strategies if the strategies, taken as a whole, accomplish the statutory purposes of the Act. In addition, the regulations that EPA has will allow States to develop approvable methods of implementing the existing regulations.

In summary, no modifications are being made to the existing EPA-State relationship by today's action. Consequently, there are not federalism implications of this action.

E. Regulatory Flexibility Act Compliance

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this rule, if promulgated, will not have significant economic impact on a substantial number of small business entities (see 46 FR 8709).

List of Subjects

40 CFR Part 51

Administrative procedures and practices, Intergovernmental relations, Air pollution control, Prevention of significant deterioration, National parks and wilderness area, Fugitive emissions, Coal strip mining, Particulate matter, Nitrogen dioxide, Carbon monoxide, Hydrocarbons, Lead.

40 CFR Part 52

Air pollution control, Prevention of significant deterioration, National parks and wilderness areas, Fugitive emissions, Coal strip mining, Particulate matter, Nitrogen dioxide, Carbon monoxide, Hydrocarbons, Lead.

Dated: November 16, 1989.

William K. Reilly,

Administrator.

[FR Doc. 89-27663 Filed 11-27-89; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 52

[A-1-FRL-3691-5]

Approval and Promulgation of Air Quality Implementation Plans; Connecticut; Alternative Reasonably Available Control Technology for Frismar, Inc.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Connecticut. This revision provides an alternative reasonably available control technology (RACT) determination for the control of volatile organic compound (VOC) emissions from one paper coating line at Frismar, Incorporated in Clinton, Connecticut. The intended effect of this action is to approve the State's request to amend its SIP. This action is being taken in accordance with section 110 of the Clean Air Act.

EFFECTIVE DATE: This rule will become effective on December 28, 1989.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region I, JFK Federal Bldg., Room 2311, Boston, MA 02203 and the Air Compliance Unit, Department of Environmental Protection, State Office Bldg., 165 Capitol Avenue, Hartford, CT 06106.

FOR FURTHER INFORMATION CONTACT: David B. Conroy, (617) 565-3252; FTS 835-3252.

SUPPLEMENTARY INFORMATION: On July 22, 1988 (53 FR 27711), EPA published a Notice of Proposed Rulemaking (NPR) for the State of Connecticut. The NPR proposed approval of State Order No. 8001 for Frismar, Incorporated as a revision to the Connecticut SIP. No public comments were received on the proposed approval.

The final State Order was submitted by Connecticut as a formal SIP revision on November 5, 1987. This State Order was issued pursuant to provisions found in subdivision 22a-174-20(cc)(3) of Connecticut's regulations which allow the DEP to impose alternative limitations on a source that has demonstrated it cannot meet the RACT limitations in the SIP for technological and economic reasons.

EPA approved the provisions in subdivision 22a-174-20(cc)(3) for making alternative RACT determinations on June 7, 1982 (47 FR 24552) as part of Connecticut's Ozone Attainment Plan. As part of that SIP revision, Connecticut submitted a letter dated January 11, 1982 in which the State committed to submit all alternative RACT determinations to EPA as SIP revisions.

Frismar is a paper coating facility utilizing two coating lines. The facility is subject to subsection 22a-174-20(q), "Paper coating" of Connecticut's SIP regulations which requires each coating line to meet an emission limitation of 2.9 pounds VOC/gallon of coating (minus water). This emission limitation is identical to the limitation specified in the applicable EPA control techniques guideline (CTG) document for this source category (EPA-450/2-77-008). Under Connecticut's regulations, a source subject to subsection 22a-174-20(q) must comply with the emission limitation contained in that regulation no later than July 1, 1985. Frismar has installed an inert atmosphere solvent recovery system on one of its coating lines (coater #2). Its other coating line (coater #1) presently has no control equipment.

As alternative RACT for one of Frismar's coating lines (coater #1), the State Order requires Frismar to comply with an emission rate of 5.32 pounds VOC/gallon of coating (minus water) for all first-pass coatings and an emission rate of 6.42 pounds VOC/gallon of coating (minus water) for all second-pass coatings. Additionally, to further limit the use of the higher VOC-containing second-pass coatings, the State Order requires Frismar to adhere to a limitation of 20 pounds VOC/ream (3000 square feet) of material coated when utilizing second-pass coatings. Frismar's other coating line (coater #2) is still required to comply with the SIP emission rate (as set forth in subsection 22a-174-20(q) of Connecticut's regulations) of 2.9 pounds VOC/gallon of coating (minus water). Coaters #1, and #2 are required to maintain compliance with their applicable RACT emission rates on an instantaneous basis. Further, the State Order requires Frismar to achieve and maintain a minimum overall reduction level of ninety-three percent (93%) from the inert atmosphere solvent recovery system installed on coater #2.

Additionally, the State Order requires Frismar to maintain daily and monthly caps of 918 pounds and 2.833 tons, respectively, for coater #1 and daily and monthly caps of 286.47 pounds and 2.87 tons, respectively, for coater #2. The monthly cap on coater #1 is required to be maintained on an average basis over every two consecutive month period. The daily and monthly caps insure that the VOC emissions from this facility will not interfere with reasonable further progress (RFP) towards attaining the National Ambient Air Quality Standard (NAAQS) for ozone in Connecticut.

To justify the above limitations as an alternative RACT determination, Frismar has submitted an extensive amount of technical and economic information to the DEP showing that it cannot reasonably attain daily compliance with the emission limitations contained in Connecticut's federally-approved SIP for coater #1. EPA's evaluation of this information confirms that add-on control equipment is economically infeasible for coater #1. (A copy of EPA's analysis is contained in the Technical Support Document prepared for this revision and is available from the EPA Regional Office listed in the *Addresses* section of this notice.)

Furthermore, Frismar has researched the feasibility of reformulating its coatings used on coater #1 to complying levels. Through these efforts, Frismar was able to realize a 28% increase in the content of coating solids in the coatings used on coater #1. Frismar cannot use any higher solids-containing coatings since the stencil manufacturing operation that it uses involves saturation as much as coating, and it is simply not possible for the tissue paper to absorb such coatings. The result of using any higher solids coatings is "skipping" which renders the product useless for subsequent sale and use.

EPA has reviewed the requirements of State Order No. 8001 and has determined that they constitute alternative RACT for Frismar. Further justification and rationale for approving this revision are contained in the Technical Support Document prepared by EPA for this revision. Copies of that document may be obtained from the EPA Regional Office listed in the *Addresses* section of this notice.

At the time of the State's November 5, 1987 submittal, although Connecticut was not in attainment of the ozone NAAQS, EPA had approved the SIP for the area, including the attainment demonstration, as providing for attainment by 1987. Thus, at that time, Connecticut was considered a nonattainment area with an approved demonstration. As discussed above, Frismar will be achieving reductions in VOC comparable to what were anticipated by Connecticut's 1982 ozone attainment demonstration. Therefore, the SIP revision being approved for Frismar today does not change Connecticut's original ozone attainment demonstration which was approved by EPA on March 21, 1984.

EPA now knows, however, that Connecticut's 1982 ozone attainment plan does not provide for attainment by the end of 1987. In the **Federal Register** on November 24, 1987, EPA's Proposed Post-1987 Policy for Ozone and Carbon Monoxide stated that air quality monitors revealed sufficient exceedances of the ozone standard in Connecticut and that a SIP call would be issued. (See 52 FR 45044). A SIP call is a finding by EPA under Clean Air Act section 110(a)(2)(H) that the SIP does not provide for attainment by the required date, and thus amounts to a revocation (for certain purposes) of EPA's approval of the SIP and the attainment demonstration. Since publishing this notice, the review of data from air quality monitors in the State have revealed additional exceedances of the standard during 1987. On May 25, 1988, EPA issued a SIP call for Connecticut.

EPA does not believe, however, that this precludes EPA from approving the SIP revision for Frismar. Section 172(b) of the Clean Air Act lists the requirements, in addition to those listed in section 110(a)(2), which a nonattainment area SIP must meet. Section 172(b)(3) requires that states must demonstrate reasonable further progress toward attainment through the adoption, at a minimum, of reasonably available control technology (RACT). The Connecticut DEP and EPA have determined, based on substantial documentation from Frismar, that the level of control required by the DEP's State Order represents the most stringent level of control possible at Frismar taking into consideration economic and technological feasibility. Unless and until the DEP determines that to make an RFP demonstration consistent with EPA's Post-1987 policy, the DEP needs reductions from Frismar beyond RACT which would cause the plant to close, it is reasonable to impose RACT in the meantime to meet the requirements of section 172(b)(3).

Consistent with this approach, the DEP has made it clear it will account for Frismar's emissions under State Order No. 8001 in any new attainment demonstration. The State has told EPA it will use the daily cap being imposed on Frismar as representing the actual daily VOC emissions from Frismar for purposes of showing reasonable further progress with the original ozone attainment demonstration. The emission limitations (including the cap) for Frismar will be included in any new SIP and associated control strategy demonstration that Connecticut prepares. Furthermore, the alternative RACT determination for Frismar does not constrain the State's ability to obtain any additional emission reductions needed to expeditiously attain and maintain ambient air quality standards. Moreover, on September 12, 1988, Connecticut submitted a letter to EPA stating that it is making reasonable efforts to develop a complete approvable SIP and provided EPA with a schedule for such development (including dates for completion of emissions inventory, correction of deficient regulations, and subsequent increments of progress). EPA believes that since the State has adequately made these representations, EPA is able to approve this alternative RACT determination on grounds that it does not interfere with attainment and maintenance of the ozone NAAQS, in accordance with section 110(a)(2) of the Clean Air Act.

Final Action

EPA is approving Connecticut's State Order No. 8001 as a revision to the Connecticut SIP. The provisions of Connecticut's State Order No. 8001 impose alternative RACT on Frismar, Incorporated pursuant to subdivision 22a-174-20(cc)(3) of Connecticut's regulations. EPA is approving this revision based on justification received from Frismar showing that it is economically infeasible for Frismar to install add-on control equipment on coater #1. The provisions contained in the State Order for this coater restrict the overall use of this coater. This requires Frismar to utilize its controlled coater (i.e., coater #2) for a large majority of its production. Under the State Order, coater #2 must continue to meet the RACT limit of 2.9 pounds VOC/gallon of coating (minus water) of subsection 22a-174-20(q), and is not, therefore, approved for an alternative RACT emission rate. Approval of Connecticut State Order No. 8001 covers only Frismar, Incorporated of Clinton, Connecticut and should not be construed as a national precedent for other paper coating facilities.

Further, it is EPA's policy to disallow a relaxation from RACT in an area needing but lacking an approved attainment demonstration. EPA believes, however, it is appropriate to

approve this request under the grand fathering provision set forth in the June 27, 1988 memorandum signed by Gerald Emison, Director of the Office of Air Quality Planning and Standards, because the request was submitted to EPA prior to the post-1987 SIP call when the area had an approved attainment demonstration.

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 29, 1990. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements.

Note: Incorporation by reference of the State Implementation Plan for the State of Connecticut was approved by the Director of the Federal Register on July 1, 1982.

Dated: November 8, 1989.

William K. Reilly,

Administrator.

Subpart H, part 52 of chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

Subpart H—Connecticut

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

Authority: 42 U.S.C. 7401–7642.

2. Section 52.370 is amended by adding paragraph (c)(47) to read as follows:

§ 52.370 Identification of plan.

* * * * *

(c) * * *

(47) Revisions to the State Implementation Plan submitted by the Connecticut Department of Environmental Protection on November 5, 1987.

(i) *Incorporation by reference.* (A) Letter from the Connecticut Department of Environmental Protection dated November 5, 1987 submitting a revision to the Connecticut State Implementation Plan.

(B) State Order No. 8001 and attached Compliance Timetable for Frismar, Incorporated in Clinton, Connecticut. State Order No. 8001 was effective on October 20, 1987.

(ii) *Additional materials.* (A) Technical Support Document prepared by the Connecticut Department of Environmental Protection providing a complete description of the alternative reasonably available control technology determination imposed on the facility.

[FR Doc. 89–27850 Filed 11–27–89; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 52

[FRL-3691-4; KY-060]

Approval and Promulgation of Implementations Plans—Kentucky: 401 KAR 50:010, Definitions and Abbreviations and 401 KAR 51:017, Prevention of Significant Deterioration of Air Quality

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: EPA today approves as State Implementation Plan (SIP) revisions amendments to Kentucky regulations 401 KAR 50:010 (Definitions and Abbreviations), and 401 KAR 51:017, Prevention of Significant Deterioration (PSD) of Air Quality. The first regulation, 401 KAR 50:010, is being amended to delete the applicability of the definition of volatile organic compounds (VOC) from the regulations for PSD and new source review (NSR) in nonattainment areas, and to change the definition of VOC to make it consistent with the federal definition for purposes of the new source performance standards. In order to reduce ambiguity regulation 401 KAR 51:017 is being amended to delete a sentence in section 8(3) relating to monitoring requirements for sources of VOC. The approval of these amendments will eliminate the remaining deficiencies in Kentucky's PSD regulations identified in the approval notice for 401 KAR 51:017 on September 1, 1989 (see 54 FR 36307).

DATE: This action will be effective on January 29, 1990, unless notice is received on or before December 28, 1989, that someone wishes to submit adverse or critical comments. Such notice may be submitted to Richard A. Schutt at the EPA Regional Office address listed below.

ADDRESSES: Copies of the material submitted by the State may be examined during normal business hours at the following locations:

Public Information Reference Unit, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460

Environmental Protection Agency, Region IV, Air Programs Branch, 345 Courtland Street, NE., Atlanta, Georgia 30365

Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet, 18 Reilly Road, Building #2, Fort Boone Plaza, Frankfort, KY 40601.

FOR FURTHER INFORMATION CONTACT: Richard Schutt of the EPA Region IV Air Programs Branch at the above address, telephone (404) 347–2864 or FTS 257–2864.

SUPPLEMENTARY INFORMATION: On December 29, 1986, the Commonwealth of Kentucky submitted to EPA two regulations: 401 KAR 50:010, Definitions and Abbreviations, and 401 KAR 51:017, Prevention of Significant Deterioration (PSD). A public hearing was held to receive comments on these regulations on November 21, 1986. EPA requested that these amendments be made to eliminate the remaining deficiencies in Kentucky's PSD regulations. The deficiencies were identified in EPA's approval of the PSD regulations on September 1, 1989 (see 54 FR 36307).

Regulation 401 KAR 50:010 is being amended to change the definition of volatile organic compound (VOC) and delete the applicability of the definition of VOC from the regulations for PSD and NSR. Upon changing this definition of VOC, there will be no definition of VOC for the PSD and NSR regulations, just as there is no definition of VOC in the federal regulations for purposes of PSD and NSR. The new VOC definition is similar to the definition that is used in 40 CFR part 60, the federal regulation for New Source Performance Standards (NSPS). Furthermore, VOC remains defined in certain Kentucky regulations in chapters 59 and 61 for new and existing sources, where it is applicable.

Kentucky also incorporates a list of eleven (11) VOC's which are not considered by EPA to be photochemically reactive into regulation 401 KAR 50:010. The compounds on this list are exempt from any VOC regulatory action for the purpose of PSD and NSR. The list is incorporated by reference in 401 KAR 50:016. Kentucky is also excluding from the definition of VOC five (5) compounds that are not considered to be organic compounds under the previous definition.

Since the definition of VOC in some Kentucky regulations in chapters 59 and 61 appears to conflict with the definition in 401 KAR 50:010, Kentucky states that the more specific definition shall apply. At the present time, no sources are affected by 401 KAR 50:010. Should any

source subject to PSD and NSR construct, reconstruct, or modify, it would not be required to adhere to the existing VOC definition.

Regulation 401 KAR 51:017, Prevention of Significant Deterioration of air quality, applies to major stationary sources and major modifications constructing in areas which are designated as attainment or unclassified. This regulation is being amended to delete the following sentence in Section 8(3): "Major volatile organic compound sources locating in an area unclassified for ozone may choose to accept the nonattainment area review requirement immediately pursuant to 401 KAR 51:052 and conduct post-approval monitoring for ozone." A similar exemption is available under federal regulations governing state regulations, but is restricted to exemptions from preconstruction monitoring. The Kentucky exemption can be interpreted to exempt the source from all PSD requirements, rather than only the preconstruction monitoring requirements. EPA requested that this change be made for clarification purposes.

Final Action

Since the amendments to 401 KAR 50:010 and 401 KAR 51:017 are the amendments requested by EPA to be consistent with EPA policy and requirements, the amendments are hereby approved.

EPA is publishing this action without prior proposal because the agency views this as a noncontroversial amendment and anticipates no adverse comments. This action will be effective January 29, 1990, unless, within 30 days of its publication, notice is received that adverse or critical comment will be submitted. If such notice is received, this action will be withdrawn and two subsequent notices will be published before the effective date. One notice will withdraw the final action and another will begin a new rulemaking by announcing a proposal of the action and establishing a comment period.

Under 5 U.S.C. 605(b), I certify that this SIP revision will not have a significant economic impact on a substantial number of small entities (see 46 FR 8709).

This action has been classified as a Table 3 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225). On January 6, 1989, the Office of Management and Budget waived Table 2 and 3 SIP revisions (54 FR 2222) from the requirements of section 3 of Executive Order 12291 for a period of two years.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 29, 1990. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

List of Subjects in 40 CFR Part 52

Air pollution control, Incorporation by reference, Intergovernmental relations, and volatile organic compounds.

Note: Incorporation by reference of the State Implementation Plan for the Commonwealth of Kentucky was approved by the Director of the Federal Register on July 1, 1982.

Dated: October 5, 1989.

Lee A. DeHihns III,

Acting Regional Administrator.

Part 52 of chapter I, title 40, Code of Federal Regulations, is amended as follows:

PART 52—[AMENDED]

Subpart S—Kentucky

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

Authority: 42 U.S.C. 7401–7642.

2. Section 52.920 is amended by adding paragraph (c)(63) to read as follows:

§ 52.920 Identification of plan.

* * * * *

(c) * * *

(63) Revisions to Kentucky Regulations 401 KAR 50:010, Definitions and abbreviations and 401 KAR 51:017, Prevention of Significant Deterioration of Air Quality, submitted on December 29, 1986, by the Kentucky Natural Resources and Environmental Protection Cabinet.

(i) *Incorporation by reference.* (A) Revisions in Kentucky Regulations are as follows. 401 KAR 50:010, Definitions and abbreviations section 1(49), and 401 KAR 51:017 Prevention of Significant Deterioration of Air Quality, Section 8(3). These revisions were state effective December 2, 1986.

(ii) *Other material.* (A) Letter of February 9, 1988, from the Kentucky Natural Resources and Environmental Protection Cabinet.

[FR Doc. 89–27851 Filed 11–27–89; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 52

[Region II Docket No. 99; FRL-3692-1]

Approval and Promulgation of Implementation Plans; Revision to the State of New York Implementation Plan for Ozone

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is today announcing the approval of a request by New York to revise its State Implementation Plan (SIP) for ozone. This revision was prepared by the New York State Department of Environmental Conservation pursuant to a SIP commitment to implement appropriate actions in order to reduce ozone levels as required under section 110 and part D of the Clean Air Act. The revision incorporates into the New York SIP a revised regulation, part 230, "Gasoline Dispensing Sites and Transport Vehicles," which will reduce volatile organic compound emissions due to motor vehicle refueling at certain gasoline stations in the New York City metropolitan area.

EFFECTIVE DATE: This action will be effective December 28, 1989.

ADDRESSES: Copies of the state submittal are available at the following addresses for inspection during normal business hours:

Environmental Protection Agency, Region II Office, Air Programs Branch, 26 Federal Plaza, room 1005, New York, New York 10278

Public Information Reference Unit, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460

New York State Department of Environmental Conservation Division of Air Resources, 50 Wolf Road, Albany, New York 12233.

FOR FURTHER INFORMATION CONTACT: Mr. William S. Baker, Chief, Air Programs Branch, Environmental Protection Agency, 26 Federal Plaza, room 1005, New York, New York 10278 (212) 264–2517.

SUPPLEMENTARY INFORMATION:

Background

On December 19, 1988 (53 FR 50975) the Environmental Protection Agency

(EPA) published a Notice of Proposed Rulemaking (NPR) for revisions of the New York State Implementation Plan (SIP) for ozone. These revisions add requirements for the control of gasoline vapors resulting from the refueling of vehicle fuel tanks at gasoline service stations (known as Stage II) and were adopted by the State on March 2, 1988 as revisions to part 230, title 6 of the New York Code of Rules and Regulations, entitled "Gasoline Dispensing Sites and Transport Vehicles." The revisions and the rationale for EPA's proposed approval were fully explained in the NPR and will not be restated here since this final action does not differ from that discussed in the NPR. No public comments were received on the NPR.

Conclusion

EPA has reviewed the State's submittal and finds that the Stage II program adopted by the State is equivalent to the program committed to in the SIP and, thus, adequately fulfills the State's SIP commitment. Therefore, EPA is approving New York's request to revise its SIP for ozone to revise part 230, "Gasoline Dispensing Sites and Transport Vehicles."

This notice is issued as required by section 110 of the Clean Air Act, as amended. The Administrator's decision regarding the approval of this plan revision is based on its meeting the requirements of section 110 of the Clean Air Act, and 40 CFR part 51.

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

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit within 60 days of publication. This action may not be challenged later in proceedings to enforce its requirements [See section 307(b)(2).].

List of Subjects in 40 CFR Part 52

Air pollution control, Hydrocarbons, Ozone, Incorporation by reference.

Note: Incorporation by reference of the State Implementation Plan for the State of New York was approved by the Director of the Federal Register on July 1, 1982.

Dated: October 31, 1989.

William K. Reilly,

Administrator, Environmental Protection Agency.

Title 40, chapter I, subchapter C, part 52, Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Subpart HH—New York

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

Authority: 42 U.S.C. 7401-7642.

2. Section 52.1670 paragraph (c) is amended by adding new paragraph (c)(80) to read as follows:

§ 52.1670 Identification of plan.

* * * * *

(c) * * *

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(80) Revisions to the New York State Implementation Plan (SIP) for ozone submitted on July 9, 1987 and April 8, 1988 by the New York State Department of Environmental Conservation (NYSDEC).

(i) *Incorporated by reference:* Amendments to part 230, title 6 of the New York Code of Rules and Regulations entitled "Gasoline Dispensing Sites and Transport Vehicles," adopted on March 2, 1988.

(ii) *Additional material:* (A) Explanation of Stage II Applicability Cut-offs, prepared by the NYSDEC, dated June 20, 1986.

(B) NYSDEC testing procedures for Stage II Vapor Recovery Systems.

3. Section 52.1679 is amended by revising the entry for part 230 to the table to read as follows:

§ 52.1679 EPA—approved New York regulations.

State regulation	State effective date	EPA approved date	Comments
* *	*	*	*
Part 230 "Gasoline Dispensing Sites and Transport Vehicles.".	32/88	11-28-89, 54 FR 48888	
* *	*	*	*

[FR Doc. 89-27847 Filed 11-27-89; 8:45 am]

BILLING CODE 6560-50-M

40 CFR Part 271

[FRL-3691-9]

Louisiana: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency.

ACTION: Immediate final rule.

SUMMARY: The State of Louisiana has applied for final authorization of revisions to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). The Environmental Protection Agency (EPA) has reviewed the Louisiana application and has made a decision, subject to public review and comment, that the Louisiana hazardous waste program revision satisfies all of the requirements necessary to qualify for final authorization. Thus, EPA is approving the Louisiana hazardous waste program revision application unless adverse public comment shows the need for further review. The Louisiana application is available for public review and comment.

DATES: Final authorization for the Louisiana revisions shall be effective January 29, 1990, unless EPA publishes a prior **Federal Register** notice withdrawing this immediate final rule. All comments on the Louisiana program revision application must be received by the close of business December 28, 1989.

ADDRESSES: Copies of the Louisiana program revision application and the materials which EPA used in evaluating the revision are available from 8:30 a.m. to 4 p.m., Monday through Friday at the following addresses for inspection and copying: Louisiana Department of Environmental Quality, 625 North 4th Street, Baton Rouge, Louisiana 70804, phone (504) 342-9072; U.S. EPA, Region 6, Library, 12th Floor, First Interstate Bank Tower at Fountain Place, 1445 Ross Avenue, Dallas, Texas 75202, phone (214) 655-6444; and U.S. EPA, Headquarters, Library, PM 211A, 401 M Street SW., Washington, DC 20460, phone (202) 382-5926. Written comments, referring to Docket Number LA-89-1, should be sent to Ms. Lynn Prince, Grants and Authorization Section (6H-HS), RCRA Programs Branch, U.S. EPA, Region 6, First Interstate Bank Tower at Fountain Place, 1445 Ross Avenue, Dallas, Texas 75202, phone (214) 655-6760.

FOR FURTHER INFORMATION CONTACT: Ms. Lynn Prince, Grants and Authorization Section (6H-HS), RCRA Programs Branch, U.S. EPA, Region 6, First Interstate Bank Tower at Fountain Place, 1445 Ross Avenue, Dallas, Texas 75202, phone (214) 655-6760..

SUPPLEMENTARY INFORMATION:

A. Background

States with final authorization under section 3006(b) of the Resource Conservation and Recovery Act, 42 U.S.C. 6926(b), have a continuing obligation to maintain a hazardous

waste program that is equivalent to the Federal program, consistent with the Federal or State programs applicable in other States, and provides adequate enforcement of compliance with the requirements of RCRA. Revisions to State hazardous waste programs are necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. These State program revisions are necessitated by changes to EPA's regulations.

B. Louisiana

The State of Louisiana received final authorization on February 7, 1985, (50 FR 3348, published on January 24, 1985) to implement its base hazardous waste management program. On May 16, 1989, the State of Louisiana submitted a complete program revision application for additional program revisions. Louisiana is seeking approval of these program revisions in accordance with 40 CFR 271.21(b)(3).

EPA has reviewed the Louisiana application, and has made a decision that the Louisiana hazardous waste program revisions satisfy all of the requirements necessary to qualify for final authorization. Consequently, EPA is granting final authorization for these modifications to the Louisiana program.

The public may submit written comments on EPA's decision to authorize the revisions in an immediate final rule until December 28, 1989.

Copies of the Louisiana application for program revision and the materials which EPA used in evaluating the revision are available for inspection and copying at the locations indicated in the "Addresses" section of this notice.

Approval of the Louisiana program revision application will become effective in 60 days unless an adverse comment pertaining to the State's revision discussed in this notice is received by the end of the 30 day comment period. If an adverse comment is received, EPA will publish either (1) a withdrawal of the immediate final rule or (2) a notice containing a response to comment which either affirms that the immediate final rule takes effect or reverses the decision.

The Louisiana program revision application included State regulatory changes that are equivalent to the rules promulgated in the Federal RCRA implementing regulations in 40 CFR parts 260 through 266, 124, and 270 that were published in the **Federal Register** through May 28, 1986. EPA is not authorizing the State's provisions which are analogous to the Hazardous and Solid Waste Amendments of 1984 (HSWA) provisions, including the availability of information provisions, with this notice. This proposed approval is, therefore, limited to the non-HSWA provisions that are listed in the chart below. This chart lists the State rules that are being recognized as equivalent to the appropriate Federal rules.

Federal citation	State analog
1. Permit Rules—Settlement Agreement—change to 40 CFR part 270, as published in the FEDERAL REGISTER on April 24, 1984.	1. Louisiana Hazardous Waste Regulations (LHWR) sec. 4303(F), effective April 13, 1988.
2. Listing of Warfarin & Zinc Phosphide as a hazardous waste—changes to 40 CFR part 261—as published in the FEDERAL REGISTER on May 10, 1984.	2. LHWR secs. 4901.E., effective April 13, 1988.
3. Exclusion of Stabilized Pickle Liquor Sludge—changes to 40 CFR part 261—as published in the FEDERAL REGISTER on June 5, 1984.	3. LHWR sec. 105.D, effective April 13, 1988.
4. The Exclusion of Household Waste as a Hazardous Waste—change to 40 CFR part 261, subpart A—as published in the FEDERAL REGISTER on November 13, 1984.	4. LHWR sec. 105.D.10, effective April 13, 1988, as amended November 21, 1988.
5. Applicability of Interim Status Standards to Owners and Operators of Treatment, Storage and Disposal Facilities—changes to 40 CFR part 265, subpart A—as published in the FEDERAL REGISTER on November 21, 1984.	5. LHWR sec. 4301.A and B, effective April 13, 1988, as amended November 21, 1988.
6. Corrections to the Test Methods Manual—changes to 40 CFR parts 260, subparts B and C and 270, subpart A—as published in the FEDERAL REGISTER on December 4, 1984.	6. LHWR sec. 105.I.1., effective April 13, 1988, as amended November 21, 1988.
7. Satellite Accumulation Rule—changes to 40 CFR part 262, subpart C—as published in the FEDERAL REGISTER on December 20, 1984.	7. LHWR sec. 1109.E.4, effective April 13, 1988, as amended November 21, 1988.
8. Redefinition of Solid Waste—changes to 40 CFR parts 260, subparts B and C; 261, subparts A and D; 264, subparts A and O; 265, subparts A, O, and P; and 266, subparts C, D, F, and G—as published in the FEDERAL REGISTER on January 4, 1985.	8. LHWR secs. 105.B; 105.D.28–35; 109; 3105; 3907; 4105.A and B; 4113; 4115; 4139.A.2; 4139.B.2 and 3; 4141.A.1 and 2; B.1,C.1 and 2, D, E, and F; 4143.A,B,C and D; 4513; 4523; 4901.A and C, effective April 13, 1988, as amended November 21, 1988.
9. Interim Status Standards for Landfills—changes to 40 CFR part 265, subparts K, M, and N—as published in the FEDERAL REGISTER.	1. LHWR sec. 2521.A and B; 2517.A and B, effective April 13, 1988.
10. Financial Responsibility: Settlement Agreement—changes to 40 CFR parts 260, subpart B; 264, subparts G and H; 265, subparts G and H; and 270, subparts B, D, and G—as published in the FEDERAL REGISTER on May 2, 1986.	2. LHWR secs. 109; 321.C and C.4 517.N–P; 3501.B and C; 3507 3511.3517; 3521–3527; 3703.A.7; 3705.A–C; 3707.A.10,B.4, C.5, D.8, E.5, F.1, I; 3709.A–C; 3711.A.11, B.4, C.5, D.9, E.5 F.1 and 2, I; 3715.E; 3719.13; 4377–4387; 4389.A–D; 4391–4395; 4397.A; 4399; 4401; 4403.A.10, B.4, C.1 and C.8, D.5, E.1 and 2, H; 4405.A–C; 4407.A.11, B.4 D.5 and 9, E.1 and 2, H; 4411.E, effective April 13, 1988, as amended November 21, 1988.
11. Listing of Spent Pickle Liquor from Steel Finishing Operations—changes to 40 CFR part 261, subpart D—as published in the FEDERAL REGISTER on May 28, 1986.	11. LHWR sec. 4901.C, effective April 13, 1988.

The State of Louisiana is not authorized to operate its hazardous waste program on Indian lands.

C. Decision

I conclude that the Louisiana program revision application meets all of the statutory and regulatory requirements established by RCRA. Accordingly, Louisiana will be granted final authorization to operate its hazardous waste program as revised. Louisiana's responsibility for permitting treatment, storage, and disposal facilities within its borders and carrying out other aspects of the RCRA program, will be subject to the limitation of its revised program application and previously approved authorities. Louisiana has primary enforcement responsibilities and EPA will exercise its enforcement responsibilities in accordance with the Memorandum of Agreement between EPA and Louisiana.

D. Codification in Part 272

EPA uses part 272 for codification of the decision to authorize the Louisiana program and for incorporation by reference of those provisions of the Louisiana statutes and regulations that EPA will enforce under subtitle C of RCRA. Therefore, EPA will soon amend part 272, subpart T, under a separate notice.

Compliance With Executive Order 12291

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

Compliance Under the Regulatory Flexibility Act

Pursuant to the provisions of 4 U.S.C. 605(b), I hereby certify that this authorization will not have a significant economic impact on a substantial number of small entities. This authorization does not create any new requirements, but simply approves requirements that are already State law. It does not impose any new burdens on small entities. This rule, therefore, does not require a regulatory flexibility analysis.

List of Subjects in 40 CFR Part 271

Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Authority: Sec. 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act, as amended in 42 U.S.C. 6912(a), 6926 and 6974(b).

Dated: August 22, 1989.

Robert E. Layton, Jr.,

Regional Administrator.

[FR Doc. 89-27848 Filed 11-27-89; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 64

[Docket No. FEMA 6855]

List of Communities Eligible for the Sale of Flood Insurance

AGENCY: Federal Emergency Management Agency.

ACTION: Final rule.

SUMMARY: This rule lists communities participating in the National Flood Insurance Program (NFIP). These communities have applied to the program and have agreed to enact certain floodplain management measures. The communities' participation in the program authorizes the sale of flood insurance to owners of property located in the communities listed.

EFFECTIVE DATE: The dates listed in the third column of the table.

ADDRESSES: Flood insurance policies for property located in the communities listed can be obtained from any licensed property insurance agent or broker serving the eligible community, or from the National Flood Insurance Program (NFIP) at: Post Office Box 457, Lanham, Maryland 20706, Phone: (800) 638-7418.

FOR FURTHER INFORMATION CONTACT: Frank H. Thomas, Assistant Administrator, Office of Loss Reduction, Federal Insurance Administration (202) 646-2717, Federal Center Plaza, 500 C Street SW., Room 417, Washington, DC 20472.

SUPPLEMENTARY INFORMATION: The National Flood Insurance Program (NFIP), enables property owners to purchase flood insurance at rates made reasonable through a Federal subsidy. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Since the communities on the attached list have recently entered the NFIP, subsidized flood insurance is now available for property in the community.

In addition, the Director of the Federal Emergency Management Agency has identified the special flood hazard areas in some of these communities by publishing a Flood Hazard Boundary Map. The date of the flood map, if one has been published, is indicated in the fourth column of the table. In the communities listed where a flood map has been published, section 102 of the Flood Disaster Protection Act of 1973, as amended, requires the purchase of flood insurance as a condition of Federal or federally related financial assistance for acquisition or construction of buildings in the special flood hazard area shown on the map.

The Director finds that the delayed effective dates would be contrary to the public interest. The Director also finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary.

The Catalog of Domestic Assistance Number for this program is 83.100 "Flood Insurance."

Pursuant to the provisions of 5 U.S.C. 605(b), the Administrator, Federal Insurance Administration, to whom authority has been delegated by the Director, Federal Emergency Management Agency, hereby certifies that this rule, if promulgated will not have a significant economic impact on a substantial number of small entities. This rule provides routine legal notice stating the community's status in the NFIP and imposes no new requirements or regulations on participating communities.

List of Subjects in 44 CFR Part 64

Flood insurance and floodplains.

1. The authority citation for part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*, Reorganization Plan No. 3 of 1978, E.O. 12127.

2. Section 64.6 is amended by adding in alphabetical sequence new entries to the table.

In each entry, a complete chronology of effective dates appears for each listed community. The entry reads as follows:

§ 64.6 List of eligible communities.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date
New Eligibles—Emergency Program			
Nebraska: Seward County, unincorporated areas	310474	Oct. 4, 1989	June 7, 1977.
Tennessee: Benton County, unincorporated areas	470218	.....do	Jan. 10, 1975.
Iowa: Corwith, city of, Hancock County [1]	190407	Oct. 11, 1989	Oct. 22, 1976.
Missouri: Lawson, city of, Clay County	290705	Oct. 19, 1989	June 4, 1976.
New Eligibles—Regular Program			
Nevada: Storey County, unincorporated areas	320033	Oct. 4, 1989	Feb. 19, 1987.
Ohio: Butler County, unincorporated areas [1]	390037	Oct. 5, 1989	Oct. 16, 1983.
California:			
Highland, city of, San Bernardino County	060732	Oct. 19, 1989	Sept. 29, 1989.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date
Hesperia, city of, San Bernardino County	060733	do	Do.
North Carolina: Walnut Creek, village of, Wayne County	370435	do	Oct. 19, 1989.
Regular Program Reinstatements			
Maryland: Emmitsburg, town of, Frederick County	240029	May 6, 1975, Emerg.; Sept. 17, 1980, Reg.; May 4, 1989, Susp.; Oct. 2, 1989, Rein.	Sept. 17, 1980.
New York: Newcomb, town of, Essex County	361390	Apr. 15, 1976, Emerg.; June 5, 1985, Reg.; June 15, 1988, Susp.; Oct. 2, 1989, Rein.	June 5, 1985.
Wyoming: Rock Springs, city of, Sweetwater County	560051	Sept. 1, 1972, Emerg.; July 16, 1979, Reg.; Sept. 15, 1989, Susp.; Oct. 2, 1989, Rein.	Sept. 15, 1989.
Utah: Escalante, town of, Garfield County	490067	Apr. 22, 1975, Emerg.; Aug. 28, 1979, Reg.; Sept. 6, 1989, Susp.; Oct. 3, 1989, Rein.	Aug. 28, 1979.
West Virginia: Bath (Berkeley Springs), town of, Morgan County	540005	May 20, 1980, Emerg.; Sept. 2, 1980, Reg.; Sept. 15, 1989, Susp.; Oct. 4, 1989, Rein.	Sept. 2, 1980.
New York: Catskill, village of, Greene County	360287	May 13, 1975, Emerg.; Sept. 6, 1989, Reg.; Sept. 6, 1989, Susp.; Oct. 4, 1989, Rein.	Sept. 6, 1989.
Maryland: Brunswick, town of, Frederick County	240028	Aug. 16, 1974, Emerg.; Jan. 7, 1977, Reg.; May 4, 1989, Susp.; Oct. 4, 1989, Rein.	Jan. 7, 1977.
Ohio: Amesville, village of, Athens County	390015	Feb. 24, 1977, Emerg.; Sept. 29, 1989, Reg.; Sept. 29, 1989, Susp.; Oct. 9, 1989, Rein.	Sept. 29, 1989.
Missouri: Anniston, city of, Mississippi County	290229	May 11, 1977, Emerg.; Jan. 18, 1989, Reg.; Jan. 18, 1989, Susp.; Oct. 12, 1989, Rein.	Jan. 18, 1989.
Florida: Ocean Breeze Park, town of, Martin County	120163	Apr. 15, 1976, Emerg.; Dec. 15, 1983, Reg.; Apr. 3, 1984, Susp.; Oct. 12, 1989, Rein.	Dec. 15, 1983.
Pennsylvania:			
Penn, township of, Butler County	421241	June 10, 1974, Emerg.; Aug. 15, 1989, Reg.; Aug. 15, 1989, Susp.; Oct. 23, 1989, Rein.	Aug. 15, 1989.
Fishing Creek, township of, Columbia County	421550	Aug. 7, 1975, Emerg.; Aug. 3, 1989, Reg.; Aug. 3, 1989, Susp.; Oct. 23, 1989, Rein.	Aug. 3, 1989.
Mississippi: Holmes County, unincorporated areas	280211	Apr. 11, 1974, Emerg.; Sept. 15, 1989, Reg.; Sept. 15, 1989, Susp.; Oct. 23, 1989, Rein.	Sept. 15, 1989.
Kentucky: Clay City, city of, Powell County	210195	Mar. 22, 1976, Emerg.; Sept. 6, 1989, Reg.; Sept. 6, 1989, Susp.; Oct. 23, 1989, Rein.	Sept. 6, 1989.
California: Grover City, city of, San Luis Obispo County	060306	Mar. 27, 1975, Emerg.; Aug. 1, 1984, Reg.; Aug. 1, 1984, Susp.; Oct. 24, 1989, Rein.	Aug. 1, 1984.
Iowa: Carter Lake, city of, Pottawattamie County	190492	Sept. 19, 1975, Emerg.; June 19, 1989, Reg.; June 19, 1989, Susp.; Oct. 27, 1989, Rein.	June 19, 1989.
North Dakota:			
Mooreton, township of, Richland County	380654	July 12, 1982, Emerg.; Sept. 18, 1986, Reg.; July 4, 1989, Susp.; Oct. 30, 1989, Rein.	Sept. 18, 1986.
Noonan, city of, Divide County	380191	Mar. 26, 1976, Emerg.; Apr. 21, 1981, Reg.; Sept. 6, 1989, Susp.; Oct. 30, 1989, Rein.	Apr. 21, 1981.
Region III			
Pennsylvania:			
Bedford, township of, Bedford County	421331	Oct. 17, 1989, suspension withdrawn	Oct. 17, 1989.
Franklin, township of, Susquehanna County	422097	do	May 17, 1989.
Lilly, Borough of, Cambria County	421430	do	Oct. 17, 1989.
West Virginia:			
Marlington, town of, Pocahontas County	540159	do	Do.
Pocahontas County, unincorporated areas	540283	do	Do.
Durbin, town of, Pocahontas County	540158	do	Do.
Region VI			
Texas: Muleshoe, city of, Bailey County	480019	do	Do.

Code for reading fourth column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.
[1] Declared disaster areas.

Issued: November 16, 1989.

Harold T. Duryee,

Administrator, Federal Insurance Administration.

[FR Doc. 89-27845 Filed 11-27-89; 8:45 am]

BILLING CODE 6718-21-M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 512

[Docket No. 78-10; Notice 10]

RIN 2127-AC95

Confidential Business Information

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Final rule.

SUMMARY: This notice revises and reissues the existing regulation contained in 49 CFR part 512—Confidential Business Information. Revisions to the existing regulation are necessary to ensure efficient processing and proper protection of business information received by the National Highway Traffic Safety Administration (NHTSA). This action is intended to clarify certain provisions, to revise certain sections to conform to statutory and case law, to include additional class determinations and to add a presumptive class determination.

DATE: This rule is effective November 28, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. E. William Fox, Office of the Chief Counsel, National Highway Traffic

Safety Administration, Room 5219, 400 Seventh Street, SW., Washington, DC 20590. Telephone: (202) 366-1834.

SUPPLEMENTARY INFORMATION: NHTSA published part 512, entitled "Confidential Business Information," as a final rule on June 7, 1982, 47 FR 24587. This regulation has not been amended or revised since that time. The agency believes that the procedures for submitting confidential business information have generally worked well since 1982, but practical experience in processing this information has shown that some improvements and clarifications are advisable. The proposed modifications were published in the Federal Register on July 7, 1989 (54 FR 28696) (the NPRM).

Six organizations responded to the agency's solicitation for public comments. Although five minor revisions have been made in the final regulation in response to comments, the comments generally reflect approval of the proposed changes. NHTSA has also modified Appendices A and B and § 512.5(b) to make clarifications in response to comments.

Discussion of Comments

The agency's proposals for which commenters expressed support or no opinion have not been included in the Discussion of Comments. The explanation of such proposals contained in the NPRM is incorporated by reference for the purposes of this Notice.

Impairment of Protectable Government Interests

The revision in § 512.5 relating to the impairment of protectable government interests attracted the attention of Ford Motor Company. While basically agreeing with need for a change, Ford suggested expanding this section to include the concept that confidentiality should be granted if disclosure was likely to impair a "private interest." Ford proposed to accomplish this by inserting the words "or private" after "government" in § 512.4(b)(3)(viii) and § 512.5(c) in recognition of dicta in cases cited in the NPRM. The agency is reluctant to make this change in the absence of clear judicial decisions which determine that the disclosure of confidential information causes a private harm other than a substantial harm to the competitive position of the submitter. The addition of § 512.5(c) and § 512.4(b)(3)(viii) in the NPRM responds to a genuine need for protection of government interests that are not otherwise recognized, i.e., the impairment of program effectiveness or compliance. However, the agency believes that the regulation sufficiently covers private interests in § 512.4(g) and § 512.5(a), and therefore will not incorporate Ford's proposed amendment.

Submitter's Supporting Certification

Volkswagen of America, Inc., and Ford requested changes to the certification in Appendix A. Volkswagen wanted Appendix A to include both the form of the affidavit and the form of the certification if the agency was truly willing to accept either format. By expressing willingness in the NPRM to accept affidavits which contain the statements contained in the proposed Appendix A, the agency did not intend to formally create an optional format. NHTSA is satisfied with one format, but a certification in that format, that is also notarized, will not be rejected as insufficient.

Ford asserted that the qualifying words "to the best of my information, knowledge and belief," which were deleted from paragraph (6) of the certification, should be retained. Ford also questioned whether it was possible for a busy company executive to make the "personal inquiry" indicated in paragraph (3) of the certification without the use of such qualifying language. NHTSA agrees to correct this oversight by adding the words "information and belief," after "knowledge" in paragraph (4). The agency believes that this will adequately address Ford's concern for fairness to the declarant who may use subordinates to aid him in his inquiries, and yet, not interfere with the statutory requirements of 28 USC 1746 and 18 USC 1001 concerning unsworn declarations to the government under penalty of perjury.

New Class Determinations

All of the commenters provided suggestions concerning the class determinations listed and proposed for listing in Appendix B. If the agency determines that public release of a particular class of information typically would result in substantial competitive harm and publishes that determination in Appendix B, a rebuttable presumption is created about the likelihood of such harm if information of that type were publicly released. This presumption has the effect of eliminating the requirement that the submitter initially demonstrate the elements contained in § 512.4(b)(3)(vi).

The commenting automobile manufacturers generally supported the General Motors Corporation's petition for the agency to make a class determination about cost information. General Motors offered an amendment to its original draft limiting "cost" to "manufacturer's cost." Volkswagen suggested that the presumptive determination include "future actual as well as estimated cost." Ford asked that the agency craft a presumption that includes the kinds of cost data that the agency generally has withheld. Chrysler Motors Corporation asserted that no distinction should be made between general cost estimates, ranges of costs and specific actual cost data relating to a product because all could be damaging if disclosed.

However, these suggestions do not adequately address the concern of the agency that a highly inclusive presumption may erroneously encompass costs that under certain circumstances are not entitled to confidential protection. Public Citizen and the Freedom of Information Clearinghouse echoed this concern, stating that it is difficult to draft a determination relating to cost that is not overbroad. While the presumption would be rebuttable, NHTSA wants to avoid confusion, misunderstanding and wasteful effort considering claims involving, for example, meaninglessly overbroad estimates of future costs or cost elements which may have inadvertently been introduced into the public domain. NHTSA does not believe that it will suffer an impaired ability to obtain cost information without the presumption, as one commenter suggested, nor does it believe that the evidence on cost submissions is clear enough to permit the drafting of a sufficiently narrow provision at this time. The agency therefore has decided that a new class determination relating to costs is not advisable. General Motors' suggested class determination is, therefore, not adopted.

Three companies made comments on NHTSA's proposed amendments to paragraphs (2) and (3) of the current class determinations in Appendix B. General Motors and Volkswagen suggested that "model year" be clarified to mean the vehicle production period. Ford proposed that product plans be protected until the date on which the last of the specific models to which the product plans pertain is first offered for sale.

All of these comments demonstrate the necessity for clarification of the terminology "product plans" and "model year." The phrase "first offered for sale" is more precise than "the beginning of the model year" in paragraph (2). Also the concept of "production period" is better suited for explaining the presumption in paragraph (3). NHTSA believes that paragraphs (2) and (3)

have been simplified and more correctly stated by the adoption of these changes.

In addition, Volkswagen wanted model plans protected to the end of the production period, not the beginning, because certain specific products or features are scheduled for introduction some time after such period begins. The agency does not agree with Volkswagen's suggestion to protect model plans until the end of the model production period. If there is a specific change that is scheduled to take place relating to a certain model vehicle after production of such model begins, it should be pointed out by the submitter when such change will be offered to the public. The specific change can then be protected until it is offered to the public, while the remainder of the information pertaining to that vehicle will be released when the vehicle is first offered to the public.

Miscellaneous Provisions

The amendment relating to voluntary submissions in § 512.5 was the subject of comments from both Ford and General Motors. Ford suggested that this section be expanded to include the concept that confidentiality should be granted if disclosure was likely to impair the ability of NHTSA to obtain necessary similar information in the future, even though NHTSA could compel disclosure of such information. General Motors made the point that material that is ostensibly obtainable via compulsory process might be considered, in some instances, the equivalent of a voluntary submission. However, as was stated in the NPRM on page 28698 and by General Motors in its comments, whether future submissions of information could be compelled is only a factor to be considered in deciding if governmental access to information will be impaired by disclosure, but it is not necessarily dispositive. *Public Citizen Health Research Group* v. *FDA*, 704 F.2d 1280, 1291 n. 29 (D.C. Cir. 1983); *Washington Post Co.* v. *HHS*, 690 F.2d 252 (D.C. Cir. 1982). Moreover, the agency recognizes that courts have given great weight to agency determinations that the release of information will not cause impairment. *General Electric Co.* v. *NRC*, 750 F.2d 1394, 1402 (7th Cir. 1984); *AT&T Information Systems* v. *GSA*, 627 F. Supp. 1396, 1401 (D.D.C. 1986), reversed and remanded on procedural grounds, 810 F.2d 1233 (D.C. Cir. 1987).

The changes proposed in the NPRM were intended to reflect more accurately the established case law but not to enumerate every factor to be considered when deciding whether information should be protected from disclosure. Furthermore, this regulation is intended to be procedural, and not substantive. Because of these factors, the agency believes that it is inappropriate to attempt to amend the regulation according to the ongoing judicial development of highly specific disclosure exceptions under the Freedom of Information Act. Consequently, the agency is satisfied that the regulation should provide broad categories and a flexible framework based upon well established judicial precedent. In order to respond to the concerns expressed by Ford and General Motors and to avoid future confusion about voluntary submissions of information as outlined in recent judicial decisions, the regulation has been modified to delete entirely the references to voluntary submissions in § 512.5(b). The agency will, however, make no change to § 512.4(b)(3)(vii) which permits the submitter to explain impairment when the information is submitted voluntarily. This modification of the proposal also accommodates precisely the issues raised by General Motors and Ford, reflects accurately the established case law and maintains a broad, flexible framework for submitters using the regulation.

Public Citizen and the Freedom of Information Clearinghouse expressed concern about the timing of NHTSA's confidentiality determinations. On this point, the NPRM did not propose any substantive changes from the original regulation. Nevertheless, these commenters suggested that the agency should decide on and publish a date certain by which confidentiality determinations will be made. Ten days were recommended to be a reasonable period of time. The commenters said that without further clarification, § 512.6(b), which requires placing in the public file copies of documents from which information claimed to be confidential or privileged has been deleted pending resolution of such claim, is likely to mislead the public.

The agency does not agree that the procedures in § 512.6(b) are misleading. All persons having an interest in files from which information has been redacted, may, and frequently do, make further inquiries about additional information pursuant to the Freedom of Information Act. In these situations, NHTSA's practical experience with the regulation has been excellent, as explained below, and the agency is satisfied that the public has pursued information under this statute in instances where more information was wanted. In such instances, as noted in § 512.6(c), the agency must respond within the statutory time periods. It is also important to point out that because of practical manpower restraints, the agency would not always be able to meet a self-imposed deadline for redacted information about which there was no expressed public interest and also fulfill its obligations to persons requesting information under statutory deadlines. Moreover, the agency believes that the processing of voluminous files for which confidential treatment has been requested has been expeditious and orderly under the applicable provisions of the existing regulation. Accordingly, the agency declines to make the suggested changes.

Public Citizen and the Freedom of Information Clearinghouse also objected to the proposed change in § 512.4(j) (currently § 512.4(i)). In this section, the agency proposed to replace the provision requiring the denial of confidential claims when information is submitted without the certification required by § 512.4(e) with a provision making it discretionary to deny or accept such claims. General Motors commented in support of the change, noting that the automatic denial of confidential treatment is "an unnecessarily harsh penalty for what may be an inadvertent omission."

The provisions of § 512.4(e) mandate that the submitter's certification be included with every request to the agency for the confidential protection of information. The agency continues to believe that the certification is the best method by which a submitter can demonstrate compliance with the requirements of the Freedom of Information Act. Furthermore, NHTSA is prepared to deny claims which do not reasonably comply with § 512.4(e). However, it is not justifiable for the agency to be compelled to deny a claim for confidential treatment which includes no certification but which is clearly exempt from disclosure pursuant to the Freedom of Information Act, 5 U.S.C. 552(b)(4). In circumstances where the agency is absolutely satisfied that a submitter has made a serious claim for confidential protection of information, the information has not been released to the public, and the information is properly protectable under Exemption 4, the agency should not require itself to disclose the information. The proposed modification realistically retains the certification requirement without creating the potentially improper technical conflict between the regulation's procedures and the demands of the Freedom of Information Act. For this reason, NHTSA believes that this comment lacks merit.

Accordingly, the proposed change has been adopted.

General Motors questioned whether documents submitted under a claim of confidentiality would be adequately protected until the Chief Counsel has made a determination and suggested that the regulation provide appropriate safeguards to prevent inadvertent disclosure of documents. NHTSA is satisfied that this concern is covered by the regulation in § 512.6(h) which provides that no information will be released prior to the time that the Chief Counsel makes a decision under the regulation. Furthermore, the purpose of this rule is to establish procedures to consider claims of confidentiality and not to specify internal agency procedures for document protection. Consequently, no change is being made in the Final Rule.

Ford raised an issue relating to whether § 512.4(j)(l) should reference paragraph (a) or subparagraphs (a)(1), (a)(2) and (a)(3) of this section. The agency considered this suggestion, but believes that all of the subparagraphs of paragraph (a) are sufficiently inter-related to justify the reference to the entire paragraph. The agency believes that the submitter should be responsible for providing a correctly sanitized second copy of information in accordance with subparagraphs (a)(4) and (a)(5), or suffer the consequences of waiver arising out of an inadvertent disclosure. NHTSA cannot agree to be responsible for finding errors in such second copies, and believes that waiver of the claim is fair and is the proper result of such submitter error.

Finally, Ford suggested that in § 512.9(a) the word "and" be replaced with "or" in the series "§§ 512.4, 512.6 and 512.7" because such sections would never be invoked simultaneously in claiming or determining confidentiality. The agency agrees with this comment and has adopted it in this Final Rule.

Federalism Assessment

The agency has considered whether this action would have any federalism implications. We have determined that this Notice would not have any impact upon the principles of federalism.

Economic and Other Effects

NHTSA has analyzed the effect of this action and has determined that it is not "major" within the meaning of Executive Order 12291 or "significant" within the meaning of Department of Transportation regulatory policies and procedures. The amendments would have a minimal effect on submitters of alleged confidential information to the agency. This determination has been made because the regulation is essentially procedural. It will not have an appreciable impact on the cost of seeking confidential treatment for data submitted to the agency. It will also not have an appreciable impact on what information is or is not accorded confidential protection. Therefore, neither a draft Regulatory Analysis nor a full Regulatory Evaluation is required.

In compliance with the Regulatory Flexibility Act, the agency has evaluated the effects of this rule on small entities. For the reasons stated above, I certify that this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the preparation of an Initial Regulatory Flexibility Analysis is unnecessary.

The requirements of part 512 are considered to be information collection requirements as that term is defined by the Office of Management and Budget (OMB) in 5 CFR part 1320. Accordingly, the exisitng requirements of part 512 have been submitted to and approved by OMB pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). The OMB clearance number is 2127-0025.

The agency has also analyzed this action for the purpose of the National Environmental Policy Act. The agency has determined that this action will not have any effect on the human environment.

List of Subjects in 49 CFR Part 512

Administrative procedure and practice, Confidential business information, Freedom of information, Motor vehicle safety, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR part 512 is revised to read as follows:

PART 512—CONFIDENTIAL BUSINESS INFORMATION

Sec.
512.1 Purpose and scope.
512.2 Applicability.
512.3 Definitions.
512.4 Asserting a claim for confidential treatment of information.
512.5 Substantive standards for affording confidential treatment.
512.6 Determination of confidential treatment.
512.7 Petitions for reconsideration upon denial of a request for confidential treatment.
512.8 Modification of confidentiality determinations.
512.9 Release of confidential business information.
512.10 Class determinations.
Appendix A to part 512—Certificate In Support of Request for Confidentiality
Appendix B to part 512—Class Determinations
Appendix C to part 512—OMB Clearance

Authority: 49 U.S.C. 322; 5 U.S.C. 552; 15 U.S.C. 1401; 15 U.S.C. 1402; 15 U.S.C. 1407; 15 U.S.C. 1418; 15 U.S.C. 1914; 15 U.S.C. 1944; 15 U.S.C. 1990d; 15 U.S.C. 2005; 15 U.S.C. 2029; delegation of authority at 49 CFR 1.50.

§ 512.1 Purpose and scope.

The purpose of this part is to establish the procedure by which NHTSA will consider claims that information submitted to the agency, or which the agency otherwise obtains, is confidential business information, as described in 5 U.S.C. 552(b)(4).

§ 512.2 Applicability.

(a) This part applies to all information which is submitted to NHTSA, or which NHTSA otherwise obtains, except as provided in paragraph (b) of this section.

(b) Information received as part of the procurement process is subject to the Federal Acquisition Regulation, 48 CFR, Chapter 1, as well as this part. In any case of conflict between the Federal Acquisition Regulation and this part, the provisions of the Federal Acquisition Regulation prevail.

§ 512.3 Definitions.

Administrator means the Administrator of the National Highway Traffic Safety Administration.

Chief Counsel means the Chief Counsel of the National Highway Traffic Safety Administration.

Confidential business information means information described in 5 U.S.C. 552(b)(4).

NHTSA means the National Highway Traffic Safety Administration.

Substantial competitive harm encompasses "significant competitive damage" under title V of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 2001 *et seq.*

§ 512.4 Asserting a claim for confidential treatment of information.

(a) Any person submitting information to NHTSA and requesting that the information be withheld from public disclosure as confidential business information shall:

(1) Stamp or mark "confidential," or some other term which clearly indicates the presence of information claimed to be confidential, on the top of each page containing information claimed to be confidential.

(2) On each page marked in accordance with paragraph (a)(1) of this section, mark each item of information

which is claimed to be confidential with brackets"[ ]".

(3) If an entire page is claimed to be confidential, indicate clearly that the entire page is claimed to be confidential.

(4) Submit two copies of the documents containing allegedly confidential information (except only one copy of blueprints) and one copy of the documents from which information claimed to be confidential has been deleted to the Office of Chief Counsel, National Highway Traffic Safety Administration, Room 5219, 400 Seventh Street, SW., Washington, DC 20590. Include the name, address, and telephone number of a representative for receipt of a response from the Chief Counsel under this part.

(5) If a document containing information claimed to be confidential is submitted in connection with an investigation or proceeding, a rulemaking action, or pursuant to a reporting requirement, for which there is a public file or docket, simultaneously submit to the appropriate NHTSA official a copy of the document from which information claimed to be confidential has been deleted. This copy will be placed in the public file or docket pending the resolution of the claim for confidential treatment.

(b)(1) When submitting each item of information marked confidential in accordance with paragraph (a) of this section, the submitter shall also submit to the Office of the Chief Counsel information supporting the claim for confidential treatment in accordance with paragraph (b)(3) and paragraph (e) of this section.

(2) If submission of the supporting information is not possible at the time the allegedly confidential information is submitted, a request for an extension of time in which to submit the information, accompanied by an explanation describing the reason for the extension and the length of time needed, must be submitted. The Chief Counsel shall determine the length of the extension. The recipient of an extension shall submit the supporting information in accordance with the extension determination made by the Chief Counsel and paragraph (b)(3) of this section.

(3) The supporting information must show:

(i) That the information claimed to be confidential is a trade secret, or commercial or financial information that is privileged or confidential.

(ii) Measures taken by the submitter of the information to ensure that the information has not been disclosed or otherwise made available to any person, company, or organization other than the submitter of the information.

(iii) Insofar as is known by the submitter of the information, the extent to which the information has been disclosed, or otherwise become available, to persons other than the submitter of the information, and why such disclosure or availability does not compromise the confidential nature of the information.

(iv) Insofar as is known by the submitter of the information, the extent to which the information has appeared publicly, regardless of whether the submitter has authorized that appearance or confirmed the accuracy of the information. The submitter must include citations to such public appearances, and an explanation of why such appearances do not compromise the confidential nature of the information.

(v) Prior determinations of NHTSA or other Federal agencies or Federal courts relating to the confidentiality of the submitted information, or similar information possessed by the submitter including class determinations under this part. The submitter must include any written notice or decision connected with any such prior determination, or a citation to any such notice or decision, if published in the **Federal Register.**

(vi) Whether the submitter of the information asserts that disclosure would be likely to result in substantial competitive harm, what the harmful effects of disclosure would be, why the effects should be viewed as substantial, and the causal relationship between the effects and disclosure.

(vii) If information is voluntarily submitted, why disclosure by NHTSA would be likely to impair NHTSA's ability to obtain similar information in the future.

(viii) Whether the submitter of the information asserts that disclosure would be likely to impair other protectable government interests, what the effect of disclosure is likely to be and why disclosure is likely to impair such interests.

(ix) The period of time for which confidentiality is claimed (permanently or until a certain date or until the occurrence of a certain event) and why earlier disclosure would result in the harms set out in paragraph (b)(2)(vi), (vii) or (viii) of this section.

(c) If any element of the showing to support a claim for confidentiality required under paragraph (b)(3) of this section is presumptively established by a class determination, as issued pursuant to § 512.10, affecting the information for which confidentiality is claimed, the submitter of information need not establish that element again.

(d) Information in support of a claim for confidentiality submitted to NHTSA under paragraph (b) of this section must consist of objective data to the maximum extent possible. To the extent that opinions are given in support of a claim for confidential treatment of information, the submitter of the information shall submit in writing to NHTSA the basis for the opinions, and the name, title and credentials showing the expertise of the person supplying the opinion.

(e) The submitter of information for which confidential treatment is requested shall submit to NHTSA with the request a certification in the form set out in Appendix A from the submitter or an agent of the submitter that a diligent inquiry has been made to determine that the information has not been disclosed, or otherwise appeared publicly, except as indicated in accordance with paragraphs (b)(3)(iii) and (iv) of this section.

(f) A single submission of supporting information, in accordance with paragraph (b) of this section, may be used to support a claim for confidential treatment of more than one item of information claimed to be confidential. However, general or nonspecific assertions or analysis may be insufficient to form an adequate basis for the agency to find that information may be afforded confidential treatment, and may result in the denial of a claim for confidentiality.

(g) Where confidentiality is claimed for information obtained by the submitter from a third party, such as a supplier, the submitter of the information is responsible for obtaining all information and a certification from the third party necessary to comply with paragraphs (b), (d) and (e) of this section.

(h) Information received by NHTSA that is identified as confidential and whose claim for confidentiality is submitted in accordance with this section will be kept confidential until a determination of its confidentiality is made under section 512.6 of this part. Such information will not be publicly disclosed except in accordance with this part.

(i) A submitter of information shall promptly amend supporting information provided under paragraphs (b) or (e) of this section if the submitter obtains information upon the basis of which the submitter knows that the supporting information was incorrect when provided, or that the supporting information, though correct when

provided, is no longer correct and the circumstances are such that a failure to amend the supporting information is in substance a knowing concealment.

(j) Noncompliance with this section may result in a denial of a claim for confidential treatment of information. Noncompliance with paragraph (i) of this section may subject a submitter of information to civil penalties.

(l) If the submitter fails to comply with paragraph (a) of this section at the time the information is submitted to NHTSA so that the agency is not aware of a claim for confidentiality, or the scope of a claim for confidentiality, the claim for confidentiality may be waived unless the agency is notified of the claim before the information is disclosed to the public. Placing the information in a public docket or file is disclosure to the public within the meaning of this part, and any claim for confidential treatment of information disclosed to the public may be precluded.

(2) If the submitter of the information does not provide all of the supporting information required in paragraphs (b)(3) and (e) of this section, or if the information is insufficient to establish that the information may be afforded confidential treatment under the substantive tests set out in § 512.5, a request that such information be afforded confidential protection may be denied. The Chief Counsel may notify a submitter of information of inadequacies in the supporting information, and may allow the submitter additional time to supplement the showing, but is under no obligation to provide either notice or additional time to supplement the showing.

§ 512.5 Substantive standards for affording confidential treatment.

Information submitted to or otherwise obtained by NHTSA may be afforded confidential treatment if it is a trade secret, or commercial or financial information that is privileged or confidential. Information is considered to be confidential when:

(a) Disclosure of the information would be likely to result in substantial competitive harm to the submitter of the information; or

(b) Failure to afford the information confidential treatment would impair the ability of NHTSA to obtain similar information in the future; or

(c) Disclosure of the information would be likely to impair other protectable government interests.

§ 512.6 Determination of confidential treatment.

(a) The decision as to whether an item of information shall be afforded confidential treatment under this part is made by the Office of Chief Counsel.

(b) Copies of documents submitted to NHTSA under § 512.4(a)(5), from which information claimed to be confidential or privileged has been deleted, are placed in the public file or docket pending the resolution of the claim for confidential treatment.

(c) When information claimed to be confidential or privileged is requested under the Freedom of Information Act, the determination of confidentiality is made within ten working days after NHTSA receives such a request, or within twenty working days in unusual circumstances as provided under 5 U.S.C. 552(a)(6).

(d) For information not requested pursuant to the Freedom of Information Act, the determination of confidentiality is made within a reasonable period of time at the discretion of the Chief Counsel.

(e) The time periods prescribed in paragraph (c) of this section may be extended by the Chief Counsel for good cause shown on the Chief Counsel's own motion, or on request from any person. An extension is made only in accordance with 5 U.S.C. 552, and is accompanied by a written statement setting out the reasons for the extension.

(f) If the Chief Counsel believes that information which a submitter of information asserts to be within a class of information set out in Appendix B is not within that class, the Chief Counsel:

(1) Notifies the submitter of the information that the information does not fall within the class as claimed, and briefly explains why the information does not fall within the class; and

(2) Renders a determination of confidentiality in accordance with paragraph (g) of this section.

(g) A person submitting information to NHTSA with a request that the information be withheld from public disclosure as confidential or privileged business information is given notice of the Chief Counsel's determination regarding the request as soon as the determination is made.

(1) If a request for confidentiality is granted, the submitter of the information is notified in writing of that determination and of any appropriate limitations.

(2) If a request for confidentiality is denied in whole or in part, the submitter of the information is notified in writing of that decision, and is informed that the information will be made available to the public not less than ten working days after the submitter of the information has received notice of the denial of the request for confidential treatment, if practicable, or some earlier date if the Chief Counsel determines in writing that the public interest requires that the information be made available to the public on such earlier date. The written notification of a denial specifies the reasons for denying the request.

(h) There will be no release of information processed pursuant to this section until the Chief Counsel advises the appropriate office(s) of NHTSA that the confidentiality decision is final according to this section, § 512.7 or § 512.9.

§ 512.7 Petitions for reconsideration upon denial of a request for confidential treatment.

(a) A submitter of information whose request for confidential treatment is denied may petition for reconsideration of that denial. Petitions for reconsideration must be addressed to and received by the Office of Chief Counsel prior to the date on which the information would otherwise be made available to the public. The determination by the Chief Counsel upon such petition for reconsideration shall be administratively final.

(b) If the submission of a petition for reconsideration is not feasible by the date on which the information would otherwise be made available to the public, a request for an extension of time in which to submit a petition, accompanied by an explanation describing the reason for the request and the length of time needed, must be received by the Office of Chief Counsel by that date. The Chief Counsel determines whether to grant or deny the extension and the length of the extension.

(c) Upon receipt of a petition or request for an extension, the Chief Counsel shall postpone making the information available to the public in order to consider the petition, unless the Chief Counsel determines in writing that disclosure would be in the public interest.

(d) If a petition for reconsideration is granted, the petitioner is notified in writing of that determination and of any appropriate limitations.

(e) If a petition for reconsideration is denied in whole or in part or a request for an extension for additional time to submit a petition for reconsideration is denied, the petitioner is notified in writing of that denial, and is informed that the information will be made available to the public not less than ten working days after the petitioner has received notice of the denial of the petition, if practicable, or some earlier date if the Chief Counsel determines in writing that the public interest requires

that the information be made available to the public on such earlier date. The written notification of a denial specifies the reasons for denying the petition.

§ 512.8 Modification of confidentiality determinations.

(a) A determination that information is confidential or privileged business information remains in effect in accordance with its terms, unless modified by a later determination based upon:

(1) Newly discovered or changed facts,

(2) A change in the applicable law,

(3) A class determination under § 512.10, or

(4) A finding that the prior determination is clearly erroneous.

(b) If NHTSA believes that an earlier determination of confidentiality should be modified based on one or more of the factors listed in paragraph (a)(1) through (a)(4) of this section, the submitter of the information is notified in writing that NHTSA has modified its earlier determination and of the reasons for that modification, and is informed that the information will be made available to the public in not less than ten working days from the date of receipt of notice under this paragraph. The submitter may seek reconsideration of the modification pursuant to § 512.7.

§ 512.9 Release of confidential business information.

(a) Information that has been claimed or determined to be confidential business information under §§ 512.4, 512.6 or 512.7 may be disclosed to the public by the Administrator notwithstanding such determination or claim if disclosure would be in the public interest as follows:

(1) Information obtained under Part A, Subchapter I of the National Traffic and Motor Vehicle Safety Act, relating to the establishment, amendment, or modification of Federal motor vehicle safety standards, may be disclosed when relevant to a proceeding under the part.

(2) Information obtained under Part B, Subchapter I of the National Traffic and Motor Vehicle Safety Act, relating to motor vehicle safety defects, and failures to comply with applicable motor vehicle safety standards, may be disclosed if the Administrator determines that disclosure is necessary to carry out the purposes of the Act.

(3) Information obtained under title I, V or VI of the Motor Vehicle Information and Cost Savings Act may be disclosed when that information is relevant to a proceeding under the title under which the information was obtained.

(b) No information is disclosed under this section unless the submitter of the information is given written notice of the Administrator's intention to disclose information under this section. Written notice is normally given at least ten working days before the day of release, although the Administrator may provide shorter notice if the Administrator finds that such shorter notice is in the public interest. The notice under this paragraph includes a statement of the Administrator's reasons for determining to disclose the information, and affords the submitter of the information an opportunity to comment on the contemplated release of information. The Administrator may also give notice of the contemplated release of information to other persons, and may allow these persons the opportunity to comment. When a decision is made to release information pursuant to this section, the Administrator will consider ways to make the release with the least possible adverse effects to the submitter.

(c) Notwithstanding any other provision of this part, information which has been determined or claimed to be confidential business information, may be released:

(1) To Congress;

(2) Pursuant to an order of a court with valid jurisdiction;

(3) To the Office of the Secretary, United States Department of Transportation and other Executive branch offices or other Federal agencies in accordance with applicable laws;

(4) With the consent of the submitter of the information;

(5) To contractors, if necessary for the performance of a contract with the Administration. In such instances, the contract limits further release of the information to named employees of the contractor with a need to know and provides that unauthorized release constitutes a breach of the contract for which the contractor may be liable to third parties.

§ 512.10 Class determinations.

(a) The Chief Counsel may issue a class determination relating to confidentiality under this section if the Chief Counsel determines that one or more characteristics common to each item of information in that class will in most cases necessarily result in identical treatment of each item of information under this part, and that it is appropriate to treat all such items as a class for one or more purposes under this part. The Chief Counsel obtains the concurrence of the Office of the General Counsel, United States Department of Transportation, for any class determination that has the effect of raising the presumption that all information in that class is eligible for confidential treatment. Class determinations are published in the **Federal Register**.

(b) A class determination clearly identifies the class of information to which it pertains.

(c) A class determination may state that all of the information in the class:

(1) Is or is not governed by a particular section of this part, or by a particular set of substantive criteria under this part,

(2) Fails to satisfy one or more of the applicable substantive criteria, and is therefore ineligible for confidential treatment,

(3) Satisfies one or more of the applicable substantive criteria, and is therefore eligible for confidential treatment, or,

(4) Satisfies one of the substantive criteria during a certain period of time, but will be ineligible for confidential treatment thereafter.

(d) Class determinations will have the effect of establishing rebuttable presumptions, and do not conclusively determine any of the factors set out in paragraph (c) of this section.

Appendix A to Part 512—Certificate in Support of Request for Confidentiality

Certificate in Support of Request for Confidentiality

I, _____, pursuant to the provisions of 49 CFR 512, state as follows:

(1) I am (official) and I am authorized by (company) to execute documents on behalf of (company):

(2) The information contained in (pertinent document[s]) is confidential and proprietary data and is being submitted with the claim that it is entitled to confidential treatment under 5 U.S.C. § 522(b)(4) (as incorporated by reference in and modified by the statute under which the information is being submitted.)

(3) I have personally inquired of the responsible (company) personnel who have authority in the normal course of business to release the information for which a claim of confidentiality has been made to ascertain whether such information has ever been released outside (company).

(4) Based upon such inquiries, to the best of my knowledge, information and belief the information for which (company) has claimed confidential treatment has never been released or become available outside (company) except as hereinafter specified:

(5) I make no representations beyond those contained in this certificate and in particular, I make no representations as to whether this information may become available outside (company) because of unauthorized or

inadvertent disclosure except as stated in Paragraph 4; and

(6) I certify under penalty of perjury that the foregoing is true and correct. Executed on this the _____. (If executed outside of the United States of America: I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.)

(signature of official)

Appendix B to Part 512—Class Determinations.

The Administration has determined that the following types of information would presumptively be likely to result in substantial competitive harm if disclosed to the public:

(1) Blueprints and engineering drawings containing process of production data where the subject could not be manufactured without the blueprints or engineering drawings except after significant reverse engineering;

(2) Future specific model plans (to be protected only until the date on which the specific model to which the plan pertains is first offered for sale);

(3) Future vehicle production or sales figures for specific models (to be protected only until the termination of the production period for the model year vehicle to which the information pertains).

Appendix C to Part 512—OMB Clearance

The OMB Clearance number for this regulation is 2127-0025.

Issued on November 21, 1989.

Jeffrey R. Miller,

Acting Administrator, National Highway Traffic Safety Administration.

[FR Doc. 89-27774 Filed 11-27-89; 8:45 am]

BILLING CODE 9910-59-M

Proposed Rules

Federal Register
Vol. 54, No. 227
Tuesday, November 28, 1989

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1079

[Docket No. AO-295-A38; DA-88-111]

Milk in the Iowa Marketing Area; Decision of Proposed Amendments to Marketing Agreement and to Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This decision expands the Iowa marketing area to include certain unregulted areas in Iowa, Illinois, and Missouri, and two Wisconsin counties not included in the marketing area for the Chicago Regional Order.

Also adopted in a lock-in provision that would continue to fully regulate under the Iowa order a distributing plant that also meets the pooling requirements of another Federal order, until the third consecutive month that the plant's Class I milk dispositions in the other order are larger than such dispositions in the Iowa marketing area. However, if the other order does not recognize the lock-in, the plant would shift to regulation under the other order in the first month of such greater sales. A proposal to permanently pool under the Iowa order a distributing plant located in the Iowa marketing area is denied.

The amendments are based on evidence received at a public hearing held in August 1988 to consider proposals by Swiss Valley Farms, Co., a dairy farmer cooperative. The amendments are necessary to reflect current sales distribution patterns of handlers regulated under the Iowa order and to maintain stable and orderly marketing conditions in the market. Cooperative associations will be polled to determine whether producers favor issuance of the amended order.

FOR FURTHER INFORMATION CONTACT: Richard A Glandt, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 447-4829.

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12291.

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this action will not have a significant economic impact on a substantial number of small entities. The amended order will promote more orderly marketing of milk by producers and regulated handlers.

Under the actions adopted herein, one currently unregulated handler that is a small business may become partially regulated under the Iowa order. The order provides partially regulated plants with options that could tend to minimize the impact of such regulation. In any event, any impact of adopting the proposed changes is expected to be minimal for this plant.

Prior documents in this proceeding:

Notice of Hearing: Issued July 11, 1988; Published July 13, 1988 (53 FR 26446).

Correction of Notice of Hearing: Published July 20, 1988 (53 FR 27450).

Notice of rescheduled Hearing: Issued July 21, 1988; published July 25, 1988 (53 FR 27863).

Recommended Decision: Issued April 12, 1989; published April 18, 1989 (54 FR 15417).

Correction of Recommended Decision: published May 3, 1989 (54 FR 18979).

Proposed Termination: Issued April 12, 1989; published April 18, 1989 (54 FR 15413).

Extension of time to file Exceptions to the Recommended Decision and Comments of Proposed Termination: Issued May 8, 1989; published May 12, 1989 (54 FR 20605).

Preliminary Statement

A public hearing was held upon proposed amendments to the marketing agreement and the order regulating the handling of milk in the Iowa marketing area. The hearing was held, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the applicable rules of practice (7 CFR part 900), at Bettendorf, Iowa, on August 9-11, 1988. Notice of such hearing was issued on July 21, 1988 and published July 25, 1988 (53 FR 27863).

Upon the basis of the evidence introduced at the hearing and the record thereof, the Administrator, on April 12, 1989, filed with the Hearing Clerk, United States Department of Agriculture, his recommended decision containing notice of the opportunity to file written exceptions thereto.

The material issues, findings and conclusions, rules, and general findings of the recommended decision are hereby approved and adopted and are set forth in full herein, subject to typographical corrections and the following modifications:

1. Under the heading "Background statement," the third and fourth paragraphs are revised.

2. Under issue number 1, "Regulation of a distributing plant with greater Class I route sales in the marketing area of another order.", two new paragraphs are added after the last paragraph.

3. Under issue number 2, "Expansion of the Iowa marketing area.", paragraphs are revised or added as follows:

(a) Nine new paragraphs are added after paragraph number 36;

(b) Under the subleading "(c) Missouri territory:", paragraphs 7, 9, and 10 are revised and three new paragraphs are added after paragraph number 10;

(c) Under the subheading "(d) Wisconsin territory:", paragraphs 3, 6, 17, and 18 are revised, four new paragraphs are added after paragraph number 6, and two new paragraphs are added after paragraph number 18.

4. Under issue number 4, "Whether an emergency exists to warrant the omission of a recommended decision and the opportunity to file written exceptions with respect to issue number.", one new paragraph is added.

The material issues on the record of the hearing relate to:

1. Regulation of a distributing plant with greater Class I route sales in the marketing area of another order.

2. Expansion of the Iowa marketing area.

3. Location adjustment revision.

4. Whether emergency conditions warrant the omission of a recommended decision and the opportunity to file

written exceptions with respect to issue number 1.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof.

Background Statement

Swiss Valley Farms, Co. (SVF), is a dairy farmer cooperative that operates a distributing plant located in Dubuque, Iowa, which is a pool plant regulated by the Iowa order. The plant has route dispositions in both the Iowa and Chicago Regional marketing areas. Class I route disposition from the Dubuque plant in the Chicago Regional (Order 30) marketing area exceeds that in the Iowa (Order 79) marketing area. However, both orders recognize sales to pool plants qualified on the basis of route disposition in the marketing area in determining which order will regulate the plant as a pool plant. In ordeer to maintain the Dubuque plant's regulation under the Iowa order, SVF handles milk that is moved as Class I milk to another pool plant under the Iowa order. It is through this mechanism that the SVF plant has been pooled on the Iowa order. SVF testified that this procedure is costly and that there is no guarantee that the arrangement with other handlers for shipping milk to another plant or plants will continue. The cost was reported to be about $16,000 to $20,000 per month, If it were not for sales to other plants, the Dubuque plant would shift from regulation under the Iowa order to regulation under the Chicago order. SVF maintains that such a switch would be "devastating" to its producers because regulation under the Chicago order would jeopardize SVF's ability to remain competitive in attracting milk to the Dubuque plant.

The record indicates that SVF procures milk in competition with about 40 other handlers and has producers in four states. The handlers and the orders that they are regulated under are not identified, although there can be little doubt that other handlers regulated under the Iowa order are included. There also can be little doubt that many of the Dubuque plant's producers are in Iowa. However, the record does not provide enough data to determine the origin of SVF's receipts of farm milk at the Dubuque plant, although the proponent's principal witness did express a belief that " * * * more than two-thirds of their producers * * * " are in Iowa. Thus, it is not possible from data in the record to determine the exact magnitude of the impact that regulation under the Chicago order would have on SVF's ability to maintain supplies for its Dubuque plant. SVF maintained that it could cost in excess of $1 million per year if the Dubuque plant were regulated under the Chicago order.

The blend, or "uniform" price, is higher under the Iowa order, than it is under the Chicago order. The location adjustment under the Chicago order further reduces the blend price at Dubuque. Thus, the monies available to SVF to pay producers in the procurement area (wherever it is) for the Dubuque plant would be less under the Chicago order than under the Iowa order. It is because of this that SVF wants to have the Dubuque plant continue its pool status under the Iowa order and this is the reason that SVF proposed a lock-in provision.

The main issue at this proceeding involves defining the marketing area to appropriately reflect that territory within which Iowa handlers are the principal distributors of milk. The marketing area issue cannot be decided on the basis of a handler's ability to attract milk to its plant. The resolution of this issue is totally independent from the issue of a lock-in provision.

1. Regulation of a Distributing Plant With Greater Class I Route Sales in the Marketing Area of Another Order

A modified version of the two-month lock-in provision originally proposed by SVF should be adopted. However, it must be recognized that such provision would have no effect unless the other order involved has a complementary provision that recognizes the lock-in. Thus, even though adopted, the provision would not prevent an Iowa pool distributing plant from shifting to the Chicago order until such time that the Chicago order may be changed to recognize the Iowa provision.

The witness for SVF testified that their proposal number 2 would establish a lock-in for Order 79 so that a handler regulated under that order would continue to be pooled there until the third consecutive month of greater Class I route sales by the handler in another marketing area.

The witness said that since monthly reports are due promptly after the end of the month it is difficult to make an accurate determination in time to file the report as to within which area a plant has the greater volume of sales. He said that the retroactive impact of a plant changing orders is irreparable to the plant's customers and its producers. Producers, he said, may not want to deliver to the plant anymore, but that they may not be aware of the plant's change in regulation until six to seven weeks later.

The witness for the proponent stated that their lock-in proposal should be modified to provide that the market administrator announce the names of distributing plants that qualify pursuant to this provision.

The representative for SVF testified that some lead time is needed to serve the interests of handlers, producers and customers. He said that in the case of their Dubuque plant, a change in regulation would not be just a simple one-plant switch in regulation. This, he said, is because it would effect supply plants, milk diverted to nonpool plants and pumpover stations. Furthermore, he said, different qualifying and pooling provisions would have to be applied.

Proponent's witness testified that SVF was modifying its lock-in proposal to make the lock-in permanent. The modified proposal, he said would apply so long as the Order 79 Class I price that applies at a plant location is not less than the other order's Class I price that would apply to that same location. He said that this modified proposal would avoid the shifting of an Order 79 plant to another order having a lower Class I price with the consequent impairment of the plant's ability to maintain its producer milk supply.

The witness for SVF said that if its Dubuque plant became regulated under Order 30, it would have to increase the over order premium so as to bring the producer pay price up to what would be payable if the plant had been regulated by Order 79 for the same period. He said that if the Dubuque plant became regulated by Order 30, its Class I price would decrease 21 cents and the producer blend price would decrease even more.

The witness for the proponent said that SVF cannot expect its dairy farmers in the Corydon, Iowa area to accept a 13-to-15 cent lower blend price and a minus 36-cent location adjustment for a total reduction of 50 cents. He said that the same would be true for producers in the Cedar Rapids area.

Proponent's witness said that SVF has a cheese plant in Clayton County and the milk diverted to this plant receives the Iowa blend price less a 24-cent location adjustment. He said that if milk diverted to this plant became regulated by Order 30, the blend price would be 13 to 15 cents lower than the Iowa blend, and a minus location adjustment of 36 cents would apply. Thus, returns to producers would be 26 cents per hundredweight lower than the Iowa blend price at that location.

The witness for SVF said they must now pay more than the Iowa blend price to procure milk. He said that if the

Dubuque plant were to become regulated under Order 30 with its lower blend price and applicable location adjustments, it would be unable to compete for the procurement of milk from the farms now serving it. Regulation under Order 30, he said, would cost SVF approximately one million dollars per year because of the additional payments that would be necessary to maintain its current producers.

The proponent's witness stated that although the Department, in the past, has generally pooled a distributing plant in the order in which it has the largest volume of sales, it recently has departed from that policy because of changes in the marketplace. He said that recently the Department has locked in several distributing plants in markets where they were located even though they had a larger volume of sales in other markets. He noted recent such decisions involving the Louisville-Lexington-Evansville and Ohio Valley orders and also the Nashville, Tennessee order.

A dairy farmer who is a member of SVF testified that regulation under Order 30 would cost him about $4,900 a year, therefore, he would have to find another market.

A witness for Central Milk Producers Cooperative (CMPC) testified that he was appearing on behalf of AMPI-Morning Glory Farms Region, Golden Guernsey Cooperative, Independent Milk Producers Cooperative, Lake-to-Lake Division of Land O'Lakes Dairy Cooperative, Manitowoc Milk Producers Cooperative, Midwest Dairymen's Company, Milwaukee Cooperative Milk Producers, Outagamie Milk Producers Cooperative, Southern Milk Sales, Wisconsin Dairies Cooperative and Woodstock Progressive Milk Producers Association. The CMPC witness indicated that CMPC is a federation of cooperatives whose members pool about 93 percent of the producer milk on Order 30 and that in addition about 94 percent of the Class I milk is priced through CMPC's premium pool.

The CMPC witness testified that the lock-in proposal should be modified to make it clear that SVF does not intend to lock-in a pool supply plant. Furthermore, he said, there must be a corollary lock-out provision in Order 30 in order to accommodate this proposal. He said without the lock-out provision, both orders would be required to regulate the plant. The CMPC witness proposed a modification to the proposed lock-in provision that was intended to insure that the Order 30 language not be superseded by the Order 79 language.

National Farmers Organization stated at the hearing that there may be some justification for a one-month lock-in.

The order currently provides that the term "pool plant" shall not apply to a plant that qualifies as a pool plant but which has a greater quantity of Class I dispositions in the marketing area of another order than in the Iowa marketing area. However, the dispositions included in making this comparison include route dispositions plus dispositions to other plants that qualify as pool plants under the respective orders. So long as a plant's route dispositions in the Iowa marketing area plus dispositions to other plants that are pool plants based on in-area route dispositions are greater than similar dispositions to another order, the plant will be pooled under the Iowa order. The Chicago order has essentially the same provision. Thus, SVF's Dubuque plant has been able to remain fully regulated under the Iowa order.

As originally proposed, the lock-in would potentially create an impasse where a distributing plant meets the pooling requirements of two orders. The impasse would exist because each order would claim the plant as a pool plant and neither order would yield to the other one. At the hearing, a modification was proposed such that the Iowa order lock-in would not take effect unless the other order had a provision that recognized the lock-in.

At this time the only prospective application of a lock-in is in conjunction with the Chicago order. Some opponents expressed the view that a lock-in should not be adopted since it could not function anyway.

The basic purpose for a two-month lock-in is to prevent a plant from flip-flopping regulatory status between two orders and to allow some time for sales adjustments to be made in the event a plant has an unexpected change in its distribution pattern that would cause a shift in regulation from one order to another. Thus, such a provision may be helpful in preserving market stability at unforeseen times and circumstances that may develop in the future, since some other nearby orders would recognize a two-month lock-in.

A lock-in provision should be applicable only to a distributing plant. This point was raised by CMPC, and is consistent with the intent of the provision as revealed in the testimony of the proponent's witness. There was no indication that proponent intended any application to plants other than distributing plants.

A suggestion by proponent that the market administrator publicly announce the name of each handler qualifying a plant as a pool plant under the lock-in provision should not be adopted. The purpose of this suggestion was so that producers, handlers, and customers would have advance notice of a possible switch in regulatory status of such a plant.

The evidence on the need for such a provision is sparse. It may be, as proponent contends, that producers need to know that a plant has switched from one order to another. On the other hand, it does not necessarily follow that a plant pooled under the two-month lock-in will necessarily be regulated under another order in the next succeeding month. It may be that the lock-in provision has been applicable in a situation where the handler has made adjustments in operations that will result in the plant continuing to be pooled under the Iowa order. Given the possible range of conditions that application of the lock-in may reflect, it does not appear that an announcement by the market administrator would be particularly useful. The lock-in provision adopted in this decision does not contain such a requirement.

As adopted, a plant that had been a pool distributing plant under the Iowa order for the preceding month, but which in the current month has greater Class I dispositions (route sales and/or transfers to plants) in another marketing area, would continue to be a pool plant until the third consecutive month of such greater dispositions in the other area, unless the other order nevertheless regulates the plant.

A further proposed modification by the proponent should not be adopted. SVF proposed an additional provision to permanently lock a distributing plant located in the Iowa marketing area into the Iowa order so long as the Iowa order's Class I price at that plant's location is not less than the price at that location under the order in which the plant had the greater route disposition. Such a provision was adopted recently in the Louisville-Lexington-Evansville order, with a corollary change in the Ohio Valley order, and in the Nashville order with a corollary change in the Georgia order. SVF maintains that the market situations that led to such amendments to these orders are similar to SVF's procurement problems involved in this proceeding. This latter proposed modification also was widely opposed.

The two recent proceedings involving other orders that were cited by both proponents and opponents have no bearing on this proceeding. Whether or not there are certain similarities in the situation that concerns SVF and those

that existed in the other orders cannot be decisive in this proceeding. Moreover, without regard to the merit of any evidence submitted by SVF or opponents, further consideration at this time is unwarranted because a corollary amendment to the Chicago order clearly would be required. However, such an amendment to the Chicago order is not an issue in this proceeding. Therefore, adoption of a permanent lock-in provision would serve no purpose.

At the hearing, the witness for the proponents expressed his view that absent a corollary amendment of the Chicago Regional order to recognize a lock-in provision in the Iowa order, the lock-in nevertheless could be implemented by terminating certain provisions of the Chicago order.

If this were done, it would change the Chicago order's present application where the order does not recognize any lock-in provision, to potentially having to recognize lock-in provisions in any order having such provisions. The merits of such an action have not been explored on the record of this proceeding. There simply is no record evidence supporting such a change, nor any other evidence that would lead to a conclusion that such action was necessary because the provision to be terminated obstructs or does not tend to effectuate the declared policy of the Act.

SVF took exception to the above finding in the recommended decision, noting that the recommended decision recognized that if the Dubuque plant became pooled under the Chicago order, SVF would be "competitively disadvantaged." The exception maintains that this is evidence that the Chicago order's "unconditional lock-in" obstructs the declared policy of the act, which is to effect orderly marketing. The exception argues that it cannot be the policy of the Act to perpetuate an order that effectively bars a plant that is subject to a higher Federal order Class I milk price from expanding its distribution into the Chicago order marketing area. Further, it is argued that the Secretary must take action to remove inconsistencies and that, therefore, the Iowa order should be amended to provide a permanent lock-in, and that an accommodating change should be made to the Chicago order.

A lock-in provision in the Iowa order cannot be effective with regard to the Chicago order until a corollary amendment of the Chicago order has been made. The reasons for not terminating a provision of the Chicago order to achieve the same thing has already been discussed. The exceptions of proponent are denied.

2. Expansion of the Iowa Marketing Area

The Iowa marketing area should be expanded to incorporate additional territories where it is clear that a majority of the milk distributed therein was distributed by plants fully regulated under the Iowa order. The specific territories that should be added are identified on a state-by-state basis later in the discussion of this issue.

Swiss ValleyFarms, Co. (SVF), proposed that the Iowa marketing area be expanded to include the following counties:

1. In Iowa, the counties of Des Moines, Henry, Lee and Van Buren.
2. In Illinois the counties of Hancock and Henderson, and the townships of Fulton, Ustick, Clyde, Genesee, Mount Pleasant, Union Grove, Garden Plain, Lynden, Fenton, Newton, Prophetstown, Portland and Erie in Whiteside County.
3. In Missouri, the counties of Clark, Grundy, Harrison, Lewis, Mercer, Putnam, Schuyler and Scotland.
4. In Wisconsin, the counties of Crawford and Grant.

At the hearing, SVF modified the proposal by deleting Hancock County in Illinois and Lewis and Clark Counties in Missouri.

The witness for the proponents testified that SVF markets milk of approximately 2300 dairy farmer members and that most of the milk is pooled under the Iowa marketing order (Order 79) through its fluid milk plant in Dubuque and its supply plants that assemble milk for transfer to the Dubuque distributing plant.

The proponent's witness said that SVF distributes a substantial amount of packaged fluid milk products into the Chicago Regional marketing area (Order 30) and that any further expansion into Order 30 will regulate their Dubuque plant under Order 30. He said that the impact of that change in regulation would be devastating because of the location adjustment provisions and the unit qualification for supply plant provisions of Order 30. He stated that the price that SVF would be able to return to its members under Order 30 would not allow it to be competitive in the supply area for their Dubuque plant.

SVF witness stated that its proposals would allow it to continue pooling their Dubuque plant under Order 79 and avoid jeopardizing its supply of milk.

The proponent's witness said that SVF is not attempting to secure a lower price on the Class I milk distributed from its Dubuque plant. He said that the Class I price fixed by the Iowa order at the Dubuque location is 21.9 cents higher than the Class I price fixed by Order 30 at this same location. The witness stated that the plants that SVF competes with in the Order 30 marketing area are not placed at a competitive price disadvantage with the Dubuque plant being pooled under Order 79 rather than Order 30.

The witness for the proponent said that the location adjustment under Order 30 fixes the minimum Order 30 Class I price and blend price at Dubuque below the prices set by Order 79. Order 79, he said, like most orders, establishes a lower price to the north and a higher price to the west and south whereas Order 30 establishes a lower price west and south.

The proponent's witness said that the Agricultural Marketing Agreement Act of 1937 requires the Secretary to fix the price at locations that will insure an adequate supply of milk at that location. He said that this standard is not met under both orders by having a lower price at Waterloo, Iowa, under Order 30, than the price at this same location under Order 79. The net effect of this misalignment, he said, is to create an artificial trade barrier.

The witness stated that proponent's exhibit shows that as the distance from Chicago increases in westerly direction through Davenport, Iowa, the price difference increased from 29.2 cents at Davenport to 52.3 cents in Jasper County (Iowa) and points west. He said that these price differences have stopped Iowa producers from supplying plants regulated by Order 30. There is no Iowa producer milk moving to Order 30 regulated plants, he said, except from the extreme northeast counties of Iowa.

Proponent's witness indicated that in order for a distributing plant to compete for sales, it must have raw product costs reasonably in line with others selling in the area. He said that raw product costs are a combination of the order's class prices and the additional payment that it takes to attract milk to the plant. He stated that the additional payment must be made to all producers supplying the plant; otherwise there would be instability (disorderly marketing) in the procurement area. Thus, a plant located in Iowa cannot pay the Order 30 price reduced by location adjustments and procure milk in competition with plants paying the Order 79 price, he said.

The witness for the proponent indicated that the Department in the past has recognized this inconsistency in other markets and has resolved the problem by snubbing the price in a marketing area to the price fixed by the order for that area. He said that would require a major overhaul of the Order 30 pricing system and the support of the

majority of the Order 30 producers and that a more expedient way in dealing with the problem is to revise the Order 79 marketing area to fit the distribution pattern of plants subject to regulation by the order. In his opinion, the SVF proposals do not completely resolve this inconsistency in prices and that this problem eventually must be resolved by an appropriate amendment to Order 30. In the meantime, proponents are looking for other ways to keep the plant pooled under the Iowa order.

The proponent's witness testified that the distribution patterns of fluid milk plants have changed substantially since the marketing orders in Iowa and neighboring states were established. He said that distributing plants, such as the SVF Dubuque plant, distribute fluid milk products over a much greater geographical area and that this benefits the milk suppliers, plant operators and consumers by way of a lower per unit processing cost.

The witness for SVF testified that a survey conducted by SVF indicated that Iowa handlers have approximately 92 percent of the sales in that portion of Whiteside County that is proposed being added to the marketing area. In Henderson County, he said, Iowa handlers have about 53 percent of the sales. In Hancock County, he said Order 32 handlers (Southern Illinois) have the majority of sales. Hancock County, he said, is included in the proposal for the convenience of Iowa handlers because of the requirements for reporting in-area and out-of-area sales.

Iowa handlers, he said, have about 95 percent of the sales in Henry County; about 72 percent in Des Moines County; about 64 percent in Lee County and about 94 percent of the sales in Van Buren County. He said in total, Iowa handlers have about 74 percent of the sales in the Iowa counties proposed to be added.

In the Missouri counties of Harrison, Mercer, Putnam, and Schuyler, Iowa handlers, he said, have 100 percent of the sales. In Grundy, he said, Iowa handlers have 55 percent of the sales. He said that in Scotland County sales are divided equally between Iowa and Illinois plants. Order 32 plants, he said, have the majority of sales in Lewis and Clark Counties. The inclusion of these two counties, he said, also is for the convenience of the Iowa handlers who have to report separately in-area and out-of-area sales. In total, he said, Iowa handlers have 61 percent of the sales in the Missouri counties proposed being added to the Order 79 marketing area.

The witness for SVF said that for Grant and Crawford Counties, Iowa handlers have 61 percent of the sales, Upper Midwest handlers have 20 percent and Chicago handlers have 14 percent. He said that adding these two counties to the Order 79 marketing area will not change the current status of any plant under either order or the classification of milk or the blend price in either order.

The proponent's witness stated that SVF wished to modify its expansion proposal by deleting Hancock, Lewis, and Clark Counties because the survey showed that Order 79 handlers do not have the majority of sales in these counties.

Anderson Erickson Dairy Co., although it did not present testimony at the hearing, filed a brief in support of the SVF proposals.

The first of many witnesses to testify in opposition to the proposals was a representative for Prairie Farms Dairy (PFD). The PFD witness said that their organization, although it has a joint venture interest in an Order 30 pool plant as well as a joint venture interest in two plants regulated under Order 79, was testifying on behalf of their solely owned plants pooled on the Southern Illinois market (Order 32).

The opponent's witness stated that PFD has over 500 producers located in the Order 32 marketing area and that it also acquires milk from cooperatives whose members are located in Iowa, Minnesota, Wisconsin and Illinois. He said that the SVF proposal could adversely impact on these cooperatives and their ability to provide milk to their Order 32 plants.

The PFD witness said that their immediate concern was their distributing plant located at Quincy, Illinois (Adams County). He said that the Quincy plant receives about 8 million pounds of milk per month and utilizes about 70 percent of this milk in Class I. The Quincy plant, he said, is in an unregulated county with large unregulated areas around Quincy.

The witness for PFD testified that for the past 12 months the Quincy plant sales averaged about five percent in Central Illinois (Order 50), about 19 percent in Order 32 and about 76 percent in non-regulated areas. He said that SVF proposal for the expansion of the marketing area, prior to its modification deleting several counties, would have made it very difficult for it to remain pooled under Order 32. He maintained that the expansion proposal would not solve the SVF problem but would shift the problem from one cooperative to another.

The witness for PFD testified that although they did not do their own survey of the proposed expansion, it did compare its sales in the various counties with SVF estimated PFD sales. He said that there is no economic, historical, practical, or beneficial justification for including any of the Missouri, Illinois or Iowa counties in the expansion except for the Iowa counties of Henry, Des Moines, and the Illinois county of Henderson.

The opponent's witness testified that its exhibit shows that for Henderson and Hancock counties in Illinois in total, SVF had 15.1 percent of the sales in these two counties and that SVF estimated that PFD had 62 percent of the sales in the two counties while PFD's exhibit shows actual sales as 25.7 percent.

The representative for PFD said that their exhibit shows for the eight Missouri counties in total, SVF has 7.9 percent of the sales in those counties and that SVF estimated PFD had 29.6 percent of the total county sales. PFD's exhibit shows actual sales as 25.5 percent.

The witness said that the PFD exhibit shows that for the four Iowa counties in total, SVF had 21.4 percent and SVF estimated that PFD had 8.9 percent of those sales compared to PFD's actual sales of 19.1 percent.

The witness for the opponent testified that for March 1988, the Quincy plant had 19.8 percent of its sales in Order 32 and if all of the counties originally proposed by SVF would become part of the Order 79 marketing area, their Quincy plant would have had 15.6 percent of their sales in Order 79. He said that the 4.2 percent difference, which equates to about 200,000 pounds of milk, is unacceptable to PFD.

The opponent's witness proposed that only Henderson County (Illinois) and Henry and Des Moines Counties (Iowa) be included in the expanded marketing area. These three counties, he said, would give SVF about 53 percent of their sales in all of the 14 proposed counties. He said that allowing the 11 other counties to remain as unregulated would allow PFD a reasonable sales cushion between Orders 32 and 79. Of the 11 counties, he said, the Quincy plant would have had about 34 percent of the total sales compared to 13 percent for SVF. He said that for the three counties that PFD suggests be added to the marketing area, SVF would have about 23 percent of the total and the Quincy plant less than one percent. He also indicated that PFD could support adding the townships named in Whiteside County, Illinois, to the marketing area.

Land O'Lakes, Inc., although not presenting testimony at the hearing, filed a brief in support of PFD's modified proposal.

The witness for PFD testified that the 120 Quincy producers are located in southeast Iowa, northeast Missouri, and western Illinois. He said that the central locations in the proposed two Illinois counties are on the average only 68 miles from Quincy while they are 154 miles from Dubuque. Central locations in the proposed Iowa counties, he said, are on the average 74 miles from Quincy compared to an average of 154 miles from Dubuque. He said that central locations in the proposed Missouri counties show that on average they are 99 miles from Quincy while being 236 miles from Dubuque. Efficiency of distribution alone, he said, should support the concept that this area is best served by the Quincy plant compared to the Dubuque plant.

The witness for the opponent testified that regulation of its Quincy plant by Order 79 would be devastating to PFD and its dairy farmers. For example, he said that the blend price to dairy farmers associated with the Quincy plant would have averaged 45 cents less if the plant had been regulated by the Iowa order. A 45-cent reduction in blend prices would amount to over $560,000 for one year, according to the witness Land-O-Lakes and Associated Milk Producers, Inc., he said, have told PFD that they could not deliver milk to Quincy at these prices.

The representative for PFD said that since May 1987 PFD has been receiving milk from SVF into its joint venture pool distributing plants located in Iowa City and Des Moines, Iowa, for the purpose of helping SVF continue to qualify the Dubuque plant on Order 79.

The expansion proposal, he said, would encourage SVF to increase its sales into this newly expanded area, so as to be able to increase its sales into Order 30. He said that PFD would be discouraged from expanding into the area that has been home country for the Quincy plant for over 50 years.

Numerous interested parties that are either dairy farmer cooperatives or proprietary handlers regulated under the Chicago order presented testimony in opposition to the SVF proposals. In general, such opposition expressed views that: (1) SVF should be regulated under the Chicago order because it has greater Class I route dispositions in the Chicago marketing area than in the Iowa marketing area; (2) SVF, due to the higher Iowa blend prices, has a competitive advantage over Order 30 regulated handlers in obtaining raw milk supplies in some areas of Wisconsin and Illinois; (3) because SVF has a milk procurement advantage, it also has an advantage in selling packaged milk (lower sales price). Chicago handlers have lost sales accounts to SVF; (4) SVF's problems are its own doing since SVF actively has expanded sales outlets in the Chicage market; (5) expansion of the Iowa marketing area now will lead to further expansion in the future; (6) the Chicago and Iowa marketing areas should be merged; (7) SVF actively seeks (and obtains) contracts to supply milk to schools and colleges in the Chicage marketing area; (8) adding Crawford and Grant Counties in Wisconsin to the Iowa marketing area would increase the Iowa blend price and decrease the Chicago order blend price, and thus take away about $1.6 million per year from Order 30 producers; and (9) the evidence shows an overlap in the milk procurement areas of the Chicago and Iowa orders such that the Chicago marketing area should be expanded. Therefore, the record should be kept open so that additional proposals on this issue could be submitted.

In addition, CMPC witnesses specifically opposed all the SVF proposals for the following reasons:

(1) Failure of the Department of Agriculture (USDA) to notify all interested persons that a hearing request had been made and to invite comments on additional proposals;

(2) USDA's refusal to consider that because a marketing area proposal would be heard, then all other provisions of the order would be open for proposed amendments;

(3) Removing two counties from the Chicago marketing area and adding them to the Iowa marketing area would, in effect, amend the Chicago order without providing Order 30 interested parties an opportunity to submit additional proposals; and

(4) The proposal's attempt to circumvent the pool plant provisions of the Chicago order without a proper notice to amend the order's pool plant definition.

Most of the testimony by interested parties regulated under the Chicago order concerned opposition to continued pool status under the Iowa order for SVF's Dubuque plant. However, most of that testimony more nearly relates to the issue of a lock-in provision. That issue has been dealt with earlier in this document. Therefore, only a brief summary of the Chicago parties' positions has been noted here.

A witness for Deters All Star Dairy, Inc. (Deters), said that Deters operates an unregulated distributing plant in Quincy, Illinois, with about 15 percent of its sales in the Iowa Counties of Lee, Des Moines, Henry and Van Buren; the Missouri Counties of Scotland, Putnam, Schuyler, and the Illinois Counties of Hancock and Henderson. He said that Deters is opposed to all of the proposals except for adding the Wisconsin Counties of Crawford and Grant, the Illinois County of Whiteside or the Missouri Counties of Grundy, Harrison or Mercer. The expansion proposal, he said, would cause Deters to become regulated, resulting in an increase in its reporting and bookkeeping costs.

Exceptions to the recommended expansion of the Iowa marketing area were filed by seven interested parties. The exceptions ranged from expressions of frustration because additional proposals were not invited prior to the hearing to allegations that the Dairy Division [AMS–USDA] has erred in its judgment and condoned pooling a plant based on a "sham" qualification mechanism. Some exceptions also claimed that the procedure to terminate two counties from the Chicago marketing area is illegal since it would amend the Chicago orders without a hearing.

The question of whether the Secretary has authority to terminate a provision of an order was discussed in the Recommended Decision. As we stated therein, such authority is clear. Furthermore, the procedures followed in announcing and conducting the hearing were in accordance with the Department's Rules of Practice and Procedure.

The only exceptions that require further response relate specifically to the marketing area issue. Associated Milk Producers, Inc., Morning Glory Farms Region, again raised questions about the proponent's data that were relied on in reaching the Recommended decision. The exception objected to the marketing area expansion because (1) there was no way to verify SVF's sales figures; (2) no method was noted for calculating percent of sales by other handlers; (3) no listing of retail establishments was made available, and (4) there was no consideration of changes in sales over time. The following observations are made in response to these objections:

1. Given that proponent's sales data represent confidential information, it would be very unusual for the record of an amendment proceeding to contain information that would allow verification of proponent's sales data;

2. As noted in the Recommended Decision, estimates of sales by other handlers in the various counties were based on discussion with SVF customers and on in-store observations;

3. A listing of retail establishments was not provided at the hearing; however, the proponent's witness

indicated that the survey included visits to most stores; and

4. Since the SVF sales figures were derived from annual data divided by 12 to arrive at an average monthly figure, the element of time was reflected, at least with respect to proponent's data.

In its exception, CMPC argues that SVF maintains its Dubuque plant as a pool plant under the Iowa order through a "sham" mechanism, and states, as it did in its brief, that the record fails to disclose details of SVF's operations.

It should be noted that the Chicago Regional order, in its definition of "pool plant" (§ 1030.7), provides that the term "pool plant" will not include a plant that has route disposition and disposition to pool plants qualified on the basis of route dispositions that are greater under another order than under the Chicago order. This mechanism, the combining of route disposition with shipments to other plants, which is what SVF has relied on to keep the Dubuque plant pooled on the Iowa order, is clearly recognized under the Chicago order.

The amount of information about its operations that SVF revealed for the record was adequate to make the decision regarding marketing area. Thus, we find no basis in the exceptions for reaching any conclusions different from those set out in the Recommended Decision.

In its exceptions, the National Farmers Organization (NFO) opposed the Iowa market area expansion. NFO claimed that the evaluation of producer blend price disparities between the Iowa and Chicago orders was arbitrary and capricious because it ignored the blend price advantage that SVF has in Grant and Crawford counties. The exception also stated that SVF should not be allowed to increase distribution of large amounts of milk in the Chicago marketing area without being subject to pooling under the Chicago order.

On the first point, the record clearly indicates, with respect to Iowa producers, that if the Dubuque plant becomes pooled under the Chicago order, SVF would be disadvantaged in competing for local milk supplies. On the other hand, SVF has the benefit of a higher blend price under the Iowa order when competing against Chicago handlers for Wisconsin milk supplies. However, the record shows that handlers regulated under other orders that have blend prices higher than the Chigao order also compete for supplies in Wisconsin. In any event, these facts are not of utmost importance in deciding the marketing area questions.

On the second point, this decision does not convey to SVF any immunity against the Dubuque plant becoming fully regulated under the Chicago order. That could still happen if Class I dispositions in the Chicago marketing area in the future became greater than Class I dispositions in the Iowa marketing area. This was clearly stated in the recommended decision and is repeated here. The exceptions are therefore denied.

Specific territories to be added to the marketing area.—(a) *Illinois territory:* The unregulated townships in Whiteside County and Henderson County should be added to the Iowa marketing area. In Whiteside County, the 13 townships are predominantly served by Iowa handlers, whose Class I sales in the area are estimated at over 90 percent of the total.

In Henderson County, SVF reported its own sales and estimated sales for one other Order 79 handler to comprise 53 percent of total Class I sales. SVF's survey resulted in an estimate that Prairie Farms (Quincy) had about 28 percent of the sales and that another Order 32 plant had 19 percent. The only other data submitted at the hearing was by the Prairie Farms Dairy representative. His data showed that the Quincy plant's sales amounted to only one percent of the estimated total in Henderson County. This is a large discrepancy (28 percent versus one percent). The SVF estimate of the Quincy plant's sales were larger than actual. Since it is clear the survey did not over-estimate the Order 79 sales, it is probable that the 53 percent of total estimate may be too low. Henderson County's Class I sales appear to come mostly (more than half, at least) from Iowa handlers' plants. Accordingly, Henderson County should be identified as part of the marketing area for the Iowa order.

(b) *Iowa territory:* Henry, Des Moines, and Van Buren Counties, which now are unregulated, should be included in the Iowa marketing area. Iowa handlers are estimated to have about 90 percent of the Class I sales in Henry and Van Buren Counties, and about 70 percent in Des Moines County. The Prairie Farms representative presented data on its sales in Henry and Van Buren Counties, which showed less sales than estimated by SVF. A witness for Deters Dairy, Quincy, Illinois, indicated that any sales from its plant in these counties would be very small. Therefore, there is no reason to question whether Iowa handlers predominate in service to these counties. No one offered any data other than SVF's estimate of sales in Des Moines County.

Lee County also was proposed to be in the marketing area. SVF's estimated total distribution in this county was 804,358 pounds, of which SVF distributed 173,339 pounds and estimated another 43 percent of the total to have been distributed by two other Iowa handlers. SVF estimated that Prairie Farms Dairy, Quincy, Illinois, had another 20 percent, which left 16 percent divided almost equally among three other non-Iowa order handlers. However, the Prairie Farms witness testified that actual sales in Lee County from its Quincy plant amounted to 396,352 pounds, or 49.3 percent of estimated total consumption, rather than the 20 percent figure noted above. This discrepancy cannot be explained from information available in the record. Thus, assuming that the estimated total consumption figure for Lee County is reasonable, it cannot be concluded that Iowa handlers have a majority of Class I distribution in the County. Accordingly, Lee County should not be identified as part of the marketing area for the Iowa order.

(c) *Missouri territory:* Five of the eight proposed unregulated Missouri counties should be added to the marketing area. They are: Grundy, Harrison, Mercer, Putnam, and Schuyler Counties. The other three (Clark, Lewis, and Scotland) should remain unregulated.

Class I consumption in Grundy County was estimated by SVF to be about 223,000 pounds per month. SVF's sales in Grundy County are small, at about 6,000 pounds, while sales by other Iowa handlers were projected by SVF to be more than 50 percent of the total. However, SVF overestimated the amount of milk distributed in Grundy County by Prairie Farms of Quincy. At the hearing, Deters Dairy indicated that they had no problem with Grundy County being added to the marketing area of the Iowa order. Thus it appears that Iowa handlers have at least 55 percent of the Class I disposition in Grundy County. Harrison and Mercer Counties also should be included in the marketing area. SVF's survey indicated virtually all of the Class I milk in both counties was distributed by plants regulated under the Iowa order. There was no contrary evidence concerning these counties.

SVF's survey of Putnam County indicated that virtually all the Class I milk was distributed in the County by Iowa order handlers. The witness for Deters Dairy indicated that any milk distributed from the Quincy plan would be small, and was not sure whether it would include any Class I milk at all. Thus, there is a sound basis in the record to include Putnam County.

The preceding paragraph could apply to Schuyler County as well, since the SVF survey found only products

distributed by Iowa handlers. However, the representative for Deters Dairy indicated that here, too, there might be a very small amount of Class I milk dispositions by a distributor, but not any direct distribution by Deters. So, in Schuyler County, the evidence leads to a conclusion that Iowa handlers have nearly all, if not all, of the Class I sales.

Clark, Lewis, and Scotland Counties, should not be added to the Iowa marketing area. The first two were dropped from the proposal by the proponents. Moreover, the sales data would not support the proposal. The later, Scotland County, should not be included because there is at least a 50 percent discrepancy in sales survey results. SVF's survey indicated 100 percent of the sales in Scotland County came from Iowa order plants. Prairie Farms, on the other hand, indicated that it's Quincy plant had route sales equal to 58 percent of the estimated consumption. This discrepancy remains unresolved. The available data do not permit a conclusion that Scotland is served primarily by Iowa plants. Therefore, the inclusion of Scotland County must be denied.

In several of these counties, the sales by SVF are a small proportion of the total. However, what is most important in this case is whether the predominant distributors of Class I milk are handlers regulated by the Iowa order.

Deters, in its testimony and in its brief, took the view that several of the proposed counties should not be added to the marketing area because no evidence can be found that disorderly marketing conditions exist. It is not necessary that disorderly marketing conditions exist before a county or other parcel of territory may be annexed to a marketing area. While other factors may be involved, the principal basis for defining marketing areas under the Federal milk marketing order program long has been that a marketing area defines a common sales area served primarily by competing handlers. If that condition exists, and it does in most of the counties discussed thus far, then the absence of market disorder is of no consequence. A major purpose of the Agricultural Marketing Agreement Act of 1937 is to promote orderly marketing. It is not a prerequisite that disorderly marketing must exist before this goal of the Act may be achieved.

The territory in Illinois, Iowa, and Missouri that should be added to the Iowa marketing area should have no impact on the regulatory status of the Prairie Farms plant at Quincy, and only minimal impact upon Deters Dairy, which is unregulated.

The representative of Prairie Farms introduced and exhibit showing the route sales by its Quincy, Illinois, plant in the counties proposed to be part of the Iowa marketing order. The total shown for March 1988 was 871,842 pounds. The witness expressed concern that this amount was large enough that any increase in sales in the Iowa order could cause the plant to flip over to regulation under the Iowa order. However, the plant's sales in the nine counties adopted in this decision amounted to only 115,273 pounds, or only 13 percent of the total sales in the counties originally proposed by SVF. This should minimize any concern of Prairie Farms that expanding the Iowa order could cause its Quincy plant to shift to the Iowa order.

Mid-American Diarymen, Inc. and Prairie Farms Dairy, Inc., both took exception to including the five Missouri counties in the marketing area. Both pointed out that SVF does not have a large volume of sales in the Missouri counties. Also, they claimed that handler costs would be increased due to having to report separately the sale in Missouri. The Prairie Farms exception also notes that the State of Missouri assesses a fee on milk sold on routes in the state. However, we see no reason why this information should have any bearing on the issue under discussion here.

The SVF distribution volume in these five counties is small. However, the decision to include these counties in the marketing area is based on the percentage of sales in each county that was distributed by plants regulated under the Iowa order. This is the same basis for including in the Iowa marketing area other territories in other states as well.

On the matter of additional reporting burden, there is no indication in the record that the type of accounting changes required by including the five Missouri counties will result in the burden of regulation being increased by any significant amount for plants that already are fully regulated under a federal milk order. In fact, we note that Anderson-Erickson Dairy Co., which operates a pool plant in Des Moines, Iowa, and which distributes milk on routes in the five Missouri counties, filed comments supporting the Recommended Decision with regard to expansion of the marketing area. Accordingly, we reaffirm that the Iowa marketing area should be expanded to include the five Missouri counties. Therefore, the exceptions on this issue are denied.

With regard to Deters Dairy, it is not possible to state exactly what portion of its Class I distribution will be partially regulated under the expanded Iowa order. However, in the nine counties in Illinois, Iowa, and Missouri, Deter's witness indicated only very small, or perhaps no sales at all. Therefore, it is expected that any impact upon Deters due to this action would be minimal, in that the plant would be only partially regulated.

As the operator of a partially regulated distributing plant, Deters would be required to pay an administrative assessment on the total hundredwieghts of route dispositions in the marketing area, less any receipts of milk priced as Class I milk under a Federal order. The maximum assessment rate for this purpose is four cents per hundredweight.

Additionally, Deters would have the option to have any further obligation computed under one of the following:

1. Compute the handler's total value of milk at the order's class prices just as if the plant were a fully regulated pool plant. Subtract payments made for milk that would have been producer milk if the plant had been fully regulated. Any positive difference would be paid to the producer-settlement fund.

2. An amount computed by multiplying the total hundredweights of route dispositions in the marketing area, less any receipts at the plant of milk priced as Class I milk under a Federal order, by the difference between the applicable Class I and uniform prices would be paid to the producer-settlement fund. If the plant received milk priced as Class I milk under a Federal order in an amount at least equal to the in-area route dispositions, there would be no obligation.

In order to determine the payment obligations referred to above, Deters would be subject to certain reporting requirements of the order.

Deters undoubtedly operates a small business. Although the options just described are available to any handler that operates a partially regulated distributing plant, they do provide a small business with choices that can help minimize the impact of even partial regulation.

(d) *Wisconsin territory:* The marketing area of the Iowa order should be expanded to include Crawford and Grant Counties in Wisconsin. Both of these counties are currently included in the marketing area for the Chicago Regional order.

The data submitted by SVF in its sales survey included estimates for these two counties. These estimates show that Chicago order handlers account for an estimated 8 percent of the route

dispositions in Crawford County, and 16 percent in Grant County. The actual sales by SVF in these counties represent 54 and 70 percent of estimated consumption in Crawford and Grant Counties, respectively. The remainder was estimated to be distributed by a handler regulated under the Upper Midwest milk order.

At the hearing, a representative for Dean Foods indicated through cross-examination that his firm's route disposition amounted to some 13.6 percent of the total in Crawford County, rather than 8 percent as shown on the SVF exhibit. It must be noted that the exhibit does not list Dean Foods as a distributor in Crawford County, but does show Dean Foods as distributing 8 percent of the total estimated routes sales of fluid milk products in Grant County. This raises a question as to whether the SVF survey erred in not picking up Dean as a distributor in Crawford County, or whether the Dean representative misspoke in his question to a AMPI witness. It makes little difference because the sales figures quoted for SVF are based on actual sales figures, whereas the percentages indicated for other distributors are estimates. Thus, if the estimated total consumption figures are about right, an error in estimates for other distributors would not change the conclusion that an Iowa handler, SVF, is the largest distributor with more than half of the Class I milk in both counties. This being the case, both counties should be identified as part of the Iowa order marketing area, rather than the Chicago Regional order marketing area, based on current marketing conditions as revealed in the record of this proceeding. In defining an order marketing area, the major consideration is which competing handlers are the principal distributors of milk within the territory under consideration.

It is noted that there were no distributing plants under either order in either county in May 1988. However, there were four reserve supply plants under the Chicago order that were located in these counties, and two supply plants pooled under the Iowa order located therein.

Crawford and Grant Counties clearly are areas where there is overlapping of supplies for both the Chicago and Iowa orders. The evidence in the record indicates also that there is keen competition for those supplies. In December 1987 the producers located in the two counties were about evenly divided between the two orders, with a few more producers and a little bit more milk that participated in the Iowa market than in the Chicago market.

The facts just noted do not weigh heavily in favor of inclusion of two counties in either marketing area based on sources of milk supply. Therefore, the question of which order's handlers distribute more milk in the two counties takes on added importance as a determining factor concerning which marketing area should include the two counties. In this regard, this record clearly supports a conclusion that Crawford and Grant Counties in Wisconsin have a stronger association with the Iowa market than with any other market for which data were provided at the hearing.

The Wisconsin Cheese Makers Association (WCMA) also filed an exception in opposition to adding Crawford and Grant counties to the Iowa marketing area. WCMA claims that the expansion would have a substantial impact on small business and would be disruptive to normal marketing of milk. According to the exception, handlers under the Iowa order will further extend milk procurement in the Chicago marketing area. Also Iowa handlers will increase their Class I sales, which translates into a loss of Class I sales by Chicago order handlers. This in turn will reduce the Chicago order blend prices and further increase the blend price disparity between the two orders.

The comments by WCMA are speculative. First, changing the two counties from the Chicago order area to the Iowa order area will not change the regulatory status of any plants. Thus, there will be no switching of producers from one order to another. Second, the change has no effect upon the ability of Iowa handlers to entice milk supplies away from Order 30 handlers. There simply is no connection between which marketing area includes the two counties and the ability of Iowa order handlers to solicit milk supplies therein. Finally, it is unknown whether Iowa handlers will expand their sales into the Chicago marketing area. However, if SVF further expands its sales, it still could become subject to Chicago order regulation.

The Notice of Hearing invited specific comments on the probable regulatory and informational impact of the hearing proposals on small businesses. Only one handler testified directly in this regard and we have responded in that case elsewhere in this decision. Otherwise, the Department believes that any negative impact of the changes adopted in this decision will not be substantial enough to cause concern. Moreover, when various witnesses were questioned on this subject, the majority of them were either noncommittal or stated that there would be a negative impact without specifying the exact nature or scope of the impact and without offering any evidence in support of their statements. In other cases, opposing views were expressed. For example, one witness indicated that if the proposals were adopted, some supply plants regulated under the Chicago order could have difficulty finding bottling plants to accept shipments of milk that the supply plants are required to make. However, another witness expressed no concern in this regard, because, in his view, Chicago handlers always need milk.

Exceptions also were filed on behalf of the Trade Association of Proprietary Plants. However, while enumerating several points of disagreement with the recommended decision, the exceptions contained arguments that already have been considered. The exceptions, therefore, are denied.

At the hearing, and in certain briefs filed, the validity of the sales survey conducted by or for SVF was questioned. Briefly stated, the estimates were made as follows:

(1) SVF estimated consumption of fluid milk products for each county in the following manner:

—Used a national average annual per capita consumption figure (source—Milk Industry Foundation, Washington, DC) divided by 365 to get a per capita consumption figure of .622 pounds per day.

—Use population data based on the 1980 U.S. Census, adjusted to 1985 (source—Rand McNally Atlas).

—Multiplied the population for a given county by the daily per capita consumption figure, and multiplied the result by 30 to get an estimate of total monthly fluid milk products consumption.

(2) The sales figures for SVF are annual sales divided by 12 to produce a monthly figure.

(3) The estimated percentages of total sales in each county by handlers other than SVF were arrived at through discussions with customers and by on-site observations in "Practically every store of any consequence."

There is no doubt that the methodology employed by SVF did not produce perfectly accurate results. The testimony by Prairie Farms' witness indicating actual sales figures different from those estimated by SVF clearly shows this. Nevertheless, such differences did not change the critical

question of whether Iowa handlers were the dominant distributors in a given county in most cases. Where such differences appeared to raise a serious question in that regard, the county was not included in the marketing area expansion. It also must be noted that except for Prairie Farms, no one else produced specific sales data. By and large, SVF's estimates remained unchallenged and uncontradicted. Accordingly, they must be regarded in this record as reasonable estimates, except as otherwise noted in the discussions of the individual counties.

The current issue of whether Crawford and Grant Counties in Wisconsin should be in the Iowa marketing area is quite similar to an earlier question involving eight counties in northwestern Indiana. The eight counties, formerly known as the Northwestern Indiana marketing area were included in the Chicago Regional marketing area when that order was promulgated on July 1, 1968. However, only a few months later it was found that the inclusion of those counties in the Chicago Regional marketing area had caused major competitive problems for 12 small local handlers because they were not regulated in a way that insured a milk cost comparable with their main competition. This occurred because the blend price under the Chicago order would be lower than the uniform prices as computed under the former Northwestern Indiana order. For example, the decision notes that under the Chicago order the blend price at Northwestern Indiana plants "* * * is expected to average more than 30 cents below the prices received by Indiana producers shipping to Fort Wayne or Indianapolis." Accordingly, the eight counties were removed from the Chicago order and were included in the new Indiana marketing area.[1]

The record in this proceeding clearly demonstrates that SVF's Dubuque plant would be competitively disadvantaged in competing with other plants regulated by the Iowa order for local supplies of milk if it became regulated under the Chicago order. Thus, this decision parallels in many ways the 1968 decision to remove the eight northwestern Indiana counties from the Chicago Regional marketing area.

Including Crawford and Grant Counties in the Iowa marketing area, based on the fact that Iowa regulated handlers have the majority of Class I dispositions in those counties, will lessen the likelihood that the Dubuque plant will switch to regulation under the Chicago order. However, if SVF continues to expand its sales in the remainder of the Chicago marketing area, such action nevertheless could bring about such a shift.

The principal opposition to expanding the marketing area came from cooperatives and handlers subject to the Chicago Regional order. In their view, if SVF had greater route dispositions in the Chicago marketing area than in the Iowa area, then the Dubuque plant should be regulated under the Chicago order. Otherwise, SVF should reduce distribution in the Chicago marketing area. The Chicago interested parties also held that SVF has an advantage over Chicago cooperatives and handlers in competing for producer milk supplies in Wisconsin so long as SVF is regulated under the Iowa order, which has a higher uniform price than the Chicago order. They also urged that other avenues should be pursued, such as revising the location adjustment provisions of the Chicago order, merging orders, and expanding the Chicago marketing area to include the territory previously regulated by the Quad Cities-Dubuque milk order, which is part of the marketing area of the current Iowa order.

Accordingly, Counsel for CMPC moved that this proceeding should be terminated without issuing a recommended or final decision. The basis for the motion was that SVF failed to provide the data necessary to permit the Secretary to reach a decision on the merits of the proposals considered at the hearing. Alternatively, he urged that the record be kept open so that other proposals not heard could be considered at a continuation of the hearing.

The issuance of this document constitutes a denial of the motion to terminate the proceeding or to keep the record open. As noted earlier, the limited lock-in provision that is adopted cannot be made effective with respect to the Chicago order for the reason stated. Also, the proposal raised at the hearing for a permanent lock-in is denied for the reasons stated. The remaining issue, marketing area expansion, can be, and has been, appropriately decided based on the information obtained at the hearing. Therefore, it is concluded that it would serve no useful purpose to reopen the hearing to consider additional proposals at this time. Such action would only serve to delay the timely issuance of appropriate action based on the hearing record.

It must be recognized that the limited marketing area expansion adopted herein may not provide a permanent solution to the issues raised at this proceeding. Rather, it may serve as a stop-gap approach to SVF's problem of regulatory status while the dairy industry in the areas involved searches for a broader based longer-term solution. Some of the information introduced in this proceeding suggests that the industry needs to study the question of order mergers or other possible actions. However, there is no indication at this point that such studies are under way or that any consensus exists about what type of action to pursue in the future. Therefore, this proceeding should be completed in a timely fashion. If and when the industry is ready to pursue some other action, a new proceeding can be requested.

The Chicago interested parties also objected vigorously to the fact that the Chicago order was not open for amendment in the proceeding, especially with regard to the two Wisconsin counties considered for addition to the Iowa marketing area. In the Chicago parties' views, the Secretary could not delete those counties from the definition of the Chicago order marketing area without a proceeding to amend the Chicago order.

In response we note that all cooperatives and handlers that supply milk to or are fully regulated under the Chicago order were sent a copy of the Hearing Notice. That notice advised such parties of the nature of the proposal and invited any interested parties to participate in the hearing and to address specifically the question of whether the counties should be part of the Iowa marketing area. Even though the provisions of the Chicago order were not open for amendment, those who may be directly affected by this proceeding were so notified and provided an opportunity to testify or otherwise submit evidence regarding the proposals submitted by SVF. No one was denied an opportunity to be heard on this issue.

At issue is the question of which mechanism to employ to implement findings based on a public hearing. This decision finds that Crawford and Grant Counties in Wisconsin should be included in the Iowa marketing area rather than in the Chicago marketing area. In order to implement these findings, two steps are necessary. One is to add the territory to the Iowa marketing area by amendment of the Iowa order. The other step involves removing the territory from the provision defining the Chicago order marketing area. This may be done either

[1] Official Notice is taken of the Assistant Secretary's decision, issued December 5, 1968, published on December 10, 1968 (33 FR 18282) on Milk in Indianapolis, Ind. (Renamed "Indiana:), Fort Wayne, Ind., and Chicago Regional Marketing Areas.

of two ways. One way is to amend the Chicago order. That cannot be done in this instance because the Chicago order was not open in this proceding. However, the Secretary is required by § 608c(16)(A)(i) of the Agricultural Marketing Agreement Act of 1937 (the Act) to terminate or suspend operation of any order or provision of an order that he finds obstructs or does not tend to effectuate the declared policy of the Act. Because it has been determined, on the basis of a properly noticed public hearing, that the two Wisconsin counties should be included in the marketing area defined by the Iowa order, it would be only logical to conclude that the two counties should not remain under the Chicago order. This finding would be implemented by terminating that part of the Chicago order which provides that the two counties in question are included under the order. Such method has an advantage in terms of timeliness and of economy in implementing a decision.

CMPC's exceptions reiterated opposition to including Crawford and Grant Counties in the Iowa marketing area. The exception contends that the termination of the two counties from the Chicago marketing area violates the notice and hearing requirements of the Act. The exception cites *Carnation Company* v. *Butz*, 372 F. Supp. 883 (D.D.C. 1974), which held unlawful the use of the suspension authority of the Act to change the pricing provisions of an order. Moreover the exception claims that there is no basis in the record to conclude that inclusion of these two counties in the Chicago Regional marketing area " * * * obstructs or does not tend to effectuate the declared policy * * * " of the Act.

In response, we disagree that the present issue is governed by *Carnation* v. *Butz*. That case specifically involved minimum prices to be paid by milk handlers to milk producers. The court rendered its decision based on its reading of section 8c(18) of the Act, which requires notice and opportunity for a hearing when adjusting prices. In the present document we are not involved in a pricing issue. In the Carnation opinion, the Court also held that the standard of review in determining whether removal of order provisions through suspension without notice and hearing is proper is " * * * whether that removal has the effect of producing a new order materially different from the old." The termination of the two counties from the Chicago marketing area does not alter the Chicago order in a material way. In response to CMPC's second point, we would reiterate that the finding that the two Wisconsin counties should be part of the Iowa marketing area is based on record evidence obtained at a public hearing. Having made this finding, it would be inconsistent to find at the same time that the two counties should remain part of the Chicago marketing area. Therefore, this exception also is denied.

3. *Location adjustment revision.* The order should amend to specify that the territory in Whiteside County, Illinois, which is being added to the marketing area, should be included in Zone 2 for location adjustment pricing purposes. The other Illinois counties in the marketing area are in Zone 2 now.

Aside from proponent's brief statement, no one else addressed this proposal. Currently there are no Iowa order pool plants in the 13 townships of Whiteside County. Thus, addition of these townships to Zone 2 (minus 7 cents) will not change the Class I or uniform price of any handlers fully regulated under the Iowa order.

This change is necessary to assure proper price alignment should there ever be a pool plant, or a nonpool plant that handles surplus milk pooled under the Iowa order, located in the portion of Whiteside County that will be in the marketing area. The townships are adjacent to other territory in Illinois and Iowa that are in Zone 2. For these reasons, the proposal should be adopted.

4. *Whether an emergency exists to warrant the omission of a recommended decision and the opportunity to file written exception with respect to issue number 1.* The notice of hearing stated that evidence will be taken to determine whether emergency marketing conditions exist that would warrant the omission of a recommended decision under the rules of practice and procedure with respect to Proposal No. 2 (plant lock-in). Although this decision provides for the two month lock-in as modified, the provision would have no application until such time as the Chicago order may be amended to provide for an accommodating lock-out provision. Several parties objected to the request by SVF for the omission of a recommended decision. We conclude that omitting a recommended decision would serve no useful purpose. There can be no justification for adopting and implementing on an emergency basis a provision that cannot be utilized in the foreseeable future. Accordingly, a recommended decision has been issued.

Swiss Valley Farms took exception to the conclusion that omitting a Recommended Decision would serve no useful purpose. The exception indicated that omission of a Recommended Decision would have expedited the change in marketing area. The Hearing Notice clearly stated that that omission of a Recommended Decision would be considered with respect to proposal No. 2, which was the lock-in proposal. Emergency action to change the marketing area was not contemplated. Accordingly, this exception must be denied.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Iowa order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except when they may conflict with those set forth herein.

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity or pure and wholesome milk, and be in the public interest;

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, a marketing agreement upon which a hearing has been held; and

(d) All milk and milk products handled by handlers, as defined in the tentative marketing agreement and the order as hereby proposed to be amended, are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products.

Rulings on Exceptions

In arriving at the findings and conclusions, and the regulatory provisions of this decision, each of the exceptions received was carefully and fully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with any of the exceptions, such exceptions are hereby overruled for the reasons previously stated in this decision.

Marketing Agreement and Order

Annexed hereto and made a part hereof are two documents, a Marketing Agreement regulating the handling of milk, and an Order amending the order regulating the handling of milk in the Iowa marketing area, which have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire decision and the two documents annexed hereto be published in the **Federal Register.**

Determination of Producer Approval and Representative Period

April 1989 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended and as hereby proposed to be amended, regulating the handling of milk in the Iowa marketing area is approved or favored by producers, as defined under the terms of the order (as amended and as hereby proposed to be amended), who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

List of Subjects in 7 CFR Part 1079

Milk marketing orders, Milk, Dairy products.

Signed at Washington, DC, on November 20, 1989.

John E. Frydenlund,

Deputy Assistant Secretary Marketing and Inspection Services.

Order Amending the Order Regulating the Handling of Milk in the Iowa Marketing Area

(This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.)

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) Findings. A public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Iowa marketing area. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure (7 CFR part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the said marketing area; and the minimum prices specified in the order as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

(3) The said order as hereby amended regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held; and

(4) All milk and milk products handled by handlers, as defined in the order as hereby amended, are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products.

Order Relative to Handling

It is therefore ordered that on and after the effective date hereof, the handling of milk in the Iowa marketing area shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby amended, as follows:

The provisions of the proposed marketing agreement and order amending the order contained in the recommended decision issued by the Administrator, on April 12, 1989 and published in the **Federal Register** on April 18, 1989 (54 FR 15417), shall be and are the terms and provisions of this order, amending the order, and are set forth in full herein.

PART 1079—[AMENDED]

1. The authority citation for 7 CFR part 1079 continues to read as follows:

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

2. Amend § (1079.2) by revising paragraphs (a) and (b), and adding paragraphs (c) and (d) to read as follows:

§ 1079.2 Iowa marketing area.

* * * * *

(a) The Iowa counties of: Adair, Adams, Allamakee, Appanoose, Audubon, Benton, Black Hawk, Boone, Bremer, Buchanan, Calhoun, Carroll, Cedar, Cerro Gordo, Chickasaw, Clarke, Clayton, Clinton, Dallas, Davis, Decatur, Delaware, Des Moines, Dubuque, Fayette, Floyd, Franklin, Greene, Grundy, Guthrie, Hamilton, Hancock, Hardin, Henry, Humboldt, Iowa, Jackson, Jasper, Jefferson, Johnson, Jones, Keokuk, Linn, Louisa, Lucas, Madison, Mahaska, Marion, Marshall, Monroe, Muscatine, Pocahontas, Polk, Poweshiek, Ringgold, Scott, Story, Tama, Taylor, Union, Van Buren, Wapello, Warren, Washington, Wayne, Webster, Wright, and the city of Osage in Mitchell County.

(b) The Illinois counties of: Henderson, Henry, Mercer, Rock Island, and the city of East Dubuque in Jo Daviess County, and the townships of Fulton, Ustick, Clyde, Genesee, Mount Pleasant, Union Grove, Garden Plain, Lyndon, Fenton, Newton, Prophetstown, Portland and Erie in Whiteside County.

(c) The Missouri counties of: Grundy, Harrison, Mercer, Putnam, Schuyler.

(d) The Wisconsin counties of: Crawford and Grant.

3. In § 1079.7, revise paragraph (d) to read as follows:

§ 1079.7 Pool plant.

* * * * *

(d) The term "pool plant" shall not apply to the following plants:

(1) A producer-handler plant;

(2) A governmental agency plant;

(3) A plant qualified as a pool plant pursuant to paragraph (a) in this section which also meets the pooling requirements of another Federal order and from which during the month a greater quantity of fluid milk products,

except filled milk, was disposed of as route disposition, in such other marketing area and to pool plants qualified on the basis of route disposition in such other marketing area than was so disposed of from such plant in the Iowa marketing area as route disposition, or to pool plants qualified on the basis of route disposition, except that if such plant was subject to all the provisions of this part in the immediately preceding month, it shall continue to be subject to all the provisions of this part until the third consecutive month in which a greater proportion of its fluid milk products disposition, except filled milk, is made in the above described manner in such other marketing area, unless, notwithstanding the provisions of this paragraph, it is regulated by such other order;

(4) A plant qualified as a pool plant pursuant to this section which also meets the pooling requirements of another Federal order and from which during the month a greater quantity of fluid milk products, except filled milk, was disposed of as route disposition in this marketing area, and to pool plants qualified on the basis of route disposition in this marketing area than was so disposed of in such other Federal order marketing area but which plant is, nevertheless, fully regulated under such other Federal order; and

(5) That portion of a plant that is physically separated from the Grade A portion of such plant, is operated separately, and is not approved by any regulatory agency for the receiving, processing, or packaging of any fluid milk product for Grade A disposition.

4. In § 1079.52, revise paragraph (a)(2)(ii) to read as follows:

§ 1079.52 Plant location adjustments for handlers.

(a) * * *

(2) * * *

(ii) The Illinois counties of Henry, Mercer, Rock Island, and the townships of Fulton, Ustick, Clyde, Genesee, Mount Pleasant, Union Grove, Garden Plain, Lyndon, Fenton, Newton, Prophetstown, Portland and Erie in Whiteside County.

* * * * *

Marketing Agreement Regulating the Handling of Milk In the Iowa Marketing Area

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of §§ 1079.1 to 1079.86, all inclusive, of the order regulating the handling of milk in the Iowa marketing area (7 CFR part 1079) which is annexed hereto; and

II. The following provisions.

§ 1079.87 Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he handled during the month of April 1989, _____ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Director, or Acting Director, Dairy Division, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

§ 1079.88 Effective date

This marketing agreement shall become effective upon the execution of a counterpart hereof by the Secretary in accordance with § 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

(SEAL)

(Signature)

By _____

(Name) (Title)

(Address)

Attest _____

Date _____

[FR Doc. 89-27767 Filed 11-27-89; 8:45 am]

BILLING CODE 3410-02-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Ch. I

[Summary Notice No. PR-89-11]

Petition for Rulemaking; Summary of Petitions Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for rulemaking received.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for rulemaking (14 CFR part 11), this notice contains a summary of certain petitions requesting the initiation of rulemaking procedures for the amendment of specified provisions of the Federal Aviation Regulations and of denials or withdrawals of certain petitions previously received. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATE: Comments on petitions received must identify the petition docket number involved and must be received on or before January 29, 1990.

ADDRESS: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC-10), Petition Docket No. 25784, 800 Independence Avenue SW., Washington, DC 20591.

FOR FURTHER INFORMATION: The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-10), Room 915G, FAA Headquarters Building (FOB-10A), 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267-3132.

This notice is published pursuant to paragraphs (b) and (f) of section § 11.27 of part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, DC, on November 22, 1989.

Pamela Trebbe,

Acting Manager, Program Management Staff, Office of the Chief Counsel.

Docket No.: 25784.

Petitioner: Steven J. Wolff, *et al.*

Sections of the FAR Affected: 14 CFR 13.15 and 13.19.

Description of Petition: To consolidate FAR §§ 13.15 and 13.19 into a single rule, which will delineate when, under the provisions of the Federal Aviation Act of 1958, a violator of the Federal Aviation Regulations (FAR) will be subject to civil penalty, and when a violator of the FAR will be subject to suspension or revocation of his or her airman certificate(s). The proposal would also require the FAA to state the policy considerations it weighs before a decision is made as to whether to initiate civil penalty or certificate action, and to describe an airman's appeal rights if he or she avails himself or herself of the opportunity to contest such action. The proposal would further require the FAA to state under what circumstances it intends to invoke its emergency powers under the Federal Aviation Act.

[FR Doc. 89-27884 Filed 11-27-89; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 39

[Docket No. 89-NM-224-AD]

Airworthiness Directives; Boeing of Canada, Ltd., de Havilland Division, Model DHC-7 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to adopt a new airworthiness directive (AD), applicable to all de Havilland Model DHC-7 series airplanes, which would require repetitive visual inspections of the right hand main landing gear (MLG) frame and attachment bolts to detect heat damage, and repair, if necessary; and would require eventual modification, which, when installed, would terminate the need for the repetitive inspections. This proposal is prompted by reports of heat damage to the right MLG frame bolts due to electrical arcing across air gaps between the bolts and frame. This condition, if not corrected, could result in degradation of the structural integrity of the right hand MLG frame and attachment bolts and possible malfunction of the MLG.

DATES: Comments must be received no later than January 16, 1990.

ADDRESSES: Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, attention: Airworthiness Rules Docket No. 89-NM-224-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from Boeing of Canada, Ltd., de Havilland Division, Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada.

This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the FAA, New England Region, New York Aircraft Certification Office, 181 South Franklin Avenue, Valley Stream, New York.

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

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

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 post card on which the following statement is made: "Comments to Docket Number 89-NM-224-AD." The post card will be date/time stamped and returned to the commenter.

Discussion

Transport Canada, which is the airworthiness authority of Canada, in accordance with existing provisions of a bilateral airworthiness agreement, has notified the FAA of an unsafe condition which may exist on all de Havilland Model DHC-7 series airplanes. There has been a report of heat damage to the right main landing gear (MLG) frame bolts due to electrical arcing, caused by external power receptacles being grounded to the MLG frame, which generated small electrical acrs across air gaps between the bolts and frame. This condition, if not corrected, could result in degradation of the structural integrity of the right hand MLG frame and attachment bolts, and possible malfunction of the MLG.

Boeing of Canada, Ltd., de Havilland Division, has issued Service Bulletin No. 7-24-66, Revision B, dated June 23, 1989, which describes procedures for repetitive inspections for heat damage to the right MLG frame and attachment bolts, and repair, if necessary. This service bulletin also describes procedures for relocating the external power ground studs to the nacelle longeron; once this modification is accomplished, the repetitive inspections may be discontinued. Transport Canada has classified this service bulletin as mandatory, and has issued Airworthiness Directive No. CF-89-04 addressing this subject.

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

Since this condition is likely to exist or develop on other airplanes of the same type design registered in the United States, an AD is proposed which would require repetitive inspections for heat damage to the MLG frame bolts, and repair, if necessary; and modification (in accordance with the service bulletin previously described), which would constitute terminating action for the repetitive visual inspections.

It is estimated that 43 airplanes of U.S., registry would be affected by this AD, that it would take approximately 3 manhours per airplane to accomplish the required initial inspection and 4 manhours per airplane to accomplsh the required initial inspection and 4 manhours to accomplish the modification, and that the average labor cost would be $40 per manhour. The modification kit will be supplied at no cost to the operators. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $12,040.

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 "major rule" under Executive Order 12291; (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 evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

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 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 48 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

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

Boeing of Canada, Ltd., De Havilland Division: Applies to all de Havilland Model DHC-7 series airplanes, certificated in any category. Compliance is required as indicated unless previously accomplished.

To prevent possible malfunction of the right main landing gear (MLG), accomplish the following:

A. Within 100 landings after the effective date of this AD, and thereafter at intervals not to exceed 500 landings, conduct a visual inspection of the right MLG frame and attachment bolts, in accordance with paragraph A. of the Accomplishment Instructions in de Havilland Service Bulletin No. 7-24-66, Revision B, dated June 23, 1989.

1. If no damage is found, reassemble parts and return the airplane to service.

2. If damage is found, replace with serviceable parts prior to further flight, in accordance with the service bulletin.

B. Within 180 days after the effective date of this AD, relocate the external power grounding studs by incorporating Modification No. 7/2577, in accordance with paragraph B. of the Accomplishment Instructions in de Havilland Service Bulletin No. 7-24-66, Revision B, dated June 23, 1989. Accomplishment of this modification constitutes terminating action for the repetitive inspections required by paragraph A., above.

C. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, New York Aircraft Certification Office, ANE-170, FAA, New England Region.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who will either concur or comment and then send it to the Manager, New York Aircraft Certification Office, ANE-170.

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

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to Boeing of Canada, Ltd., de Havilland Division, Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or at the FAA, New England Region, New York Aircraft Certification Office, 181 South Franklin Avenue, Valley Stream, New York.

Issued in Seattle, Washington, on November 15, 1989.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 89-27831 Filed 11-27-89; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 341

[Docket No. 76N-052G]

RIN 0905-AA06

Cold, Cough, Allergy, Bronchodilator, and Antiasthmatic Drug Products for Over-the-Counter Human Use; Reopening of Record for Receipt of Comments Regarding the Marketing Status of Combination Drug Products Containing Promethazine Hydrochloride

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; reopening of administrative record.

SUMMARY: The Food and Drug Administration (FDA) is reopening the administrative record for over-the-counter (OTC) cold, cough, allergy, bronchodilator, and antiasthmatic combination drug products to accept additional comments and data concerning combination drug products containing promethazine hydrochloride.

DATES: Comments and data by January 29, 1990.

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

FOR FURTHER INFORMATION CONTACT: William E. Gilbertson, Center for Drug Evaluation and Research (HFD-210), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-295-8000.

SUPPLEMENTARY INFORMATION: In the Federal Register of August 12, 1988 (53 FR 30522), FDA published a notice of proposed rulemaking in the form of a tentative final monograph that would establish conditions under which OTC cough-cold combination drugs are generally recognized as safe and effective and not misbranded. In that document, FDA proposed OTC marketing of cough-cold combination drug products containing promethazine hydrochloride. Before the proposal, such drug products had been marketed as prescription drugs only.

At the time FDA proposed OTC marketing of promethazine hydrochloride-containing cough-cold combination drug products, the agency believed that these products could be generally recognized as safe and effective for short-term (7-day) use for treating the symptoms of the common cold. In accordance with the enforcement policy set out in 21 CFR 330.13, the agency stated that it would allow the OTC marketing of promethazine-containing combination cough-cold drug products to begin.

On December 15, 1988, the agency received a citizen petition (Ref. 1) from the Public Citizen Health Research Group (HRG) and the University of Maryland SIDS Institute objecting to OTC status for promethazine-containing cough-cold drug products. The agency also received letters from a number of physicians (Refs. 2 through 8) voicing the same objection. The major concern that the petition and the letters raised was that the possibility that the use of drug products containing promethazine hydrochloride in children under 2 years of age may be associated with the occurrence of sudden infant death syndrome (SIDS), and that OTC availability of these drug products could "dramatically increase overuse" of these drug products in children this age. The petition also raised concerns about possible adverse neurological reactions to drug products containing promethazine hydrochloride, and about the use on a prescription basis of promethazine-containing drug products in children under age 2, in pregnant or nursing women, and in the elderly.

In response to these concerns, FDA held a meeting of its Pulmonary-Allergy Drugs Advisory Committee on July 31, 1989, to discuss OTC marketing of promethazine hydrochloride combination drug products. Presentations were made by FDA staff, by representatives of HRG, and by representatives of the major manufacturer of promethazine-containing drug products. The presentations addressed adverse neurological reactions associated with the use of promethazine and other

phenothiazine drugs, and the possible relationship between promethazine use in children under 2 years of age and the occurrence of SIDS. By a vote of seven to one, the advisory committee recommended to FDA that these drug products not be marketed OTC at this time. In the Federal Register of September 5, 1989 (54 FR 36762), the agency announced that promethazine-containing combination drug products for use in treating the symptoms of the common cold may not be marketed OTC at this time.

The administrative record for the proposed rule on OTC cough-cold combination drug products had several closing dates: December 12, 1988, for the submission of comments, August 14, 1989, for the submission of new data, and October 12, 1989, for the submission of comments on the new data submitted. As provided in § 330.10(a)(10)(iii) of the procedural regulations for OTC drugs (21 CFR 330.10(a)(10)(iii)), new data and comments received after August 14, 1989, and October 12, 1989, respectively, can not be included in the administrative record unless the agency reopens the record. Because the Pulmonary-Allergy Drugs Advisory Committee's recommendations of July 31, 1989, were part of the basis for the agency's decision to rescind the OTC marketing status of promethazine hydrochloride at this time, FDA is reopening the administrative record to provide an opportunity for further public comment on the advisory committee's recommendations concerning promethazine hydrochloride combination drug products. The agency has placed the transcripts of the advisory committee's July 31, 1989, meeting in the docket for this rulemaking (Ref. 9). The minutes of this meeting will be placed in the docket for this rulemaking as soon as they are completed. The agency is also reopening the administrative record for OTC cough-cold combination drug products to accept any additional available data relating to the issue of OTC marketing of combination cough-cold drug products containing promethazine hydrochloride. Accordingly, the record is reopened for the receipt of comments and data on this subject only until January 29, 1990.

This notice also serves to inform interested persons of the existence of comments, data, and information on promethazine-containing drug products; their availability for review at the Dockets Management Branch between 9 a.m. and 4 p.m. Monday through Friday, and to provide for the filing of written comments and data by January 29, 1990, on the OTC marketing of promethzine-containing cough-cold combination drug products. Three copies of all comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document.

References

(1) Comment No. CP, Docket No. 76N-052G, Dockets Management Branch.
(2) Comment No. C00205, Docket No. 76N-052G, Dockets Management Branch.
(3) Comment No. C00206, Docket No. 76N-052G, Dockets Management Branch.
(4) Comment No. C00207, Docket No. 76N-052G, Dockets Management Branch.
(5) Comment No. C00208, Docket No. 76N-052G, Dockets Management Branch.
(6) Comment No. C00209, Docket No. 76N-052G, Dockets Management Branch.
(7) Comment No. C00212, Docket No. 76N-052G, Dockets Management Branch.
(8) Comment No. C00214, Docket No. 76N-052G, Dockets Management Branch.
(9) Transcripts of the July 31, 1989 Meeting of the FDA Pulmonary-Allergy Drugs Advisory Committee, Docket No. 76N-052G, Dockets Management Branch.

Dated: November 20, 1989.

Ronald S. Chesemore,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 89-27808 Filed 11-27-89; 8:45 am]
BILLING CODE 4160-01-M

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21 CFR Part 444

[Docket No. 89N-0448]

Certain Neomycin Sulfate-Polymyxin B Sulfate Containing Ophthalmic Dosage Forms; Revision of Upper Potency Specification

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend the antibiotic drug regulations by revising the upper potency specification for certain neomycin sulfate-polymyxin B sulfate ophthalmic dosage forms. This action is being taken at the request of a manufacturer and to make the upper potency specification for these products consistent with other neomycin sulfate ophthalmic dosage forms.

DATES: Written comments by January 29, 1990; requests for an informal conference by December 28, 1989.

ADDRESSES: Written comments and requests for an informal conference to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Peter A. Dionne, Center for Drug Evaluation and Research (HFD-520), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-295-8046.

SUPPLEMENTARY INFORMATION: At the request of a manufacturer, FDA is proposing to amend the antibiotic drug regulations by revising the upper potency specification for certain neomycin sulfate-polymyxin B sulfate ophthalmic dosage forms.

The individual monographs (regulations) for these products currently specify an upper potency limit for neomycin sulfate and polymyxin B sulfate of 125 percent of label claim. To bring its products in line with the upper potency specifications of other neomycin sulfate ophthalmic products, the manufacturer requests that the upper potency limit for neomycin sulfate and polymyxin B sulfate be increased to 130 percent of label claim.

FDA has reviewed the manufacturer's request and has tentatively concluded that the requested change is acceptable. Therefore, FDA is proposing that the subject monographs for neomycin sulfate-polymyxin B sulfate ophthalmic dosage forms be amended to revise the upper potency specification for neomycin sulfate and polymyxin B sulfate from 125 percent to 130 percent of label claim. The agency proposes to revise 21 CFR 444.342h(a)(1), 444.342i(a)(1)(ii), 444.342j(a)(1), and 444.342k(a)(1).

Environmental Impact

The agency has determined under 21 CFR 25.24(c)(6) that this proposed 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.

Economic Impact

The agency has considered the economic impact of this proposed rule and has determined that it does not require a regulatory flexibility analysis, as defined in the Regulatory Flexibility Act (Pub. L. 96-354). Specifically, the proposal would impose an insubstantial amendment to an existing technical requirement without imposing a more stringent requirement. Accordingly, the agency certifies that this regulation, if promulgated, will not have a significant economic impact on a substantial number of small entities.

Submitting Comments or Requests for Conference

Interested persons may on or before January 29, 1990, submit to the Dockets

Management Branch (address above) written comments regarding this proposal. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Interested persons may also, on or before December 28, 1989, submit to the Dockets Management Branch a request for an informal conference. The participants in an informal conference, if one is held, will have until January 29, 1990, or 30 days after the day of the conference, whichever is later, to submit their comments.

List of Subjects in 21 CFR Part 444

Antibiotics.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR Part 444 be amended as follows:

PART 444—OLIGOSACCHARIDE ANTIBIOTIC DRUGS

1. The authority citation for 21 CFR part 444 continues to read as follows:

Authority: Sec. 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357).

2. Section 444.342h is amended in paragraph (a)(1) by revising the second and third sentences to read as follows:

§ 444.342(h) Neomycin sulfate-polymyxin B sulfate ophthalmic ointment.

(a) * * *

(1) * * * Its neomycin sulfate content is satisfactory if it is not less than 90 percent and not more than 130 percent of the number of milligrams of neomycin that it is represented to contain. Its polymyxin B sulfate content is satisfactory if it is not less than 90 percent and not more than 130 percent of the number of milligrams of polymyxin B that it is represented to contain. * * *

* * * * *

3. Section 444.342i is amended in paragraph (a)(1)(ii) by revising the third and fourth sentences to read as follows:

§ 444.342i Neomycin sulfate-polymyxin B sulfate ophthalmic solution.

(a) * * *

(1) * * *

(ii) * * *Its neomycin sulfate content is satisfactory if it is not less than 90 percent and not more than 130 percent of the number of milligrams of neomycin that it is represented to contain. Its polymyxin B sulfate content is satisfactory if it is not less than 90 percent and not more than 130 percent of the number of milligrams of polymyxin B that it is represented to contain. * * *

* * * * *

4. Section 444.342j is amended in paragraph (a)(1) by revising the third and fourth sentences to read as follows:

§ 444.342j Neomycin sulfate-polymyxin B sulfate-dexamethasone ophthalmic suspension.

(a) * * *

(1) * * * Its neomycin sulfate content is satisfactory if it is not less than 90 percent and not more than 130 percent of the number of milligrams of neomycin that it is represented to contain. Its polymyxin B sulfate content is satisfactory if it is not less than 90 percent and not more than 130 percent of the number of milligrams of polymyxin B that it is represented to contain. * * *

* * * * *

5. Section 444.342k is amended in paragraph (a)(1) by revising the second and third sentences to read as follows:

§ 444.342k Neomycin sulfate-polymyxin B sulfate-dexamethasone ophthalmic ointment.

(a) * * *

(1) * * * Its neomycin sulfate content is satisfactory if it is not less than 90 percent and not more than 130 percent of the number of milligrams of neomycin that it is represented to contain. Its polymyxin B sulfate content is satisfactory if it is not less than 90 percent and not more than 130 percent of the number of milligrams of polymyxin B that it is represented to contain. * * *

* * * * *

Dated: November 15, 1989.

Sammie R. Young,

Deputy Director, Office of Compliance Center for Drug Evaluation and Research.

[FR Doc. 89-27764 Filed 11-27-89; 8:45 am]

BILLING CODE 4160-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region II Docket No. 92; FRL-3691-6]

Approval and Promulgation of Implementation Plans; Revision to the State of New York Implementation Plan for Ozone and Carbon Monoxide

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is today announcing that it is proposing to approve a request by New York to revise its State Implementation Plan (SIP) for attainment of the ozone and carbon monoxide standards in the New York City Metropolitan area. The revision proposes modifications to certain enforcement procedures in the operation of New York's motor vehicle emission inspection program for a two-year trial period. These modifications are not expected to have any adverse impact on air quality.

DATES: Comments must be received by December 28, 1989.

ADDRESSES: All comments should be addressed to: Mr. William J. Muszynski, P.E., Acting Regional Administrator, Environmental Protection Agency, Region II Office, 26 Federal Plaza, New York, New York 10278.

Copies of the state submittal are available at the following addresses for inspection during normal business hours:

Environmental Protection Agency, Region II Office, Air Programs Branch, 26 Federal Plaza, room 1005, New York, New York 10278.

New York State Department of Environmental Conservation, Division of Air Resources, 50 Wolf Road, Albany, New York 12233.

FOR FURTHER INFORMATION CONTACT: Mr. William S. Baker, Chief, Air Programs Branch, Environmental Protection Agency, 26 Federal Plaza, room 1005, New York, New York 10278, (212) 264-2517.

SUPPLEMENTARY INFORMATION:

Background

On November 5, 1979, as part of its State Implementation Plan (SIP) for Ozone and Carbon Monoxide, the State of New York submitted to the Environmental Protection Agency (EPA) information which specified the design and operational procedures for the State's motor vehicle emission inspection and maintenance (I/M) program in the New York City metropolitan area (NYCMA). Included among these were monitoring and enforcement procedures such as periodic (approximately once every two months) unannounced inspection visits by New York State Department of Motor Vehicle (NYSDMV) personnel and unannounced, concealed identity, inspections designed to ensure that private inspection stations properly performed their emissions inspections, adequately maintained the exhaust analyzers and kept satisfactory records.

On January 1, 1981, the I/M program began with mandatory inspections and voluntary repair. On January 1, 1982, mandatory inspection and repair became effective.

On February 15, 1984, EPA received a SIP revision request from New York State which proposed modifications to the I/M monitoring and enforcement procedures used by the NYSDMV. Specifically, the revisions reduced the periodic monitoring visits at stations from once every two months to once every four months, increased the concealed identity monitoring visits to ensure that at least 25 percent of all inspection stations received an undercover investigation every year, increased the oversight of stations with less than satisfactory performance and expanded the public's awareness of the consumer complaint services offered by the NYSDMV. Other aspects of the monitoring and enforcement procedures remained unchanged. EPA approved the request on June 1, 1984 (49 FR 22812).

The State Submittal

On September 19, 1988 the Director of the Division of Air Resources of the New York State Department of Environmental Conservation (NYSDEC) submitted a SIP revision request proposing to alter the nature and frequency of I/M inspection station audits for a two year trial period. This revision would require NYSDMV personnel to perform two unannounced, expanded, audits of each inspection station per year, and to conduct 1,800 concealed identity inspections annually, with at least 25 percent of these concealed identity inspections performed with a vehicle that has been set to fail the emissions test.

It should be noted that while the frequency of inspection station audits decreases under this proposal, the State is proposing to perform more intensive audits that would focus on accounting for inspection records and stickers in far more detail than could normally be undertaken during a routine audit. In order to implement the proposed expanded audit program, NYSDMV has committed to increase staffing by about 40 percent over present levels. As a result, the State expects audit related enforcement actions to increase by about 81 percent over present levels.

The NYSDEC stated that a shift to concealed identity inspections would ensure the most effective use of field staff for improving the I/M program. The State believes that concealed identity inspections tend to identify serious violations, especially with respect to improper inspections, while program audits rarely identify improper inspections but, rather, identify record keeping problems. By increasing concealed identify inspections from 1100 to 1800 annually, the State expects concealed identity related enforcement actions to increase by about 64 percent over present levels.

The State expects that the combination of expanded audits and increased concealed identity inspections will increase overall enforcement actions by 73 percent. However, the State has found that it cannot quantify the effect of these modifications on air quality. Nonetheless, the State believes that the increased effectiveness of enforcement associated with the modifications will reduce the number of incomplete and improperly performed inspections and, therefore will lead to some improvements in air quality.

Finding

EPA has reviewed the State's submittal and finds that the revised enforcement and monitoring procedures should improve the overall quality of the I/M program and, thus, provide air quality benefits equivalent to those committed to in New York's SIP. This action does not preclude comprehensive program restructuring that might be necessary as the State prepares for the submittal of its September 1991 SIP revision. Consequently, this SIP revision is being proposed for approval only with the understanding that the program is being executed on a two-year trial basis. At the end of this two-year period, EPA will evaluate the results of the trial and decide whether the modifications should be a permanent component of the State's enforcement procedures. Any future actions taken in this respect will be announced in the **Federal Register.**

EPA is soliciting public comments on its proposed action. Comments will be considered before taking final action. Interested parties may participate in the federal rulemaking procedure by submitting written comments to the address noted at the beginning of today's notice.

Conclusion

EPA is today proposing to find that New York's revised I/M enforcement and monitoring procedures adequately fulfill the SIP commitment made by the State.

This notice is issued as required by section 110 of the Clean Air Act, as amended. The Administrator's decision regarding the approval of this plan revision is based on its meeting the requirements of section 110 of the Clean Air Act, and 40 CFR part 51.

Under 5 U.S.C. section 605(b), I certify that this SIP revision will not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709.)

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

List of Subjects in 40 CFR Part 52

Air pollution control, Carbon monoxide, Hydrocarbons.

Authority: 42 U.S.C. 7401–7642.

Dated: January 13, 1989.

Editorial note: This document was received by the Office of the Federal Register on November 27, 1989.

William J. Muszynski,

Acting Regional Administrator.

[FR Doc. 89–27852 Filed 11–27–89; 8:45 am]

BILLING CODE 6560-50-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA-230-09-4311-02]

RIN 1004-AB48

43 CFR Parts 5400, 5420, 5450, 5460, and 9230

Sales of Forest Products, General: Preparation for Sale, Award of Contract, Sales Administration and Trespass

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rulemaking.

SUMMARY: This proposed rulemaking would amend provisions of the existing regulations in 43 CFR part 5400—Sales of Forest Products; General, part 5420—Preparation for Sale, part 5450—Award of Contract, part 5460—Sales Administration, and 9230—Trespass. It is necessary to amend the existing regulations for more effective control of the trespass of timber or other vegetative resources. The proposed rulemaking would provide minimum standards for management and protection of timber and other vegetative resources, and provide for penalties, which may be supplemented by State law, for trespass.

DATE: Comments should be submitted by January 29, 1990. Comments received or postmarked after the above date may not be considered in the decisionmaking process on the final rulemaking.

ADDRESSES: Comments should be sent to: Director (140), Bureau of Land Management, Room 5555, Main Interior Building, 1800 C Street, NW., Washington, DC 20240.

Comments will be available for public review at the above address during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Richard Bird, (202) 653-8864, for technical or policy information, or Ted Hudson, (202) 343-8735, for procedural information.

SUPPLEMENTARY INFORMATION: The Department of the Interior has determined that the existing regulations on the trespass of forest products on the public lands are inadequate. Under existing regulations, only the trespass of timber suitable for sawlog and lumber manufacture, violation of free use permits, and trespass activity in the State of Alaska are addressed in sufficient detail. Existing regulations defer to State law action on the trespass of sawlogs except in those situations where State law does not exist. In many situations State law does not provide a sufficient deterrent. Trespass associated with the issuance of standard Bureau of Land Management contracts or permits for the harvest of timber or other vegetative resources for such other purposes as fuelwood and/or Christmas trees is not addressed.

The proposed rulemaking would provide guidance concerning the sale of other vegetative resources and timber products whether sold by contract or under a permit. Recognizing that all permits are contracts but that contracts are not necessarily permits, further explanation of permit contents, requiements, and stipulations, and violation penalties would be addressed. In addition, definitions are provided to clarify several terms used in the proposed rulemaking.

The principal author of this proposed rulemaking is Gary Ryan of the Division of Forestry, assisted by the staff of the Division of Legislation and Regulatory Management, Bureau of Land Management.

It is hereby determined that this proposed rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment, and that no detailed statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) is required.

The Department of the Interior has determined under Executive Order 12291 that this document is not a major rule, and under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) that it will not have a significant economic impact on a substantial number of small entities. Additionally, as required by Executive Order 12630, the Department has determined that the rulemaking would not cause a taking of private property.

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3501 et seq.

List of Subjects in 43 CFR

Part 5400

Administrative practice and procedure, Forests and forest products, Public lands, Reporting and recordkeeping requirements.

Part 5420

Forests and forest products, Government contracts, Public lands, Reporting and recordkeeping requirements.

43 CFR Part 5450

Forests and forest products, Government contracts, Public lands, Reporting and recordkeeping requirements, Surety bonds.

43 CFR Part 5460

Forests and forest products, Government contracts, Public lands.

43 CFR Part 9230

Penalties, Public lands.

Under the authorities cited below, parts 5400, 5420, 5450, and 5460 of Group 5000, subchapter E, and part 9230 of Group 9200, subchapter I, chapter II of title 43 of the Code of Federal Regulations are proposed to be amended as set forth below:

PART 5400—[AMENDED]

1. The authority citation for part 5400 is revised to read as follows:

Authority: 61 Stat. 681, as amended, 69 Stat. 367, 48 Stat. 1269, sec. 11, 30 Stat. 414, as amended, sec. 5, 50 Stat. 875; 30 U.S.C. 601 et seq., 43 U.S.C. 315, 1181a, 16 U.S.C. 607a, and 43 U.S.C. 1701 et seq.

2. Section 5400.0-3 is amended by adding paragraph (e) to read as follows:

§ 5400.0-3 [Amended]

* * * * *

(e) Authority to enforce the provisions of this title is contained in the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1701 et seq.).

3. Section 5400.0-5 is amended by removing the lettered paragraph designations while retaining the numbered subparagraph designations, reordering the paragraphs in alphabetical order of the terms defined, italicizing the defined terms at the beginning of each definition paragraph, by revising the definitions of "public lands" and "other vegetative resources," and by adding the following paragraphs in alphabetical order, to read as follows:

§ 5400.0-5 Definitions.

Affiliate means a business entity including but not limited to an individual, partnership, corporation, or association, which controls or is controlled by a purchaser, or, along with a purchaser, is controlled by a third business entity.

* * * * *

Commercial use means use intended for resale, barter, or trade, or for profit.

* * * * *

Incidental use means personal use of other vegetative resources on the site where they are obtained, or, if they are transported to a secondary location, personal use of the resources within a reasonable period of time by the person obtaining them.

* * * * *

Nonwillful means an action which is inadvertent, mitigated in character by the belief that the conduct is reasonable or legal, or reflective of an honest mistake.

* * * * *

Other vegetative resources means all vegetative material that is not normally measured in board feet, but can be sold or removed from public lands by means of the issuance of a contract or permit.

Permit means authorization in writing by the authorized officer or other person authorized by the United States Government, and is a contract between the purchaser and the United States.

Personal use means use other than for sale, barter, trade, or obtaining a profit.

Product value means the stumpage value of timber or the fair market value of other vegetative resources.

Public lands means the public domain and its surface resources under the jurisdiction of the Bureau of Land Management and lands from which timber or other vegetative resources may be sold in accordance with the provisions of § 5400.0-3.

Purchaser means a business entity including, but not limited to, an individual, partnership, corporation, or association that buys Federal timber.

* * * * *

Trespass means the severance, removal, or unlawful use of timber or other vegetative resources without the consent (authorization) of the Federal Government. In addition, trespass can result from failure to comply with contract or permit requirements, causing direct injury or damage to timber or other vegetative resources, or causing undue environmental degradation.

Trespasser means any person, partnership, association, or corporation responsible for committing a trespass.

Willful means an action that is done knowingly and constitutes the voluntary or conscious performance of a prohibited act, including indifference to or the reckless disregard for the law.

§ 5401.0-6 [Amended]

4. Section 5401.0-6 is amended by inserting the phrase "or other vegetative resources" after the word "timber" in the fourth (last) sentence of paragraph (a).

5. Section 5402.0-6 is amended by revising paragraph (c)(2) to read as follows:

§ 5402.0-6 Policy.

* * * * *

(c) * * *

(2) The contract is for the disposal of timber or other vegetative resources, for which it is impracticable to obtain competition.

PART 5420—[AMENDED]

6. The authority citation for part 5420 is revised to read as follows:

Authority: 61 Stat. 681, as amended, 69 Stat. 367; Sec. 5, 50 Stat. 875; 30 U.S.C. 601 et seq.; 43 U.S.C. 1181e.

§ 5424.0-5 [Removed]

7. Section 5424.0-5 is removed.

8. Section 5424.0-6 is revised to read as follows:

§ 5424.0-6 Policy.

(a) All timber sales shall be made on contract or permit forms approved by the Director, Bureau of Land Management.

(b) Other than for incidental use, the severance and/or removal of any vegetative resource for personal or commercial use requires a written contract or permit issued by the authorized officer or other person authorized by the United States. All contracts or permits shall contain the following:

(1) The name of the purchaser of his/her authorized representative with complete mailing address.

(2) The specific vegetative resources authorized for removal and their respective quantities and values.

(3) The specific location from which the vegetative resources are to be removed.

(4) The term for which the contract or permit is valid.

(5) Contract or permit conditions and stipulations.

(6) Signature of purchaser or authorized representative.

(c) The authorized officer may include additional provisions in the contract or permit to cover conditions peculiar to the sale area, such as road construction, logging methods, silvicultural practices, reforestation, snag felling, slash disposal, fire prevention, fire control, and the protection of improvements, watersheds, recreational values, and the prevention of pollution or other environmental degradation.

(d) The contract or permit form and any additional provisions shall be made available for inspection by prospective bidders during the advertising period. When sales are negotiated all additional provisions shall be made part of the contract or permit.

(e) Except for such specific quantities of grades and species of unprocessed timber determined to be surplus to domestic lumber and plywood manufacturing needs, each timber sale contract shall include provisions that prohibit:

(1) The export of any unprocessed timber harvested from the area under contract;

(2) The use of any timber of sawing or peeler grades, sold pursuant to the contract, as a substitute for timber from private lands which is exported or sold for export by the purchaser, an affiliate of the purchaser, or any other parties.

PART 5450—[AMENDED]

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

Authority: Sec. 5, 50 Stat. 875; 61 Stat. 681, as amended; 69 Stat. 367; 43 U.S.C. 1181e; 30 U.S.C. 601 et seq.

10. Section 5450.1 is amended by adding paragraph (c) to read as follows:

§ 5450.1 Pre-award qualifications of high bidder.

* * * * *

(c) Award of contracts or permits on negotiated sales occurs upon the execution of the contract or permit. Terms and conditions shall reflect the contractor's ability to perform, and shall require prevention or mitigation of environmental degradation associated with the removal of the timber or other vegetative resource.

PART 5460—[AMENDED]

11. The authority citation for part 5460 is revised to read as follows:

Authority: Sec. 5, 50 Stat. 875; 61 Stat. 681, as amended; 69 Stat. 367; 43 U.S.C. 1181e; 30 U.S.C. 601 et seq.

12. Part 5460 is amended by adding new subpart 5462 to read as follows:

PART 5462—CONTRACT AND PERMIT REQUIREMENTS

§ 5462.1 Contract and permit compliance.

(a) The following minimum requirements shall be met in order to assure contract or permit compliance;

(1) Contracts or permits shall be executed by authorized purchasers or their formally designated representatives.

(2) For other than lump sum sales, only the specific timber or other vegetative resource designated for removal, in their respective quantities, shall be removed.

(3) Timber or other vegetative resources shall be removed only from designated locations or areas.

(4) Transportation of timber or other vegetative resources shall be in accordance with contract or permit requirements and shall include appropriate load or product tagging if required.

(5) Contract or permit stipulations and specifications shall be adhered to.

(6) Payments shall be made in accordance with Subpart 5461 of this title.

(b) All contract and permit provisions and special provisions shall be adhered to unless the contract is modified in accordance with Part 5470 of this title.

PART 9230—[AMENDED]

13. The authority citation for part 9230 is revised to read as follows:

Authority: R.S. 2478; 43 U.S.C. 1201; 43 U.S.C. 1701 et seq.; 18 U.S.C. 1851-1858.

Subpart 9239—[Amended]

§ 9239.0-7 [Amended]

14. Section 9239.0-7 is amended by inserting after the word "timber" in the first sentence the phrase "or other vegetative resources."

§ 9239.0-8 [Amended]

15. Section 9239.0-8 is amended by inserting in the first sentence between the word "timber" and the comma immediately following it the phrase "or other vegetative resources."

§ 9239.1 [Amended]

16. Section 9239.1 is amended by revising the heading to read: "Timber and other vegetative resources."

17. Section 9239.1-1 is amended by redesignating paragraphs (a), (b), and (c) as paragraphs (d) (1), (2), and (3), respectively, by revising the section heading, and by adding new paragraphs (a) through (c) and an introductory clause for paragraph (d) to read as follows:

§ 9239.1-1 Unauthorized cutting and/or removal.

(a) All of the definitions in § 5400.0-5 of this title apply to this section.

(b) Authorization by contract or permit for other than incidental use shall be obtained prior to the cutting and/or removal of any vegetative resources. Severance or removal of timber or other vegetative resources without a contract or permit, or the use of an invalid contract or permit, constitutes a trespass and is a violation of regulation subject to criminal penalties.

(c) Failure to comply with any of the requirements and/or stipulations of a contract or permit may, if determined to be detrimental to the public interest by the authorized officer, result in the cancellation of the contract or permit. Individual contracts or permits may contain specific language defining the remedies or penalties associated with noncompliance. Cancellation shall be mandatory in cases of:

(1) Intentional falsification of information;

(2) Unauthorized activity; or

(3) Activity by unauthorized person or entity.

(d) Permittees under Part 5510 are subject to the following prohibitions:

* * * * *

18. Section 9239.1-2 is amended by redesignating the existing text as paragraph (b), by revising the heading, and adding new paragraph (a) to read as follows:

§ 9239.1-2 Penalty for unauthorized cutting and/or removal.

(a) In accordance with §§ 9239.0-7, and 9239.0-8, and 9239.1-1 of this title, violators of the terms and conditions of a contract or permit, or persons who cut or remove timber or other vegetative resources without a contract or permit, are in trespass and may be prosecuted under Title 18 of the United States Code or under State criminal law.

* * * * *

19. Section 9239.1-3 is revised to read as follows:

§ 9239.1-3 Measure of damages.

(a) Unless State law provides stricter penalties, in which case the State law shall prevail, the following minimum damages apply to trespass of timber and other vegetative resources:

(1) Administrative costs incurred by the United States as a consequence of the trepass.

(2) Costs associated with the rehabilitation and stabilization of any resources damaged as a result of the trespass.

(3) Twice the fair market value of the resource at the time of the trespass when the violation was nonwillful, and 3 times the fair market value at the time of the trespass when the violation was willful.

(b) The provisions of paragraph (a) of this section shall not be deemed to limit the measure of damages that may be determined under State law.

Dated: June 16, 1989.

James M. Hughes,

Deputy Assistant Secretary of the Interior.

[FR Doc. 89-27830 Filed 11-27-89; 8:45 am]

BILLING CODE 4310-84-M

Notices

Federal Register
Vol. 54, No. 227
Tuesday, November 28, 1989

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 89-190]

Availability of Environmental Assessment and Finding of No Significant Impact Relative to Issuance of a Permit to Field Test Genetically Engineered Cotton Plants

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that an environmental assessment and finding of no significant impact have been prepared by the Animal and Plant Health Inspection Service relative to the issuance of a permit to Monsanto Agricultural Company, to allow the field testing in Kauai, Hawaii, of cotton plants genetically engineered to be tolerant to the herbicide glyphosate or to resist select lepidopteran insects. The assessment provides a basis for the conclusion that the field testing of these genetically engineered cotton plants will not present a risk of introduction or dissemination of a plant pest and will not have any significant impact on the quality of the human environment. Based upon this finding of no significant impact, the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

ADDRESS: Copies of the environmental assessment and finding of no significant impact are available for public inspection at Biotechnology, Biologics, and Environmental Protection, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Room 850, Federal Building, 6505 Belcrest Road, Hyattsville, MD, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Dr. James White, Biotechnologist, Biotechnology Permit Unit, Biotechnology, Biologics, and Environmental Protection, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Room 841, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436-7612. For copies of the environmental assessment and finding of no significant impact, write Ms. Linda Gordon at this same address. The environmental assessment should be requested under permit number 89-150-01.

SUPPLEMENTARY INFORMATION: The regulations in 7 CFR part 340 regulate the introduction (importation, interstate movement, and release into the environment) of genetically engineered organisms and products that are plant pests or that there is reason to believe are plant pests (regulated articles). A permit must be obtained before a regulated article can be introduced in the United States. The regulations set forth procedures for obtaining a limited permit for the importation or interstate movement of a regulated article and for obtaining a permit for the release into the environment of a regulated article. The Animal and Plant Health Inspection Service (APHIS) has stated that it would prepare an environmental assessment and, when necessary, an environmental impact statement before issuing a permit for the release into the environment of a regulated article (see 52 FR 22906).

Monsanto Agricultural Company, of St. Louis, Missouri, has submitted an application for a permit for release into the environment, to field test cotton plants genetically engineered to tolerate the herbicide glyphosate or to resist select lepidopteran insects. The field trial will take place in Kauai, Hawaii.

In the course of reviewing the permit application, APHIS assessed the impact on the environment of releasing the cotton plants under the conditions described in the Monsanto Agricultural Company application. APHIS concluded that the field testing will not present a risk of plant pest introduction or dissemination and will not have any significant impact on the quality of the human environment.

The environmental assessment and finding of no significant impact, which are based on data submitted by Monsanto Agricultural Company, as well as a review of other relevant literature, provide the public with documentation of APHIS' review and analysis of the environmental impacts associated with conducting the field testing.

The facts supporting APHIS' finding of no significant impact are summarized below and are contained in the environmental assessment.

1. A gene encoding a modified 5-enolpyruvyl-3-phosphoshikimate synthase which shows reduced sensitivity to the herbicide glyphosate or a gene encoding delta-endotoxin has been inserted into the cotton chromosome. In nature, chromosomal genetic material can only be transferred to other sexually compatible plants by cross-pollination. In this field trial, the introduced gene cannot spread to other plants by cross-pollination because the field test plot is a sufficient distance from any sexually compatible plants with which it might cross-pollinate.

2. Neither the 5-enolpyruvyl-3-phosphoshikimate synthase gene nor the delta-endotoxin gene themselves, nor their gene products, confer on cotton any plant pest characteristics. Traits that lead to weediness in plants are polygenic traits and cannot be conferred by adding a single gene.

3. The plant from which the 5-enolpyruvyl-3-phosphoshikimate synthase gene and the micro-organism from which the delta-endotoxin gene was isolated are not plant pests.

4. Select noncoding regulatory regions derived from plant pests have been incorporated into the plant DNA but do not confer on cotton any plant pest characteristics.

5. Neither the 5-enolpyruvyl-3-phosphoshikimate synthase nor the delta-endotoxin gene provides the transformed cotton plants with any measurable selective advantage over nontransformed cotton in the ability to be disseminated or to become established in the environment.

6. The vector used to transfer the genes to cotton plants has been evaluated for its use in this specific experiment and does not pose a plant pest risk in this experiment. The vector, although derived from a DNA sequence with known plant pest potential, has been disarmed; that is, genes that are necessary for producing plant disease have been removed from the vector. The vector has been tested and shown to be nonpathogenic to plants.

7. The vector agent, the bacterim that was used to deliver the vector DNA and the genes into the plant cell, has been shown to be eliminated and no longer associated with the transformed cotton plants.

8. Horizontal movement of the introduced gene is not possible. The vector acts by delivering the gene to the plant genome (i.e., chromosomal DNA). The vector does not survive in the plants.

9. Glyphosate is one of the herbicides that is rapidly degraded in the environment. It has shown to be less toxic to animals than many herbicides commonly used.

10. Delta-endotoxin is a polypeptide which upon ingestion kills only select lepidopteran insects. Delta-endotoxin is not toxic to other insects, wild or domestic birds, fish or mammals. Because of its safety, its topical application on vegetable crops is permitted up to harvest date.

11. The field test site is small (about 3 acres) and physically isolated by a surrounding area of cultivated land.

The environmental assessment and finding of no significant impact have been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4331 *et seq.*), (2) Regulations of the Council on Environmental Quality for Implementing the Procedural Provisions of NEPA (40 CFR Parts 1500–1509), (3) USDA Regulations Implementing NEPA (7 CFR Part 1b), and (4) APHIS Guidelines Implementing NEPA (44 FR 50381–50384, August 28, 1979, and 44 FR 51272–51274, August 31, 1979).

Done in Washington, DC this 21st day of November 1989.

William F. Helms,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 89–27768 Filed 11–27–89; 8:45 am]

BILLING CODE 3410-34-M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

Transportation and Related Equipment, Technical Advisory Committee; Partially Closed Meeting

A meeting of the Transportation and Related Equipment Technical Advisory Committee will be held December 12, 1989, 9:30 a.m., Herbert C. Hoover Building, room 1617–F, 14th Street and Constitution Avenue, NW., Washington, DC. The Committee advises the Office of Technology and Policy Analysis with respect to technical questions which affect the level of export controls applicable to transportation and related equipment or technology.

AGENDA

General Session

1. Opening Remarks by the Chairman or Commerce Representative.
2. Introduction of Members and Visitors.
3. Presentation of papers or Comments by the Public.
4. Discussion of the Chairmen's Meeting.
5. Review of IL 1460 Revision Relating to Aircraft, Helicopters, and Aero-Engines.
6. Discussion of the Quarterly List Review.
7. Discussion of the 1990 Annual Plan.

Executive Session

8. Discussion of matters properly classified under Executive Order 12356, dealing with the U.S. and COCOM control programs and strategic criteria related thereto.

The General Session of the meeting will be open to the public and a limited number of seats will be available. To the extent time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, in order to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that you forward your public presentation materials two weeks prior to the meeting to the below listed address: Ms. Ruth D. Fitts, U.S. Department of Commerce/BXA, Office of Technology & Policy Analysis, 14th & Constitution Avenue, NW., Room 4069A, Washington, DC 20230.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on January 10, 1988, pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, that the series of meetings or portions of meetings of the Committee and of any Subcommittee thereof, dealing with the classified materials listed in 5 U.S.C. 552(c)(1) shall be exempt from the provisions relating to public meetings found in section 10 (a)(1) and (a)(3), of the Federal Advisory Committee Act. The remaining series of meetings or portions thereof will be open to the public.

A copy of the Notice of Determination to close meetings or portions of meetings of the Committee is available for public inspection and copying in the Central Reference and Records Inspection Facility, Room 6628, U.S. Department of Commerce, Washington, DC. For further information or copies of the minutes call Ruth D. Fitts, 202–377–4959.

Dated: November 21, 1989.

Betty A. Ferrell,

Director, Technical Advisory Committee Unit, Office of Technology and Policy Analyses.

[FR Doc. 89–27766 Filed 11–27–89; 8:45 am]

BILLING CODE 3510-DT-M

Foreign-Trade Zones Board

[Docket 19–89]

Foreign-Trade Zone 22—Chicago, IL; Application for Subzone by E.J. Brach & Sons, Inc., Confectionary Manufacturing Plant, Chicago, IL

The comment period for the above case, involving a proposed special-purpose subzone for the confectionary manufacturing plant of E.J. Brach & Sons, Inc. (54 FR 42317, 10/16/89), is extended to December 29, 1989, to allow interested parties additional time in which to comment on the proposal.

Comments in writing are invited during this period. Submissions shall include 5 copies. Material submitted will be available at: Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, Room 2835, 14th and Pennsylvania Avenue, NW., Washington, DC 20230.

Dated: November 20, 1989.

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 89–27814 Filed 11–27–89; 9:35 am]

BILLING CODE 3510-DS-M

International Trade Administration

[A-588-405]

Cellular Mobile Telephones and Subassemblies From Japan; Preliminary Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of Preliminary Results of Antidumping Duty Administrative Review.

SUMMARY: In response to a request by a respondent, the Department of Commerce has conducted an administrative review of the antidumping duty order on cellular mobile telephones and subassemblies from Japan. The review covers one manufacturer of this merchandise and the period December 1, 1987 through November 30, 1988. The review indicates

the existence of dumping margins during this period.

As a result of the review, the Department has preliminary determined to assess dumping duties equal to the calculated differences between United States price and foreign market value.

Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: November 28, 1989.

FOR FURTHER INFORMATION CONTACT: Anne D'Alauro or Robert Marenick, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-5255.

SUPPLEMENTARY INFORMATION:

Background

On December 19, 1985, the Department of Commerce ("the Department") published in the **Federal Register** (50 FR 51724) an antidumping duty order on cellular mobile telephones and subassemblies from Japan. One respondent, TDK Corporation ("TDK"), requested in accordance with § 353.53a(a) of the Commerce Regulations (19 CFR 353.53a(a) (1988)) that we conduct an administrative review. We published a notice of initiation of the antidumping duty administrative review on January 31, 1989 (54 FR 4871). The Department has now conducted that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of the Review

The United States has developed a system of tariff classification based on the international harmonized system of Customs nomenclature. On January 1, 1989, the United States fully converted to the Harmonized Tariff Schedule ("HTS") as provided for in section 1201 *et seq.* of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered, or withdrawn from warehouse, for consumption on or after that date is now classified solely according to the appropriate HTS number(s).

Imports covered by this review are cellular mobile telephones ("CMTs"), CMT transceivers, CMT control units, and certain subassemblies thereof, which meet the tests set forth below. CMTs are radio-telephone equipment designed to operate in a cellular radio-telephone system, *i.e.*, a system that permits mobile telephones to communicate with traditional land-line telephones via a base station, and that permits multiple simultaneous use of particular radio frequencies through the division of the system into independent cells, each of which has its own transceiving base station. Each CMT generally consists of (1) a transceiver, *i.e.*, a box of electronic subassemblies which receives and transmits calls; and (2) a control unit, *i.e.*, a handset and cradle resembling a modern telephone, which permits a motor-vehicle driver or passenger to dial, speak, and hear a call. They are designed to use motor vehicle power sources. Cellular transportable telephones, which are designed to use either motor vehicle power sources or, alternatively, portable power sources, are included in this antidumping duty order.

Subassemblies are any completed or partially completed circuit modules, the value of which is equal to or greater than five dollars and which are dedicated exclusively for use in CMT transceivers or control units. The term "dedicated exclusively for use" only encompasses those subassemblies that are specifically designed for use in CMTs, and could not be used, absent alteration, in a non-CMT device. The Department selected the five dollar value for defining the scope since this is a value that it has determined is equivalent to a "major" subassembly. The Department feels that a dollar cutoff point is a more workable standard than a subjective determination such as whether a circuit module is "substantially complete." Examples of subassemblies which may fall within this definition are circuit modules containing any of the following circuitry or combinations thereof: audio processing, signal processing (logic), RF, IF, synthesizer, duplexer, power supply, power amplification, transmitter and exciter. The presumption is that CMT subassemblies are covered by the order unless an importer can prove otherwise. An importer will have to file a declaration with the Customs Service to the effect that a particular CMT subassembly is not dedicated exclusively for use in CMTs or that the dollar value is less than five dollars, if he wishes it to be excluded from the order.

The following merchandise has been excluded from this order: pocket-size self-contained portable cellular telephones, cellular base stations or base station apparatus, cellular switches, and mobile telephones designed for operation on other, non-cellular, mobile telephone systems.

During the review period, cellular mobile telephones and subassemblies were classified under Tariff Schedules of the United States item numbers 685.28 and 685.33. This merchandise is currently classified under HTS item numbers 8525.20.60, 8525.10.80, 8527.90.80, 8529.10.60, 8529.90.50, 8542.20.00, and 8542.80.00. The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

The review covers one manufacturer of Japanese CMTs and subassemblies, TDK, and the period December 1, 1987 through November 30, 1988.

United States Price

In calculating United States price the Department used purchase price, as defined in section 772 of the Tariff Act.

The Department determined that purchase price and not exporter's sales price was the most appropriate indicator of United States price in this case based on the following elements:

1. The merchandise, which was made to order for each U.S. customer, was purchased or agreed to be purchased from TDK, Japan, prior to the date of U.S. importation.

2. The selling agent located in the United States acted only as a processor of sales-related documentation and as a communication link with the unrelated U.S. buyers.

3. For all but one of TDK's U.S. customers, the merchandise was shipped directly from the manufacturer to the unrelated U.S. buyer. Direct shipment to its customers was, therefore, the customary commercial channel of trade. For the remaining U.S. customer, the merchandise was not sold through inventory. Rather, the custom-ordered merchandise was warehoused only to accommodate specific delivery needs stipulated by this customer.

Purchase price was based on the packed f.o.b. (foreign port), f.o.b. (post-clearing at U.S. port), or ex-warehouse price to unrelated purchasers in the United States. Where applicable, we made deductions for foreign "inland freight, Japanese brokerage fees, ocean freight, marine insurance, and customs duties. No other adjustments were claimed or allowed.

Foreign Market Value

In calculating foreign market value the Department used home market price, as defined in section 773 of the Tariff Act, since sufficient quantities of such or similar merchandise were sold in the home market to provide a basis for comparison.

Home market price was based on the packed delivered (customer's warehouse) price to unrelated and related purchasers, with adjustments, where applicable, for inland freight and insurance, differences in merchandise, warranty expenses, warehousing expenses, and differences in the cost of

packing and credit. No other adjustments were claimed or allowed.

Preliminary Results of the Review

As a result of our comparison of United States price to foreign market value, we preliminarily determine that a margin of .95 percent exists for TDK Corporation during the period December 1, 1987 through November 30, 1988.

Parties to the proceeding may request disclosure within 5 days of the date of publication of this notice. Any interested party may request a hearing within 10 days of publication. Any hearing, if requested, will be held 44 days after the date of publication, or the first workday thereafter. Case briefs and/or written comments from interested parties may be submitted not later than 30 days after the date of publication. Rebuttal briefs and rebuttals to written comments, limited to issues raised in those comments, may be filed not later than 37 days after the date of publication. Copies of case briefs and rebuttal briefs must be served on interested parties in accordance with § 353.38(e) of the Commerce regulations (54 FR 12785; March 28, 1989) (to be codified at 19 CFR 353.38(e)). The Department will publish the final results of the administrative review including the results of its analysis of any such written comments or oral argument.

Representatives of interested parties may request disclosure of proprietary information under administrative protective order within 10 days of the date that the interested party becomes a party to the proceeding but in no event later than the date the case briefs are due.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentage stated above. The Department will issue appraisement instructions directly to the Customs Service.

Further, as provided for by section 751(a)(1) of the Tariff Act, a cash deposit of estimated antidumping duties based on the above margin shall be required for TDK. For shipments from the remaining known manufacturers and exporters not covered by this review, the cash deposit will continue to be at the latest rate applicable to each of those firms. For any future entries of this merchandise from a new exporter not covered in this or prior reviews, whose first shipments occurred after November 30, 1988 and who is unrelated to any reviewed firm, a cash deposit of .95 percent shall be required. These deposit requirements are effective for all shipments of Japanese cellular mobile telephones and subassemblies entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and section 353.22 of the Commerce regulations.

Dated: November 20, 1989.

Lisa B. Barry,

Acting Assistant Secretary for Import Administration.

[FR Doc. 89-27815 Filed 11-27-89; 8:45 am]

BILLING CODE 3510-DS-M

National Oceanic and Atmospheric Administration

Western Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The Western Pacific Fishery Management Council will hold a public Fishermen's Forum on December 6, 1989, at 1:30 p.m., at the Ilikai Hotel, Hilo Suite, 1777 Ala Moana Boulevard, Honolulu, HI.

The Forum will provide an opportunity for fishermen to directly discuss with Council members issues of mutual interest including: (1) Ultra-sonic tracking of large pelagic fish; (2) a National Seafood Inspection program for vessels; (3) the U.S. Customs interpretative rule on transshipment and transportation of tuna caught outside the U.S. Exclusive Economic Zone; (4) intreractions between local longliners and small boat fishermen; (5) problems in data reporting; and (6) other items of mutual interest.

For more information contact Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council, 1164 Bishop Street, Suite 1405, Honolulu, HI 96813; telephone: (808) 523-1368.

Dated: November 20, 1989.

Richard H. Schaefer,

Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89-27756 Filed 11-27-89; 8:45 am]

BILLING CODE 3510-22-M

Western Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The Western Pacific Fishery Management Council will hold its 46th Scientific and Statistical Committee (SSC) public meeting on December 4-5, 1989, at 9 a.m., at the Ilikai Hotel, Hilo and Kona Suites, 1777 Ala Moana Boulevard, Honolulu, HI.

The SSC will review the status of programmatic projects in support of fishery management plans (FMPs) for bottomfish, crustaceans, precious corals, and pelagic species. The Committee also will review reports of the Plan Monitoring Team for each FMP and formulate recommendations for the Council. In particular, the SSC will: (1) Review results of the Council FMP Monitoring and Assessment Workshop; (2) review the Planning Team reports on overfishing and thresholds for all FMPs; (3) review the Limited Entry Program for the Northwestern Hawaiian Islands; (4) discuss amendments and the inclusion of tuna management in the Magnuson Fishery Conservation and Management Act; (5) discuss the current status of drift gillnet fishing; and (6) any other SSC business.

For more information contact Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council, 1164 Bishop Street, Suite 1405, Honolulu, HI 96813; telephone: (808) 523-1368.

Dated: November 20, 1989.

Richard H. Schaefer,

Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89-27757 Filed 11-27-89; 8:45 am]

BILLING CODE 3510-22-M

Western Pacific Fishery Management Council; Public Meeting

AGENCY: The Western Pacific Fishery Management Council and its Standing Committees will hold public meetings on December 5-8, 1989, at the Ilikai Hotel, Hilo Suite, 1777 Ala Moana Boulevard, Honolulu, HI. The Council will begin meeting on December 7 and December 8 at 9 a.m. The Council's Standing Committees will meet on December 5 at 1 p.m., and on December 6 at 8:30 a.m.

At its 67th meeting, the Council will hear routine fisheries reports from state, territorial, and federal governments' representatives on the Council, as well as from private sector Council members from Hawaii, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands (CNMI). The status of fishery management plans (FMPs) covering crustaceans, bottomfish and seamount groundfish, pelagics, and precious corals also will be discussed.

The Council will review and approve (as necessary) the: (1) Planning Team reports on overfishing and thresholds for all FMPs; (2) Northwestern Hawaiian

Islands Limited Entry Program; (3) long-range planning; (4) FMP Monitoring and Assessment Workshop; (5) fishing rights of indigenous peoples/limited entry projects for American Samoa, Guam, and the CNMI; (6) enforcement resources and projects; (7) status of drift gillnet fishing and Magnuson Fishery Conservation and Management Act amendments; (8) general administrative matters including the Council's Statement of Organization, Practices, and Procedures (SOPP), election of officers, Standing Committee assignments; and (9) any other Council business.

For more information contact Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council, 1164 Bishop Street, Suite 1405, Honolulu, HI 96813; telephone: (808) 523-1368.

Dated: November 20, 1989.

Richard H. Schaefer,

Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 89-27758 Filed 11-27-89; 8:45 am]

BILLING CODE 3510-22-M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of an Import Limit for Certain Wool Textile Products Produced or Manufactured in the Polish People's Republic

November 21, 1989.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs increasing a limit.

EFFECTIVE DATE: November 21, 1989.

FOR FURTHER INFORMATION CONTACT: Jerome Turtola, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of this limit, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 566-5810. For information on embargoes and quota re-openings, call (202) 377-3715.

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 current limit for Category 433 is being increased for carryforward.

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 53 FR 44937, published on November 7, 1988). Also see 53 FR 49584, published on December 8, 1988.

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.

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 21, 1989.

Commissioner of Customs, *Department of the Treasury, Washington, DC 20229.*

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on December 2, 1988. That directive concerns imports into the United States of certain cotton, wool and man-made fiber textile products, produced or manufactured in Poland and exported during the twelve-month period which began on January 1, 1989 and extends through December 31, 1989.

Effective on November 21, 1988, the directive of December 2, 1988 is amended further to increase to 8,600 dozen [1] the current limit for wool textile products in Category 433, as provided under the provisions of the current bilateral textile agreement between the Governments of the United States and the Polish People's Republic.

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 89-27829 Filed 11-27-89; 8:45 am]

BILLING CODE 3510-DR-M

[1] The limit has not been adjusted to account for any imports exported after December 31, 1988.

COPYRIGHT ROYALTY TRIBUNAL

[Docket No. 90-1-88JD]

1988 Jukebox Royalty Distribution Proceeding

AGENCY: Copyright Royalty Tribunal.

ACTION: Notice of no controversy; notice of full distribution.

SUMMARY: The Copyright Royalty Tribunal announces that no controversies exist concerning the distribution of the 1988 jukebox copyright royalties and orders a full distribution of the 1988 jukebox copyright royalty fund.

DATE: Distribution of the 1988 jukebox copyright royalty fund shall take place on November 30, 1989.

FOR FURTHER INFORMATION CONTACT: Robrt Cassler, General Counsel, Copyright Royalty Tribunal, 1111 20th Street, NW., Suite 450, Washington, DC 20036 (202-653-5175).

SUPPLEMENTARY INFORMATION: 17 U.S.C. 116(c)(3) authorizes the Copyright Royalty Tribunal (Tribunal) to distribute annually royalty fees paid by jukebox operators to certain copyright owners and performing rights societies.

In this proceeding, the Tribunal takes up the distribution of royalty fees deposited by jukebox operators for the calendar year 1988. During the month of January, 1989, five parties filed timely claims: Asociacion de Compositores y Editores de Musica Latinoamericana (ACEMLA), the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), Italian Book Corporation (IBC) and SESAC, Inc. (SESAC).

On April 24, 1989, ACEMLA informed the Tribunal that it had reached a settlement with ASCAP and BMI concerning, among other things, its claim to the 1988 jukebox copyright royalty fund, and it was therefore withdrawing its claim.

On October 2, 1989, in accordance with 17 U.S.C. 116(c)(3), the Tribunal published in the **Federal Register** a notice requesting all claimants to comment by November 1, 1989 whether any controversies existed concerning the distribution of the 1988 jukebox fund. 54 FR 40473. The comment period was extended at the request of the claimants to November 22, 1989. Order, dated November 1, 1989.

On November 6, 1989, IBC informed the Tribunal that it had reached a settlement with ASCAP, BMI and SESAC concerning its claim to the 1988 jukebox copyright royalty fund, and it was therefore withdrawing its claim.

On Nomvember 20, 1989, ASCAP, BMI and SESAC filed a joint comment with the Tribunal, informing the Tribunal that they had reached a voluntary agreement and there existed no more controversies concerning the distribution of the 1988 jukebox fund. In the same filing, the three performing rights societies made a motion for an immediate and complete distribution of the royalties in the 1988 jukebox fund.

On the basis of the filed comments of the claimants, the Tribunal concludes

that there exists no controversy concerning the distribution of the 1988 jukebox copyright royalty fund, and orders that a full distribution of the fund shall take place on November 30, 1989.

Dated: November 21, 1989.

Mario F. Aguero,

Acting Chairman.

[FR Doc. 89-27754 Filed 11-27-89; 8:45 am]

BILLING CODE 1410-09-M

DEPARTMENT OF DEFENSE

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44. U.S.C. Chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: DoD FAR Supplement, Part 247, Transportation; DFSC Form 1890; and OMB Control Number 0704-0245.

Type of Request: Revision.

Average Burden Hours/Minutes Per Response: .94038 hours.

Frequency of Response: On occasion.

Number of Respondents: 33,250.

Annual Burden Hours: 65,074.

Annual Responses: 69,200.

Needs and Uses: This request concerns information collection requirements needed to support contracting for transportation and related services in the DoD FAR Supplement and the Service Supplements attached hereto.

Affected Public: Businesses of other for-profit; Non-profit institutions; Small businesses or organizations.

Respondent's Obligation: Mandatory.

OMB Dest Officer: Ms. Eyvette R. Flynn.

Written comments and recommendations on the proposed information collection should be sent to Ms. Eyvette R. Flynn at Office of Management and Budget, Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Pearl Rascoe-Harrison.

Written request for copies of the information collection proposal should be sent to Ms. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202-4302.

Dated: November 21, 1989.

L.M. Rynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 89-27842 Filed 11-17-89; 8:45 am]

BILLING CODE 3810-01-M

Office of the Secretary

Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Recalculated Rates

AGENCY: Office of the Secretary, DoD.

ACTION: Notice of recalculated mental health per diem rates.

SUMMARY: This notice provides for the recalculation and updating of hospital specific per diem rates for high volume providers and regional per diem rates for low volume providers; the revised cap per diem for high volume providers; and the beneficiary per diem cost-share amount for low volume providers to be used for FY 1990 under the CHAMPUS Mental Health Per Diem Payment System.

EFFECTIVE DATE: The rates contained in this notice are effective for services occurring on or after October 1, 1989.

ADDRESSES: Office of the Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS), Office of Program Development, Aurora, CO 80045-6900.

For copies of the **Federal Register** containing this final rule, contact the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238.

The charge for the **Federal Register** is $1.50 for each issue payable by check or money order to the Superintendent of Documents.

FOR FURTHER INFORMATION CONTACT: Stan Regensberg, Office of Program Development, OCHAMPUS, telephone (303) 361-3572

To obtain copies of this document, see the "**ADDRESS**" section above. Questions regarding payment of specific claims under the CHAMPUS Mental Health Per Diem Payment System should be addressed to the appropriate CHAMPUS contractor.

SUPPLEMENTARY INFORMATION: The final rule published on pages 34285 through 34294 on September 6, 1988, set forth reimbursement changes that were effective for all inpatient hospital admissions in psychiatric hospitals and exempt psychiatric units occurring on or after January 1, 1989. Included in this final rule were provisions for updating reimbursement rates for each fiscal year. As stated in the final rule, hospital-specific per diems and the regional per diems calculated for the base period (FY 88) shall be in effect for federal fiscal year 1989 with no additional update for fiscal year 1989. For subsequent federal fiscal years, each per diem shall be updated by the Medicare update factor for hospitals and units exempt from the Medicare prospective payment system. Since January 1, 1989, the Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS) has determined that more complete and accurate data is available for establishing per diem rates under this system than was originally used. The data base that was originally used was the same data base which was used to establish CHAMPUS DRGs for the payment of inpatient services of acute medical hospitals. The data was found to be acceptable for establishing DRGs. However, the data used to calculate the mental health per diem rates was found to contain errors which were specifically caused by improper accumulation of days and failure to include all allowed charges. Based on this determination and the fact that several psychiatric hospitals have inquired as to the validity of the originally established per diem rates, OCHAMPUS has decided to recalculate all per diem rates under this system. This means recalculating both hospital-specific per diem rates for high volume hospitals and units and regional per diem rates for low volume hospitals and units. It also means recalculating the cap per diem amount for high volume hospitals and units and the beneficiary cost-share per diem amount for low volume hospitals and units. The recalculated rates have been recalculated using the original base period of July 1, 1987, through May 31, 1988. These rates have also been updated using the Medicare market basket update factor of 5.5 percent for FY 90. The recalculated and updated rates are effective for dates of service beginning on or after October 1, 1989. OCHAMPUS will notify hospitals and units with hospital-specific rates of their recalculated and updated rates by overnight mail. Recalculated and updated regional rates are contained in this notice.

Hospitals will have 60 days from the date of this notice to request an administrative review of their recalculated per diem rates. Up to an additional 60 days will be allowed to provide sufficient opportunity for a hospital to provide evidence in support of their position. As was stated in the original rule, any hospital or unit which believes the OCHAMPUS calculated per

diem rate differs by more than five dollars from that calculated by the hospital or unit may apply to the Director of OCHAMPUS or designee for a recalculation. Such requests can be submitted directly to the address provided above. The burden of proof shall be on the hospital. The payment rate determined by an administrative review will be retroactive to October 1, 1989.

Any required reduction resulting from the recalculation of the per diem rates will not be retroactive. In addition, all administrative reviews of individual hospital rates completed prior to October 1, 1989, will be honored. This means, for these hospitals, recalculated rates established during the previous administrative review will be retained and updated for FY 90 using the Medicare update factor mentioned above.

Based on the recalculations, the cap limit for high volume hospitals and units has been lowered to $614 per day. This cap has been established with the 5.5 percent increase referenced above. A few hospitals were underpaid based on the difference between the originally calculated per diems and the recalculated per diems. For these providers, CHAMPUS will retroactively make payment adjustments back to January 1, 1989. No separate action on the part of these providers is required.

For hospitals wanting more detailed information on the methodology used to recalculate the per diem rates, the Office of Civilian Health and Medical Program of the Uniformed Services will provide the information upon written request.

Dated: November 22, 1989.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

REGIONAL SPECIFIC RATES FOR PSYCHIATRIC HOSPITALS AND UNITS WITH LOW CHAMPUS VOLUME

[Less than 25 CHAMPUS discharges in a year]

United States Census Region	Rate [1]
Northeast:	
New England	$416
Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut	
Mid-Atlantic	$398
New York, New Jersey, Pennsylvania	
Midwest:	
East North Central	$345
Ohio, Indiana, Illinois, Michigan, Wisconsin	
West North Central	$326

REGIONAL SPECIFIC RATES FOR PSYCHIATRIC HOSPITALS AND UNITS WITH LOW CHAMPUS VOLUME—Continued

[Less than 25 CHAMPUS discharges in a year]

United States Census Region	Rate [1]
Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, Kansas	
South:	
South Atlantic	$411
Delaware, Maryland, D.C., Virginia, West Virginia, North Carolina, South Carolina, Georgia, Florida	
East South Central	$446
Kentucky, Tennessee, Alabama, Mississippi	
West South Central	$374
Arkansas, Louisiana, Texas, Oklahoma	
West:	
Mountain	$373
Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada	
Pacific	$441
Washington, Oregon, California, Alaska, Hawaii	

[1] The wage portion of the rate, subject to the area wage adjustment, is 73.84%.

Beneficiary cost-share (other than dependents of active duty members) for care paid on the basis of a regional per diem rate is the lower of $109 per day or 25% of the hospital billed charges effective for services rendered on or after October 1, 1989.

[FR Doc. 89-27816 Filed 11-27-89; 8:45 am]

BILLING CODE 3810-01-M

Meetings; Defense Advisory Committee on Women in the Services

AGENCY: Defense Advisory Committee on Women in the Services (DACOWITS), DOD.

ACTION: Notice of meeting.

SUMMARY: Pursuant to Public Law 92-463, notice is hereby given of a forthcoming meeting of the Executive Committee of the Defense Advisory Committee on Women in the Services (DACOWITS). The purpose of the meeting is to review the resolutions made by the committee at the 1989 Fall Conference; review the Subcommittee Issue Agenda, discuss issues relevant to women in the Services, and complete any unfinished business for 1989. All meeting sessions will be open to the public.

DATE: December 11, 1989, 9:30 a.m.-4 p.m.

ADDRESS: SecDef Conference Room 3E869, The Pentagon, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Lieutenant Colonel Mary C. Pruitt, Director, DACOWITS and Military Women Matters, OASD (Force Management and Personnel), The Pentagon, Room 3D769, Washinngton, DC 20301-4000; telephone (202) 697-2122.

Dated: November 20, 1989.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 89-27843 Filed 11-27-89; 8:45 am]

BILLING CODE 3810-01-M

Department of the Navy

U.S. Navy Catchment Area Management Demonstration

SUMMARY: The Assistant Secretary of Defense (Health Affairs) has delegated the authority to the Department of the Navy to conduct a Catchment Area Management demonstration project at Naval Hospital, Charleston, South Carolina, beginning 1 January, 1990. Under the provisions of chapter 55, title 10, section 1092, the demonstration project will test the feasibility of giving the commanding officer both the authority and responsibility for all health care delivery within the catchment area. By influencing the distribution of Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) and direct care costs within the Operations and Maintenance, Navy (O&M,N) funds budgeted for the catchment area, it is anticipated that the commanding officer can enhance both the quality and quantity of healthcare delivery within the catchment area, while containing costs. The project will demonstrate that the patterns of beneficiary healthcare use within a Navy MTF catchment area can be modified to reduce the total cost of healthcare below levels that would have otherwise resulted. This will be accomplished by giving the MTF commander authority to provide for alternate means of healthcare delivery, using portions of the catchment area's budgeted CHAMPUS, as well as direct care funds. An independent evaluation of this project will be conducted by the Rand Corporation, who will determine the degree to which healthcare services at the demonstration site are being provided in a manner which meets the stated objectives of the project. The objectives of the demonstration are to (1) contain the rate of growth of government health care expenditures, (2) improve accessibility to cost-effective healthcare services, (3) improve beneficiary and provider satisfaction with availability and accessibility of health care services, (4) maintain the quality of care provided to the CHAMPUS beneficiary population, and (5) ensure meaningful caseload and enhance the practice environment of active duty providers.

EFFECTIVE DATE: Implementation date of the demonstration project is 1 January 1990.

FOR FURTHER INFORMATION CONTACT: CAPT Taylor I. Cook, Project Officer, CAMS Project Office, NAVHOSP Charleston, SC 29408-6900, telephone (803) 743-1754.

SUPPLEMENTARY INFORMATION:

I. Background

Until recently, there was no mechanism to convert innovations in CHAMPUS healthcare delivery into increased resources in the MTF. In FY 88, CHAMPUS funding was allocated to the individual Services. Each Service is now responsible for the total CHAMPUS bill for care provided for all Services' beneficiaries within specific catchment areas, as well as to its own beneficiaries outside catchment areas. In an attempt to evaluate the concept that the services can effectively manage these funds and provide necessary medical care within the projected CHAMPUS and direct care budgets, Congress directed in the FY 88 Defense Authorization Act that each Service conduct a demonstration of catchment area management in at least one area. During the demonstration all normal CHAMPUS requirements apply except those that are specifically identified herein as subject to deviation.

II. What the Demonstration Project Is Designed To Test

Catchment Area Management is based on the premise that the local MTF commander is responsible for all medical care provided to the eligible DoD beneficiary population within a radius of approximately 40 miles to the MTF. To fulfill that responsibility, the commander will control the funds customarily allocated to operate the MTF, plus have discretion in use of the funds projected to be spent for civilian care under CHAMPUS. At the same time, he will be allowed increased flexibility in dealing with regulatory restrictions to enhance his ability to select the most cost effective options in delivering care to the beneficiary population. The demonstration will test whether, by increasing local participation in the control and distribution of the CHAMPUS and direct care dollars, the MTF commander can enhance the level of services and maintain quality, while not exceeding the total projected healthcare costs for the catchment area in the absence of this demonstration.

III. Key Features

The Navy CAM Demonstration Project within the catchment area of the Naval Hospital, Charleston, South Carolina will be structured on increased utilization of the clinical care capacity of the Naval Hospital and the Charleston Air Force Base Clinic, in combination with a military managed preferred provider network. This combination is designed to provide a managed healthcare system for all beneficiaries within the demonstration project site who voluntarily enroll or participate. Enhanced MTF care capability will be accomplished through personnel acquisitions using Civil Service, VA-DoD resource sharing, service contracting, and CHAMPUS partnership agreements. The mix of services provided will be determined through cost benefit analysis and consideration of graduate medical education and contingency requirements. The mix and size of the preferred provider network will be based on residual care requirements after increased utilization of the MTF has been factored into the total catchment area demand.

The project will be expected to reduce total O&M,N expenditures in the Charleston Catchment Area through several processes. Cost benefit analyses have shown that, in most cases, the increased variable and semivariable costs incurred by the MTF in partnership agreements still allow for significant savings over the cost of similar services provided under the existing CHAMPUS system. In those cases where care requirements exceed the capacity of the MTF, the preferred provider network will lower overall costs of care received outside the MTF relative to existing CHAMPUS. This will occur through the process of discounts on per unit cost, utilization management using pre-authorization for high volume, high cost procedures, and case management and discharge planning. Since beneficiary enrollment and participation is voluntary, the magnitude of cost containment of this system is a function of the percent of the beneficiary population that enrolls and uses the system as an alternative to existing CHAMPUS. The system will market two care options (CAMCHAS and CHAMCHAS PRIME) which offer different incentives and vary in the degree of freedom of the consumer to use the existing CHAMPUS system. The central management element for both will be the healthcare finder system. This will be a centralized appointment system based on the Composite Healthcare System Patient Appointment and Scheduling Module. It will provide appointments first to the MTFs and then to the network providers, if appointments are not available in a prescribed period of time at the MTF. The "CAMCHAS" option will appeal to those consumers who may desire to use existing CHAMPUS but will be attracted because they can use the healthcare finder and participating physicians whose charges are below CHAMPUS prevailing rates. The "CAMCHAS PRIME" option will be a voluntary enrollment plan. As participants in a program designed to monitor utilization and provide cost-effective care, the enrollees will be required to use the healthcare finder system and participating physicians. Without the ability currently to mandate enrollment, the "CAMCHAS PRIME" program will offer incentives to voluntary enrollment—the individual and family deductible will be reduced by 50 percent and non-professional outpatient fees and all professional fee copayments will be reduced from 20 percent to 15 percent for active duty beneficiaries and 25 percent to 20 percent for retirees and their beneficiaries. Enrollee copayments for inpatient hospitalization will remain unchanged. Enrollees must go through healthcare finders who will ascertain the availability of MTF care prior to authorizing care with network providers. Requirements for non-availability statements will remain unchanged. Enrollees who do not use healthcare finders to obtain outpatient healthcare locally will pay the usual CHAMPUS rate, plus a penalty of an additional 5 percent in CHAMPUS copayments for outpatient services. For example, copayments for dependents of active duty enrollees would be increased from 20 percent to 25 percent of CHAMPUS allowable and the government share would decrease from 80 percent to 75 percent for outpatient care not obtained through healthcare finders.

The healthcare finder system will initiate utilization management by establishing the initial primary care assessments by internists, family practitioners, pediatricians, or obstetricians/gynecologists. It will allow for generic pre-authorization of follow up appointments. All subsequent extension of visit requirements, specialty consultations, or hospital admissions will be required to come through the healthcare finder system for appointment and review. Hospitalization and specialty review will be performed primarily by department heads at the naval hospital. This will be done on the basis of availability of care and facilitated by the use of availability templates in the computer system.

Enrollment into the managed care system will be coordinated with

provider participation to assure acceptable access to care. Because enrollment is voluntary, total enrollment levels will be subject to the overall effectiveness of the managed care marketing effort. Disenrollment will be allowed without cause after a year's participation or during the first year through a formal grievance process. Disenrollment will also occur when families move out of the catchment area or members lose eligibility. For care provided to beneficiaries outside of the project catchment area, standard CHAMPUS reimbursement and out of pocket charges will apply. Separate fiscal intermediary procedures will identify enrollee claims. Claims processing will be performed by the current CHAMPUS fiscal intermediary.

The demonstration project alters the normally applicable cost-sharing requirements in the CHAMPUS regulation, DoD 6010.8-R, Chapter 4, Section F. In addition to reduced cost share requirements, additional discounts available from the preferred providers will further reduce the actual beneficiary cost. All network providers will accept the discounted CHAMPUS determined allowable charge as payment in full, so that the beneficiary's financial responsibility will be limited to copayment.

The Navy reserves the right during the course of this demonstration project to implement additional changes which will improve our ability to meet overall project objectives. Where necessary, these changes will be published in the **Federal Register**.

The Department of the Navy anticipates that the Catchment Area Management Demonstration will provide enhanced levels of service at discounted rates. This will result in more appropriate care being delivered with no increases in the overall direct care and CHAMPUS budgets. Overall savings depend upon the total number of beneficiaries who enroll in the plan and the number of participating preferred providers.

V. Duration

The legislative authority for the CAM demonstration became effective 1 October 1987. Actual implementation will begin on 1 January 1990, and will continue for at least two years from that date.

Dated: November 21, 1989.

Sandra M. Kay,

Department of the Navy, Alternative Federal Register Liaison Officer.

[FR Doc. 89-27805 Filed 11-27-89; 8:45 am]

BILLING CODE 3810-AE-M

CNO Executive Panel Advisory Committee; Closed Meeting

Notice was published on November 7, 1989, at 54 FR 46758 that the Chief of Naval Operations (CNO) Executive Panel Advisory Committee Defense Subpanel Task Force will meet on December 11-12, 1989 at 4401 Ford Avenue, Alexandria, Virginia. This meeting has been rescheduled for December 18, 1989 because of operational necessity. In accordance with 5 U.S.C. section 552b(e)(2), the meeting rescheduling is publicly announced at the earliest practical time.

Dated: November 21, 1989.

Sandra M. Kay,

Department of the Navy, Alternate Federal Register Liaison Officer.

[FR Doc. 89-27804 Filed 11-27-89; 8:45 am]

BILLING CODE 3810-AE-M

DEPARTMENT OF EDUCATION

Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of proposed information collection requests.

SUMMARY: The Acting Director, Office of Information Resources Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATES: Interested persons are invited to submit comments on or before December 28, 1989.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Jim Houser, Desk Officer, Department of Education, Office of Management and Budget, 726 Jackson Place, NW., Room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to George P. Sotos, Department of Education, 400 Maryland Avenue, SW., Room 5624, Regional Office Building 3, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: George P. Sotos (202) 732-2174.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations.

The Director, Office of Information Resources Management, pubishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following:

(1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Frequency of collection; (4) The affected public; (5) Reporting burden; and/or (6) Recordkeeping burden; and (7) Abstract. OMB invites public comment at the address specified above. Copies of the requests are available from George Sotos at the address specified above.

Dated: November 21, 1989.

Carlos Rice,

Director for Office of Information Resources Management.

Office of Educational Research and Improvement

Type of Review: Extension.
Title: Application for Basic Grant under Library Services for Indian Tribes Program.
Frequency: Annually.
Affected Public: State or local governments.
Reporting Burden:
Responses: 200.
Burden Hours: 400.
Recordkeeping Burden:
Recordkeepers: 0.
Burden Hours: 0.
Abstract: This form is needed to enable Indian Tribes and Hawaiian Natives to apply for Basis Project Grants as amended. The Department uses the information to determine compliance with the Act and to make grant awards.

Office of Educational Research and Improvement

Type of Review: Extension.
Title: Field Test of the The Schools and Staffing Survey.
Frequency: Non-recurring.
Affected Public: Individuals or households; State or local governments; Businesses or other for profit; Non-profit institutions; Small businesses or organizations.
Reporting Burden:
Responses: 2763.
Burden Hours: 4405.
Recordkeeping Burden:

Recordkeepers: 0.
Burden Hours: 0.
Abstract: A field test will be conducted to determine teacher demands and shortage, school conditions, and staffing. The Department will make decisions impacting the final data collection methodology and survey instruments based on the result of this field test.

Office of Vocational and Adult Education

Type of Review: Revision.
Title: Performance Report for Direct Grants.
Frequency: Annually.
Affected Public: State or local governments; Non-profit institutions.
Reporting Burden:
Responses: 200.
Burden Hours: 1600.
Recordkeeping Burden:
Recordkeepers: 0.
Burden Hours: 0.
Abstract: This report is used by grantees that have participated in direct grant programs administered by the Office of Vocational and Adult Education. The Department uses the information collected to assess the accomplishments of project goals and objectives and to aid in effective program management.

Office of Elementary and Secondary Education

Type of Review: Extension.
Title: Application for State Educational Agency Grants Under the Desegregation of Public Education Program.
Frequency: Annually.
Affected Public: State or local governments.
Reporting Burden:
Responses: 53.
Burden Hours: 1113.
Recordkeeping Burden:
Recordkeepers: 0.
Burden Hours: 0.
Abstract: This application will be used by State educational agencies to apply for grants under Title IV of the Civil Rights Act of 1964. The Department uses this information to evaluate the proposed projects and make awards in accordance with program regulations.

[FR Doc. 89-27771 Filed 11-27-89; 8:45 am]
BILLING CODE 4000-01-M

National Assessment Governing Board; Meeting

AGENCY: Department of Education.

ACTION: Notice of partially closed meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of its opportunity to attend.

DATES: December 8-9, 1989.

TIME: December 8: 8 a.m.-12 p.m., open; 12 p.m.-2 p.m., closed; 2-Adjournment, open. December 9: 8:30 a.m.-3:30 p.m., open.

ADDRESS: Four Seasons Hotel, 98 San Jacinto, Austin, Texas.

FOR FURTHER INFORMATION CONTACT: Roy Truby, Executive Director, National Assessment Governing Board, 1100 L Street, NW., Suite 7322, Washington, DC, 20005-4013, Telephone: (202) 357-6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board is established under section 406(i) of the General Education Provisions Act (GEPA) as amended by section 3403 of the National Assessment of Educational Progress Improvement Act (NAEP Improvement Act), Title III-C of the Augustus Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P.L. 100-297), (20 U.S.C. 1221e-1).

The Board is established to advise the Commissioner of the National Center for Education Statistics on policies and actions needed to improve the form and use of the National Assessment of Educational Progress, and develop specifications for the design, methodology, analysis and reporting of test results. The Board also is responsible for selecting subject areas to be assessed, identifying the objectives for each age and grade tested, and establishing standards and procedures for interstate and national comparisons.

The National Assessment Governing Board will meet in Austin, Texas on December 8, and 9, 1989. On December 8, the Board will meet from 8 a.m. until completion of business and from 8:30 a.m. to 3:30 p.m. on December 9, 1989.

The proposed agenda of the open portion of the meeting on December 8, 1989 includes meetings of the subcommittees on reading, writing, analysis and dissemination, the Nominations Committee and the Executive Committee. There will also be discussion on alternatives to multiple-choice testing practices, a progress report on goal setting, and review of a "White Paper" on the future of NAEP. On December 9, 1989 the open portion of the meeting will be reports from the subcommittee meetings.

On December 8, 1989 from 12 p.m. until 2 p.m., this portion of the meeting will be closed to the public. The closed portion of the meeting will be closed under the authority of 10(d) of the Federal Advisory Committee Act (5 U.S.C. App. 2) and under exemption 9(B) of the Government in the Sunshine Act (5 U.S.C. 552b (c). During the closed portion of the meeting, there will be review of a grantee's draft trend report prior to its formal release by the Department. The draft report is still undergoing technical review and analysis and there is a significant possibility that the data may be incorrect or incomplete. The premature disclosure of this information would be likely to significantly frustrate implementation of proposed agency action. Such matters are protected by 5 U.S.C. 552b(c)(9)(B).

A summary of the activities at the closed session and related matters which are informative to the public consistent with the policy of title 5 U.S.C. 552b will be available to the public within fourteen days of the meeting. Records are kept of all Board proceedings, and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, 1100 L Street, NW., Suite 7322, Washington, DC, 20005-4013 from 8:30 a.m. to 5 p.m., Monday through Friday.

Christopher T. Cross,
Assistant Secretary for Educational Research and Improvement.

[FR Doc. 89-27879 Filed 11-27-89; 8:45 am]
BILLING CODE 4000-01-M

DEPARTMENT OF ENERGY

Office of the Secretary

Regional Hearings To Solicit Views From Public Officials and Individuals With Expertise and Interest in Development of a National Energy Strategy

AGENCY: Office of the Secretary, DOE.

ACTION: Notice of meeting to provide comments on the development of a National Energy Strategy.

SUMMARY: These hearings will be the seventh through eleventh hearings in a series being conducted through the country by the Department of Energy to solicit comments from interested parties

on a range of energy topics. Oral testimony at these hearings will be presented by invitation only. Written testimony can be submitted by any intested party at either the hearing site or directly to the Deparment of Energy, Office of Policy. Planning and Analysis, c/o Mr. Scott Neitzel, 1000 Independence Avenue, SW., Room 7B-143, Washington, DC 20585. Please reference specific hearing(s) and topic(s).

These hearings are designed to solicit information, data, and analysis related to the development of national energy policy and objectives, strategies for achieving them, and the role that the Federal Government should play in meeting national energy, economic, and environmental objectives.

The Department is interested in obtaining specific suggestions as to options and obstacles to efficient production and use of energy. Written comments may address general policies, regulations, economic incentives or disincentives, research and development needs, energy science, technology transfer, education, technical assistance, role of State and Local Government, the role of industry in energy policy development and implementation, or any other issues that would enhance the national dialogue on national energy strategy.

Dates. Locations, and Topics of the Hearings are as Follows: Decemer 4, 1989—Houston, TX; "Our Domestic Energy Resources Base" (fossil fuel and renewable energy supplies; technological and regulatory factors affecting supply). The hearing will be held between 9 a.m. and 3 p.m. at the University of Houston, Conrad N. Hilton College of Hotel and Restaurant Management, Hilton College Complex—South Wing, South Ballroom, Second Floor, Houston, Texas.

December 8, 1989—Omaha, NE; "Agriculture as Consumer and Producer of Energy (use of energy in crop production and processing; energy crops). The hearing will be held between 9 a.m. and 3 p.m. at The Omaha/Douglas Civic Center, Legislative Chamber, Floor LC, Room 4, 1819 Farnam Street, Omaha, Nebraska.

December 11, 1989—Detroit, MI; "Transportation and Energy" (fuel efficiency, advanced technology, and potential for systems changes). The hearing will be held between 9 a.m. and 3 p.m. at the Cobo Conference and Exhibition Center, Room W1-55, Street Level, 1 Washington Boulevard, Detroit, Michigan.

December 13, 1989—Washington, DC; "Energy, Defense, and National Security Interests" (role of stockpiles; role of foreign suppliers, globally and in the Western Hemisphere; international relations; energy interdependence). The specific location and time for this hearing will be announced in the near future.

December 14, 1989—Atlanta, GA; "Energy and the Environment" (global climate change, reconciling energy and environmental objectives). The specific location and time for this hearing will be announced in the near future.

All testimony submitted in conjunction with these hearings will be entered into the National Energy Strategy development record and made available to the public.

FOR FURTHER INFORMATION CONTACT: For further information, please write or call William H. Hatch, Office of Policy, Planning and Analysis, U.S. Department of Energy, 1000 Independence Avenue, SW., PE-01, Washington, DC 20585, (202) 586-4767.

Linda G. Stuntz,

Deputy Under Secretary, Policy, Planning and Analysis.

[FR Doc. 89-27901 Filed 11-24-89; 8:45 am]

BILLING CODE 6450-01-M

Voluntary Agreement and Plan of Action To Implement the International Energy Program; Meetings

In accordance with section 252(c)(1)(A)(i) of the Energy Policy and Conservation Act (42 U.S.C. 6272(c)(1)(A)(i)), the following meeting notices are provided:

I. A meeting of the Industry Advisory Board (IAB) to the International Energy Agency (IEA) will be held on Tuesday, December 5, 1989, at the offices of the IEA, 2, rue Andre Pascal, Paris, France, beginning at 2 p.m. The agenda for the meeting is as follows:

1. Opening remarks
2. Approval of Record Note of the IAB meeting of February 1989
3. Interval between Emergency Tests
4. Training program for Industry Supply Advisory Group Personnel
5. Other Training Operations
6. IAB Working Groups
7. Future Work Program
8. Date of Next IAB Meeting

II. A meeting of the IAB will be held Wednesday, December 6, 1989, at the offices of the IEA, at the aforesaid address beginning at 9:00 a.m. This meeting is being held in order to permit attendance by representatives of U.S. company members of the IAB at a meeting of the IEA's Standing Group on Emergency Questions (SEQ) which is scheduled to be held at the aforesaid location on that date. The agenda for the meeting is under the control of the SEQ. It is expected that the following draft agenda will be followed:

1. Adoption of the Agenda
2. Summary Record of the 62nd Meeting
3. 1990 Program of Work
4. IEA Emergency Response Systems
   —Emergency Management Manual and Emergency Sharing System Operations Manual, Proposal to Establish Working Group
   —Design of Coordinated Emergency Response Measures Test 2, Proposal to Establish Working Group
   —Training Program for ISAG Personnel
   —Other Training Operations
   —Membership of National Emergency Sharing Organizations (NESO) and ISAG
5. Emergency Response Programs of IEA Member Countries
   —Test of IEA Emergency Allocation Procedures by Canadian NESO
   —Review of Member Countries' Emergency Response Programs
   —Review of the United States
   —Review of Denmark
   —Calendar for Reviews
   —Oil Spills and Related Issues in Emergency Response Reviews
   —Summary of Energy Emergency Legislation of IEA Member Countries
   —Member Countries' Legislation, Administrative Procedures and Policy Attitudes Concerning the Use of Stocks in Supply Disruptions
6. Workshop on the Practical Aspects of Stockholding and Stockdraw
7. Emergency Reserve Situation of IEA Countries
   —IEA Country Emergency Reserves—Calculation Method Chosen, Emergency Reserve and Net Import Situations of IEA Member Countries
8. Emergency Data Systems
   —Proposal for Simplification of Questionnaire C (QC) and Improvement of Procedures to Provide Basic QuC Data
   —Revision of Questionnaires A and B Reporting Instructions, Proposal to Establish Working Group
   —Base Period Final Consumption 3Q88-2Q89
   —Monthly Oil Statistics (MOS) to September 1989; MOS to October 1989; QuC Data to November 1989
   —Availability of Oil Trade Statistics for Individual EEC Countries Post-1992
9. Quarterly Oil Forecast 4Q89/3Q90
10. Normal Domestic Production
11. IAB Issues
12. Any Other Business
   —End-November Monthly Oil Report

13. Date of Next Meeting

III. A meeting of the IAB will be held on Thursday, December 7, 1989, at 9:00 a.m., at the aforesaid address. This meeting is being held to allow members of the IAB to participate in an IAB working group meeting on the IEA's Questionnaire A/Questionnaire B (QA/QB) reporting instructions to be held at that time. The agenda for the meeting is as follows:

1. Opening Remarks
2. Reporting Forward Month Trade
3. No Present Destination Oil
4. Other Changes in Company Operating and Trading Practices
5. Other Issues Relating to QA/QB
6. Next Meeting

IV. A meeting of the IAB will be held on Thursday, December 7, 1989, at 2:00 p.m., at the aforesaid address. The purpose of the meeting is to allow members of the IAB to participate in an IAB working group meeting on the Emergency Operations Manual to be held at that time. The agenda for the meeting is as follows:

1. Opening Remarks
2. Emergency Sharing System Operations Manual
3. Next Meeting

As provided in section 252(c)(2)(A)(ii) of the Energy Policy and Conservation Act, the meetings are open only to representatives of members of the IAB, their counsel, representatives of members of the IEA's Standing Group on Emergency Questions (SEQ), representatives of the Departments of Energy, Justice, State, the Federal Trade Commission, and the General Accounting Office, representatives of Committees of the Congress, representatives of the IEA, representatives of the Commission of the European Communities, and invitees of the IAB, the SEQ, or the IEA.

Issued in Washington, DC, November 22, 1989.

Stephen A. Wakefield,

General Counsel.

[FR Doc. 89-27860 Filed 11-27-89; 8:45 am]

BILLING CODE 6450-01-M

Assistant Secretary for International Affairs and Energy Emergencies

Proposed Subsequent Arrangement

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160), notice is hereby given of a proposed "subsequent arrangement" under the Agreement for Cooperation between the Government of the United States of America and the Government of Canada concerning Civil Uses of Atomic Energy, as amended, and the Agreement for Cooperation between the Government of the United States of America and the Government of the Arab Republic of Egypt concerning Peaceful Uses of Nuclear Energy.

The subsequent arrangement to be carried out under the above-mentioned agreements involves approval of the following retransfer: RTD/GP(CA)-1, for the transfer from Canada to Egypt of 60 kilograms of uranium, enriched to 1.38 percent in the isotope uranium-235, for fabrication of CANDU fuel for subsequent irradiation testing in Canada.

In accordance with section 131 of the Atomic Energy Act of 1954, as amended, it has been determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect sooner than fifteen days after the date of publication of this notice.

For the Department of Energy.

Dated: November 21, 1989.

Thad Grundy, Jr.,

Deputy Assistant Secretary for International Affairs.

[FR Doc. 89-27858 Filed 11-27-89; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Project No. 9423-001]

Summit Energy Storage, Inc.; Notice of Intent To Prepare an Environmental Impact Statement, and Notice of Public Scoping Meetings

November 20, 1989.

The staff of the Federal Energy Regulatory Commission (Commission) has determined that issuance of a license for the construction and operation of the proposed Summit Pumped Storage Hydroelectric Project, FERC Project No. 9423-001, in the city of Norton, Upper Tuscarawas subbasin, Summit County, Ohio, would constitute a major federal action significantly affecting the quality of the human environment. Therefore, the staff intends to prepare an environmental impact statement (EIS) on the proposed hydroelectric project in accordance with the National Environmental Policy Act. The staff's EIS will objectively consider both site specific and cumulative impacts of the proposed project, reasonable alternatives, and will also include an econmic, and financial and engineering analysis.

A draft EIS will be issued in May 1990, and circulated for review by all the interested parties. All comments filed on the draft EIS will be analyzed by the staff and considered in the final EIS. The staff's conclusions and recommendations will then be presented to the Commissioner's for their consideration in reaching a final decision on whether to issue a license for the project.

Scoping Meetings

On Wednesday, December 20, 1989, the staff will conduct a scoping session oriented toward natural resource agencies and other interested parties in Norton, Ohio, from 9:00 a.m. to 12:00 noon, and a public scoping session from 7 p.m. to 10 p.m. The morning scoping session will be held at the Administration and Police Station Building, 4060 Columbia Woods Drive, Norton, Ohio, and the evening scoping session at the Norton High School, 4128 Cleveland/Massillon Road, Norton, Ohio.

All interested individuals, organizations, and agencies are invited to attend and to assist the staff in identifying the scope of environmental issues that should be analyzed in the upcoming EIS.

Objectives

At the scoping meetings the staff will: (1) summarize the environmental issues tentatively identified for analysis in the planned EIS, (2) encourage statements from the public and experts on the issues that should be analyzed in the EIS, including points of view in opposition to, or in support of, the staff's preliminary views; and (3) solicit from the meeting participants all available information, especially quantified data, on the resources at issue.

Procedures

The meetings will be recorded by a stenographer and thereby become a part of the formal record of the Commission proceeding on the Summit Project. Individuals presenting statements at the meetings will be asked to clearly identify themselves for the record.

Organizations, agencies, and individuals with environmental expertise and concerns are encouraged to attend the morning session to assist the staff in defining and clarifying the issues to be addressed in the EIS.

Persons choosing not to speak at the meetings, but who have views on the issues or information relevant to the issues, may submit written statements for inclusion in the public record. In addition, written scoping comments may be filed with the Secretary, Federal Energy Regulatory Commission, 825

North Capitol Street, NE, Washington, D.C. 20426, until January 22, 1990. All correspondence should clearly show the following caption on the first page: Summit Project, Ohio, Project No. P-9423-001.

A preliminary EIS scoping document outlining subject areas to be addressed at the meeting will be distributed by mail to all interested parties.

For further information please contact Lee Emery at (202) 357-0779.

Lois D. Cashell,

Secretary.

[FR Doc. 89-27745 Filed 11-27-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ90-1-20-001 TQ90-2-20-000]

Algonquin Gas Transmission Co.; Proposed Changes in FERC Gas Tariff and Request for Amendment

November 20, 1989.

Take notice that Algonquin Gas Transmission Company ("Algonquin") on November 9, 1989, tendered for filing proposed changes in its FERC Gas Tariff, Second Revised Volume No. 1, as set forth in the revised tariff sheets:

Proposed to be effective December 1, 1989

Alternate Thirty-seventh Revised Sheet No. 201
Alternate Thirty-eithth Revised Sheet No. 203
Alternate Thirty-fourth Revised Sheet No. 204
Alternate Thirty-first Revised Sheet No. 205

Algonquin states that it is filing the above listed tariff sheets in conformance with its PGA, section 17 of the General Terms and Conditions as found in Algonquin's compliance filing of October 27, 1989 in Docket No. RP86-41-000, pursuant to the Commission's Order Approving Contested Offer Of Settlement Subject To Conditions issued April 14, 1989 as modified and clarified by the Commission's Order Granting In Part And Denying In Part Rehearing, issued October 6, 1989. The instant filing reflects the roll in of costs associated with Algonquin's purchases to supply its sales services under Rate Schedules F-1, WS-1, I-1, E-1, F-2, F-3 and F-4. Algonquin's calculations include Texas Eastern's Standby Charges under Texas Eastern's Rate Schedules CD-1 and CD-2. The inclusion of Texas Eastern's Standby charges is predicated upon the Commission granting Algonquin's request for a waiver of the Commission's regulations as necessary to permit such inclusion. Algonquin states that it made such a request on June 26, 1989 in Docket No. RP89-199-000 and on Ocotber 17, 1989 in Docket No. RP90-13-000.

Algonquin further states that on October 31, 1989 it made a Quarterly PGA filing in Docket No. TQ90-1-20-000 ("October 31 filing") in which Algonquin requested a waiver of the Commission's regulations in order to permit the October 31 filing to become effective on November 1, 1989. In the instant filing, Algonquin is requesting that the October 31 filing be treated as an out-of-cycle PGA and that the instant filing be accepted as its Quarterly PGA to become effective December 1, 1989.

Algonquin states that the revised rates for Rate Schedules F-1, WS-1, I-1, E-1, F-2, F-3 and F-4 reflect Algonquin's estimate of sales for the three (3) month period beginning December 1, 1989 and those changes in rates in the services underlying such schedules.

Algonquin States that the effect of the changes in the underlying rates is to decrease the Demand-1 and Demand-2 charges by 0.70¢ and 0.12¢ per MMBtu, respectively while the commodity charge increases by 2.46¢ per MMBtu from the rates contained in Algonquin's October 31 filing.

Algonquin notes that copies of the filing were served upon the affected parties and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before November 29, 1989. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary

[FR Doc. 89-27735 Filed 11-27-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-241-001]

Algonquin Gas Transmission Co.; Compliance Filing

November 20, 1989.

Take notice that Algonquin Gas Transmission Company ("Algonquin") on November 15, 1989, tendered for filing proposed changes in its FERC Gas Tariff, Second Revised Volume No. 1, as set forth in Substitute Original Sheet No. 220 proposed to be effective November 1, 1989.

Algonquin states that on September 25, 1989 Algonquin filed tariff sheets ("September 25 filing") to set forth the terms and conditions of its proposed new Rate Schedule ATAP. Under Rate Schedule ATAP, Algonquin proposed to assign to third parties, on both a firm and interruptible basis, its firm transportation rights through Texas Eastern's Transportation Assignment Program ("TAP") under Rate Schedule FT-1 as approved by the Commission on August 22, 1989 and further clarified on September 28, 1989.

Algonquin further states that its September 25 filing was accepted by Commission Order Accepting Tariff Sheets Subject To Conditions issued October 31, 1989. Such Commission order accepted Algonquin's September 25 filing to be effective on November 1, 1989 (Ordering Paragraph A) subject to Algonquin filing revised tariff sheets reflecting the elimination of the flow-through of Texas Eastern's Standby charges (Ordering Paragraph B).

Algonquin maintains that in compliance with the Commission's October 31 Order (Ordering Paragraph B), it is submitting within fifteen days of the Commission's Order a revised tariff sheet, Substitute Original Sheet No. 220, reflecting the elimination of the flow-through of Texas Eastern's Standby charges. Substitute Original Sheet No. 220 is proposed to be effective on November 1, 1989.

Furthermore, Algonquin states that it is serving notice that it is accepting valid request for assignment of its FT-1 Service Rights (under Texas Eastern's TAP Program) subject to the terms and conditions of Rate Schedule ATAP. All valid requests received by Algonquin during the five (5) business day window period following this announcement shall have the same first-come, first-served priority. Such window period shall extend from November 16, 1989 through November 22, 1989. Requests for assignments under Rate Schedule ATAP related to Rate Schedule F-1 and F-4 sales conversion requests shall have priority over all other requests for assignments under Rate Schedule ATAP outside of the "first-come, first-served" queue.

Algonquin notes that copies of the filing were served upon the affected parties and interested state commissions.

Any person desiring to be heard or to

protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before November 29, 1989. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 89-27736 Filed 11-27-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM90-3-32-000]

Colorado Interstate Gas Co.; Filing

November 20, 1989.

Take note that on November 15, 1989, Colorado Interstate Gas Company ("CIG") submitted for filing tariff sheets reflecting a new Gas Research Institute ("GRI") charge of 1.3¢/Mcf effective January 1, 1990, pursuant to Commission Opinion No. 334 issued on October 10, 1989 in Docket No. RP89-187-000, and Sections 24 and 15, respectively, of CIG's FERC Original Volume No. 1 and Second Revised Volume No. 1-A.

CIG notes that on November 14, 1989, it filed to implement "interim settlement" rates in Docket No. RP87-30, effective for the limited period October 1, 1989 through December 31, 1989. CIG's acceptance of the settlement and continuation of the settlement rates, however, is contingent upon satisfactory clarification of the Commission's November 8, 1989 order approving the settlement, and upon that order, as clarified, becoming final. Otherwise, CIG's rates revert to the pre-settlement level January 1, 1990. Because CIG is uncertain when and whether the Docket No. RP87-30 settlement will be finally approved, it states that this GRI filing reflects rates without the Docket No. RP87-30 settlement implemented. Should the Commission grant the requested clarification of its November 8, 1989 order in Docket No. RP87-30 and the order becomes final, then CIG states that it will, at that time, file to conform the tariff sheets herein to be consistent with such Commission action.

Copies of this filing are being served on all jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before November 29, 1989. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 89-27737 Filed 11-27-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CS87-47-001 et al.]

Geodyne Production Co., et al. (Geodyne Production Co.), et al.; Applications for Small Producer Certificates [1]

November 20, 1989.

Take notice that each of the Applicants listed herein has filed an application pursuant to section 7(c) of the Natural Gas Act and § 157.40 of the Commission's regulations thereunder for a small producer certificate of public convenience and necessity authorizing the sale for resale and delivery of natural gas in interstate commerce, all as more fully set forth in the applications which are on file with the Commission and open to public inspection.

Any person desiring to be heard or to make any protest with reference to said applications should on or before December 7, 1989, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). 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 petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicants to appear or to be represented at the hearing.

Lois D. Cashell,

Secretary.

[1] This notice does not provide for consolidation for hearing of the several matters covered herein.

Docket No.	Date Filed	Applicant
CS87-47-001	Oct. 23, 1989 [1]	Geodyne Production Company, et al. (Geodyne Production Company), 320 South Boston Avenue, The Mezzanine, Tulsa, OK 74103.
CS84-109-002	Nov. 7, 1989 [2]	Plains Resources Inc., PRI Producing Inc., Hiawatha Oil Company, Inc., PRI Property Management, Inc., PRI Royalty Holdings Inc., J.P. Collins and Janewill Petroleum Inc. (Plains Resources Inc. PRI Producing Inc., Hiawatha Oil Company, Inc., PRI Property Management, Inc., and PRI Royalty Holdings Inc.), Cullen Center, 1600 Smith Street, Houston, TX 77002.
CS90-3-000	Oct. 19, 1989	Axem Energy Co., as record title holder for Blackbird Co., 7800 East Union Avenue, Suite 1100, Denver, CO 80237.
CS90-4-000	Oct. 23, 1989	Union Ridge Oil & Gas Corporation, P.O. Box 7056, Ann Arbor, MI 48107.
CS90-5-000	Nov. 9, 1989	Hall-Houston Oil Company, 700 Louisiana, Suite 2610, Houston, TX 77002.

[1] By letter dated October 6, 1989, Applicant advised that the small producer certificate in Docket No. CS87-47-000 was intended to cover PaineWebber/Geodyne Energy Income Production Partnerships I-A, I-B, I-C, I-D, I-E and I-F as co-holders of the small producer certificate. Applicant requests that PW/Geodyne Production Partnerships II-A, II-B, II-C, II-D, II-E, II-F, II-G and II-H also be covered as coholders of the small producer certificate.

[2] By letter dated November 2, 1989, Applicant requests that the small producer certificate in Docket No. CS84-109-001 be amended to include J.P. Collins and Janewill Petroleum Inc.

[Docket No. CP89-2198-000]

Great Lakes Gas Transmission Co.; Technical Conference

November 20, 1989.

On September 29, 1989, Great Lakes Gas Transmission Company (Great Lakes) filed an application in the above-captioned docket, pursuant to section 7(c) of the Natural Gas Act, for a blanket certificate of public convenience and necessity authorizing open access, self-implementing transportation of natural gas and pre-granted authorization to abandon such self-implementing transportation service, in accordance with the provisions of § 284.221(d) of the Commission's regulations, 18 CFR 284.221(d).

Notice of Great Lakes' application was published in the **Federal Register** on October 13, 1989, 54 FR 42010. Fifty motions to intervene and/or protests have been filed. A number of the interventions and/or protests raise issues concerning the tariff provisions for open access transportation filed by Great Lakes and propose changes to such tariff provisions. Certain of the parties have requested that a technical conference be held. On November 16, 1989, Great Lakes filed a motion recommending such a conference.

TAKE NOTICE that an informal technical conference will be held at the offices of the Commission, commencing at 11:00 a.m. on Tuesday, December 19, 1989, for the purpose of discussing possible resolution of the issues which have been raised by the parties concerning the tariff provisions filed by Great Lakes in this proceeding. All interested persons are invited to attend.

Lois D. Cashell,

Secretary.

[FR Doc. 89-27744 Filed 11-27-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ90-1-27-001]

North Penn Gas Co.; Tariff Filing

November 20, 1989.

Take notice that on November 8, 1989, North Penn Gas Company (North Penn) filed revised Ninety-Sixth Revised Sheet No. PGA-1 to its FERC Gas Tariff, First Revised Volume No. 1.

North Penn states that the tariff sheet supersedes Ninety-Fifth Revised Sheet No. PGA-1 instead of Substitute Ninety-Fifth Revised Sheet No. PGA-1 which was incorrect in North Penn's quarterly PGA filing that was made October 31, 1989.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practices and Procedure (18 CFR 385.214, 385.211 (1989). All such protests should be filed on or before November 29, 1989. 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. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-27746 Filed 11-27-89; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TA90-1-38-002]

Ringwood Gathering Co.; Tariff Filing

November 20, 1989.

Take notice that on November 13, 1989, Ringwood Gathering Company (Ringwood) filed Substitute Fifty-First Revised Sheet Annual PGA-1 to FERC Gas Tariff, Original Volume No. 1.

Ringwood also states that it has removed the carrying charges on the costs of gas in excess of the 103 percent level.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practices and Procedure (18 CFR 385.214, 385.211 (1989). All such protests should be filed on or before November 29, 1989. 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. Persons that already are parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 89-27738 Filed 11-27-89; 8:45 am]

BILLING CODE 6717-01-M

Office of Energy Research

Health and Environmental Research Advisory Committee; Renewal

Pursuant to section 14(a)(2)(A) of the Federal Advisory Committee Act, and section 101-6.1015 of the Final Rule on Advisory Committee Management, (41 CFR 101-6.1015) and following consultation with the Committee Management Secretariat, General Services Administration, notice is hereby given that the Health and Environmental Research Advisory Committee has been renewed for a two-year period ending November 22, 1991. The Committee will provide advice to the Director, Office of Energy Research, on the Health and Environmental Research (HER) program.

The Committee presently has 19 members. The membership is balanced to include representatives of the national laboratories, the universities and the business sector. Important disciplines such as experimental biological research, ecological research, and medicine are well represented; and experience, point of view and geography are taken into account in the selection of the committee members.

The renewal of the Health and Environmental Research Advisory Committee has been determined to be essential to the conduct of the Department's business and to be in the public interest in connection with the performance of duties imposed upon the Department of Energy by law. The Committee will operate in accordance with the provisions of the Federal Advisory Committee Act (Pub. L. No. 92-463), the Department of Energy Organization Act (Pub. L. No. 95-91), and regulations and directives implementing those statutes.

Further information regarding this advisory committee can be obtained from Elinor C. Donnelly (202-586-3448).

Issued in Washington, DC, on November 22, 1989.

Howard H. Raiken,

Advisory Committee Management Officer.

[FR Doc. 89-27857 Filed 11-27-89; 8:45 am]

BILLING CODE 6450-01-M

Office of Fossil Energy

[FE Docket No. 89-48-NG]

Kamine/Besicorp Carthage L.P.; Application To Import Natural Gas From Canada

AGENCY: Office of Fossil Energy, DOE.

ACTION: Application for long-term authorization to import natural gas from Canada.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt on July 21, 1989, of an application filed by Kamine/Besicorp Carthage L.P. (Applicant), for authorization to import up to 14,200 Mcf of natural gas per day, and a total of 104 Bcf of natural gas from Canada over a 20-year term. The gas would be used to fuel the Applicant's new 49.9 MW cogeneration plant to be constructed and operated in Carthage, New York. Applicant requests that the authorization commence upon the commercial operation of the facility or May 1, 1991, whichever is earlier. The gas would be transported within the U.S. through existing and proposed pipeline facilities.

The application is filed under Section 3 of the Natural Gas Act (NGA) and DOE Delegation Order Nos. 0204-111 and 0204-127.

Protests, motions to intervene, notices of intervention, and written comments are invited.

DATE: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed at the address listed below no later than 4:30 p.m., e.s.t., December 28, 1989.

ADDRESS: Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Forrestal Building, Room 3F-056, FE-50, 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Robert Groner, Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Forrestal Building, Room 3H-087, 1000 Independence Avenue SW., Washington, DC 20585. (202) 586-1657;

Diane Stubbs, Natural and Mineral Leasing, Office of General Counsel, U.S. Department of Energy, Forrestal Building, Room 6E-042, 1000 Independence Avenue SW., Washington, DC 20585. (202) 586-1667.

SUPPLEMENTARY INFORMATION:

Applicant is a Delaware limited partnership whose general partners are Kamine Carthage Cogen Co., Inc. (Kamine), and Beta Carthage Inc. (Beta). Kamine is an affiliate of Kamine Engineering and Mechanical Contracting Co., Inc. (KEMCO), a New Jersey corporation with its principal place of business in East Union, New Jersey. Beta is a wholly owned subsidiary of Besicorp Group, Inc. (Besicorp), a New York corporation with its principal place of business in Kingston, New York. KEMCO and Besicorp, individually and jointly, are energy project developers and have been owners and operators of natural gas cogeneration facilities since 1985. KEMCO and/or Besicorp (as affiliates) currently operate four cogeneration facilities in New York and New Jersey and have several other cogeneration facilities in various stages of planning or construction.

According to Applicant, the new cogeneration facility is expected to be completed and in commercial operation by May 1, 1991. If the facility is not operational until after May 1, 1991, the gas subject to the Agreement will be sold in Canadian markets until facility operations begin. Applicant states the gas will be used to fuel a new combined-cycle cogeneration facility to be owned by Applicant and constructed on premises leased from James River II, Inc. (JRII), an affiliate of James River Corporation of Virginia, at the JRII paper mill near Carthage, Saratoga County, New York. The plant has been certified as a "qualifying facility" under the Public Utility Regulatory Policies Act of 1978 (PURPA). The steam will be sold to the JRII paper mill and the electricity will be sold to Niagara Mohawk Power Corporation (Niagara Mohawk).

Applicant will purchase the gas from Renaissance Energy Ltd., (Renaissance), pursuant to a natural gas purchase agreement executed May 9, 1989, and enclosed as an exhibit with the application. The agreement states that the Applicant will pay Renaissance for gas a minimum base price of $1.45 per MMBtu U.S. This base price is adjusted each quarter to reflect the percentage change in value of an index comprised of: (1) a 50% weighting reflecting the 100% load factor rate published by Consolidated Natural Gas (CNG), (2) a 25% weighting reflecting the price of No. 2 fuel, and (3) a 25% weighting reflecting the average price of spot gas delivered to five major pipelines) compared to the value of the Index on December 1, 1988. The adjusted base price includes commodity costs, royalties, transportation charges, and costs of permits. This base price will be adjusted annually to reflect the percentage increase in the average electric unit price paid by Niagara Mohawk for electricity generated by the cogeneration facility, subject to a maximum of $2.40 per MMBtu in the first contract year. The base price and the composition of the index will be renegotiated in the month preceding the date of first delivery and prior to the expiration of the fifth and tenth contract years. If Applicant and Renaissance cannot agree on such renegotiated base price or composition of the index, either party may terminate this agreement upon proper notice.

Applicant supplemented its application with a November 6, 1989, filing that details the transportation arrangements made for the proposed import using existing facilities, lists the approximate costs of the transportation components, and includes copies of the TransCanada PipeLines (TCPL) transportation agreement and tariffs. Applicant indicates that Renasissance will deliver the natural gas through the pipeline facilities of the NOVA Corporation. The Applicant will take title to the gas in Canada and transport the gas through the facilities of TCPL to an existing interconnection with Great Lakes Gas Transmission (Great Lakes). Great Lakes will transport the Gas to ANR Pipeline Company (ANR). ANR will transport the gas to the existing interconnect with Texas Gas Pipeline Co. (Texas Gas) which will transport it to CNG. CNG will transport the gas to the Niagara Mohawk distribution system which will transport the gas to the cogeneration facility. The approximate costs of the transportation totals $1.60 per Mcf. According to Applicant, transportation is on an interruptible basis through the systems of Great Lakes, ANR, Texas Gas, and CNG.

Applicant states that all the natural gas imported under its requested authorization will be used to fuel the new cogeneration facility. Under anticipated normal operating conditions, the cogenerating facility will produce an average of about 14,200 Mcf per day. Applicant asserts that its request for authority to import up to 104 Bcf per year is necessary to meet the facility's fuel needs, allow for transportation shrinkage, and provide a reasonable margin for any unforeseen exigency.

In support of its application, Applicant states that the imported gas will provide a reliable, long-term, secure supply of competitively priced gas to the new cogeneration facility. According to the Applicant, the agreement's price provisions provide for market-responsive pricing subject to quarterly adjustments. Moreover, the Applicant states, it is not subject to a take-or-pay obligation; instead, the agreement provides for mutual quantity reduction options in the event of specified degrees of reduced performance by either party. At the same time, Applicant avers, its electric purchase contracts require Niagara Mohawk to purchase all generated electric power, with no curtailment or interruption provisions except for specific operational reasons. Similarly, the Applicant states, JRII has

contracted to purchase all of its net steam requirement from the new cogeneration facility. With regard to security of supply, the agreement provides for the dedication of specific reserves from a portion of Renaissance's reserve base of 20 gas fields. For these reasons, the Applicant maintains that the proposed import is consistent with the public interest.

Applicant filed a Certification of Compliance with the coal capability requirement for proposed new electric powerplants pursuant to the Powerplant and Industrial Fuel Use Act of 1978 (FUA)(10 USC 3801 *et seq.*, as amended; 53 FR 35544, September 14, 1988).

The decision on Applicant's application for import authority will be made consistent with the DOE's gas import policy guidelines, under which the competitiveness of an import arrangement in the markets served is the primary consideration in determining whether it is in the public interest (49 FR 6684, February 22, 1984). Other matters that may be considered in making a public interest determination include need for gas, security of the long-term supply, and any relevant issues that may be unique to cogeneration facilities. Parties that may oppose this application should comment in their responses on the issues of competitiveness, need for the gas, and security of supply as set forth in the policy guidelines. The applicant asserts that this import arrangement is in the public interest because it is competitive and its gas source will be secure. Parties opposing the import arrangement bear the burden of overcoming these assertions.

All parties should be aware that if the requested import is approved, the authorization would be conditioned on the filing of quarterly reports indicating volumes imported and the purchase price.

NEPA Compliance

Under section D of the DOE guidelines for compliance with the National Environmental Policy act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, actions that grant or deny import authorizations where no new gas transmission facilities are needed but where new ancillary facilities are to be constructed, such as a cogeneration facility, would normally require the preparation of an environmental assessment (EA), because they involve "minor new construction" (54 FR 12474, March 27, 1989). However, we believe that preparation of an EA to approve or disapprove this application is unnecessary, and compliance with NEPA for the proposed action can be achieved by invoking two categorical exclusions in the DOE NEPA guidelines (52 FR 47622, December 15, 1987).

The environmental impacts of constructing and operating new cogeneration facilities have been addressed on numerous occasions by the Economic Regulatory Administration (ERA) in conjunction with processing exemption petitions under the FUA, and as a result, such actions have been granted a categorical exclusion from further NEPA review (52 FR 47670, December 15, 1987). The cogeneration facilities to be constructed in connection with these import applications are identical to those facilities covered by the categorical exclusion for FUA actions. Therefore, it is an appropriate application of another categorical exclusion contained in the DOE guidelines for "actions that are substantially the same as other actions for which the environmental effects have already been assessed in a NEPA document and determined by DOE to be clearly insignificant and where such assessment is currently valid" (52 FR 47668, December 15, 1987) to extend the FUA categorical exclusion for cogeneration facilities to the grant of an authorization to import natural gas under the NGA which results in the construction and operation of a cogeneration facility.

A categorical exclusion raises a rebuttable presumption that the Federal action will not significantly affect the quality of the human environment. Unless it appears during the proceedings on this import application that the grant or denial of authorization will significantly affect the quality of the human environment, the Office of Fuels Programs expects that no additional environmental review will be required.

Public Comment Procedures

In response to this notice, any person may file a protest, motion to intervene or notice of intervention, as applicable and written comments. Any person wishing to become a party to the proceeding and to have the written comments considered as the basis for any decision on the application must, however, file a motion to intervene or notice of intervention, as applicable. The filing of a protest with respect to this application will not serve to make the protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the application. All protests, motions to intervene, notices of intervention, and written comments must meet the requirements that are specified by the regulations in 10 CFR part 590. Protests, motions to intervene, notices of intervention, requests for additional procedures, and written comments should be filed with the Office of Fuels Programs at the above address.

It is intended that a decisional record will be developed on the application through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial questions of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, notice to all parties will be provided. If no party requests additional procedures, a conditional or final opinion and order may be issued based on the official record, including the application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

A copy of Applicant's application is available for inspection and copying in the Office of Fuels Programs Docket Room, 3F-056, at the above address, (202) 586-9478. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, November 21, 1989.

Clifford P. Tomaszewski,

Acting Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.

[FR Doc. 89-27861 Filed 11-27-89; 8:45 am]

BILLING CODE 6450-01-M

[FE Docket No. 89-47-NG]

Kamine/Besicorp South Glens Falls L.P.; Application To Import Natural Gas From Canada

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application for long-term authorization to import natural gas from Canada.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt on July 21, 1989, of an application filed by Kamine/Besicorp South Glens Falls L.P. (Applicant), for authorization to import up to 14,200 Mcf of natural gas per day, and a total of 104 Bcf of natural gas from Canada over a 20-year term. The gas would be used to fuel the Applicant's new 49.9 MW cogeneration plant to be constructed and operated in South Falls, New York. Applicant requests that the authorization commence upon the commercial operation of the facility or May 1, 1991, whichever is earlier. The gas would be transported within the U.S. through existing pipeline facilities.

The application is filed under section 3 of the Natural Gas Act (NGA) and DOE Delegation Order Nos. 0204-111 and 0204-127. Protests, motions to intervene, notices of intervention, and written comments are invited.

DATE: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed at the address listed below no later than 4:30 p.m., e.s.t., December 28, 1989.

ADDRESS: Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Forrestal Building, Room 3F-056, FE-50, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Robert Groner, Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Forrestal Building, Room 3H-087, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-1657;

Diane Stubbs, Natural and Mineral Leasing, Office of General Counsel, U.S. Department of Energy, Forrestal Building, Room 6E-042, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-6667.

SUPPLEMENTARY INFORMATION:

Applicant is a Delaware limited partnership whose general partners are Kamine South Glens Falls Cogen Co., Inc. (Kamine), and Beta South Glens Falls Inc. (Beta). Kamine is an affiliate of Kamine Engineering and Mechanical Contracting Co., Inc. (KEMCO), a New Jersey corporation with its principal place of business in East Union, New Jersey. Beta is a wholly owned subsidiary of Besicorp Group, Inc. (Besicorp), a New York corporation with its principal place of business in Kingston, New York. KEMCO and Besicorp, individually and jointly, are energy project developers and have been owners and operators of natural gas cogeneration facilities since 1985. KEMCO and/or Besicorp (as affiliates) currently operate four cogeneration facilities in New York and New Jersey and have several other cogeneration facilities in various stages of planning or construction.

According to Applicant, the new cogeneration facility is expected to be completed and in commercial operation by May 1, 1991. If the facility is not operational until after May 1, 1991, the gas subject to the Agreement will be sold in Canadian markets until facility operations begin. Applicant states the gas will be used to fuel a new combined-cycle cogeneration facility to be owned by Applicant and constructed on premises leased from James River II Corporation (James River), an affiliate of James River Corporation of Virginia, at the James River paper mill near South Glens Falls, Jefferson County, New York. The plant has been certified as a "qualifying facility" under the Public Utility Regulatory Policies Act of 1978 (PURPA). The steam will be sold to the James River paper mill and the electricity will be sold to Niagara Mohawk Power Corporation (Niagara Mohawk).

Applicant will purchase the gas from Renaissance Energy Ltd. (Renaissance), pursuant to a natural gas purchase agreement executed May 9, 1989, and enclosed as an exhibit with the application. The agreement states that the Applicant will pay Renaissance for gas a minimum Base Price of $1.45 per MMBtu U.S. This base price is adjusted each quarter to reflect the percentage change in value of an index comprised of: (1) A 50% weighting reflecting the 100% load factor rate published by Consolidated Natural Gas (CNG), (2) a 25% weighting reflecting the price of No. 2 fuel, and (3) a 25% weighting reflecting the average price of spot gas delivered to five major pipelines compared to the value of the index on December 1, 1988. The adjusted base price includes commodity costs, royalties, fuel, shrinkage, transportation charges, and costs of permits. This base price will be adjusted annually to reflect the percentage increase in the average electric unit price paid by Niagara Mohawk for electricity generated by the cogeneration facility, subject to a maximum of $2.40 per MMBtu in the first contract year. The base price and the composition of the index will be renegotiated in the month preceding the date of first delivery and prior to the expiration of the fifth and tenth contract years. If Applicant and Renaissance cannot agree on such renegotiated base price or composition of the index, either party may terminate this agreement upon proper notice.

Applicant supplemented its application with a November 6, 1989, filing that details the transportation arrangements made for the proposed import using existing facilities, lists the approximate costs of the transportation components, and includes copies of the TransCanada PipeLines (TCPL) transportation agreement and tariffs. Applicant indicates that Renaissance will deliver the natural gas through the pipeline facilities of the NOVA Corporation. The Applicant will take title to the gas in Canada and transport the gas through the facilities of TCPL to an existing interconnection with Great Lakes Gas Transmission (Great Lakes). Great Lakes will transport the gas to ANR Pipeline Company (ANR). ANR will transport the gas to the Niagara Mohawk distribution system which will transport the gas to the existing interconnect with Texas Gas Pipeline Co. (Texas Gas) which will transport it to CNG. CNG will transport the gas to the cogeneration facility. The approximate costs of the U.S. transportation components total $1.60 per Mcf. According to Applicant, transportation is on an interruptible basis through the systems of Great Lakes, ANR, Texas Gas, and CNG.

Applicant states that all the natural gas imported under its requested authorization will be used to fuel the new cogeneration facility. Under anticipated normal operating conditions, the cogenerating facility will produce an average of about 14,200 Mcf per day. Applicant asserts that its request for authority to import up to 104 Bcf per year is necessary to meet the facility's fuel needs, allow for transportation shrinkage, and provide a reasonable margin for any unforeseen exigency.

In support of its application, Applicant states that the imported gas will provide a reliable, long-term, secure supply of competitively priced gas to the new cogeneration facility. According to the Applicant, the agreement's price provisions provide for market-responsive pricing subject to quarterly adjustments. Moreover, the Applicant states, it is not subject to a take-or-pay obligation; instead, the agreement provides for mutual quantity reduction options in the even of specified degrees of reduced performance by either party.

At the same time, Applicant avers, its electric purchase contracts require Niagara Mohawk to purchase all generated electric power, with no curtailment or interruption provisions except for specific operational reasons. Similarly, the Applicant states, James River has contracted to purchase all of its net steam requirement from the new cogeneration facility. With regard to security of supply, the agreement provides for the dedication of specific reserves from a portion of Renaissance's reserve base of 20 gas fields. For these reasons, the Applicant maintains that the proposed import is consistent with the public interest.

Applicant filed a Certification of Compliance with the coal capability requirement for proposed new electric powerplants pursuant to the Powerplant and Industrial Fuel Use Act of 1978 (FUA) (10 U.S.C. 3801 *et seq.*, as amended; 53 FR 35544, September 14, 1988).

The decision on Applicant's application for import authority will be made consistent with the DOE's gas import policy guidelines, under which the competitiveness of an import arrangement in the markets served is the primary consideration in determining whether it is in the public interest (49 FR 6684, February 22, 1984). Other matters that may be considered in making a public interest determination include need for gas, security of the long-term supply, and any relevant issues that may be unique to cogeneration facilities. Parties that may oppose this application should comment in their responses on the issues of competitiveness, need for the gas, and security of supply as set forth in the policy guidelines. The applicant asserts that this import arrangement is in the public interest because it is competitive and its gas source will be secure. Parties opposing the import arrangement bear the burden of overcoming these assertions.

All parties should be aware that if the requested import is approved, the authorization would be conditioned on the filing of quarterly reports indicating volumes imported and the purchase price.

NEPA Compliance

Under section D of the DOE guidelines for compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, actions that grant or deny import authorizations where no new gas transmission facilities are needed but where new ancillary facilities are to be constructed, such as a cogeneration facility, would normally require the preparation of an environment assessment (EA), because they involve "minor new construction" (54 FR 12474, March 27, 1989). However, we believe that preparation of an EA to approve or disapprove this application is unnecessary, and compliance with NEPA for the proposed action can be achieved by invoking two categorical exclusions in the DOE NEPA guidelines (52 FR 47622, December 15, 1987).

The environmental impacts of constructing and operating new cogeneration facilities have been addressed on numerous occasions by the Economic Regulatory Administration (ERA) in conjunction with processing exemption petitions under the FUA, and as a result, such actions have been granted a categorical exclusion from further NEPA review (52 FR 47670, December 15, 1987). The cogeneration facilities to be constructed in connection with these import applications are identical to those facilities covered by the categorical exclusion for FUA actions. Therefore, it is an appropriate application of another categorical exclusion contained in the DOE guidelines for "actions that are substantially the same as other actions for which the environmental effects have already been assessed in a NEPA document and determined by DOE to be clearly insignificant and where such assessment is currently valid" (52 FR 47668, December 15, 1987) to extend the FUA categorical exclusion for cogeneration facilities to the grant of an authorization to import natural gas under the NGA which results in the construction and operation of a cogeneration facility.

A categorical exclusion raises a rebuttable presumption that the Federal action will not significantly affect the quality of the human environment. Unless it appears during the proceedings on this import application that the grant or denial of authorization will significantly affect the quality of the human environment, the Office of Fuels Programs expects that no additional environmental review will be required.

Public Comment Procedures

In response to this notice, any person may file a protest, motion to intervene or notice of intervention, as applicable and written comments. Any person wishing to become a party to the proceeding and to have the written comments considered as the basis for any decision on the application must, however, file a motion to intervene or notice of intervention, as applicable. The filing of a protest with respect to this application will not serve to make the protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the application. All protests, motions to intervene, notices of intervention, and written comments must meet the requirements that are specified by the regulations in 10 CFR Part 590. Protests, motions to intervene, notices of intervention, requests for additional procedures, and written comments should be filed with the Office of Fuels Programs at the above address.

It is intended that a decisional record will be developed on the application through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial questions of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, notice to all parties will be provided. If no party requests additional procedures, a conditional or final opinion and order may be issued based on the official record, including the application and responses filed by parties pursuant to this notice, in accordance with 10 CFR Section 590.316.

A copy of Applicant's application is available for inspection and copying in the Office of Fuels Programs Docket Room, 3F-056, at the above address, (202) 586-9478. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, November 21, 1989.

Clifford P. Tomaszewski,

Acting Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.

[FR Doc. 89-27859 Filed 11-27-89; 8:45 am]

BILLING CODE 6450-01-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA-847-DR]

Major Disaster and Related Determinations; Virginia

AGENCY: Federal Emergency Management Agency.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the Commonwealth of Virginia (FEMA-847-DR), dated November 8, 1989, and related determinations.

DATE: November 8, 1989.

FOR FURTHER INFORMATION CONTACT: Neva K. Elliott, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472 (202) 646-3614.

Notice: Notice is hereby given that, in a letter dated November 8, 1989, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*, Public Law 93-288, as amended by Public Law 100-707), as follows:

I have determined that the damage in certain areas of the Commonwealth of Virginia, resulting from severe storms, flooding, and mudslides on October 16-17, 1989, is of sufficient severity and magnitude to warrant a major disaster declaration under Public Law 93-288, as amended by Public Law 100-707. I, therefore, declare that such a major disaster exists in the Commonwealth of Virginia.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and Public Assistance in the designated areas. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under PL 93-288, as amended by PL 100-707, for Public Assistance will be limited to 75 percent of the total eligible costs.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, shall be for a period not to exceed six months after the date of this declaration.

Notice is hereby given that pursuant to the authority vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint Robert J. Adamcik of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the Commonwealth of Virginia to have been affected adversely by this declared major disaster:

Buchanan County for Individual Assistance and Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Robert H. Morris,

Acting Director, Federal Emergency Management Agency.

[FR Doc. 89-27844 Filed 11-27-89; 8:45 am]

BILLING CODE 6718-02-M

FEDERAL MARITIME COMMISSION

Agreement(s) Filed; Gulfway

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 203-011141-010.

Title: Gulfway.

Parties:

Lykes Bros. Steamship Co., Inc.
Hapag Lloyd AG
Sea-Land Services, Inc.
P&O Containers (TFL) Ltd.
Deppe Linie GMBH & Co.
Gulf Container Line (GCL), BV
Nedlloyd Lijnen, BV
South Atlantic Cargo Shipping, N.V.
Euro-Gulf International, Inc.
Transportation Maritima Mexicana, S.A. de C.V. (TMM)

Synopsis: The proposed amendment would remove exclusions of certain minibridge routings from the scope of the Agreement. It would provide that all parties shall be advised of any accord reached under the Agreement and would make certain other procedural and administrative changes to the Agreement.

By Order of the Federal Maritime Commission.

Dated: November 21, 1989.

Joseph C. Polking,

Secretary.

[FR Doc. 89-27749 Filed 11-27-89; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM

Dahlonega Bancorp, Inc., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than December 12, 1989.

A. Federal Reserve Bank of Atlanta (Robert E. Heck, Vice President) 100 Marietta Street, NW., Atlanta, Georgia 30303:

1. *Dahlonega Bancorp, Inc.*, Dahlonega, Georgia; to acquire an additional 2.1 percent of the voting shares of Mountain Bank of Georgia, Hiawassee, Georgia, for a total of 7 percent.

B. Federal Reserve Bank of San Francisco (Harry W. Green, Vice President) 101 Market Street, San Francisco, California 94105:

1. *BankAmerica Corporation*, San Francisco, California; to acquire 100 percent of the voting shares of Woodburn State Bank, Woodburn, Oregon.

2. *Seafirst Corporation*, Seattle, Washington; to merge with Woodburn Bancorp, Woodburn, Oregon, and

thereby indirectly acquire Woodburn State Bank, Woodburn, Oregon.

Board of Governors of the Federal Reserve System, November 21, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89-27786 Filed 11-27-89; 8:45 am]

BILLING CODE 6210-01-M

Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than December 12, 1989.

A. **Federal Reserve Bank of Atlanta** (Robert E. Heck, Vice President) 100 Marietta Street, N.W., Atlanta, Georgia 30303:

1. *Jordan E. Ginsburg,* Boca Raton, Florida; to acquire 8.58 percent of the voting shares of First Commercial Bancorporation, Boca Raton, Florida, for a total of 24.90 percent and thereby indirectly acquire First Commercial Bank of Florida, formerly First Commercial Bank of Palm Beach County, Boca Raton, Florida.

B. **Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *S.N. and Mrs. Magaret A. Moffit,* Larned, Kansas; to acquire an additional 5.1 percent of the voting shares of Pawnee Bancshares, Inc., Larned, Kansas, for a total of 26.2 percent, and thereby indirectly acquire First National Bank & Trust, Larned, Kansas.

Board of Governors of the Federal Reserve System, November 21, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89-27787 Filed 11-27-89; 8:45 am]

BILLING CODE 6210-01-M

Manufacturers Hanover Corp., New York, NY; Proposal to Conduct Private Placements as Agent of All Types of Securities and Buy and Sell All Types of Securities on the Order of Investors as Riskless Principal

Manufacturers Hanover Corporation, New York, New York ("Manufacturers"), has applied, pursuant to section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.23(a)(3) of the Board's Regulation Y (12 CFR 225.23(a)(3)), for permission to engage through its wholly owned subsidiary, Manufacturers Hanover Securities Corporation, New York, New York ("Company"), in the placement, as agent for issuers, of all types of securities (including securities that are registered under the Securities Act of 1933), and buying and selling all types of securities on the order of investors as riskless principal. Manufacturers is proposing that Company will engage in these activities on a nationwide basis.

Manufacturers is currently authorized to engage indirectly in providing securities brokerage and related services generally, and investment advisory and securities brokerage services on a combined basis to institutional customers, as well as underwrite and deal in obligations of the United States, general obligations of states and their political subdivisions, and other obligations that state member banks are authorized to underwrite and deal in under 12 U.S.C 24 and 335. Manufacturers is also authorized to engage through Company in underwriting and dealing to a limited extent in municipal revenue bonds, 1-4 family mortage-backed securities, consumer-receivable related securities, and commercial paper. Additionally, Company is authorized to act as a placement agent with respect to commercial paper.

Manufacturers has applied to engage, through Company, in the placement, as agent for issuers, of all types of securities within the following limitations: (1) Company will privately place securities exclusively with "accredited investors", as defined in Rule 501(a) issued by the SEC under the 1933 Act, will make no general solicitation or general advertising for such securities, and such securities will not be purchased by the general public; (2) Company will not purchase or repurchase for its own account (other than as riskless principal) the securities being privately placed and will not inventory unsold portions of such securities; (3) except as otherwise permitted in prior Board orders, Company will execute securities transactions as principal only as a "riskless principal", *i.e.* only where there are firm offsetting orders to buy and sell, and will not act as riskless principal in any transaction where a foreign affiliate is a counterparty; (4) Manufacturers will adopt appropriate procedures, including maintenance of necessary documentary records, to ensure that any extensions of credit by it or any of its subsidiaries to issuers of securities privately placed by Company (including securities privately placed by Company in a riskless principal transaction) or to purchasers of such securities are on an arm's-length basis; (5) no bank affiliate of Company will express an opinion with respect to the advisability of the purchase of securities privately placed by Company (including securities privately placed by Company in a riskless principal transaction) unless the bank notifies the customer that Company is privately placing the security; (6) neither Manufacturers nor any of its other subsidiaries will purchase, as principal, securities that are privately placed by Company (including securities privately placed by Company in a riskless principal transaction) during the period of the placement; (7) neither Manufacturers nor any of its bank subsidiaries will purchase, as a trustee or in any other fiduciary capacity, for accounts over which they have investment discretion, securities privately placed by Company (including securities privately placed by Company in a riskless principal transaction) during the period of the placement, unless such purchase is authorized under the instrument creating the fiduciary relationship, by court order, or by the law of the jurisdiction under which the trust is administered.

The Board has not previously determined that the proposed combination of activities is permissible under section 4(c)(8) of the Bank Holding Company Act. Section 4(c)(8) provides that a bank holding company may, with Board approval, engage in any activity "which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking as to be a proper incident thereto." Manufacturers maintains that the proposed placement and riskless principal activities are closely related to banking because banks generally provide private placement services.

In determining whether an activity is a proper incident to banking, the Board must consider whether the proposal may "reasonably be expected to produce benefits to the public, such as greater

convenience, increased competition, or gain in efficiency, that outweigh possible adverse effects, such as undue concentration or resources, decreased or unfair competition, conflicts of interest, or unsound banking practices." Manufacturers contends that permitting Company to engage in the proposed activities would enhance competition and help make Company a stronger participant in the private placement market. Manufacturers maintains that approval of its proposal would result in increased efficiencies for Manufacturers as well as increased convenience for customers, including reduced issuer costs and enhanced liquidity in the secondary market for privately placed securities.

Furthermore, states Manufacturers, any potential adverse effects or conflicts of interest that might be said to arise from the proposed activities are adequately addressed by the structural operational insulation between Company and its bank affiliates, as well as the limits on affiliate transactions imposed by sections 23A and 23B of the Federal Reserve Act, and the antitying provisions of the Bank Holding Company Act. Manufacturers argues that the risks associated with the proposed activities are no greater than the risks incurred by banks in engaging in private placement and riskless principal activities.

Manufacturers further contends that approval of the application would not be barred by section 20 of the Glass-Steagall Act (12 U.S.C. 377), relying on *Securities Industry Ass'n* v. *Board of Governors*, 807 F.2d 1052 (D.C. Cir. 1986), *cert. denied*, 107 S.Ct 3228 (1987).

Any request for a hearing on this application must comply with § 262.3(e) of the Board's Rules of Procedure (12 CFR 262.3(e).

The application may be inspected at the offices of the Board of Governors of the Federal Reserve Bank of New York.

Any comments or requests for hearing should be submitted in writing and received by William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551, not later than December 18, 1989.

Board of Governors of the Federal Reserve System, November 21, 1989.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 89-27785 Filed 11-27-89; 8:45 am]

BILLING CODE 6510-01-M

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Open Season; Thrift Savings Plan Elections

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Notice.

SUMMARY: The Federal Retirement Thrift Investment Board (Board) in its regulation at 5 CFR 1600.2 provides that notice will be given of the beginning and ending dates of all open seasons (as defined at 5 CFR 1600.1) which are subsequent to the open season ending on July 31, 1987. The Board's current open season commenced on November 15, 1989, and will end on January 31, 1990. The election period (as defined at 5 CFR 1600.1) covered by this open season extends from January 1 to January 31, 1990.

FOR FURTHER INFORMATION CONTACT: James B. Petrick, (202) 523-6367.

Dated: November 21, 1989.

Francis X. Cavanaugh,

Executive Director.

[FR Doc. 89-27753 Filed 11-27-89; 8:45 am]

BILLING CODE 6760-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control

Determination of Fees for Sanitation Inspections of Cruise Ships

AGENCY: Centers for Disease Control (CDC), Public Health Serivce, HHS.

ACTION: Revision of fees for sanitation inspections of cruise ships; continued use of Lloyd's Registry of Shipping in the determination of fees; and the establishment of an additional category for extra small vessels.

SUMMARY: Notice of revised fees for vessel sanitation inspections effective January 1, 1990. Discussion of public comment on the use of gross tonnage as established by Lloyd's Registry of Shipping in the determination of fees collected for sanitation inspections and the establishment of an additional category for Extra Small vessels is also presented.

EFFECTIVE DATE: January 1, 1990.

FOR FURTHER INFORMATION CONTACT: Vernon N. Houk, M.D., Director, Center for Environmental Health and Injury Control, CDC, Atlanta, Georgia, 30333. Telephone: FTS: 236-4111, Commercial: (404) 488-4111.

SUPPLEMENTARY INFORMATION:

Purpose and Background

Collection of fees for sanitation inspections of passenger cruise ships currently inspected under the Vessel Sanitation Program, CDC began on March 1, 1988; the fee schedule was first published in the **Federal Register** November 24, 1987, (52 FR 45019). The fee schedule for calendar year 1989 was published in the **Federal Register** November 3, 1988, (53 FR 44528). The cost per inspection was determined by dividing the full cost of the Vessel Sanitation Program by the estimated number of inspections and multiplying by a size/cost factor based on the size of the vessel and the number of vessels in each size category.

A request for public comment on the use of Gross Registered Tonnage (GRT) [1] as reported by Lloyd's Registry of Shipping in the determination of fees collected for sanitation inspections of passenger cruise ships and the fees to be set for small passenger cruise ships was published in the **Federal Register** on Thursday, October 5, 1989 (54 FR 41164).

Discussion of Comments

The public notice provided a 30 day comment period. During the comment period, comments were received from 6 sources, one of which was the International Committee of Passenger Lines (ICPL) representing 19 separate cruise lines and their subsidiaries. Discussion of the comments and CDC's responses follows:

Comment: One commentor stated the GRT can vary with different kinds of ships because it is based on a measurement which does not necessarily relate to the number of people on board. In the commentor's opinion, the vessel sanitation inspection is directly related to the number of people on board the vessel. The total number of people certified to sail on a vessel should be the basis for determining fees to be collected for sanitation inspections.

Response: The number of passengers on board does not always correlate with the number and complexity of food service and water systems on board a passenger vessel. For example, there are a number of vessels with a lower passenger count in the same size category but whose food service areas are more numerous and complex than a vessel with a similar number of passengers. A vessel's GRT correlates more closely with the length of time required to conduct a sanitation

[1] GRT-Gross tonnage in cubic feet, as shown in Lloyd's Registry of Shipping.

inspection than the number of passengers a vessel is certified to carry. After considering the commentor's alternative proposal, CDC sees no advantage to using the number of passengers on board rather than the GRT in determining fees.

Comment: One commentor stated that harbor fees, pilot fees, wharfage, etc. are calculated in most ports of the world by multiplication of net or gross tonnage by a certain denominator. The commentor suggested that a denominator be established and vessels charged according to their reported GRT as established by Lloyd's Registry of Shipping. Another commentor suggested a per ton rate so that the charge will vary continuously according to the dimension of the ship and not by the categories.

Response: Establishing a denominator is the method used in determining the fees to be assessed. The cost per inspection is determined by dividing the full cost of the Vessel Sanitation Program by a weighted average of the number of inspections projected for the year. The weighted average accounts for the length of time required to complete a sanitation inspection due to the number and complexity of food service areas and water systems on board passenger vessels. The size/cost factor is based on CDC's estimate that the complexity and the time required to conduct a sanitation inspection depends upon a vessel's size category rather than individual tonnage. The size categories of vessels were established based on CDC's estimate of the time required to conduct a sanitation inspection for that category.

Comment: Two commentors agreed with the use of the GRT as reported by Lloyd's Registry of Shipping but suggested the classification of a large vessel should be changed from the present range of 30,001 to 65,000 GRT to a range of 30,001 to 60,000 and the classification of an Extra Large vessel changed from the present range of greater than 65,000 GRT to greater than 60,000 GRT. Neither commentor addressed the issue of a new classification for an Extra Small vessel.

Response: CDC reviewed the 89/90 edition of Lloyd's Registry of Shipping for the GRT of all passenger vessels coming to a port under the control of the U.S. There was only one vessel listed with a GRT of between 60,000 and 65,000; the complexity and the time required to conduct a sanitation inspection of that vessel is closer to the time rquired for vessels in the Extra Large category. The vessel with the next lowest GRT is 47,262; the complexity and the time required to conduct a sanitation inspection of that vessel is more closely related to the vessels in the Large category. Therefore, CDC agreeess with these commentors' suggestion regarding the size classification for an Extra Large vessel. The size category for an Extra Large vessel will be grater than 60,000 GRT.

While the ICPL has no comment on the proposals regarding the size classifications, the ICPL suggested again, as it had in November, 1987, that "the vessel inspection program and the related inspection fees should continue to reflect the voluntary cooperative nature of the program and that the reference to authority for vessel sanitation inspection and collection of fees should be deleted." CDC has not changed its earlier conclusion that the collection of fees for sanitation inspections of passenger cruise ships is covered by existing authorizations. The **Federal Register** of July 17, 1987 (52 FR 27060) cited the appropriate authority for the vessel sanitation inspections (Public Health Service Act sections 361–369, 42 U.S.C. 264–272, and 42 CFR part 71) and the authority to collect fees for the full costs of services (Pub. L. 99–591, Sec. 101(i)).

There were no comments received which disagreed with the use of Lloyd's Registry of Shipping to establish GRTs for use in the determination of fees collected for sanitation inspections of passenger cruise ships.

There were no comments disagreeing with the addition of an Extra Small vessel category and the change in the category of small vessels. The category of Extra Small vessel is established and fees determined based upon the time and complexity of the inspection. Therefore, the categories of vessels by GRT and the fees to be charged for calendar year 1990 beginning January 1, 1990 are as follows:

Tonnage	Classification	Fee
>3,001 GRT	Extra Small Ship	$624
3,001–15,000 GRT.	Small Ship	$1,249
15,001–30,000 GRT.	Medium Ship	$2,498
30,001–60,000 GRT.	Large Ship	$3,747
<60,000	Extra Large Ship	$4,996

Applicability

The fees will be applicable to all passenger cruise vessels for which sanitation inspections are conducted as part of the Vessel Sanitation Program, CDC.

Dated: November 20, 1989.

Robert L. Foster,

Acting Director, Office of Program Support, Centers for Disease Control.

[FR Doc. 89–27792 Filed 11–27–89; 8:45 am]

BILLING CODE 4160–18–M

Food and Drug Administration

[Docket No. 89N–0433]

Biological Products; In Vitro Tests To Detect Antibodies to the Human Immunodeficiency Virus, Type 1; Points to Consider; Request for Comments, Data, and Recommendations; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft document entitled "Points to Consider in the Manufacture and Clinical Evaluation of *In Vitro* Tests to Detect Antibodies to the Human Immunodeficiency Virus; Type 1 (1989)."

FDA is also requesting comments, data, and recommendations from the public on this document. The agency eventually may develop this document into a guideline or regulations to help ensure the safety, purity, potency, and effectiveness of biological products, new drugs, or other products regulated under the Federal Food, Drug, and Cosmetic Act or under the Public Health Service Act.

DATE: Comments by January 29, 1990.

ADDRESSES: Submit written requests for single copies of the draft document to the Congressional and Public Affairs Staff (HFB–140), Food and Drug Administration, Park Bldg., room 158, 5600 Fishers Lane, Rockville, MD 20857. Send two self-addressed adhesive labels to assist that office in processing your request. Submit written comments on the draft document to the Dockets Management Branch (HFA–305), Food and Drug Administration, room 4–62, 5600 Fishers Lane, Rockville, MD 20857. Requests and comments should be identified with the docket number found in brackets in the heading of this document. Copies of the draft document and received comments are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Karen L. Goldenthal, Center for Biologics Evaluation and Research (HFB–230), Food and Drug

Administration, 8800 Rockville Pike, Bethesda, MD 20892, 301-443-4864.

SUPPLEMENTARY INFORMATION: As a result of the recognition of acquired immunodeficiency syndrome (AIDS) and the identification of the etiologic agent, human immunodeficiency virus type 1, (HTV-1), there has been extensive interest in the development of in vitro diagnostic tests for detecting evidence of infection with the virus. FDA's Center for Biologics Evaluation and Research has developed a draft document concerning these products, entitled "Points to Consider in the Manufacture and Clinical Evaluation of *In Vitro* Tests to Detect Antibodies to the Human Immunodeficiency Virus, Type 1 (1989)." FDA is issuing this document to provide useful guidance to manufacturers engaged in the production and clinical evaluation of such in vitro test kits. FDA is announcing availability of the draft document and is inviting public comment.

FDA may develop this document into a guideline under 21 CFR 10.90(b)(1) or into regulations as needed to help ensure the safety, purity, potency, and effectiveness of biological products, new drugs, or other products regulated under the Federal Food, Drug, and Cosmetic Act or under the Public Health Service Act. Because these new technologies are changing and improving constantly, FDA may revise the draft document several times and place the revisions on display at the Dockets Management Branch (address above).

Dated: November 20, 1989.

Ronald G. Chesemore,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 89-27807 Filed 11-27-89; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 89M-0472]

Allergan Optical, Inc.; Premarket Approval of Hydron® (ocufilcon D) H55 Hydrophilic Contact Lenses

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its approval of the application by Allergan Optical, Inc., Woodbury, NY, for premarket approval, under the Medical Device Amendments of 1976, of the spherical Hydron® (ocufilcon D) H55 Hydrophilic Contact Lenses for extended wear. After reviewing the recommendation of the Ophthalmic Devices Panel, FDA's Center for Devices and Radiological Health (CDRH) notified the applicant, by letter of September 19, 1989, of the approval of the application.

DATES: Petitions for administrative review by December 28, 1989.

ADDRESSES: Written requests for copies of the summary of safety and effectiveness data and petitions for administrative review to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: David M. Whipple, Center for Devices and Radiological Health (HFZ-460), Food and Drug Administration, 1390 Piccard Dr., Rockville, MD 20850, 301-427-1080.

SUPPLEMENTARY INFORMATION: On April 3, 1989, Allergan Optical, Inc., Woodbury, NY 11797, submitted to CDRH an application for premarket approval of the Hydron® (ocufilcon D) H55 Hydrophilic Contact Lenses. The spherical lenses are indicated for extended wear from 1 to 7 days between removals for cleaning and disinfection as recommended by the eye-care practitioner. The lenses are indicated for the correction of visual acuity in not-aphakic persons with nondiseased eyes that are myopic. The lenses may be worn by persons who exhibit astigmatism of 2.00 diopters (D) or less that does not interfere with visual acuity. The spherical lenses range in powers from plano to −10.00 D and are to be disinfected using a chemical lens care system.

On June 23, 1989, the Ophthalmic Devices Panel, an FDA advisory committee, reviewed and recommended approval of the application. On September 19, 1989, CDRH approved the application by a letter to the applicant from the Director of the Office of Device Evaluation, CDRH.

A summary of the safety and effectiveness data on which CDRH based its approval is on file in the Dockets Management Branch (address above) and is available from that office upon written request. Requests should be identified with the name of the device and the docket number found in brackets in the heading of this document.

A copy of all approved labeling is available for public inspection at CDRH—contact David M. Whipple (HFZ-460), address above. The labeling of the Hydron® (ocufilcon D) H55 Hydrophilic Contact Lenses states that the lens is to be used only with certain solutions for disinfection and other purposes. The restrictive labeling informs new users that they must avoid using certain products, such as solutions intended for use with hard contact lenses only.

Opportunity for Administrative Review

Section 515(d)(3) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360e(d)(3)) authorizes any interested person to petition, under section 515(g) of the act (21 U.S.C. 360e(g)), for administrative review of CDRH's decision to approve this application. A petitioner may request either a formal hearing under part 12 (21 CFR part 12) of FDA's administrative practices and procedures regulations or a review of the application and CDRH's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration under § 10.33(b) (21 CFR 10.33 (b)). A petitioner shall identify the form of review requested (hearing or independent advisory committee) and shall submit with the petition supporting data and information showing that there is a genuine and substantial issue of material fact for resolution through administrative review. After reviewing the petition, FDA will decide whether to grant or deny the petition and will publish a notice of its decision in the **Federal Register**. If FDA grants the petition, the notice will state the issue to be reviewed, the form of review to be used, the persons who may participate in the review, the time and place where the review will occur, and other details.

Petitioners may, at any time on or before December 28, 1989, file with the Dockets Management Branch (address above) two copies of each petition and supporting data and information, identified with the name of the device and the docket number found in brackets in the heading of this document. Received petitions may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (secs. 515(d), 520(h) (21 U.S.C. 360e(d), 360j(h))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Devices and Radiological Health (21 CFR 5.53).

Dated: November 20, 1989.

Walter E. Gundaker,

Acting Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 89-27762 Filed 11-27-89; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 89M-0475]

Allergan Medical Optics; Premarket Approval of Phaco-Flex™ Models SI-18B and SI-18NB Silicone Ultraviolet-Absorbing Posterior Chamber Intraocular Lenses

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its approval of the application by Allergan Medical Optics, Irvine, CA, for premarket approval under the Medical Device Amendments of 1976 (the amendments), of the Phaco-Flex™ Models SI-18B and SI-18NB Silicone Ultraviolet-Absorbing Posterior Chamber Intraocular Lenses. After reviewing the recommendation of the Ophthalmic Devices Panel, FDA's Center for Devices and Radiological Health (CDRH) notifed the applicant, by letter of October 31, 1989, of the approval of the application.

DATES: Petitions for administrative review by December 28, 1989.

ADDRESSES: Written requests for copies of the summary of safety and effectiveness data and petitions for administrative review to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Nancy C. Brogdon, Center for Devices and Radiological Health (HFZ-460), Food and Drug Administration, 1390 Piccard Dr., Rockville, MD.20850, 301-427-1212.

SUPPLEMENTARY INFORMATION: On November 7, 1988, Allergan Medical Optics, Irvine, CA 92799-5155, submitted to CDRH an application for premarket approval of the Phaco-Flex™ Models SI-18B and SI-18NB Silicone Ultraviolet-Absorbing Posterior Chamber Intraocular Lenses. The devices are indicated for primary implantation for the visual correction of aphakia in persons 60 years of age or older in whom a cataractous lens has been removed by extracapsular cataract extraction. These devices are intended to be placed in the ciliary sulcus or capsular bag. The devices are available in a range of powers from 10 diopters (D) through 27 D in 0.5-D increments.

On April 13, 1989, the Ophthalmic Devices Panel, an FDA advisory committee, reviewed and recommended approval of the application. On October 31, 1989, CDRH approved the application by a letter to the applicant from the Director of the Office of Device Evaluation, CDRH.

A summary of the safety and effectiveness data on which CDRH based its approval is on file in the Dockets Management Branch (address above) and is available from that office upon written request. Requests should be identified with the name of the device and the docket number found in brackets in the heading of this document.

A copy of all approved labeling is available for public inspection at CDRH—contact Nancy C. Brogdon (HFZ-460), address above.

Opportunity For Administrative Review

Section 515(d)(3) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360e(d)(3)) authorizes any interested person to petition, under section 515(g) of the act (21 U.S.C. 360e(g)), for administrative review of CDRH's decision to approve this application. A petitioner may request either a formal hearing under part 12 (21 CFR part 12) of FDA's administrative practices and procedures regulations or a review of the application and CDRH's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration under § 10.33(b) (21 CFR 10.33(b)). A petitioner shall identify the form of review requested (hearing or independent advisory committee) and shall submit with the petition supporting data and information showing that there is a genuine and substantial issue of material fact for resolution through administrative review. After reviewing the petition, FDA will decide whether to grant or deny the petition and will publish a notice of its decision in the **Federal Register**. If FDA grants the petition, the notice will state the issue to be reviewed, the form of review to be used, the persons who may participate in the review, the time and place where the review will occur, and other details.

Petitioners may, at any time on or before December 28, 1989, file with the Dockets Management Branch (address above) two copies of each petition and supporting data and information, identified with the name of the device and the docket number found in brackets in the heading of this document. Received petitions may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (secs. 515(d), 520(h) (21 U.S.C. 360e(d), 360j(h))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Devices and Radiological Health (21 CFR 5.53).

Dated: November 20, 1989.

Walter E. Gundaker,

Acting Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 89-27761 Filed 11-27-89; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 89M-0463]

Sola/Barnes-Hind; Premarket Approval of Signature™ (Netrafilcon A) Contact Lens

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its approval of the application by Sola/Barnes-Hind, Sunnyvale, CA, for premarket approval, under the Medical Device Amendments of 1976 of the spherical SIGNATURE™ (netrafilcon A) Contact Lens for daily and extended wear. After reviewing the recommendation of the Ophthalmic Devices Panel, FDA's Center for Devices and Radiological Health (CDRH) notifed the applicant, by letter of September 15, 1989, of the approval of the application.

DATE: Petitions for administrative review by December 28, 1989.

ADDRESS: Written requests for copies of the summary of safety and effectiveness data and petitions for administrative review to the Dockets Management Branch (HFA-305), Food and Drug Administration, room 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: David M. Whipple, Center for Devices and Radiological Health (HFZ-460), Food and Drug Administration, 1390 Piccard Dr., Rockville, MD 20850, 301-427-1080.

SUPPLEMENTARY INFORMATION: On March 3, 1989, Sola/Barnes-Hind, Sunnyvale, CA 94086-5200, submitted to CDRH an application for premarket approval of the SIGNATURE™ (netrafilcon A) Contact Lens. The spherical lens is indicated for daily wear and extended wear from 1 to 7 days between removals for cleaning and disinfection as recommended by the eye-care practitioner. The lens is indicated for the correction of visual acuity in not-aphakic persons with nondiseased eyes that are myopic or hyperopic. The lens may be worn by persons who exhibit astigmatism of 2.00 diopters (D) or less that does not interfere with visual acuity. The lens ranges in powers from −20.00 D to +12.00 D and is to be disinfected using

either a chemical, heat, or hydrogen peroxide lens care system.

On June 23, 1989, the Ophthalmic Devices Panel, an FDA advisory committee, reviewed and recommended approval of the application. On September 15, 1989, CDRH approved the application by a letter to the applicant from the Director of the Office of Device Evaluation, CDRH.

A summary of the safety and effectiveness data on which CDRH based its approval is on file in the Dockets Management Branch (address above) and is available from that office upon written request. Requests should be identified with the name of the device and the docket number found in brackets in the heading of this document.

A copy of all approved labeling is available for public inspection at CDRH—contact David M. Whipple (HFZ-460), address above. The labeling of the spherical SIGNATURE™ (netrafilcon A) Contact Lens states that the lens is to be used only with certain solutions for disinfection and other purposes. The restrictive labeling informs new users that they must avoid using certain products, such as solutions intended for use with hard contact lenses only.

Opportunity for Administrative Review

Section 515(d)(3) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360e(d)(3)) authorizes any interested person to petition, under section 515(g) of the act (21 U.S.C. 360e(g)), for administrative review of CDRH's decision to approve this application. A petitioner may request either a formal hearing under part 12 (21 CFR part 12) of FDA's administrative practices and procedures regulations or a review of the application and CDRH's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration under § 10.33(b) (21 CFR 10.33(b)). A petitioner shall identify the form of review requested (hearing or independent advisory committee) and shall submit with the petition supporting data and information showing that there is a genuine and substantial issue of material fact for resolution through administrative review. After reviewing the petition, FDA will decide whether to grant or deny the petition and will publish a notice of its decision in the **Federal Register**. If FDA grants the petition, the notice will state the issue to be reviewed, the form of review to be used, the persons who may participate in the review, the time and place where the review will occur, and other details.

Petitioners may, at any time on or before December 28, 1989, file with the Dockets Management Branch (address above) two copies of each petition and supporting data and information, identified with the name of the device and the docket number found in brackets in the heading of this document. Received petitions may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (secs. 515(d), 520(h) (21 U.S.C. 360e(d), 360j(h))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Devices and Radiological Health (21 CFR 5.53).

Dated: November 20, 1989.

Walter E. Gundaker,

Acting Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 89-27765 Filed 11-27-89; 8:45 am]

BILLING CODE 4160-01-M

Consumer Participation; Notice of Open Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the following district consumer exchange meeting:

Minneapolis District Office, chaired by John Feldman, District Director. The topic to be discussed is food labeling.

DATE: Tuesday, December 19, 1989, 1 p.m.

ADDRESS: Park Avenue Senior Center, 1505 Park Ave., Minneapolis, MN 55404.

FOR FURTHER INFORMATION CONTACT: Donald Aird, Consumer Affairs Officer, Food and Drug Administration, 240 Hennepin Ave., Minneapolis, MN 55401, 612-334-4100.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to encourage dialogue between consumers and FDA officials, to identify and set priorities for current and future health concerns, to enhance relationships between local consumers and FDA's district offices, and to contribute to the agency's policymaking decisions on vital issues.

Dated: November 20, 1989.

Alan L. Hoeting,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 89-27810 Filed 11-27-89; 8:45 am]

BILLING CODE 4160-01-M

Health Resources and Services Administration

Program Announcement for Grants for Graduate Training in Family Medicine (Second Cycle)

The Health Resources and Services Administration announces that applications for Fiscal Year 1990 Grants for Graduate Training in Family Medicine are being accepted for a second grant cycle under the authority of section 786(a), title VII, of the Public Health Service Act, extended by the Health Professions Reauthorization Act of 1988, Public Law 100-607, title VI.

Public Law 100-607, section 633(a), requires that for grants issued under sections 780, 784, 785 and 786 for Fiscal Year 1990 or subsequent fiscal years, the Secretary of Health and Human Services shall, not less than twice each fiscal year, issue solicitations for applications for such grants if amounts appropriated for such grants and remaining unobligated at the end of the first solicitation period, are sufficient with respect to issuing a second solicitation.

The Administration's budget request for Fiscal Year 1990 does not include funding for this program. Applicants should be advised that this program announcement is a contingency action being taken to ensure that should funds become available for this purpose, they can be awarded in a timely fashion consistent with the needs of the programs as well as provide for even distribution of funds throughout the fiscal year. This notice regarding applications does not reflect any change in this policy.

Section 786(a) of the Public Health Service Act authorizes the Secretary to award grants to public or nonprofit private hospitals, schools of medicine or to make grants to accredited schools of medicine or osteopathic, and other public or private nonprofit entities to assist in meeting the cost of planning, developing and operating or participating in approved graduate training programs in the field of family medicine. In addition, section 786(a) authorizes assistance in meeting the cost of supporting trainees in such programs who plan to specialize or work in the practice of family medicine. To receive support, programs must meet the requirements of regulations as set forth in 42 CFR part 57, subpart Q.

Review Criteria

The review of applications will take into consideration the following criteria:

1. The degree to which the proposed project provides for the project requirements;

2. The administrative and management ability of the applicant to carry out the proposed project in a cost-effective manner; and

3. The potential of the project to continue on a self-sustaining basis.

In addition, the following mechanisms may be applied in determining the funding of approved applications:

1. Funding preferences—funding of a specific category or group of approved applications ahead of other categories or groups of applications, such as competing continuations ahead of new projects.

2. Funding priorities—favorable adjustment of review scores when applications meet specified objective criteria.

3. Special considerations—enhancement of priority scores by merit reviewers based on the extent to which applicants address special areas of concern.

Funding Priorities for Fiscal Year 1990

The following funding priorities were established in FY 1989 and the Administration is extending these priorities in Fiscal Year 1990.

In determining the order of funding of approved applications a funding priority will be given to:

(1) Projects which satisfactorily demonstrate an enrollment of underrepresented minorities in proportion or more to their numbers in the general population or can document an increase in the number of underrepresented minorities (i.e. Black, Hispanic and American Indian/Alaskan Native) over the average of the past three years in postgraduate year (PGY) trainees.

(2) Projects in which substantial training experience is in a PHS 332 health manpower shortage area and/or PHS 329 migrant health center, PHS 330 community health center or PHS 781 funded Area Health Education Center or State designated clinic/center serving an underserved population.

(3) Applications that demonstrate sufficient curricular time and offering devoted to assuring competence in prevention, recognition and treatment of those with HIV infection-related diseases.

(4) Applications that demonstrate sufficient curricular time and offering devoted to assuring competence in quality assurance/risk management activities, monitoring and evaluation of health care services and utilization of peer-developed guidelines and standards.

(5) Applications proposing to provide substantial multidisciplinary geriatric training experiences in multiple ambulatory settings and inpatient and extended care facilities.

Requests for application materials and questions regarding grants policy should be directed to: Grants Management Officer (D-15), Bureau of Health Professions, Health Resources and Services Administration, 5600 Fishers Lane, room 8C-26, Rockville, Maryland 20857, telephone: (301) 443-6960.

Completed applications should be forwarded to the Grants Management Officer at the above address.

If additional programmatic information is needed, please contact: Primary Care Medical Education Branch, Division of Medicine, Bureau of Health Professions, Health Resources and Services Administration, 5600 Fishers Lane, room 4C-04, Rockville, Maryland 20857, telephone: (301) 443-6820.

The standard application form PHS 6025-1, HRSA Competing Training Grant Application, General Instructions and supplement for this program have been approved by the Office of Management and Budget under the Paperwork Reduction Act. The OMB clearance number is 0915-0060.

The deadline date for receipt of applications is December 22, 1989. Applications shall be considered as meeting the deadline if they are either:

(1) *Received* on or before the deadline date, or

(2) *Postmarked* on or before the deadline and received in time for submission to the independent review group. A legibly dated receipt from a commercial carrier or U.S. Postal Service will be accepted in lieu of a postmark. Private metered postmarks shall not be acceptable as proof of timely mailing.

Applications received after the deadline will be returned to the applicant.

This program is listed at 13.379 in the *Catalog of Federal Domestic Assistance*. It is not subject to the provisions of Executive Order 12372, Intergovernmental Review of Federal Programs (as implemented through 45 CFR part 100).

Dated: October 31, 1989.

John H. Kelso,

Acting Administrator.

[FR Doc. 89-27806 Filed 11-27-89; 8:45 am]

BILLING CODE 4160-15-M

Office of Human Development Services

Federal Allotments to States for Social Services Expenditures Pursuant to the Title XX—Social Services Block Grant Act; Promulgation for Fiscal Year 1991

AGENCY: Office of Human Development Services, HHS.

ACTION: Notification of allocation of title XX—social services block grant allotment for fiscal year 1991.

SUMMARY: This issuance sets forth the individual allotments to States for Fiscal Year 1991, pursuant to Title XX of the Social Security Act, as amended (Act). The allotments to the States published herein are based upon the authorization set forth in section 2003 of the Act and are contingent upon Congressional appropriations for the fiscal year. If Congress enacts and the President approves an amount different from the authorization, the allotments will be adjusted proportionately.

FOR FURTHER INFORMATION CONTACT: HDS Regional Administrators.

SUPPLEMENTARY INFORMATION: Section 2003 of the Act authorizes $2.7 billion for Fiscal Year 1991 and provides that it be allocated as follows:

(1) Puerto Rico, Guam, the Virgin Islands, and the Northern Mariana Islands each receives an amount which bears the same ratio to $2.7 billion as its allocation for Fiscal Year 1981 bore to $2.9 billion.

(2) American Samoa receives an amount which bears the same ratio to the amount allotted to the Northern Mariana Islands as the population of American Samoa bears to the population of the Northern Mariana Islands determined on the basis of the most recent available at the time such allotment is determined.

(3) The remainder of the $2.7 billion is allotted to each State in the same proportion as that State's population is to the population of all States, based upon the most recent data available from the Department of Commerce.

For Fiscal Year 1991, the allotments are based upon the Bureau of Census population statistics contained in its publications "Current Population Reports" (Series P-26, No. 88-A issued August 1989) and "Estimates of the Population of Puerto Rico and the Outlying Areas: 1980 to 1988" (Series P-25, No. 1049 issued October 1989), which is the most recent satisfactory data available from the Department of Commerce at this time as to the population of each State and each Territory.

EFFECTIVE DATE: The allotments shall be effective October 1, 1990.

Fiscal Year 1991 Federal Allotments to States for Social Services—Title XX Block Grants

Total	$2,700,000,000
Alabama	44,815,730
Alaska	5,723,481
American Samoa	173,471
Arizona	38,087,363
Arkansas	26,159,803
California	309,264,584
Colorado	36,055,746
Connecticut	35,313,004
Delaware	7,208,965
Dist. of Col.	6,739,290
Florida	134,731,180
Georgia	69,271,596
Guam	465,517
Hawaii	11,993,096
Idaho	10,955,442
Illinois	126,866,854
Indiana	60,686,375
Iowa	30,954,857
Kansas	27,262,993
Kentucky	40,697,882
Louisiana	48,147,145
Maine	13,172,744
Maryland	50,484,598
Massachusetts	64,334,548
Michigan	100,925,505
Minnesota	47,043,955
Mississippi	28,617,405
Missouri	56,153,465
Montana	8,792,752
Nebraska	17,498,123
Nevada	11,512,498
New Hampshire	11,851,101
New Jersey	84,333,963
New Mexico	16,460,469
New York	195,614,162
North Carolina	70,855,384
North Dakota	7,285,423
No. Mariana Islands	93,103
Ohio	118,565,623
Oklahoma	35,411,308
Oregon	30,223,038
Pennsylvania	131,093,929
Puerto Rico	13,965,517
Rhode Island	10,846,215
South Carolina	37,890,755
South Dakota	7,787,866
Tennessee	53,466,488
Texas	183,905,056
Utah	18,459,318
Vermont	6,083,929
Virgin Islands	465,517
Virginia	65,699,882
Washington	50,768,587
West Virginia	20,501,858
Wisconsin	53,029,581
Wyoming	5,231,961

Dated: November 21, 1989.

Linda G. Eischeid,

Director, Office of Policy, Planning, and Legislation.

Approved: November 21, 1989.

Mary Sheila Gall,

Assistant Secretary for Human Development Services.

[FR Doc. 89-27826 Filed 11-27-89; 8:45 am]

BILLING CODE 4130-01-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV-930-00-4212-24]

Emergency Closure of Public Lands; Churchill County, NV

AGENCY: Bureau of Land Management, Nevada.

ACTION: Notice is hereby given that selected public lands adjacent to Bravo-16 and Bravo-19 bombing ranges are closed to the public until further notice. The closure is necessary to ensure public safety and allow the U.S. Navy to perform operations required to clean-up and dispose of live and inert ordnance on public lands adjacent to Bravo-16 and Bravo-19.

DATE: This closure goes into effect on November 17, 1989, and shall remain in effect until further notice.

FOR FURTHER INFORMATION CONTACT: Mike Phillips, Lahontan Resource Area Manager, Carson City District, 1535 Hot Springs Road, Suite 300, Carson City, Nevada 89706, Telephone: (702) 882-1631.

SUPPLEMENTARY INFORMATION: The authority for this closure is 43 CFR 8364.1. Any person who fails to comply with this closure order is subject to arrest and fine of up to $1,000.00 and/or imprisonment not to exceed 12 months. This closure applies to all the public except authorized military and BLM personnel. The public lands affected by this closure are described as follows:

Bravo-16

Mt. Diablo Meridian, Nevada

T. 16 N., R. 27 E.,
sections 1 and 2, all;
section 3, E½.
T. 17 N., R. 27 E.,
section 34, E½.
T. 16 N., R. 28 E.,
sections 5 and 6, all.
T. 17 N., R. 28 E.,
section 21, all:
Aggregating approximately 3,840 acres.

Bravo-19

Mt. Diablo Meridian, Nevada

T. 16 N., R. 29 E.,
sections 33-36, all.
T. 15 N., R. 30 E.,
sections 2, 11, 14, 23 and 24, all.
T. 16 N., R. 30 E.,
section 27, S½;
section 28, S½;
section 29, S½;
section 30, SE¼;
sections 31-34, all.
Aggregating approximately 9,440 acres.

Dated this 17th day of November, 1989.

James W. Elliott,

District Manager, Carson City District.

[FR Doc. 89-27769 Filed 11-27-89; 8:45 am]

BILLING CODE 4310-HC-M

National Park Service

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 November 18, 1989. Pursuant to § 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013-7127. Written comments should be submitted by December 13, 1989.

Carol D. Shull,

Chief of registration, National Register.

CALIFORNIA

Contra Costa County

Contra Costs County Courthouse Block, 625 Court St., Martinez; 89002113

Los Angeles County

Heaver, Henry, House, 142 Adelaide Dr., Santa Monica, 89002114

Santa Clara County

Steinbeck, John, House, 16250 Greenwood La., Monte Sereno, 89002117

FLORIDA

Seminole County

Sanford Residential Historic District, Roughly, bounded by Sanford Ave., 14th St., Elm Ave., and 3rd St., Sanford, 89002119

IDAHO

Shoshone County

US Post Office—Kellogg Main (US Post Offices in Idaho, 1990—1941 MPS), 302 S. Division, Kellogg, 89002118

Washingon County

Cambridge News Office, 155 N. Superior St., Cambridge, 89002128

IOWA

Jackson County

Cundill Block (Maquoketa MPS). 202 S. Main, Maquoketa, 89002112
First National Bank Building (Maquoketa MPS), 120 S. Main, Maquoketa, 89002108
Hotel Hurst (Maquoketa MPS), 277 S. Main, Maquoketa, 89002105
Hotel Hurst Garage (Maquoketa MPS), 219 S. Main, Maquoketa, 89002109
IOOF Building (Maquoketa MPS), 103 N. Main, Maquoketa, 89002110

Lyon Block (Maquoketa MPS), 112—116 M. Main, Maquoketa, 89002104
Maquoketa Free Public Libery (Maquoketa MPS), Second and Pleasant, Maquoketa, 89002102
Merrero Building (Maquoketa MPS), 111—115 S. Main, Maquoketa, 89002107
Mitchell—Maskrey Mill (Maquoketa MPS), Maquoketa, 89002111
New Era Building (Maquoketa MPS), 115–117 E. Platt, Maquoketa, 89002103
Sanborn, C.M., Building (Maquoketa MPS), 203 S. Main, Maquoketa, 89002108

KENTUCKY

Bourbon County

Downtown Paris Historic District, Roughly bounded by 2nd St., Pleasant St., Main St., High St., and 12th St., Paris, 89002123

Menifee County

Gladie Cabin, KY 715 at Confluence of Red River and Gladie Creek, Slade victinity, 89002120

MASSACHUSETTS

Suffolk County

Roxbury Presbyterian Church, 328 Warren St., Boston, 89002125

MINNESOTA

St. Louis County

Hartley Building, 40 E. Superior St., Duluth, 89002127

MISSOURI

Barry County

Tom Town Historic District, Off Co. Rd. VV, S of Pleasant Ridge, Pleasant Ridge vicinity, 89002126

Dent County

Nichols Farm District, W of Co. Rd. V, N of Current River, Cedar Grove vicinity, 89002129

NEW JERSEY

Morris County

Madison Civic Commercial District, Roughly Main St., Waverly Pl., Lincoln Pl., Prospect St., Kings Rd., Green Ave., Wilmer St., and Green Village Rd., Madison, 89002115

OREGON

Multnomah County

Honeyman Hardware Company Building, 832 NW. Hoyt, Portland, 89002124

WISCONSIN

Milwaukee County

Washington Highlands Historic District, Bounded by N. 68th St., W. Lloyd St., N. 60th St., and Milwaukee Ave., Wauwatosa, 89002121

Walworth County

Main Street Historic District, Roughly W. Main St./US 12 from Prairie St. to Fremont St. and Church St. from Forest Ave. to W. Main St., Whitewater, 89002116

[FR Doc. 89–27747 Filed 11–27–89; 8:45 am]
BILLING CODE 4310-70-M

INTERSTATE COMMERCE COMMISSION

[Section 5a Application No. 32]

Columbia River Tariff Bureau; Agreement

AGENCY: Interstate Commerce Commission.

ACTION: Notice of decision and request for comment.

SUMMARY: The Commission has reviewed the pending application filed by Columbia River Tariff Bureau (CRTB) for continued approval of its collective ratemaking agreement in light of changes: (1) In the standards applicable to motor and rail rate bureaus; and (2) in the water carrier industry, including recent tariff filings by CRTB, since the last pleadings were filed in this proceeding in response to Ex Parte No. 297 (Sub-No. 4), Reopening of Section 5a Application Proceedings to Take Additional Evidence (not printed), served January 6, 1978. This preliminary examination has raised questions as to whether continued antitrust immunity for CRTB is necessary or appropriate. Therefore, the Commission is asking CRTB to describe any current or contemplated collective ratemaking activities within the Commission's jurisdiction for which antittrust immunity is required. If CRTB demonstrates that it has a need for and a continuing interest in immunity that the Commission properly may grant, the Commission proposes to review the agreement under the three-part test set forth in the Ex Parte No. 297 (Sub-No. 4), and to interpret that test in light of the standards the Commission has applied in evaluating motor and rail rate bureaus under 1980 statutory amendments.

DATES: CRTB's comments are due December 28, 1989. Comments from other parties are due January 29, 1990. Rebuttal is due February 20, 1990.

ADDRESSES: An original and 10 copies, if possible, of comments referring to Section 5a Application No. 32 should be sent to: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

One copy should be sent to: C. Kent Roberts, Executive Secretary, Columbia River Tariff Bureau, Suite 1800, Pacwest Center, 1211 SW. Fifth Avenue, Portland, OR 97204–3795.

FOR FURTHER INFORMATION CONTACT: A. Kloze, (202) 275–7935, or Richard B. Felder, (202) 275–7691 [TDD for hearing impaired: (202) 275–1721].

SUPPLEMENTARY INFORMATION: Columbia River Tariff Bureau (CRTB) supplemented its then pending application for approval of a revised collective ratemaking agreement in response to Ex Parte No. 297 (Sub-No. 4), *Reopening of Section 5a Application Proceedings to Take Additional Evidence* (not printed), served January 6, 1978. In that decision, the Commission reopened all previously approved non-rail collective ratemaking agreements to take additional evidence to determine whether those agreements still qualified for Commission approval. The decision required each bureau to submit evidence to establish: (1) That its agreement enhanced one or more National Transportation Policy (NTP) goals; (2) that the agreement did not have anticompetitive effects; and (3) that if anticompetitive effects were found, the benefits the agreement conferred on the public outweighed the harm.

Subsequently, following passage of the Motor Carrier Act of 1980 (MCA), which established new standards for review and approval of motor carrier rate bureau agreements the Commission in a decision served August 21, 1980, terminated the Ex Parte No. 297 (Sub-No. 4) proceeding to the extent it involved review of motor carrier agreements. The proceeding continued for freight forwarders and water carrier rate bureaus and CRTB's agreement requires our approval under 49 U.S.C. 10706(c).

A preliminary examination of CRTB's current activities and those of the water carrier industry generally has raised questions as to whether continued antitrust immunity for the Bureau is necessary or appropriate. In the circumstances, the Commission is asking CRTB to describe any current or contemplated collective ratemaking activities within the Commission's jurisdiction for which antitrust immunity is required. If CRTB does not show that it conducts or needs in the future to conduct such collective ratemaking, the Commission will consider: (a) Dismissing the application for approval of its amended collective ratemaking agreement; (b) revoking antitrust immunity for future collective actions by CRTB and its signatory members; and (c) requiring CRTB to cancel its tariffs.

If CRTB demonstrates that it has a need for and a continuing interest in immunity that the Commission may properly grant, it proposes to review the agreement under the three-part test in Ex Parte No. 297 (Sub-No. 4) in light of the standards now applicable to motor and rail carriers. Because water carrier activities are similar to those of railroads, the Commission proposes to consider especially those guidelines

now applicable to rail rate bureaus under 49 U.S.C. 10706(a)(3)(A) (i) and (ii). Standards developed for motor carrier rate bureaus may also be applied, as relevant and necessary to prevent anticompetitive behavior.

The Commission requests interested parties to comment on its preliminary findings and proposed actions. Such parties must serve a copy of their comments filed with the Commission on CRTB. CRTB will have the opportunity to reply and the Commission will consider all the pleadings in determining what further findings and actions are required.

Additional information is contained in the Commission's decision. To obtain a copy of the full decision, write to, call, or pick up in person from: Office of the Secretary, Room 2215, Interstate Commerce Commission, Washington, DC 20423. Telephone: (202) 275-7428. [Assistance for the hearing impaired is available through TDD services (202) 275-1721.]

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Authority: 49 U.S.C. 11701, 10706, and 10321.

Decided: November 14, 1989.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andrè, Lamboley, and Phillips. Commissioner Andrè dissented.

Noreta R. McGee,

Secretary.

[FR Doc. 89-27827 Filed 11-27-89; 8:45 am]

BILLING CODE 7035-01-M

[Section 5a Application No. 106] [1]

Household Goods Forwarders Tariff Bureau

AGENCY: Interstate Commerce Commission.

ACTION: Notice of decision and request for comment.

SUMMARY: The Commission has reviewed the pending application filed by Household Goods Forwarders Tariff Bureau for continued approval of its collective ratemaking agreement in light of changes: (1) In the standards applicable to motor and rail rate bureaus; and (2) in the household goods forwarder industry, including recent tariff filings by the Bureau, since the last pleadings were filed in this proceeding in response to the Commission's decision in Ex Parte No. 297 (Sub-No. 4), *Reopening of Section 5a Application Proceedings to Take Additional Evidence* (not printed), served January 6, 1978. This preliminary examination has raised questions as to whether continued antitrust immunity for the Bureau is necessary or appropriate. Therefore, the Commission is asking the Bureau to describe any current or contemplated collective ratemaking activities within the Commission's jurisdiction for which antitrust immunity is required. If the Bureau demonstrates that it has a need for and a continuing interest in immunity that the Commission properly may grant, the Commission proposes to review the agreement under the three-part test set forth in Ex Parte No. 297 (Sub-No. 4), *supra,* and to interpret that test in light of the standards the Commission has applied in evaluating motor carrier rate bureau agreements under the Motor Carrier Act of 1980.

DATES: The Bureau's response to the decision is due December 28, 1989. Comments from interested parties are due January 29, 1990. The Bureau's reply is due February 20, 1990.

ADDRESSES: An original and 10 copies, if possible, of comments referring to Section 5a Application No. 106 should be sent to:

Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

One copy should be sent to:

Alan F. Wohlstetter, General Counsel and Executive Secretary, Household Goods Forwarders Tariff Bureau, 1700 K Street, NW., Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT:

Ken Schwartz, (202) 275-7956

or

Richard Felder, (202) 275-7691

[TDD for hearing impaired (202) 275-1721]

SUPPLEMENTARY INFORMATION:

The Bureau filed its application in response to the Commission's decision in Ex Parte No. 297 (Sub-No. 4), *Reopening of Section 5a Application Proceedings to Take Additional Evidence* (not printed), served January 6, 1978. In that decision, the Commission reopened all previously approved non-rail collective ratemaking agreements to take additional evidence to determine whether those agreements still qualified for Commission approval. The decision required each bureau to submit evidence to establish: (1) That its agreement enhanced one or more National Transportation Policy goals; (2) that the agreement did not have anticompetitive effects; and (3) that, if anticompetitive effects were found, the benefits the agreement conferred on the public interest outweighed the harm.

Subsequently, following passage of the Motor Carrier Act of 1980 (MCA), which established new standards for review and approval of *motor carrier* rate bureau agreements, the Commission terminated the Ex Parte No. 297 (Sub-No. 4) proceeding to the extent it involved review of motor carrier agreements. The proceeding continued for freight forwarder and water carrier rate bureaus. Then, pursuant to the Surface Freight Forwarder Deregulation Act of 1986, *non-household goods* freight forwarders were substantially deregulated, and the Commission's jurisdiction to grant antitrust immunity for their collective ratemaking was revoked. However, jurisdiction over *household goods* freight forwarders continues, and HGFTB's agreement requires the Commission's approval under 49 U.S.C. 10706(c).

A preliminary examination of the Bureau's activities has raised questions as to whether continued antitrust immunity for the Bureau is necessary or appropriate. In the circumstances, the Commission is asking the Bureau to describe any current or contemplated collective ratemaking activities within the Commission's jurisdiction for which antitrust immunity is required. If the Bureau does not show that it conducts or needs in the future to conduct such collective ratemaking, the Commission will consider: (a) Dismissing the application; (b) revoking antitrust immunity for future collective actions by the Bureau and its signatory members; and (c) requiring the Bureau to cancel its tariffs.

If the Bureau demonstrates that it has a need for and a continuing interest in immunity that the Commission properly may grant, the Commission proposes to review the agreement under the three-part test set forth in Ex Parte No. 297 (Sub-No. 4), *supra,* and to interpret that test in light of the standards the Commission has applied in evaluating motor carrier rate bureau agreements under the MCA.

The Commission requests interested parties to comment on its preliminary findings and proposed actions. Such parties must serve on the Bureau a copy of any comments they file with the Commission. The Bureau will have the opportunity to reply to the comments, and the Commission will consider all the pleadings in determining what further findings and actions are required.

Additional information is contained in the Commission's decision. To obtain a copy of the full decision, write to, call, or pick up in person from: Office of the Secretary, Room 2215, Interstate

[1] Section 5 was recodified as section 10706.

Commerce Commission, Washington, DC 20423. Telephone: (202) 275-7428. [Assistance for the hearing impaired is available through TDD services (202) 275-1721.]

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Authority: 49 U.S.C. 11701, 10706, and 10321.

Decided: November 14, 1989.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Commissioner Andre dissented.

Noreta R. McGee,

Secretary.

[FR Doc. 89-27828 Filed 11-27-89; 8:45 am]

BILLING CODE 7035-01-M

JUDICIAL CONFERENCE OF THE UNITED STATES

Judicial Conduct and Disability Act

AGENCY: Judicial Conference of the United States.

Subagency: Committee to Review Circuit Council Conduct and Disability Orders.

ACTION: Proposed rules and opportunity for comment.

SUMMARY: The Judicial Conference is authorized by section 372(c)(11) of title 28, United States Code, to prescribe such rules for the conduct of proceedings under section 372(c), including the processing of petitions for review, as it considers to be appropriate. It is further provided by 28 U.S.C. 372(c)(11) that any such rule shall be made or amended only after giving appropriate public notice and an opportunity for comment.

Section 372(c), as enacted by the Judicial Conduct and Disability Act of 1980, Public Law No. 96-458, section 3(a), 94 Stat. 2036, establishes procedures for the consideration of complaints alleging conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging mental or physical disability, on the part of a United States circuit, district or bankruptcy judge or a United States magistrate. Such complaints are presented to and considered by the judicial councils of the circuits or, in the case of a judge of the United States Court of Appeals for the Federal Circuit, the United States Court of International Trade, and the United States Claims Court, by the respective courts.

28 U.S.C. 372(c)(10) provides that a complainant, judge, or magistrate aggrieved by an action of a judicial council (or court) taken under section 372(c)(6) upon a complaint may petition the Judicial Conference for review thereof. By authority of 28 U.S.C. 331 and 372(c)(10), the Conference has established the Committee to Review Circuit Council Conduct and Disability Orders as a standing committee to consider such petitions for review. This Committee has submitted to the Conference the following proposed rules for the processing of petitions for review. The Judicial Conference at its meeting of September 20, 1989, approved these rules for issuance to the public by way of notice with the opportunity for comment.

DATE: By action of the Judicial Conference these rules shall become final following their publication and the consideration of any comments. Comments will be accepted until December 29, 1989.

ADDRESS: Send the original and five copies of any comments to the attention of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, Office of the General Counsel, Administrative Office of the United States Courts, Washington, DC 20544.

FOR FURTHER INFORMATION CONTACT: William R. Burchill, Jr., General Counsel, Administrative Office of the United States Courts, Washington, DC 20544. Telephone: (202) 633-6127.

Dated: November 15, 1989.

James E. Macklin, Jr.,

Deputy Director, Administrative Office of the United States Courts.

Rules of the Judicial Conference of the United States for the Processing of Petitions for Review of Circuit Council Orders Under the Judicial Conduct and Disability Act

The Judicial Conference of the United States prescribes these rules under the authority of section 372(c)(11) of title 28, United States Code, with respect to the processing of petitions for review submitted to the Conference under 28 U.S.C. 372(c)(10), seeking review of circuit council actions taken under 28 U.S.C. 372(c)(6) upon complaints of judicial conduct or disability:

1. Petition for review may be made by the filing of a written submission to the Judicial Conference addressed as follows: L. Ralph Mecham, Secretary, Judicial Conference of the United States, Administrative Office of the United States Courts, Washington, DC 20544. Attention: Office of the General Counsel.

2. No form is prescribed for the filing of a petition for review.

3. Such petition shall consist of a written submission in typewriting on plain paper of 8½ by 11 inch dimensions.

4. No formal limitation is imposed upon the length of the petition, but it is suggested that such petition should not normally exceed 20 pages in addition to the attachments required by Rule 8.

5. The petition shall contain a short and plain statement of the basic facts underlying the complaint, the history of its consideration before the appropriate circuit judicial council, and the premises upon which the petitioner asserts entitlement to relief from the action taken by the council.

6. No absolute time limitation exists upon the filing of a petition for review. Nevertheless the petition should be submitted seasonably following final action by the circuit judicial council and issuance of its implementing order under 28 U.S.C. 372(c)(15).

7. Five copies of the petition for review shall be submitted, at least one of which shall bear the original ink signature of the petitioner or his or her attorney. If the petitioner submits a signed declaration of inability to pay the expense of duplicating the petition, the Administrative Office shall then accept the original petition alone and shall undertake necessary reproduction of copies at its expense.

8. The petition for review shall have attached thereto a copy of each of the following documents:

- The order of the circuit judicial council issued under 28 U.S.C. 372(c)(15), of which review is sought;
- The original complaint of judicial misconduct or disability that commenced the proceeding;
- Any other documents or correspondence arising in the course of the proceeding before the judicial council or its special committee which the petitioner deems essential or useful to the prompt disposition of the review petition.

9. Upon receipt of a petition for review that appears on its face to be coherent, in compliance with these rules, and appropriate for present disposition, the Administrative Office shall promptly acknowledge receipt of the petition and advise the chairman of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, a committee appointed by the Chief Justice of the United States as authorized by 28 U.S.C. § 331.

10. Unless otherwise directed by the Executive Committee of the Judicial Conference, the Committee to Review Circuit Council Conduct and Disability

Orders shall assume the consideration and disposition of all petitions for review, in conformity with the Judicial Conference statement of the Committee's jurisdiction.

11. The Administrative Office shall then distribute the petition and its attachment to the members of the Committee to Review Circuit Conduct and Disability Orders for their deliberation. The petition shall receive an eight-digit identifying number of which the initial two digits shall refer to the year of filing, the next three digits shall be "372," and the final three shall identify each individual petition. Unless otherwise directed by the chairman, the Administrative Office shall contact the circuit executive or clerk of the U.S. court of appeals for the appropriate circuit to obtain the record of circuit council consideration of the complaint for distribution to the Committee.

12. In recognition of the review nature of petition proceedings under 28 U.S.C. 372(c)(10), no additional investigation shall ordinarily be undertaken by the Judicial Conference or the Committee. If such investigation is deemed necessary, the Conference or Committee may remand the matter to the circuit judicial council that considered the complaint, or may undertake any investigation found to be required. If such investigation is undertaken by the Conference or Committee, (a) adequate prior notice shall be given in writing to the judge or magistrate whose conduct is the subject of the complaint, (b) such judge or magistrate shall be afforded an opportunity to appear at any investigative proceedings which might be conducted and to present argument orally or in writing, and (c) the complaint shall be afforded an opportunity to appear at any proceedings conducted if it is considered that the complainant could offer substantial new and relevant information.

13. Except where additional investigation is undertaken as provided in Rule 12, there shall be no oral arguments or personal appearances before the Committee. Unless the petition for review is amenable to disposition on the face thereof, the Committee may determine to review written argument from the petitioner and from the other party to the complaint proceeding (the complainant or judge/magistrate complained against).

14. The decision on the petition shall be made by written order as provided by 28 U.S.C. 372(c)(15). Such order shall be forwarded by the Committee chairman to the Administrative Office, which shall distribute it as directed by the chairman. In accordance with section 372(c)(15), orders of the Committee shall be maintained as public documents by the Administrative Office and by the clerk of the United States court of appeals for the circuit in which the complaint arose.

15. In conformity with 28 U.S.C. 372(c)(10), all orders and determinations of the Judicial Conference or of the Committee on its behalf, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

[FR Doc. 89-27782 Filed 11-27-89; 8:45 am]

BILLING CODE 2210-01-M

DEPARTMENT OF JUSTICE

Drug enforcement Administration

[Docket No. 89-33]

Bob's Pharmacy and Robert T. Covington, Inc., National City, CA; Hearing

Notice is hereby given that on April 19, 1989, the Drug Enforcement Administration, Department of Justice, issued to Bob's Pharmacy and Robert T. Covington, Inc., an Order to Show Cause as to shy the Drug Enforcement Administration should not revoke your DEA Certificate of Registration, BB0529810, and deny any pending applications for registration.

Thirty days have elapsed since the said Order to Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held on Tuesday, November 28, 1989, commencing at 9:30 a.m., in Suite 401, 950 Sixth Avenue, San Diego, California.

Dated: November 17, 1989.

John C. Lawn,

Administrator, Drug Enforcement Administration.

[FR Doc. 89-27833 Filed 11-27-89; 8:45 am]

BILLING CODE 4410-09-M

Drug Enforcement Administration

[Docket No. 89-41]

William F. Harrison, M.D. Wichita, KS; Hearing

Notice is hereby given that on May 23, 1989, the Drug Enforcement Administration, Department of Justice, issued to William F. Harrison, M.D., an Order to Show Cause as to why the Drug Enforcement Administration should not deny your application for a DEA Certificate of Registration.

Thirty days have elapsed since the said Order to Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held on Wednesday, December 13, 1989, commencing at 10 a.m., at the National Labor Relations Board, 5799 Broadmoor, Courtroom B, Fifth Floor, Mission, Kansas.

Dated: November 17, 1989.

John C. Lawn,

Administrator, Drug Enforcement Administration.

[FR Doc. 89-27834 Filed 11-27-89; 8:45 am]

BILLING CODE 4410-09-M

[Docket No. 89-47]

Edwin A. Schuller, Jr., D.O., Springfield, PA; Hearing

Notice is hereby given that on June 16, 1989, the Drug Enforcement Administration, Department of Justice, issued to Edwin A. Schuller, Jr., D.O., an Order to Show Cause as to why the Drug Enforcement Administration should not revoke your DEA Certificate of Registration, AS1385055, and deny any pending applications for registration.

Thirty days have elapsed since the said Order to Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held on Wednesday, December 6, 1989, commencing at 10 a.m., in the Hearing Room, DEA Headquarters, Lincoln Place, East Building, 600 Army Navy Drive, Arlington, Virginia.

Dated: November 17, 1989.

John C. Lawn,

Administrator, Drug Enforcement Administration.

[FR Doc. 89-27835 Filed 11-27-89; 8:45 am]

BILLING CODE 4410-09-M

[Docket No. 89-50]

Sheo Sinha, M.D., Brooklyn, NY; Hearing

Notice is hereby given that on June 21, 1989, the Drug Enforcement Administration, Department of Justice, issued to Sheo Sinha, M.D., an Order to Show Cause as to why the Drug Enforcement Administration should not revoke your DEA Certificate of

Registration, AS6523167, and deny any pending applications for registration.

Thirty days have elapsed since the said Order to Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held on Wednesday, December 20, 1989, commencing at 10:00 a.m., at the United States Court of Appeals for the Federal Circuit, 717 Madison Place, NW., Washington, DC.

Dated: November 17, 1989.

John C. Lawn,

Administrator, Drug Enforcement Administration.

[FR Doc. 89-27836 Filed 11-27-89; 8:45 am]

BILLING CODE 4410-09-M

DEPARTMENT OF LABOR

Office of the Secretary

Senior Executive Service; Appointment of Members to the Performance Review Board

Title 5 U.S.C. 4314(c)(4) provides that Notice of the appointment of individuals to serve as members of the Performance Review Board of the Senior Executive Service shall be published in the **Federal Register.**

The following executives are hereby appointed or reappointed respectively, to three-year terms, effective November 11, 1989: Lawrence W. Rogers, David O. Williams.

The following executive is hereby reappointed to a three-year term effective November 18, 1989: Monica Gallagher.

FOR FURTHER INFORMATION CONTACT: Mr. Larry K. Goodwin, Director of Personnel Management, Room C5526, Department of Labor, Frances Perkins Building, Washington, DC 20210, telephone: (202) 523-6551.

Signed at Washington, DC, this 20th day of November, 1989.

Elizabeth Dole,

Secretary of Labor.

[FR Doc. 89-27872 Filed 11-27-89; 8:45 am]

BILLING CODE 4510-23-M

Employment and Training Administration

Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for adjustment assistance issued during the period November 1989.

In order for an affirmative determination to be made and a certification of eligibility to apply for adjustment assistance to be issued, each of the group eligibility requirements of Section 222 of the Act must be met.

(1) That a significant number or proportion of the workers in the workers' firm, or an appropriate subdivision thereof, have become totally or partially separated,

(2) That sales or production, or both, of the firm or subdivision have decreased absolutely, and

(3) That increases of imports of articles like or directly competitive with articles produced by the firm or appropriate subdivision have contributed importantly to the separations, or threat thereof, and to the absolute decline in sales or production.

Negative Determinations

In each of the following cases the investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA-W-23,384; Eyelet Embroideries, Inc., Edgewater, NJ

TA-W-23,334; Alco Controls, Wytheville, VA

TA-W-23,365; The Pullman Group of Companies, San Antonio, TX

TA-W-23,357; Core Fashions Sportswear, Inc., East Newark, NJ

TA-W-23,364; Model Garment Co., Inc., Frackville, PA

TA-W-23,269; P.S. & L Corp., Orange, NJ

TA-W-23,391; Maine Electronics, Lisbon, ME

TA-W-23,362; Metrocolor Laboratory, Culver City, CA

TA-W-23,401; Struthers Thermo Flood, Winfield, KS

TA-W-23,389; Hale Manufacturing Co., Putnam, CT

TA-W-23,399; Slawson Exploration Co., Inc., Oklahoma City, OK

In the following cases, the investigation revealed that the criteria for eligibility has not been met for the reasons specified.

TA-W-23,404 and TA-W-23,405; W.A. Kruger Co., Scottsdale, AZ and Brookfield, WI

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-23,356; Brooks Brothers, Inc., Paterson, NJ

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,382; Deutz of America Corp., Richmond, IN

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-23,372; BP Exploration, Inc., (Lower 48 States), S.W. Freeway Offices, Houston, TX

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,373; BP Exploration, Inc., San Felipe Office, Houston, TX

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,388; Harrison Well Service, Inc., Mt. Carmel, IL

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-23,428; Specialty Services, Farmington, NM

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-23,355; Bridge Oil (U.S.A.), Inc., Dallas, TX

The investigation revealed that criterion (2) has not been met. Sales or production did not decline during the relevant period as required for certification.

TA-W-23,368; Arco Oil and Gas Onshore Production, Beeville, TX

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,403 and TA-W-23,403A; Swaco Geolograph Co., Houston, TX and Swaco Geolograph Co., Oklahoma City, OK

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-23,3771 Buffalo Refrigeration Co., Buffalo, NY

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-23,434; Valdez Creek Mining Co., Inc., Cantwell, AK

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,395; National Standard Co., Niles, MI

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,367; Ace Schiffli Embroidery Co., Inc., Fairview, NJ

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,369; All American Emblem Corp., Fairview, NJ

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,371; BC Five Corp., North Bergen, NJ

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,374; Barbara Embroidery Corp., Fairview, NJ

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,361; Mercury Marine, St. Cloud, FL

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,397; Pyote Well Service, Inc., Wickett, TX

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-23,376; Brooks Foundry Co., Inc., Albion, MI

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,436; AT & T Microelectronics, Union, NJ

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-23,375; Bipolar Integrated Technology, Inc., Beaverton, OR

The investigation revealed that criterion (2) has not been met. Sales or production did not decline during the relevant period as required for certification.

TA-W-23,412; The Bovaird Supply Co., Tulsa, OK

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-23,433; Taurus Petroleum, Inc., Denver, CO

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-23,448; Mari Leather Works, Inc., Hialeah, FL

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,390; J & K Fashions, Orange, NJ

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,402; Suburban Sportswear, Orange, NJ

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,407; Bogert Oil Co., Drilling Div., Oklahoma City, OK

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-23,418; Jonesboro Wood Products, Jonesboro, LA

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,340; Cecil's Custom Shop, Odessa, TX

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-23,366; Schindler Elevator Corp., Toledo, OH

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-23,396; Pennzoil Product Co., Exploration & Production Div., Bradford, PA Div., Chipmonk Valley Lease, Chipmonk, NY

The investigation revealed that criterion (1) has not been met. Employment did not decline during the relevant period as required for certification.

TA-W-23,341; Chapman Exploration, Inc., Tulsa, OK

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

Affirmative Determinations

TA-W-23,413; Briscoe Drilling Co., Kingfisher, OK

A certification was issued covering all workers separated on or after August 31, 1988.

TA-W-23,387; General Motors Corp., BOC Chicago Plant, Willow Springs, IL

A certification was issued covering all workers separated on or after December 2, 1989.

TA-W-23,411; Baxter Healthcare Corp., Pharmasel Div., Eaton, OH

A certification was issued covering all workers separated on or after September 10, 1988.

TA-W-23,406; The William Powell Co., Cincinnati, OH

A certification was issued covering all workers separated on or after September 7, 1988.

TA-W-23,398; Revelations Shoe Corp., Exeter, PA

A certification was issued covering all workers separated on or after September 7, 1988.

TA-W-23,383; Evart Products Co., Evart, MI

A certification was issued covering all workers separated on or after June 1, 1989.

TA-W-23,381; Decalta International Corp., Denver, CO

A certification was issued covering all workers separated on or after September 5, 1988.

TA-W-23,381A; Decalta International Corp., Operating at Various Locations in The State of CA

A certification was issued covering all workers separated on or after September 5, 1988.

TA-W-23,381B; Decalta International Corp., Operating at Various Locations in The State of CO

A certification was issued covering all workers separated on or after September 5, 1988.

TA-W-23,429; Kent Sportswear, Inc., Kent I, Curwensville, PA

A certification was issued covering all workers separated on or after September 8, 1988.

TA-W-23,430; Kent Sportswear, Inc., Kent II, Curwensville, PA

A certification was issued covering all workers separated on or after September 8, 1988.

TA-W-23,431; Kent Sportswear, Inc., Hyde, Hyde, PA

A certification was issued covering all workers separated on or after September 8, 1988.

TA-W-23,432; Kent Sportswear, Inc., Clearfield, PA

A certification was issued covering all workers separated on or after September 8, 1988.

TA-W-23,345; Interlake Companies, Inc. Material Handling Div., Mendota, IL

A certification was issued covering all workers separated on or after August 23, 1988.

TA-W-21,293; Mustang Drilling, Inc., Great Bend, KS

A certification was issued covering all workers separated on or after October 1, 1985 and before June 30, 1988.

TA-W-21,182; G & A Contract Services, Inc., Houston, TX

A certification was issued covering all workers separated on or after October 1, 1985.

TA-W-21,188; Griffin-Alexander Drilling Co. Houston, TX

A certification was issued covering all workers separated on or after October 1, 1985.

TA-W-21,414; Emerald Corp., Inc., Denver, CO

A certification was issued covering all workers separated on or after October 1, 1988.

TA-W-21,313; Stephens & Sons, Inc., Corpus Christi, TX

A certification was issued covering all workers separated on or after October 1, 1985 and before November 1, 1988.

TA-W-21,332; Circle M Construction Co., Inc., Midland, TX

A certification was issued covering all workers separated on or after October 1, 1985 and before January 31, 1986.

TA-W-21,157; Al's Oilfield Service, Willston, ND

A certification was issued covering all workers separated on or after October 1, 1985.

TA-W-21,423; Four Square Excavating Co., Carmi, IL

A certification was issued covering all workers separated on or after October 1, 1985 and before June 1, 1987.

TA-W-21,262; Donham Oil Tools Co., Inc., Lake Charles, LA

A certification was issued covering all workers separated on or after October 1, 1985 and before December 31, 1987.

TA-W-21,312; Spartan Drilling & Workover Services, Rocky Mountain District, Sidney, MT & Operating at Various Locations in The Following States:

TA-W-21,312A MT
TA-W-21,312B ND
TA-W-21,312C SD

A certification was issued covering all workers separated on or after October 1, 1985 and before January 1, 1987.

TA-W-21,350; Grace Drilling Co., Odessa, TX & Operating at Various Locations in The Following States:

TA-W-21,350A Shreveport, LA
TA-W-21,350B Lafayette, LA
TA-W-21,350C Ft. Smith, AR
TA-W-21,350D Houston, TX
TA-W-21,350E Oklahoma City, OK
TA-W-21,350F Golden, CO

A certification was issued covering all workers separated on or after October 1, 1985 and before January 1, 1987.

TA-W-21,399; Grace Drilling Co., Williston, ND

A certification was issued covering all workers separated on or after October 1, 1985 and before January 1, 1987

TA-W-21,827 and TA-W-21,828; Dyna Jet, Inc., Gillette, WY and Grand Junction, CO

A certification was issued covering all workers separated on or after October 1, 1985.

TA-W-21,712; Digicon Geophysical Corp., Houston, TX

A certification was issued covering all workers separated on or after October 1, 1985.

TA-W-21,511; Classic Exploration, Inc., Witchita, KS

A certification was issued covering all workers separated on or after October 1, 1985.

TA-W-21,512; Classic Exploration, Inc., Great Bend, KS

A certification was issued covering all workers separated on or after October 1, 1985.

TA-W-22,063; Renn Drilling, Inc., McLeansboro, IL

A certification was issued covering all workers separated on or after October 1, 1985.

TA-W-21,648; Mud-Co., Inc., Wichita, KS

A certification was issued covering all workers separated on or after October 1, 1985 and before January 1, 1988.

TA-W-21,649; Mud-Co., Inc., Hays, KS

A certification was issued covering all workers separated on or after October 1, 1985 and before August 21, 1986.

TA-W-21,421; Fluor Drilling Services, Inc., New Orleans, LA

A certification was issued covering all workers separated on or after October 1, 1985 and before December 5, 1986.

TA-W-21,611; Dakota Drilling Co., Bottineau, ND

A certification was issued covering all workers separated on or after October 1, 1985.

TA-W-21,770; Teleco Oilfield Services, Inc., Broussard, LA & Operating at Various Locations in The Following States:

TA-W-21,770A Anchorage, AK
TA-W-21,770B Ventura, CA
TA-W-21,770C Meriden, CT
TA-W-21,770D Lafayette, LA
TA-W-21,770E Houston, TX
TA-W-21,770F Evanston, WY

A certification was issued covering all workers separated on or after October 1, 1985.

TA-W-21,456; Mid America Petroleum, Inc., Midland, TX

A certification was issued covering all workers separated on or after October 1, 1985.

TA-W-21,328; Buford Drilling Co., Clodine, TX

A certification was issued covering all workers separated on or after October 1, 1985.

TA-W-21,495; Viking Drilling Fluids, Littleton, CO

A certification was issued covering all workers separated on or after January 1, 1986 and before January 31, 1988.

TA-W-21,443; Knox Corder Drilling Co., Devine, TX

A certification was issued covering all workers separated on or after October 1, 1985 and before March 21, 1987.

TA-W-21,440; Jeansville Corp, Orangeburg, SC

A certification was issued covering all workers separated on or after October 7, 1987 and before November 30, 1988.

TA-W-21,557; Chapman Services, Inc., Odessa, TX

A certification was issued covering all workers separated on or after October 1, 1985.

TA-W-21,401; Burgener Services, Inc., Olney, IL

A certification was issued covering all workers separated on or after October 1, 1985.

TA-W-21,551; BTA Oil Producers, Midland, TX

A certification was issued covering all workers separated on or after October 1, 1985 and before January 1, 1987.

TA-W-21,396; Amazon Technologies, Inc., Longmount, TX

A certification was issued covering all workers separated on or after October 1, 1985.

TA-W-21,464; Parker Drilling Co., Gulf Coast Div., Lafayette, LA

A certification was issued covering all workers separated on or after January 1, 1986.

TA-W-21,505; AT&T Technologies General Markets Groups, Shreveport, LA

A certification was issued covering all workers separated on or after October 17, 1987.

TA-W-21,347; General Motors Corp., Pontiac Motor Div., Pontiac, MI & Operating at Various Plant Locations:

TA-W-21,347A Plant #15
TA-W-21,347B Plant #52
TA-W-21,347C Plant #56

A certification was issued covering all workers separated on or after October 4, 1987.

TA-W-21,819; Crown Exploration Co., Abilene, TX

A certification was issued covering all workers separated on or after January 1, 1988.

TA-W-21,862; Hatch Wireline Service, Ed Dorado, AR

A certification was issued covering all workers separated on or after October 1, 1985 and before December 31, 1988.

I hereby certify that the aforementioned determinations were issued during the month of November 1989. Copies of these determinations are available for inspection in Room 6434, U.S. Department of Labor, 601 D Street, NW., Washington, DC 20213 during normal business hours or will be mailed to persons to write to the above address.

Dated: November 21, 1989.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 89-27871 Filed 11-27-89; 8:45 am]

BILLING CODE 4510-30-M

Job Training Partnership Act: Native American Programs' Advisory Committee; Appointment of Members

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of appointment of members.

SUMMARY: Notice is hereby given that appointments have been made to fill eighteen (18) vacancies on the Job Training Partnership Act Native American Programs' Advisory Committee.

The membership of the Committee and categories represented are as follows:

JTPA Section 401 Grantees

Mr. Thomas W. Dowd, Executive Director, Native Americans for Community Action, Inc., Flagstaff, Arizona

Ms. Evelyn F. Stephens, Executive Director, The Oklahoma Tribal Assistant Program, Inc., Tulsa, Oklahoma

Mr. Fred H. Muscavitch, Executive Director, Milwaukee Area American Indian Manpower Council, Inc., Milwaukee, Wisconsin

Mr. Frank LaMere, Executive Director, Nebraska Indian Inter-Tribal Development Corporation, Winnebago, Nebraska

Mr. John R. Hassan, JTPA Director, Council of Three Rivers, American Indian Center, Inc., Pittsburgh, Pennsylvania

Mr. Anthony Vaska, JTPA Director, Association of Village Council Presidents, Bethel, Alaska

Ms. Winona Whitman, Employment and Training Program Administrator, Alu Like, Inc., Honolulu, Hawaii

Ms. Joy J. Hanley, Executive Director, Affiliation of Arizona Indian Centers, Inc., Phoenix, Arizona

Mr. Doyle Tubby, Director, Department of Employment and Training, Mississippi Band of Choctaw Indians, Philadelphia, Mississippi

Mr. Gary L. Johnson, Executive Director, Western Washington Indian Employment & Training Program, Tacoma, Washington

Mr. Eddie L. Tullis, Chairman, Poarch Band of Creek Indians, Atmore, Alabama

National Organizations

Mr. Norman C. DeWeaver, Washington, D.C. Representative, Indian and Native American Employment and Training Coalition, Washington, D.C.

Mr. Syd Beane, President, National American Indian Council, Washington, D.C.

Representatives From Other Disciplines

Ms. Ada E. Deer, Senior Lecturer, American Indian Studies Program, University of Wisconsin, Madison, Wisconsin

Dr. John W. Tippeconnic III, Associate Professor of Education, Center for Indian Education, Arizona State University, Tempe, Arizona

Mr. Dale Wing, Assistant Project Director, American Association of Retired People, Washington, D.C.

Dr. Rose-Alma McDonald-Jacobs, Native American Consultant, Hogansburg, New York

Mr. A. David Lester, Executive Director, Council of Energy Resource Tribes, Denver, Colorado

Each of these members has been appointed for a term which will end on October 20, 1990.

The JTPA Native American Programs' Advisory Committee was established under section 401(h)(1) of title IV of JTPA to advise the Assistant Secretary for Employment and Training on rules, regulations and performance standards specifically and solely for Native American programs authorized under that section.

DATES: These appointments were made and were effective on November 9, 1989. The appointments expire on October 20, 1990.

FOR ADDITIONAL INFORMATION CONTACT: Paul A. Mayrand, Director, Office of Special Targeted Programs, Employment and Training Administration, Room N-4644, 200 Constitution Avenue, NW., Washington, DC 20210; Telephone: (202) 535-0500.

Signed at Washington, DC, this 22nd day of November 1989.

Roberts T. Jones,

Assistant Secretary for Employment and Training.

[FR Doc. 89-27870 Filed 11-27-89; 8:45 am]

BILLING CODE 4510-30-M

MERIT SYSTEMS PROTECTION BOARD

Call for Riders for the U.S. Merit Systems Protection Board Publication, "Questions & Answers About Whistleblower Appeals"

AGENCY: U.S. Merit Systems Protection Board.

ACTION: Notice of call for riders for the Board's publication, "Questions & Answers About Whistleblower Appeals."

SUMMARY: The purpose of this notice is to inform Federal departments and agencies that the U.S. Merit Systems Protection Board's information publication, "Questions & Answers About Whistleblower Appeals," will be available on riders to the Government Printing Office. Departments and agencies may order this publication by riding the Board's requisition number 0-00109.

DATE: Agency requisitions must be received by the Government Printing Office on or before [insert date 30 days from date of publication].

ADDRESS: Interested departments and agencies should send requisitions from their Washington, DC, headquarters office authorized to procure printing to the Government Printing Office, Requisition Section, Room C-836, Washington, DC 20401. The estimated cost is approximately 20 cents per copy.

FOR FURTHER INFORMATION CONTACT: Charles J. Stanislav, Office of Management Analysis, U.S. Merit Systems Protection Board, 1120 Vermont Avenue NW., Washington, DC 20419, 202-653-8892.

SUPPLEMENTARY INFORMATION: This is a new publication containing general information on the rights of Federal employees to appeal certain personnel actions allegedly based on their whistleblowing activities to the Board and on the provisions of the Whistleblower Protection Act of 1989 (Pub. L. No. 101-12) and the Board's regulations applying to such appeals.

In making this publication available, the Board intends to provide general information about whistleblower appeal rights and procedures in a convenient, readable format for Federal employees and others with an interest in the Board's activities. The publication is not all-inclusive, nor is it regulatory in nature. The availability of this publication does not relieve an agency of its obligation, under the Board's regulations at 5 CFR 1201.21, to provide an employee against whom an action appealable to the Board is taken with notice of the employee's appeal rights and the other information specified in the Board's regulations.

This publication is based on the Board's interim regulations, part 1201 and part 1209, as published in the Federal Register of July 6, 1989. When final regulations are published, any changes that affect the information in this publication will be reflected in a revised edition.

Dated: November 22, 1989.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 89-27855 Filed 11-27-89; 8:45 am]

BILLING CODE 7400-01-M

NATIONAL COMMISSION ON CHILDREN

Meeting

Background

The National Commission on Children was created by Public Law 100-203, December 22, 1987 as an amendment to the Social Security Act. The purpose of the law is to establish a nonpartisan Commission directed to study the problems of children in the areas of health, education, social services, income security, and tax policy.

The powers of the Commission are vested in Commissioners consisting of 36 voting members as follows:

1. Twelve members appointed by the President
2. Twelve members appointed by the Speaker of the House of Representatives
3. Twelve members appointed by the President pro tempore of the Senate.

This notice announces the second town meeting of the National Commission on Children to be held in Kansas City, Missouri.

Time: 7:00 p.m..9:30 p.m., Monday, December 11, 1989.

Place: Pierson Hall, University of Missouri—Kansas City, Kansas City, Missouri.

Status: 7:00 p.m.-9:30 p.m., open to the public.

Agenda: America's Children and the Drug Crisis.

Contact: Jeannine Atalay, (202) 254-3800.

Dated: November 22, 1989.

John D. Rockefeller IV,

Chairman, National Commission on Children.

[FR Doc. 89-27854 Filed 11-27-89; 8:45 am]

BILLING CODE 6820-37-M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-445/446]

Availability of Supplement to the Final Environmental Statement for Comanche Peak Steam Electric Station, Units 1 and 2

Notice is hereby given that a supplement to NUREG-0775, "Final Environmental Statement related to the operation of Comanche Peak Steam Electric Station, Units 1 and 2," has been prepared by the Nuclear Regulatory Commission. The supplement provides the NRC staff's evaluation of the alternative of facility operation with the installation of further mitigation design features. The Comanche Peak Steam Electric Station, Units 1 and 2, is located on Squaw Creek Reservoir in Somervell County, Texas about 7 miles north-northeast of Glen Rose, Texas, and about 40 miles southwest of Fort Worth in north central Texas.

Copies of the supplement are available for inspection by the public at: (1) The NRC's Public Document Room at 2120 L Street, NW., Washington, DC 20555; (2) the Local Public Document Room at the Somervell County Public Library on the Square, P.O. Box 1417, Glen Rose, Texas 76043; and (3) the mini Local Public Document Room at the University of Texas at Arlington Library, 701 South Cooper, P.O. Box 19447, Arlington, Texas 76019.

The document is also being made available at the state and metropolitan clearing houses.

Copies of the supplement may be purchased at current rates from the National Technical Information Service, Department of Commerce, 5285 Port Royal Road, Springfield, Virginia 22161, and from the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013-7082.

Dated at Rockville, Maryland, this 21st day of November 1989.

For the Nuclear Regulatory Commission.

James E. Lyons,

Acting Director, Comanche Peak Project Division, Office of Nuclear Reactor Regulation.

[FR Doc. 89-27802 Filed 11-27-89; 8:45 am]

BILLING CODE 7590-01-M

Advisory Committee on Reactor Safeguards; Subcommittee on Human Factors; Meeting

The ACRS Subcommittee on Human Factors will hold a meeting on December 6, 1989, Room P-110, 7920 Norfolk Avenue, Bethesda, MD.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, December 6, 1989—8:30 a.m. Until the Conclusion of Business

The Subcommittee will discuss: (1) Proposed changes to 10 CFR 55, Operator Licenses, (2) NRC staff response to INPO comments on performance indicators, (3) Stater letter on operator training, and (4) Access Authorization rule (tentative).

Oral statements may be presented by members of the public with the concurrence of the Subcommittee Chairman; written statements will be accepted and made available to the Committee. Recordings will be permitted only during those portions of the meeting when a transcript is being kept, and questions may be asked only by members of the Subcommittee, its consultants, and Staff. Persons desiring to make oral statements should notify the ACRS staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the Subcommittee, along with any of its consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

The Subcommittee will then hear presentations by and hold discussions with representatives of the NRC Staff, its consultants, and other interested persons regarding this review.

Further information regarding topics to be discussed or whether the meeting has been cancelled or rescheduled can be obtained by a prepaid telephone call to the cognizant ACRS staff member, Mr. Herman Alderman (telephone 301/492-7750) between 7:30 a.m. and 4:15 p.m. Persons planning to attend this meeting are urged to contact the above named individual one or two days

before the scheduled meeting to be advised of any changes in schedule, etc., which may have occurred.

Dated: November 20, 1989.

Gary R. Quittschreiber,

Chief, Project Review Branch No. 2.

[FR Doc. 89-27793 Filed 11-27-89; 8:45 am]

BILLING CODE 7590-01-M

Advisory Committee on Reactor Safeguards; Subcommittee on Thermal Hydraulic Phenomena; Meeting

The ACRS Subcommittee on Thermal Hydraulic Phenomena will hold a meeting on December 7, 1989, Room P-110, 7920 Norfolk Avenue, Bethesda, MD.

A portion of the meeting will be closed to discuss information deemed proprietary by the Westinghouse Electric Company.

The agenda for the subject meeting shall be as follows:

Thursday, December 7, 1989—8:30 a.m. Until the Conclusion of Business

The Subcommittee will discuss: (1) The proposed NRR and RES programs for resolution of the interfacing systems LOCA Issue; (2) the status of the NRC/RES's Technical Program Group's efforts to apply the Code Scaling, Applicability and Uncertainty (CSAU) methodology to calculation of a small break LOCA; and (3) the status of development of the Westinghouse best estimate ECCS/LOCA model.

Oral statements may be presented by members of the public with the concurrence of the Subcommittee Chairman; written statements will be accepted and made available to the Committee. Recordings will be permitted only during those portions of the meeting open to the public, and questions may be asked only by members of the Subcommittee, its consultants, and Staff. Persons desiring to make oral statements should notify the ACRS staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the Subcommittee, along with any of its consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

The Subcommittee will then hear presentations by and hold discussions with representatives of the NRC Staff, the Westinghouse Electric Company, its consultants, and other interested persons regarding these topics.

Further information regarding topics to be discussed, the scheduling of sessions open to the public, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the cognizant ACRS staff member, Mr. Paul Boehnert (telephone 301/492-8558) between 7:30 a.m. and 4:15 p.m. Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., which may have occurred.

Dated: November 20, 1989.

Gary R. Quittschreiber,

Chief, Project Review Branch No. 2.

[FR Doc. 89-27794 Filed 11-27-89; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-139]

University of Washington; Consideration of Issuance of Amendment to Facility License and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to License No. R-13, issued to the University of Washington (the licensee), for the 100KW (thermal) Argonaut reactor facility located on the campus of the University of Washington, in Seattle, Washington. The amendment would involve approval of the licensee's Decommissioning Plan and the renewal of License No. R-13 as a possession-only license with associated Technical Specifications (TS).

The licensee submitted a request to change its license from an operating to a possession-only license on August 3 and 23, 1989 and a Decommissioning Plan on August 31, 1989, which also made a timely request that the license be extended until October 13, 2009. The Decommissioning Plan consists of two phases. The first phase is a partial decommissioning wherein the fuel and parts of the Argonaut reactor will be removed from the facility. After this phase is completed and surveys prove the facility to be acceptable, the licensee plans to install a subcritical assembly and a robotics laboratory in the facility. An application for a special nuclear material license under Part 70 is expected to be submitted, as a separate action, for installation of the subcritical assembly. The second phase of the Decommissioning Plan addresses the complete decontamination of the facility so that it can be released for unrestricted use.

The amendment would accomplish the following: (1) Approval of the licensee's Decommission Plan, which involves on-site storage of residual radioactivity until the year 2009, followed by facility dismantling. The Decommissioning Plan decribes the structures, systems and components to be removed during the first and second phase and the monitoring maintenance of the remainder of the facility; (2) revise the Technical Specification (TS) to delete certain license conditions including the exemption of the physical security and emergency plan that were applicable for reactor operations but not for permanent shutdown possession-only conditions, and to retain the TS suitable for possession-only status such as requirements for radiation protection, monitoring and facility maintenance; and (3) renewal of License No. R-13 from its October 13, 1989 expiration date to October 13, 2009 to be consistent with the licensee's Decommissioning Plan and Possession-Only license amendment request.

Prior to issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, an amended (the Act) the the Commission's regulations.

By December 28, 1989, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility 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 petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. 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 20555. 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 fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. 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 action 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.

A request for a hearing or a petition for leave to intervene shall be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-(800) 325-6000 (in Missouri 1-(800) 342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Seymour H. Weiss: 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 Mr. Lloyd W. Peterson, Senior Assistant Attorney General, University of Washington, 112 Administration, MS AF-50, Seattle, Washington 98195, attorney for 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).

If a request for a hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazards considerations in accordance with 10 CFR 50.91 and 50.92.

For further details with respect to this action, see the application for amendment dated August 3, 1989 as revised August 23, 1989 and August 31, 1989, which is available for public inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC 20555.

Dated at Rockville, Maryland this 21st day of November 1989.

For the Nuclear Regulatory Commission.

Seymour H. Weiss,

Director Non-Power Reactor, Decommissioning and Environmental Project Directorate Division of Reactor Projects—III, IV, V and Special Projects Office of Nuclear Reactor Regulation.

[FR Doc. 89-27801 Filed 11-27-89; 8:45 am]

BILLING CODE 7590-01-M

NUCLEAR WASTE TECHNICAL REVIEW BOARD

Meeting

Notice is hereby given that meetings of the Nuclear Waste Technical Review Board and three of its Panels will be held on Monday, December 11, 1989, through Friday, December 15, 1989, at the Hyatt Regency Denver Hotel, Anaconda Tower, 2nd floor, 1750 Welton Street, Denver, Colorado 80202. The agenda will be as follows:

Monday, December 11, 1989

8:30 a.m. to 5:00 p.m., Anaconda Tower, Room 210A-B, Hydrogeology and Geochemistry Panel Meeting (open to public). Topics to be covered: characterization of infiltration, conceptual model of infiltration, current understanding, future plans; importance of fracture vs. matrix flow, results of experimental studies and field observations, conceptual models for fracture-matrix flow, implications of experimental studies and field observations; measurement of unsaturated zone hydrologic properties, overview of unsaturated zone hydrologic properties program, air permeability testing—role of fractures; in-situ monitoring—measuring fluid-flow potential field; radionuclide gas releases, review gaseous isotopes—H-3, C-14, Kr-85, I-129, C-14 migration, chemistry modeling, gas-flow modeling; overview of validation strategy; record of model development: conceptual, mathematical, numerical; lab/field investigations; sensitivity and uncertainty analyses; formal technical reviews; examples of validation.

Tuesday, December 12, 1989

8:30 a.m. to 12:00 noon, Anaconda Tower, Room 210A-B, Hydrogeology and Geochemistry Panel Meeting (open to public). Topics to be covered: applicability of lab experiments; factors controlling sorptive behavior; experimental K_d determination; laboratory and field evidence: thermohydrological, mechanical and geothermal effects of repository development: near and far field;

radionuclide behavior at elevated temperatures, colloidal behavior.

1:00 p.m. to 3:30 p.m., full Board meeting (open to public). Briefings by the Edison Electric Institute/Utility Nuclear Waste and Transportation Program and the Electric Power Research Institute on issues of concern to the industry.

Wednesday, December 13, 1989

8:30 a.m. to 10:30 a.m., Anaconda Tower, Room 210A–B, Structural Geology and Geoengineering Panel technical exchange on use of mechanical methods of tunnel and shaft excavation versus conventional drill-and-blast, and the access each provides to gather geologic data for site characterization (open to public). Participants: NWTRB, DOE, USGS, U.S. Bureau of Reclamation.

10:45 a.m. to 5:00 p.m., full Board will meet (closed to public) to discuss matters solely related to the internal personnel rules and practices of the Board, and to discuss information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of privacy.

Thursday, December 14, 1989

8:00 a.m. to 5:00 p.m., and

Friday, December 15, 1989

8:00 a.m. to 12:00 noon: Anaconda Tower, Room 214, Containers and Transportation Panel technical exchange on RADTRAN 4.0 and TRANSNET (open to public; limited seating).

The public is invited to attend the open meetings as indicated above only as observers. Open meetings on December 11 and 12 will be recorded and transcribed, and procedures to obtain transcripts will be provided at the meeting. Technical exchanges will not be recorded. To ensure that adequate facilities are provided for public attendance, persons planning to attend the meetings should contact Helen Einersen on (202) 254–4792 by December 5, 1989, 4:30 p.m. (EST).

Further information on these meetings can be obtained from William W. Coons, Executive Director, Nuclear Waste Technical Review Board, 1111 18th Street, NW., Suite 801, Washington, DC 20036, (202) 254–4792.

Dated: November 21, 1989.

William W. Coons,

Executive Director, Nuclear Waste Technical Review Board.

[FR Doc. 89–27752 Filed 11–27–89; 8:45 am]

BILLING CODE 6820-AM-M

Office of Science and Technology Policy

Biotechnology Science Coordinating Committee; Meeting

AGENCY: Executive Office of the President, Office of Science and Technology Policy.

ACTION: Open meeting.

Name: Federal Coordinating Council for Science, Engineering, and Technology, Biotechnology Science Coordinating Committee (BSCC).

Date and Time: Wednesday, December 13, 1989; 3:30–5:30 p.m.

Place: National Science Foundation, Room 540, 1800 G Street, Northwest, Washington, DC 20050.

Contact: Dr. John H. Moore, Chairman, BSCC, National Science Foundation, 1800 G Street, Northwest, Washington, DC 20050.

Purpose of the Committee: The BSCC serves as an interagency coordinating committee for addressing scientific biotechnology issues.

Tentative Agenda: The BSCC is interested in hearing comments from all sectors of the public on the effectiveness of the BSCC in handling scientific issues related to biotechnology. In addition, comments are sought on the Coordinated Framework for Regulation of Biotechnology (51 FR 23302, June 26, 1986) that address its utility and effectiveness. Other points of concern to the BSCC and for which public comment is invited include biotechnology safety issues, research and development funding, and the present state and future of academic research in biotechnology-related fields.

Public Participation: The meeting is open to the public. Members of the public who wish to make oral presentations should send a summary of their topic to Dr. Moore at the address listed above. Requests to make statements at the meeting must be received in writing 5 days in advance; reasonable provisions will be made to include requested presentations on the agenda. All presentations from the public will be limited to 5 minutes. Copy for the public record must be submitted at the time of the presentation. The Chairman of the Committee is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Dated: November 21, 1989.

Barbara J. Diering,

Special Assistant, Office of Science and Technology Policy.

[FR Doc. 89–27812 Filed 11–22–89; 11:44 am]

BILLING CODE 3170-01-M

SECURITIES AND EXCHANGE COMMISSION

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Boston Stock Exchange, Incorporated

November 21, 1989.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f–1 thereunder for unlisted trading privileges in the following securities:

Americus Trust for AT&T Shares
Scores, No Par Value (File No. 7–5529)
Americus Trust for Chevron Shares
Scores, No Par Value (File No. 7–5530)
Americus Trust for Dow Chemical Shares
Scores, No Par Value (File No. 7–5531)
Americus Trust for DuPont Shares
Scores, No Par Value (File No. 7–5532)
Americus Trust for Ford Motor Shares
Scores, No Par Value (File No. 7–5533)
Americus Trust for General Motors Shares
Scores, No Par Value (File No. 7–5534)
Americus Trust for General Electric Shares
Scores, No Par Value (File No. 7–5535)
Americus Trust for American Home Products Shares
Scores, No Par Value (File No. 7–5536)
Americus Trust for Johnson & Johnson Shares
Scores, No Par Value (File No. 7–5537)
Americus Trust for Mobil Oil Shares
Scores, No Par Value (File No. 7–5538)
Americus Trust for Arco Shares
Scores, No Par Value (File No. 7–5539)
Americus Trust for Sears Shares
Scores, No Par Value (File No. 7–5540)
Americus Trust for Exxon Shares
Scores, No Par Value (File No. 7–5541)
American Capital Income Trust
Shares of Beneficial Interest, No Par Value (File No. 7–5542)
Allstate Municipal Income Trust II
Shares of Beneficial Interest, No Par Value (File No. 7–5543)
Allstate Municipal Income Opportunity Trust II
Shares of Beneficial Interest, Common Stock, $.01 Par Value (File No. 7–5544)
Apex Municipal Fund
Common Stock, $.10 Par Value (File No. 7–5545)
Dreyfus Municipal Income Fund, Inc.
Common Stock, No Par Value (File No. 7–5546)
MFS Charter Income Fund
Shares of Beneficial Interest, No Par

Value (File No. 7-5547)
Munienhanced Fund, Inc.
Common Stock, $.10 Par Value (File No. 7-5548)
Nuveen Performance Plus Municipal Fund, Inc.
Common Stock, $.01 Par Value (File No. 7-5549)
Prospect Street High Income Portfolio, Inc.
Common Stock, $.01 Par Value (File No. 7-5550)
Putnam High Yield Municipal Trust
Shares of Beneficial Interest, No Par Value (File No. 7-5551)
High Income Advantage Trust II
Shares of Beneficial Interest, Common Stock, $.01 Par Value (File No. 7-5552)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before December 13, 1989, written data, views and arguments concerning the above-referenced applications. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the applications if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-27777 Filed 11-27-89; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Midwest Stock Exchange, Incorporated

November 21, 1989.

The Midwest Stock Exchange, Inc. ("MSE") has filed an application with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(C) of the Securities Exchange Act of 1934 ("Act") and Rule 12f-1 thereunder for unlisted trading privileges ("UTP") in the 3 securities listed below solely for the purpose of trading these securities as part of a portfolio transaction traded through the MSE's Portfolio Trading System during its Secondary Trading Session. The 3 securities listed below are all over-the-counter securities that are quoted on the National Association of Securities Dealers Automated Quotation System ("NASDAQ").[1] Last sale information for these securities are reported through NASDAQ facilities.

American Greetings
Class A Common Stock, $1.00 Par Value (File No. 7-5553)
Intergraph Corp.
Common Stock, $.10 Par Value (File No. 7-5554)
Ryan's Family Steak House
Common Stock, $1.00 Par Value (File No. 7-5555)

Interested persons are invited to submit on or before December 8, 1989 written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street, NW., DC 20549. Commentators are asked to address whether they believe the requested grants of UTP would be consistent with Section 12(f) of the Act. Under this section the Commission can only approve the UTP application if it finds, after this notice and opportunity for hearing, that the extensions of unlisted trading privileges pursuant to such application is consistent with the maintenance of fair and orderly markets and the protection of investors.

Further, in considering the MSE's application for extension of UTP in the 16 NASDAQ stocks, section 12(f)(2) of the Act requires the Commission to consider, among other matters, the public trading activity in such securities, the character of such trading, the impact of such extension on the existing markets for such securities, and the desirability of removing impediments to and the progress that has been made toward the development of a national market system. The Commission may not grant such application if any rule of the national securities exchange making an application under section 12(f)(1)(C) of the Act would unreasonably restrict competition among dealers in such securities or between such dealers acting in the capacity of market makers who are specialists and such dealers who are not specialists.

[1] None of the securities on which UTP has been requested are registered on another national securities exchange under section 12(b) of the Act.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-27778 Filed 11-27-89; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Midwest Stock Exchange, Incorporated

November 21, 1989.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder for unlisted trading privileges in the following securities:

Portugal Fund, Inc.
Common Stock, $.001 Par Value (File No. 7-5517)
Potash Corporation of Saskatchewan, Inc.
Common Stock, No Par Value (File No. 7-5519)
Capstead Mortgage Corporation
$1.60 Cumulative Convertible Preferred Stock Series A (File No. 7-5518)
First Philippine Fund, Inc.
Common Stock, $.01 Par Value (File No. 7-5520)
Rhone-Poulenc, S.A.
American Depositary Shares, No Par Value (File No. 7-5521)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before December 13, 1989, written data, views and arguments concerning the above-referenced applications. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the applications if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-27779 Filed 11-27-89; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Philadelphia Stock Exchange, Incorporated

November 21, 1989.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder for unlisted trading privileges in the following securities:

United Industrial Corp.
  Common Stock, $1 Par Value (File No. 7-5522)
El Paso Refinery, L.P.
  Cum. Participating Conv. Pfd. Units (File No. 7-5523)
The Portugal Fund, Inc.
  Common Stock, $.001 Par Value (File No. 7-5524)
Potash Corporation of Saskatchewan, Inc.
  Common Stock, No Par Value (File No. 7-5525)
Enron Oil & Gas Company
  Common Stock, No Par Value (File No. 7-5526)
The First Philippine Fund, Inc.
  Common Stock, $.01 Par Value (File No. 7-5527)
Van Kampen Merritt Municipal Income Trust
  Common Stock, $0.01 Par Value (File No. 7-5528)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before December 13, 1989, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-27780 Filed 11-27-89; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. 34-27454; SR-NSCC-89-12]

Self-Regulatory Organizations; National Securities Clearing Corp. ("NSCC"); Order Approving Modification to NSCC's Automated Customer Account Transfer Service Rules

November 20, 1989.

On August 14, 1989 the National Securities Clearing Corporation ("NSCC") filed a proposed rule change (File No. SR-NSCC-89-12) pursuant to section 19(b) of the Securities Exchange Act of 1934 ("Act").[1] The proposed rule change would provide for the automated transfer of mutual fund assets in the form of eligible book shares that are transferred through NSCC's Mutual Fund Settlement, Entry and Registration Verification Service ("Fund/SERV"). Notice of the proposed rule change appeared in the **Federal Register** of August 30, 1989.[2] No comments were received. As discussed below, the Commission is approving the proposed rule change.

I. Description of the Proposal

NSCC's proposal would amend Rules 50 and 52 in order to provide a uniform procedure for member transfers of customer positions in mutual funds associated with NSCC's Fund/SERV [3] through the Automated Customer Account Transfer Service ("ACAT Service" or "ACATS").[4] Under NSCC's proposal, if an eligible fund asset [5] is held in book share form and all asset details are submitted in automated format, the transfer will be processed automatically through NSCC's Fund/SERV.[6] In order to transfer Fund/SERV eligible assets in a client's account, through the ACAT Service, from one brokerage firm to another, the firm to whom a customer's securities account is to be transferred ("receiving member") will submit to NSCC, in physical or automated format, a Transfer Initiation Form ("TIF") for a particular customer account, indicating whether the account includes mutual fund assets. NSCC will then perform a preliminary edit of the data.[7] If any data is missing, NSCC will reject the TIF and return it to the receiving member for correction.

NSCC will forward a copy of the TIF to the member carrying the customer account ("delivering member"). The delivering member must either accept or reject the transfer request. A delivering member may reject a transfer request if it does not know the account, if the TIF has errors, or if additional documentation is required.[8] NSCC will then issue a Control Report for receiving and delivering members that will be available to the participating members by 8:00 a.m.[9] of the day after the TIF has been submitted.

[1] 15 U.S.C. 78s(b)(1) (1982).

[2] Securities Exchange Act Release No. 27172 (August 23, 1989), 54 FR 35,966 (August 30, 1989).

[3] On November 20, 1987, the Commission approved NSCC's proposal to amend its rules and procedures in order to offer Fund/SERV as a centralized, automated processing system for the purchase and redemption of mutual funds. *See* NSCC Rules, R. 51 & 52. Securities Exchange Act Release No. 25146 (November 20, 1987) 52 FR 45,418 (November 27, 1987).

[4] On September 30, 1985, the Commission approved NSCC's Rule 50 establishing the ACAT Service, which allows participants to transfer customer accounts in an automated fashion. Securities Exchange Act Release No. 22481 (September 30, 1985), 50 FR 41,274 (October 9, 1985).

[5] A Fund/SERV eligible asset consists of mutual fund shares in book-entry format that are associated with mutual funds which have been admitted to NSCC for the purpose of receiving purchase and redemption orders. NSCC Rules, R. 3, § 7.

NSCC's Fund/SERV allows participants to transmit information pertaining to purchase and redemption orders as of a specific date, including trades not submitted on trade date or trades previously rejected from the system. These orders are denominated "as-of" orders and a participant may submit these orders at any time within six months after trade date. NSCC's proposed enhancement to the ACAT Service does not envision the transfer of "as-of" orders, because these positions do not represent current positions within the transferred account.

[6] Presently, the ACAT Service can be used to facilitate the transfer of accounts that have mutual fund assets. The broker-dealer to whom an account is being transferred, however, must initiate separate re-registration proceedings for the mutual fund assets and delivery and payment, if any, occurs outside ACATS. *See* Letter from Allison N. Hoffman, Associate Counsel NSCC, to Julius R. Leiman-Carbia, Staff Attorney, Division of Market Regulation, Securities and Exchange Commission (October 5, 1989).

[7] A TIF must contain the following information: (a) Receiving member's clearing number; (b) delivering member's clearing number; (c) customer's account number at the delivering member; (d) customer's account title. *See* NSCC, ACATS PROCEDURES MANUAL, at A-1 (January 1986).

[8] *Id.* at C-1.

[9] All times in this Order are referenced in terms of eastern time.

The Control Report will reflect the status of the account relative to the data submitted by the participating members. The account being transferred will appear in the Transfer Initiation section of the Control Report with the status of "New." The system will also provide a transfer initiation reject capability for the delivering member. If the deliverer rejects the transfer request the rejected account will appear in the Control Report with the status "Reject" plus the Reject Code.[10]

A delivering member accepting a transfer request must submit, in an automated fashion, data regarding the customer account's assets within five business days of the receipt of the TIF.[11] NSCC will attempt to provide any missing information (*e.g.*, a missing CUSIP number) or correct any format errors in order to validate the data submitted by the delivering member.[12] If the data submitted by the delivering member fails to have the necessary information or contains one or more format errors, NSCC will notify the receiving member that it has received the customer account data but that it contains errors.

By 8 a.m. of the day after the delivering member submits data regarding the customer account's assets, NSCC will make available to both the receiving and the delivering members an Asset Detail Report setting forth the mutual fund assets, along with the other account assets (*e.g.*, corporate common stock or corporate bonds). Eligible mutual fund shares which are held in book share form, will be set forth in a separate category on the Asset Detail Report. If mutual fund shares are held in physical form or if the shares are not Fund/SERV eligible shares, the receiving and delivering members must arrange transfers outside the ACAT Service between themselves.

Within two business days of receipt of the Asset Detail Report, a receiving member must accept or reject the account, or request the delivering member to make adjustments.[13] Within the same time frame, a receiving member accepting an account will be required to submit transfer instructions for those mutual fund shares to be processed through Fund/SERV.[14] If a delivering member makes an adjustment to the account, NSCC will generate a new Asset Detail Report and the receiving member will be allowed two business days to submit the transfer information.[15]

On a daily basis, NSCC will produce a Registration Detail Report advising members of the transfer instructions received and, in the event no instructions were received, the standing (*i.e.*, pre-established) instructions for re-registration in the member's nominee name (*i.e.*, a pre-established street name).[16] The receiving member will have two business days to submit corrections to the instructions contained in the report.[17] NSCC, however, will provide its own standing transfer instructions to the Fund member,[18] if the receiving member submits incorrect transfer instructions or fails to submit them before 12 noon of the second business day after the issuance of the Asset Detail Report.[19]

Each day, at 8 p.m., through Fund/SERV, NSCC will transmit transfer instructions and details for eligible mutual fund shares to the corresponding Fund members.[20] NSCC expects to receive confirmations or rejections for the transfer instructions by 11 a.m. of the following day.[21] By 12 noon of that day, NSCC will notify the receiving and delivering members, through the Mutual Fund Registration Status Report, of those instructions that have been confirmed, rejected or still pending.[22] As part of the ACAT Service, NSCC will then issue a Settlement Summary Report reflecting entries for fund confirmed transactions that are to be delivered the following day ("settlement date").[23]

On settlement date, NSCC will collect the value of the mutual fund assets from the deliverer by debiting its settlement account.[24] NSCC will then credit this amount to the receiver's settlement account.[25] If NSCC has received confirmation from the Fund member indicating that it has accepted the transfer instructions, NSCC will offset the previous settlement account entries by crediting the delivering member and debiting the receiving member for the value of the assets.[26] This activity will be reflected in the participants' Money Settlement Statements.

In the event transfer instructions remain pending (*i.e.*, neither confirmed nor rejected by the Fund member), NSCC will also collect from the deliverer the value of the pending mutual fund assets.[27] The members' Money Settlement Statements will therefore reflect a debit to the delivering member's settlement account and a credit to the settlement account of the receiving member. NSCC will offset the members' settlement account entries on the day after NSCC receives confirmation from the Fund member that it has received the transfer instructions.[28]

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[10] NSCC will issue Control Reports on a daily basis, accounting for all transfers performed through the ACAT Service. NSCC will notify a receiving member of transfer requests that have been rejected by the delivering member and will delete such transfer requests from the ACAT Service. A receiving member resubmitting a rejected transfer request must reinstate the request as if one had never been previously submitted.

[11] NSCC, *supra* note 7, at D-1. NSCC's proposed Rule 50, § 6 requires delivering members to submit asset details in an automated format. A delivering member will input this data through the Customer Account Asset Input/Adjustment Form. The specific instructions for the automated input of this data will be similar to the automated interface procedures currently in use for the ACAT Service. Under NSCC's proposed ACAT-Fund/SERV Service, however, the Customer Account Asset Input/Adjustment Form will contain additional "fields" for the submission of the following asset information regarding the account being transferred: (a) Customer's account number at the mutual fund and whether the number was assigned by the delivering member or the mutual fund, (b) networking control indicator (if the account is a Networking Account), (c) whether the account is held in customer or street name, (d) whether the transferred funds are Fund/SERV eligible, and (e) the registered representative's identity, if any.

[12] NSCC Rules, Proposed R. 50, section 8. A format error consists of a failure to supply information as required by NSCC's instructions for automated input.

[13] NSCC Rules, R. 50, section 9. A receiving member accepting an account is not required to take any specific action. *Id.* In order to change or delete assets listed in the Asset Detail Report, a delivering member must submit an Asset Input/Adjustment Form.

[14] NSCC Rules, Proposed R. 50, section 9, ¶ 2.

[15] *Id.*

[16] *Id.* NSCC's derived standing instructions will also consist of instructions to re-invest distributions. A participant will be able to submit standing instructions containing specific information about the type of account and the identity of the client for whom it will hold the account. *See* NSCC, IMPORTANT NOTICE # A 3228, at 4 (September 15, 1989).

[17] NSCC Rules, Proposed R. 50, section 9, ¶ 2.

[18] Pursuant to NSCC's Rules, Fund members are NSCC members who can only process and settle, on an automated basis, mutual fund purchase and redemption orders and transmit registration instructions. NSCC Rules, R. 51 & 52.

[19] If the delivering member makes an adjustment to the Asset Detail Report, however, the receiving member will be allowed two additional business days to submit the transfer information. NSCC Rules, Proposed R. 50, section 9, ¶ 2.

[20] NSCC, FUND/SERV SYSTEM CAPABILITIES AND SPECIFICATIONS 7 (October 1986).

[21] *Id.*

[22] NSCC, IMPORTANT NOTICE # A 3228, at 5 (September 15, 1989). Fund members will be reminded, on a daily basis, of the items which have not been confirmed or rejected. These pending items will be continually carried forward in the system.

[23] The corresponding debiting and crediting entries for Fund/Serv eligible assets will be separately set forth in the member's ACATS Settlement Report, which is intended to assist the participant's internal preparation for the receipt and delivery of customer account securities.

[24] NSCC Rules, Proposed R. 50, section 11(c).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

If the Fund member rejects a Fund/SERV eligible book share mutual fund asset,[29] NSCC, as part of the ACAT Service, will issue receive and deliver orders, respectively.[30] On settlement date NSCC will collect the value of the rejected mutual fund assets from the delivering member and credit the receiving member's money settlement account.[31] The deliverer's payment obligation will be netted with the rest of its NSCC payment obligations. The actual transfer of the rejected items, however, must be accomplished between the parties, outside the ACAT and Fund/SERV Services and delivering members will remain responsible for the actual delivery of assets.[32]

NSCC's proposed enhancement to the ACAT Service will occur in two phases. Under Phase I, access to this service will be voluntary. To be eligible to participate, delivering members must be able to transmit data to NSCC in an automated format. In Phase II, all NSCC members will become eligible participants, but to be eligible delivering members, must continue to have automated input capabilities.[33]

During Phase I of the proposed enhancement, standing instructions for the transfer of assets will be derived by NSCC. During Phase II, the receiving member will be able to establish its own standing transfer instructions. In the event the receiving member chooses not to provide standing instructions, the NSCC derived standing instructions will be used.[34]

II. NSCC's Rationale

NSCC believes the proposal is consistent with section 17A of the Act [35] because it promotes the prompt settlement of mutual fund transactions by providing for the automated transfer of Fund/SERV eligible book shares as part of a transfer of a customer account from one brokerage firm to another.

III. Discussion

As discussed below the Commission believes that NSCC's proposed enhancement of the ACAT Service is consistent with the Act. Currently, NSCC compares customers' mutual fund transfer data submitted by broker-dealers, through the ACAT Service. The actual re-registration, delivery and money payment, if any, however, occurs outside the ACAT Service and remains the responsibility of the participating members. NSCC's proposal to allow ACATS participants the use of Fund/SERV in order to facilitate the transfer of eligible mutual fund assets will inject specific duties and performance time frames into the transfer procedure. This, in turn, will prevent unnecessary delays in the processing of these transfers and, as required by the Act, will promote the prompt and accurate clearance and settlement of customer account transfers involving eligible mutual fund assets.[36]

NSCC's proposal combines the advantages of the Fund/SERV and ACAT Services, thus allowing for a greater participant control over the transfer of Fund/SERV eligible assets. As the Commission has stated before, Fund/SERV achieves significant efficiencies for broker-dealers and mutual funds by offering a centralized automated facility with standard formats for processing mutual fund information.[37] The Commission also believes that the ACAT Service promotes the prompt and accurate clearance and settlement of securities by "foster[ing] disciplined broker-to-broker communication related to cumbersome account transfers." [38]

NSCC's proposal will allow for an efficient information sharing process regarding the transfer of eligible mutual fund shares through the ACATS system. At each stage of the transfer, the system will provide participants with information concerning the status of the transferred assets in relation not only to their counterpart, but also to the participating Fund members. NSCC will achieve this constant flow of information by issuing multiple reports that will enable participants to compare information regarding the value of transferred assets and check the accuracy of re-registration instructions within specific time frames. In addition, the ACATS communication system will also serve to remind participants, including Fund members, of those transfers over which no action has been taken. For this reason, the Commission believes that the effective communication system associated with ACATS will improve the information sharing process among participants and therefore expedite the transfer of eligible mutual fund shares.

Participating members' ability to transmit data through Fund/SERV's automated environment will centralize the processing of re-registration information for eligible mutual fund shares. NSCC will transmit transfer instructions derived by either NSCC or the receiving member. In either case, however, the information must be established in a standardized format before the initiation of a transfer. This procedure will minimize delays associated with participant's failure to submit complete information on time.

At the same time, the processing of transfers involving mutual fund assets through Fund/SERV's automated system also will foster cooperation and coordination with "persons engaged in the clearance and settlement of securities transactions," eliminating multiple communications and settlement arrangements between broker-dealers and Fund members.[39] This simplification will reduce the risks of failed deliveries, inadequate transaction records, operational errors and, ultimately, financial insolvency.[40]

NSCC's proposal allowing participants to use Fund/SERV as part of the ACAT Service will encourage the use of new data processing and communications techniques to promote more efficient, effective and safe procedures for the transfer of mutual fund assets. This fostering of efficient means of communication should provide for a faster transfer of mutual fund assets which will, in turn, give investors more timely control over their transferred assets. For these reasons the Commission believes that NSCC's proposal promotes the prompt and accurate clearance and settlement of transfers involving eligible mutual fund assets and is consistent with the safety goals embodied in section 17A of the Act.[41]

[29] A Fund member may reject eligible book shares if it fails to recognize such assets as forming part of the mutual fund.

[30] Receive and Deliver instructions are intended to notify participants of their delivery obligation outside of the NSCC's continuous net settlement system. *See* NSCC's Rules, R. 50, section 10. Settlement of receive and deliver orders is, instead, subject to the rules of the respective members' designated examining authorities ("DEA"), rather than NSCC's rules. NSCC Rules, Proposed R. 50, section 11(b).

[31] NSCC Rules, Proposed R. 50, section 11(c), *see also* NSCC, *supra* note 7, at G-1.

[32] NSCC Rules, Proposed R. 50, section 11(b). Pursuant to NSCC's proposal a member's failure to deliver will be subject to the rules of the member's DEA, rather than NSCC's rules.

[33] NSCC expects to implement Phase II sixty days after the implementation of Phase I.

[34] See *supra* note 16 for a discussion of standing transfer instructions.

[35] 15 U.S.C. 78q-1 (1982).

[36] *See* 15 U.S.C. 78q-1(a)(3)(F) (1982).

[37] *See* Securities Exchange Act Release No. 24088 (February 10, 1987) 52 FR 5,228 (February 19, 1987); *See also* Securities Exchange Act Release No. 26506 (January 31, 1989) 54 FR 6,051, 6,052 (February 7, 1989).

[38] Securities Exchange Act Release No. 22481, *supra* note 4, at 41,275.

[39] *See* 15 U.S.C. 78q-1(b)(3)(F) (1982).

[40] *See* Securities Exchange Act Release No. 24088, *supra* note 37, at 5,230.

[41] *See* 15 U.S.C. 78q-1(a)(1)(C) (1982) where, with regards to the clearance and settlement of securities, the 94th Congress found that "[n]ew data processing and communications techniques create

Continued

The Commission believes that the proposed rule change, as required by the Act, gives NSCC an increased capacity to safeguard funds in its custody or control, or for which it is responsible.[42] While NSCC will not guarantee the delivery of Fund/SERV eligible assets, it will collect from the deliverer the value of the Fund/SERV eligible assets being transferred and credit the receiver's settlement account. This procedure will encourage participants to expedite the transfer of customer's mutual fund assets. In the event of a pending or rejected transfer, moreover, this procedure will provide receiving members with the value of the transferred assets until the delivering member can obtain re-registration of the assets and make subsequent delivery.

NSCC's proposal to collect the value of the transferred assets from delivering members, offers protection to customers by ensuring constant control over the value of the assets being transferred. At the same time, however, the proposal also protects the delivering member's interests because it retains the safeguards in place for the protection of Fund/SERV participants. As such, NSCC can require the return of any monies credited to a receiving member's account through the ACAT-Fund/SERV Services.[43]

Finally, the Commission believes that NSCC's proposed rule change furthers the development of a National Clearance and Settlement System ("National System").[44] The proposal encourages settlement of transfers among broker-dealers in a clearing agency environment, thus contributing to reduce physical movements of certificates in connection with transfer settlements among broker-dealers.[45]

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule filing (SR-NSCC-89-12) be, and is hereby, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority. 17 CFR 200.30-(12) (1988).

Jonathan G. Katz,

Secretary.

[FR Doc. 89-27819 Filed 11-27-89; 8:45 am]

BILLING CODE 8010-01-M

the opportunity for more efficient, effective, and *safe* procedures for clearance and settlement" (emphasis added).

[42] *See* 15 U.S.C. 78q-1(a)(3)(A) (1982).

[43] NSCC Rules, Addendum D, at 2, *see also* Securities Exchange Act Release No. 24227 (March 17, 1987), 52 FR 9,603, 9,604 (March 25, 1987).

[44] Section 17A(a)(2), 15 U.S.C. 78q-1(a)(2), directs the Commission to use its authority to facilitate the establishment of a National System in order to not only "bolster sagging investor confidence but also to assure that the country maintains a strong, effective and efficient capital raising and capital allocating system in the years ahead." SEN. REP. NO. 75, 94th Cong., 1st Sess. 3 (1975).

[45] *See* Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 41,920, 41,923 (June 23, 1980) (Release setting forth the standards to be followed by the Division of Market Regulation when recommending specific action to the Commission regarding the registration of clearing agencies).

[Rel. No. IC-17227; 812-7152]

Allied Capital Corporation, et al.; Notice of Application

November 17, 1989.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 (the "Act").

Applicants: Allied Capital Corporation ("Allied Capital"), Allied Advisory Inc. ("Allied Advisory"), Allied Management Partners ("Management Partners"), Allied Venture Partnership ("Venture Fund") and Allied Technology Partnership ("Technology Fund").

Relevant 1940 Act Section: Order requested under sections 17(b) and 17(d) of the Act and Rule 17d-1 thereunder.

Summary of Application: Applicants seek an order permitting certain joint transactions and arrangements relating to a proposed externalization of the presently internalized management functions of Allied Capital.

Filing Dates: The application was filed on October 19, 1988, with amendments thereto on April 18, 1989, October 25, 1989, and November 15, 1989.

Hearing or Notification of Hearing: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 18, 1989, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicants, 1666 K Street, NW., Suite 901, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Stuart Norwich (202) 272-3035, or Karen L. Skidmore, Branch Chief, (202) 272-3023 (Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application is available for a fee either by going to the SEC's Public Reference Branch or contacting the SEC's commercial copier at (800) 231-3282 (in Maryland (301) 258-4300).

Applicants' Representation

1. Allied Capital is a closed-end, non-diversified investment company registered under the Act. It is a holding company engaged in providing venture capital financing to small businesses through four wholly-owned subsidiaries also registered as closed-end investment companies. Allied Capital is therefore basically a shell, virtually all of its public venture capital operations are transacted through its investment company subsidiaries. Allied Capital did not elect business development company ("BDC") status upon the adoption of the 1970 amendments to the Act concerning BDCs, because it preferred not to lose the pass-through tax treatment accorded by virtue of the Internal Revenue Code. Nevertheless, Allied Capital is still considering whether it would be advantageous to elect BDC status and it may, at some future time, do so.

2. Allied Advisory, a registered investment adviser and a wholly-owned subsidiary of Allied Capital, is registered as an investment adviser under the Investment Advisers Act of 1940. Allied Advisory has a 50 percent interest in, and is the general partner of, Management Partners, which is the general partner of Venture Fund and Technology Fund (the "Venture Partnerships"). The Venture Partnerships were formed to manage the assets of institutional investors. Management Partners contributed 1% of the capital of each Venture Partnership, one half of which was furnished by Allied Advisory.

3. Pursuant to advisory agreements with the Venture Partnerships, Allied Advisory provides investment advice and administrative services to them. Allied Advisory also provides investment advisory and administrative services to Allied Capital and its investment company subsidiaries. Neither Allied Capital nor any of its investment company subsidiaries have any direct employees. All operating assets are owned by Allied Advisory,

including desks, chairs, and computers; leases are also in the name of Allied Advisory. Each quarter Allied Advisory bills Allied Capital and its investment company subsidiaries for their directly attributable expenses and for their proportional share of the general expenses of Allied Advisory incurred during the quarter.

4. Applicants propose, subject to the approval of Allied Capital's shareholders, to externalize the management of Allied Capital by "spinning off" Allied Advisory. Under the plan, shares of Allied Advisory will be distributed to shareholders of Allied Capital; they would receive shares of Allied Advisory equal to the number of shares of Allied Capital owned. Upon effectuation of the spin-off, Allied Advisory is expected to have approximately 3,000 shareholders, all of whom will also be shareholders of Allied Capital. Immediately after the spin-off, the shares of Allied Advisory will be tradeable in the over-the-counter market. Once Allied Advisory shares begin trading, that identity of ownership may change.

5. Pursuant to shareholder approval, Allied Capital would then retain Allied Advisory to provide, pursuant to contract, the services previously provided by it as a subsidiary of Allied Capital. The only change in Allied Advisory's relationship with Allied Capital will be that the services previously rendered to Allied Capital in an internalized structure will be provided under the terms of an investment advisory and administrative services agreement. That agreement will contain a provision to the effect that the manager will not undertake any conflicting duties of loyalty which would affect its prior fiduciary duty to Allied Capital. Allied Advisory will also manage the business affairs of Allied Capital. As compensation, Allied Capital will pay an amount to cover its specifically attribuble expenses plus an amount equal to 2.5% (on an annual basis) of Allied Capital's consolidated assets.

6. Allied Advisory will render the same "significant managerial assistance" to portfolio companies that it currently provides as a wholly-owned subsidiary of Allied Capital. Allied Advisory, in addition to managing Allied Capital and the two Venture Partnerships, will endeavor to expand its advisory business to include other registered investment companies and other funds. It is anticipated that this expansion of Allied Advisory's business will result in greater profitability of Allied Advisory that will benefit the shareholders of Allied Capital who will become the original shareholders of Allied Advisory, while also providing financial incentives to attract and retain qualified personnel.

7. The board of directors of Allied Capital is comprised of 14 persons, 10 of whom are not interested persons of Allied Capital. The board received no reports from financial consultants and outside counsel; however, numerous discussions regarding the details of the externalization proposal occurred. These included discussions with venture capital advisory and consulting firms regarding the reasonableness of a 2.5% advisory fee; discussions with a mutual fund consulting firm regarding the value of Allied Advisory; and discussions with law firms and an accounting firm regarding the tax, securities, and accounting issues involved with the spin-off proposal. The board also considered the fact that the indirect interest in the profits of the Venture Partnerships would not be available to future shareholders of Allied Capital after the spin-off, although the future shareholders of Allied Capital will purchase shares based on the then-existing structure of the company. The board approved the externalization proposal because it should result in advantages to shareholders from: (a) Direct ownership of Allied Advisory, which would mean shareholders could immediately receive any profits resulting from Allied Advisory by trading their shares in the over-the-counter market; (b) lower advisory costs to Allied Capital, based on figures, summarized in the application, showing a reduction in advisory costs were the spin-off to occur; (c) increased assets under management (by acquiring additional advisory clients) without concomitant increases in administrative costs; (d) personnel incentives; and (e) a simpler corporate structure.

8. On October 24, 1983, Allied Capital obtained a Commission order to permit the establishment of an executive compensation plan providing for the issuance of stock options to certain officers and permitting loans to such officers to facilitate their exercise of the options. See Investment Company Release No. 13595 (Oct. 23, 1983). The shareholders of Allied Capital authorized its stock option plan on December 20, 1983, which provides for the granting of options for up to 468,750 shares of stock. Under the terms of the externalization proposal, the stock option plan would remain intact.

9. On September 17, 1985, Allied Capital obtained a Commission order to permit the establishment of Venture Fund and on June 30, 1987, it obtained a Commission order to permit the establishment of Technology Fund ("Partnership Orders"). See Investment Company Release Nos. 14725 (Sept. 17, 1985) and 15833 (June 30, 1987). The Partnership Orders permitted various affiliated transactions associated with the activities of the Venture Partnerships, including their co-investing with Allied Capital in portfolio companies. Under the terms of these orders, co-participation in investments may occur under specific conditions meant to ensure fairness to Allied Capital, and allocation decisions were required to be approved by a majority of Allied Capital's directors who had no personal interest in the Venture Partnerships. After the spin-off of Allied Advisory, the relationship between Allied Capital and the Venture Partnerships will continue as before, including the co-investing.

Applicants' Legal Analysis

1. Applicants believe that the distribution of shares of Allied Advisory to shareholders of Allied Capital, including the distribution of shares to affiliates of Allied Capital, falls within the purview of Rule 17a-5 under the Act. However, the Division has taken the position that Rule 17a-5 only applies to pro rata distributions of an investment company's portfolio securities. See Chicago Milwaukee Corporation (pub. avail. Dec. 16, 1988) ("Chicago Letter"). Allied Advisory, as a wholly-owned subsidiary of Allied Capital, probably would not be deemed a "portfolio security" of Allied Capital. Based on the Chicago Letter, Applicants believe a question exists as to whether the distribution of shares of Allied Advisory to the shareholders of Allied Capital is covered by Rule 17a-5. Applicants, therefore, request an exemption pursuant to section 17(b) of the Act. Applicants contend this exemptive relief under section 17(b) is warranted because the transfer of assets represented by the distribution of shares of Allied Advisory, for purposes of analysis under the Act, is merely technical. The shareholders of Allied Capital are not having anything transferred away from them; whereas before the spinoff they owned Allied Advisory indirectly, after the spin-off, they will own Allied Advisory directly.

2. Allied Advisory owns all of the furniture, furnishings and equipment used by Allied Capital; it also owns a general partner interest in Management Partners. Nothing in the proposed transactions will alter those ownership interests and obligations. Applicants

believe that any transfer of ownership of these interests based on the proposed transactions is subsumed into the distribution of shares of Allied Advisory. Therefore, Applicants are not requesting specific exemptive relief under section 17(b) permitting the transfer of such other property.

3. Allied Capital, Allied Advisory, Management Partners, Venture Fund, and Technology Fund are affiliates of each other because of their control relationships with each other. The participation of the entities in the proposed transaction and the entry into new contractual arrangements may, therefore, constitute a "joint enterprise or other joint arrangement" within the meaning of section 17(d) of the Act and Rule 17d-1 thereunder. Applicants seek an order pursuant to Rule 17d-1 permitting the proposed transactions. Applicants assert that the terms of the transactions are not less advantageous to Allied Capital or its controlled companies than to other participants. Applicants state the Allied Capital's board carefully considered the effect of the proposed externalization and determined that the shareholders would derive greater benefits from the direct ownership of Allied Advisory than the indirect benefit derived from Allied Advisory's general partner interest in Management Partners. Applicants also assert that the proposal should result in reduced advisory costs and greater assets under management, which should result in greater profits for Allied Advisory inuring to the benefit of its shareholders.

4. Applicants submit that their externalization proposal is so free from potential manipulation, that compared to the prior applications granted by the Commission, the conditions established in those applications are inappropriate here. Applicants' proposal does not involve a transfer of economic benefit away from public investment company shareholders to private entities controlled by affiliates. The shareholders of Allied Capital will be the owners of the entity that will provide the advisory and management services.

Applicants' Conditions

Applicants agree that any exemptive relief be subject to the following conditions:

1. Allied Advisory will not increase the fee charged Allied Capital for two years.

2. An independent valuation report of Allied Advisory will be completed prior to the spin-off.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-27823 Filed 11-27-89; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-17231; (812-7236)]

Barclays Bank PLC; Notice of Application

November 20, 1989.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for an order under the Investment Company Act of 1940 (the "1940 Act")

Applicant: Barclays Bank PLC ("Barclays").

Relevant 1940 Act Section: Exemption requested under section 6(c) from the provisions of Section 17(f).

Summary of Application: Barclays requests an order to permit a foreign subsidiary and a foreign securities depository to maintain securities and other assets of United States investment companies. If granted, the order would amend a prior order (Investment Company Act Release No. 16536, August 24, 1988) which permitted Barclays and any registered investment company or a custodian for such investment company to maintain securities in the custody of certain of Barclays' foreign subsidiaries.

Filing Dates: The Application was filed on February 7, 1989.

Hearing or Notification of Hearing: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 15, 1989, and should be accompanied by proof of service on the Applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549; Barclays Bank PLC, 54 Lombard Street, London EC3P 3AH, England, or Paul B. Ford, Jr., Esq., Simpson Thacher & Bartlett, 425 Lexington Avenue, New York, New York 10017.

FOR FURTHER INFORMATION CONTACT: James E. Banks, Staff Attorney (202) 272-3026, or Max Berueffy, Branch Chief (202) 272-3016 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person, or the SEC's commercial copier (800) 231-3282 (in Maryland (301) 258-4300).

Applicant's Representations

1. Barclays is a company organized and existing under the laws of the United Kingdom. Barclays, one of the ten clearing banks in the United Kingdom, is authorized and regulated by the Bank of England. It is regulated in the United States as a bank holding company and is subject to the United States International Banking Act of 1978. Barclays' New York branch is licensed by the Superintendent of Banks of the State of New York and is qualified to do business in accordance with the provisions of Article V of the Banking Law of the State of New York.

2. Barclays Bank Australia Limited ("Barclays Australia"), an Australian merchant bank, is a wholly-owned, direct subsidiary of Barclays. It provides custodial services through its subsidiary, Barclays Australian Custodian Services Limited. Barclays states that Barclays Australia is experienced, capable, and well qualified to provide custodial services to registered investment companies, and, under the foreign custody arrangements proposed, the protection of investors would not be diminished.

3. Frankfurter Kassenverein A.G. ("Frankfurter Kassenverein") is one of seven depository and clearing agencies in West Germany, each of which services a particular stock exchange. Barclays states that Frankfurter Kassenverein is experienced, capable and well qualified to provide custodial services to registered investment companies, and under the foreign custody arrangements proposed, the protection of investors would not be diminished.

Applicant's Legal Conclusions

1. Barclays meets the requirements in Rule 17f-5 under the 1940 Act of an "eligible foreign custodian" because Barclays is a regulated bank under the laws of England and has shareholders' equity in excess of the pound sterling equivalent of the rule's $200 million requirement. Barclays, however, requests this order because the proposed foreign custodians are not

"eligible foreign custodians" under the rule.

2. Barclays Australia is not an "eligible foreign custodian" because it does not satisfy the rule's $200 million shareholders' equity requirement. Although Barclays Australia has assets in excess of $1.5 billion, it only has shareholders' equity of approximately $122 million. However, Barclays believes that the terms of the proposed foreign custodial arrangements will adequately protect United States registered investment companies and their shareholders against loss. Barclays will remain liable for the performance of the duties and obligations delegated to Barclays Australia as well as the losses relating to the bankruptcy or insolvency of Barclays Australia. The risks associated with foreign investment, however, will remain with the investment companies (which will presumably disclose any such material risks to investors). The relief requested is similar to that previously granted with regard to Barclays' other subsidiaries. See Barclays Bank PLC, Investment Company Act Release No. 16536 (Aug. 24, 1988).

3. Frankfurter Kassenverein is not an "eligible foreign custodian" because it is not the central or transnational system for the handling of securities in West Germany, as required by the rule. Frankfurter Kassenverein services the Frankfurt Stock Exchange, the largest and most active of the German stock exchanges. Virtually all domestic and foreign banks engaged in the securities business in Frankfurt are members of Frankfurter Kassenverein. The Commission has issued three previous orders permitting United States investment companies to maintain securities and other assets with Frankfurter Kassenverein. See Morgan Guaranty Trust Company of New York, Investment Company Act Release No. 16080 (Oct. 27, 1987); Citibank, N.A., Investment Company Act Release No. 15617 (Mar. 11, 1987); and State Street Bank and Trust Company, Investment Company Act Release No. 14698 (Aug. 28, 1985).

4. Barclays submits that the requested relief is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the 1940 Act.

Applicant's Conditions

If the requested order is granted, Barclays agrees to the following conditions:

1. Barclays Australia will satisfy the requirements of Rule 17f-5 in all respects other than with regard to shareholders' equity.

2. Frankfurter Kassenverein will satsify the requirements of Rule 17f-5 in all respects other than the requirement that securities depositories must be the central system or transnational system for the handling of securities or equivalent book-entries in the relevant country.

3. Securities of United States investment companies will be maintained with Barclays Australia only in accordance with a three-party contractual agreement, required to remain in effect at all times during which Barclays Australia fails to satisfy all of the requirements of Rule 17f-5, between Barclays, Barclays Australia, and the United States investment company or the custodian for a United States investment company. Pursuant to the terms of this agreement, Barclays would provide specified custodial or sub-custodial services for the United States investment company or custodian and would delegate to Barclays Australia such of Barclays' duties and obligations as would be necessary to permit Barclays Australia to hold in custody in the country in which it operates, the securities of the United States investment company or custodian. The agreement would further provide that Barclays' delegation of duties to Barclays Australia would not relieve Barclays of any responsibility to the United States investment company or custodian for any loss due to such delegation except such loss as may result from political risk (e.g., exchange control restrictions, confiscation, expropriation, nationalization, insurrection, civil strife or armed hostilities) and other risks of loss (excluding bankruptcy or insolvency of Barclays Australia) for which neither Barclays nor Barclays Australia would be liable under Rule 17f-5 (e.g., despite the exercise of reasonable care, loss due to acts of God, nuclear incident, and the like).

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-27820 Filed 11-27-89; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-17229; 811-4147]

Integrated Corporate Investors Fund, Inc.; Application for Deregistration

November 20, 1989.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "1940 Act").

Applicant: Integrated Corporate Investors Fund, Inc. ("Applicant").

Relevant 1940 Act Section: Section 8(f).

Summary of Application: Applicant seeks an order declaring that it has ceased to be an investment company under the 1940 Act.

Filing Dates: The application on Form N-8F was filed on January 23, 1989, and an amendment was filed on November 6, 1989.

Hearing or Notification of Hearing: If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m. on December 19, 1989. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicant with the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit, or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESS: Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicant, 10 Union Square East, New York, New York 10003.

FOR FURTHER INFORMATION CONTACT: Patricia Copeland, Legal Technician, (202) 272-3009, or Stephanie Monaco, Branch Chief (202) 272-3030 (Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier (800) 231-3282 (in Maryland (301) 258-4300).

Applicant's Representations

1. Applicant is an open-end diversified management company which registered as an investment company under the 1940 Act and filed a registration statement under the Securities Act of 1933 on November 2, 1984. Applicant's registration statement became effective in February 1985, at which time Applicant commenced offering its shares.

2. Due to unstable and volatile conditions in the preferred equity markets, Applicant's assets were reduced to cash instruments.

3. Prior to September 16, 1988, all public securityholders voluntarily

redeemed or exchanged shares at the then current net asset value in accordance with Applicant's registration statement. Applicant discontinued sale of shares on September 15, 1988. On September 30, 1988, Applicant had outstanding 5,382.592 shares with a net asset value per share of $20.09.

4. On October 27, 1988, Applicant's Board of Directors adopted a plan of liquidation. At a Special Meeting held on October 31, 1988, the remaining shareholder, Integrated Resources, Inc., approved, by proxy, the liquidation of Applicant, and on November 15, 1988, it redeemed its shares.

5. Applicant filed a Certificate of Dissolution with the State of Maryland on October 31, 1988.

6. Applicant is not a party to any current or pending litigation or administrative proceedings, and does not propose to engage in any business activities other than those necessary to effectuate the winding-up of its business and affairs.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-27822 Filed 11-27-89; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-17230; File No. 811-4301]

The Insurers Series Fund, Inc.

November 20, 1989.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of Application for an Order under section 8(f) of the Investment Company Act of 1940 ("the 1940 Act").

Applicant: The Insurers Series Fund, Inc. ("Applicant").

Relevant 1940 Act Sections: Order requested under section 8(f).

Summary of Application: Applicant seeks an order under section 8(f) of the 1940 Act declaring that it has ceased to be an investment company.

Filing Date: The application was filed on April 10, 1989 and amended on November 3, 1989.

Hearing or Notification of Hearing: If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m., on December 14, 1989. Request a hearing in writing, giving the nature of your interest, the reason for the request and the issues you contest. Serve the Applicant with the request either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit, or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicant, the Insurers Fund, Inc., c/o Joseph H. Haggerty, Esq., I.C.H. Financial Services, Inc., 4211 Norbourne Blvd., Louisville, KY 40207.

FOR FURTHER INFORMATION CONTACT: Michael V. Wible, Staff Attorney, at (202) 272-2026 or Clifford E. Kirsch, Acting Assistant Director, at (202) 272-2060 (Division of Investment Management).

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a free from either the SEC's Public Reference Branch in person or the SEC's commercial copier (800) 231-3282 (in Maryland (301) 253-4300).

Applicant's Representations

1. The Applicant is registered under the 1940 Act as an open-end, diversified management investment company. The Applicant's registration statement on Form N-1A, filed on May 14, 1985, became effective on February 7, 1986. The initial public offering commenced on February 21, 1986.

2. The Applicant served as an underlying investment medium for certain variable universal life insurance policies issued by LifeFund Account ("LifeFund"). LifeFund is a separate account of Southwestern Life Insurance Company ("Southwestern") and is registered as a unit investment trust under the 1940 Act.

3. On April 10, 1989, pursuant to an order of the Commission under section 26(b) of the 1940 Act, shares of Advisors Management Trust ("AMT"), a Massachusetts business trust registered as an open-end, diversified management investment company, were substituted for those shares of the Applicant held by LifeFund. The transaction was effected by LifeFund redeeming its shares of the Applicant and using the proceeds to purchase shares of AMT at net asset value. The Applicant represents that no assets attributable to policyholder accounts have been retained.

4. The Applicant has no debts or outstanding liabilities, is not a party to any litigation or administrative proceedings, and is not now engaged, nor does it propose to engage, in any business activities other than those necessary for the winding up of its affairs.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-27821 Filed 11-27-89; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-17225; File No. 811-5363]

Variable Account A of Skandia Life America Corp.

November 17, 1989.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for an order under the Investment Company Act of 1940 ("1940 Act").

Applicant: Variable Account A of Skandia Life America Corporation.

Relevant 1940 Act Section: Order requested under section 8(f).

Summary of Application: Applicant requests an order under section 8(f) of the 1940 Act declaring that it has ceased to be an investment company.

Filing Date: The application was filed on April 17, 1989 and amended on September 22, 1989.

Hearing or Notification of Hearing: If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m. on December 12, 1989. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicant with the request, either personally or by mail, and also send it to the Secretary of the SEC along with proof of service by affidavit, or for attorneys, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. Applicant, Tower One Corporate Drive, Shelton, Connecticut 06484.

FOR FURTHER INFORMATION CONTACT: Heidi Stam, Staff Attorney, (202) 272-3017 or Clifford E. Kirsch, Acting Assistant Director, (202) 272-2061 (Office of Insurance Products and Legal Compliance, Division of Investment Management).

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier which may be

contacted at (800) 231-3282 (Maryland (303) 253-4300).

Applicant's Representations

1. On October 16, 1987, Applicant filed Form N-8A to register under the 1940 Act as a unit investment trust. Applicant also filed a registration statement under the Securities Act of 1933 on October 16, 1987. Applicant had planned to issue variable life insurance contracts, but its registration statement did not become effective and Applicant never made a public offering of the contracts.

2. Skandia Life America Corporation authorized the formation and registration of Applicant on May 25, 1987, and duly authorized the deregistration of Applicant on May 31, 1988.

3. The Applicant has not within the last 18 months transferred any of its assets to a separate trust, the beneficiaries of which were or are securityholders of Applicant.

4. Applicant has not been dissolved, liquidated or merged, and there have been no distributions to securityholders of Applicant made in connection with the winding up of its affairs.

5. As of the date of filing this application, applicant has not conducted any business, has no assets, debt or other liabilities, has no shareholders and is not now engaged, nor does it propose to engage in any business activities other than those necessary for the winding up of its affairs. Applicant is not a party to any litigation or administrative proceeding.

6. Applicant does not propose to engage in any business activities, other than those necessary for the winding up of its affairs.

7. Applicant was created in connection with Skandia Life America Corporation's intention to offer and sell variable life insurance contracts. No such contracts or any other securities were offered or sold by Applicant.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 89-27824 Filed 11-27-89; 8:45 am]

BILLING CODE 8010-01-M

SMALL BUSINESS ADMINISTRATION

[License No. 04/04-0248]

Mariner Venture Capital Corp.; Issuance of a Small Business Investment Company License

On September 2, 1988, a notice was published in the **Federal Register** (52 FR 49633) stating that an application has been filed by Mariner Venture Capital Corp., with the Small Business Administration (SBA) pursuant to § 107.102 of the Regulations governing small business investment companies (13 CFR 107.102 (1989)) for a license to operate as a small business investment company.

Interested parties were given until close of business Monday, October 2, 1988 to submit their comments to SBA. No comments were received.

Notice is hereby given that, pursuant to Section 301(c) of the Small Business Investment Act of 1958, as amended, after having considered the application and all other pertinent information, SBA issued License No. 04/04-0248 on October 2, 1989, to Mariner Venture Capital Corp.; to operate as a small business investment company.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: November 17, 1989.

Robert G. Lineberry,

Deputy Associate Administrator for Investment.

[FR Doc. 89-27759 Filed 11-27-89; 8:45 am]

BILLING CODE 8025-01-M

[Application No. 02/02-5530]

Application for License To Operate as a Small Business Investment Company

Notice is hereby given of the filing of an application with the Small Business Administration (SBA) pursuant to Section 107.102 of the Regulations governing small business investment companies (13 CFR 107.102 (1989)) by SYL Capital Corp. (the Applicant), 605 King Georges Post Road, Fords, New Jersey 08863, for a license to operate as a small business investment company (SBIC) under the provisions of the Small Business Investment Act of 1958, as amended (the Act) (15 U.S.C. 661 *et seq.*), and the Rules and Regulations promulgated thereunder.

The proposed officers, directors, and shareholders of the Applicant are as follows:

Name and address	Title or relationship	Percentage of shares owned
Su-Yi Lin, 6 Lori Lane, Holmdel, NJ 07733	President/Manager/Director	50
Pi-Luan Lin, 6 Lori Lane, Holmdel, NJ 07733	Secretary/Treasurer/Director	28
Edward J. Chrvala, 1709 Riviera Court, Point Pleasant, NJ 08742	Assistant to President	0
Jen-Yang Lin, 215 Dock Street, Union Beach, NJ 07735	Director	1
Huei-Ju Lin Chu, 1231 Inwood Terrace, Fort Lee, NJ 07024	Chairman/Director	20
Huei Chien Lin, RR1, Box 2162, Hampten, MA 04444	Director	1

The Applicant will begin operations with a capitalization of $1,000,000 and will be a source of equity capital and long term loan funds for qualified small business concerns.

The Applicant will conduct its operations in the State of New Jersey. As a small business investment company under Section 301(d) of the Act, the Applicant has been organized and chartered solely for the purpose of performing the functions and conducting the activities contemplated under the Act and will provide assistance solely to small concerns which will contribute to a well balanced national economy by facilitating ownership in such concerns by persons whose participation in the free enterprise system is hampered because of social or economic disadvantages.

Matters involved in SBA's consideration of the application include the general business reputation and character of the proposed owners and management, and the probability of successful operations of the new company under their management including profitability and financial soundness is accordance with the Small Business Investment Act and the SBA Rules and Regulations.

Notice is further given that any person may, not later than 30 days from the date of publication of this Notice, submit written comments on the proposed SBIC to the Deputy Associate Administrator for Investment, Small Business Administration, 1441 "L" Street, NW., Washington, DC 20416.

A copy of this Notice will be published in a newspaper of general

circulation in the Fords, New Jersey area.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: November 17, 1989.

Robert G. Lineberry,

Deputy Associate Administrator for Investment.

[FR Doc. 89-27760 Filed 11-27-89; 8:45 am]

BILLING CODE 8025-01-M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Application of Yute Air Alaska, Inc., Under Subpart Q to Resume Air Service Under Its Section 401 Certificate

AGENCY: Department of Transportation.

ACTION: Notice of Order to Show Cause (Order 89-11-48), Docket 46163.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue an order finding that Yute Air Alaska, Inc., continues to be fit to operate pursuant to its section 401 certificate authorizing it to engage in interstate and overseas air transportation of persons, property and mail for a period of one year.

DATE: Persons wishing to file objections should do so no later than December 6, 1989.

ADDRESS: Objections and answers to objections should be filed in Docket 46163 and addressed to the Documentary Services Division (C-55, Room 4107), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590 and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Ms. Carol A. Woods, Air Carrier Fitness Division (P-56, Room 6401), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-2340.

Dated: November 21, 1989.

Jeffrey N. Shane,

Assistant Secretary for Policy and International Affairs.

[FR Doc. 89-27773 Filed 11-27-89; 8:45 am]

BILLING CODE 4910-62-M

President's Commission on Aviation, Security and Terrorism; Public Hearing

AGENCY: Office of the Secretary, Department of Transportation.

ACTION: Notice of public hearing of the President's Commission on Aviation Security and Terrorism.

SUMMARY: The President's Commission on Aviation Security and Terrorism will be holding its second public hearing, in which it will take testimony from Federal agencies involved in aviation security, counterterrorism, and foreign intelligence. Interested members of the public are invited to attend. Persons wishing to submit written statements to the Commission are welcome to do so at any time by contacting the person listed below. Persons wishing to address the Commission at the hearing should contact the person listed below not later than seven days before the hearing.

DATE: Monday, December 18, 1989, 10 a.m. et.

ADDRESS: Reserve Officers Association, Fifth Floor, One Constitution Avenue, NE., Washington, DC 20002.

FOR FURTHER INFORMATION CONTACT: Harry R. Van Cleve, Commission on Aviation Security and Terrorism, 1825 K Street, NW., Suite 519, Washington, DC 20036, (202) 254-3166.

SUPPLEMENTARY INFORMATION: By Executive Order 12686, August 4, 1989, the President established the Commission on Aviation Security and Terrorism to examine policy regarding the threat of terrorism to civil aviation, specifically options for preventing aviation terrorism and handling terrorist threats, including prior notification to the public, and policies, practices, and laws regarding treatment of families of the victims of terrorism. In these areas, the Commission is specifically to focus on the destruction of the Pan American flight 103 over Lockerbie, Scotland, on December 21, 1988.

The Commission held its first hearing on Friday, November 17, 1989, at which it took tesimony from families of victims of the PanAm 103 explosion and of the UTA flight to Paris that exploded over Niger in September 1989, as well as representatives of numerous elements of the aviation industry. The principal issue addressed at that hearing was how the Commission should approach its mandate from the President. Persons interested in obtaining copies of formal statements made at that hearing should contact the person listed above.

Issued in Washington, DC on November 21, 1989.

Harry R. Van Cleve,

Commission General Counsel.

[FR Doc. 89-27772 Filed 11-27-89; 8:45 am]

BILLING CODE 4910-62-M

Coast Guard

[CGD 1-89-139]

New York Harbor Traffic Management Advisory Committee Meeting

AGENCY: Coast Guard, DOT.

ACTION: Notice of cancellation of meeting.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. I), notice is hereby given of the cancellation of a previously scheduled meeting of the New York Harbor Traffic Management Advisory Committee that was to be held on December 13, 1989, in the Conference Room, second floor, U.S. Coast Guard Marine Inspection Office, Battery Park, New York, NY, beginning at 10:00 A.M.

FOR FURTHER INFORMATION CONTACT: Lt. Comdr. L. Brooks, Executive Secretary, New York Harbor Traffic Management Advisory Committee, Port Safety Office, Building 109, Governors Island, New York, NY 10004; or by calling (212) 668-7834.

Dated: November 21, 1989.

Robert T. Nelson,

Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services.

[FR Doc. 89-27755 Filed 11-27-89; 8:45 am]

BILLING CODE 4910-14-M

Federal Aviation Administration

[Summary Notice No. PE-89-45]

Petition for Exemption; Summary of Petitions Received; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR Part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR Chapter I), dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATE: Comments on petitions received must identify the petition docket number involved and must be received on or before: December 18, 1989.

ADDRESS: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), Petition Docket No. _____, 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-10), Room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3132.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR part 11).

Issued in Washington, DC, on November 22, 1989.

Pamela Trebbe,

Acting Manager, Program Management Staff, Office of the Chief Counsel.

Petitions for Exemption

Docket No.: 20049.
Petitioner: T.B.M. Inc.
Sections of the FAR Affected: 14 CFR 91.211(a)(1).
Description of Relief Sought: To extend Exemption No. 2956, as amended, that allows petitioner to operate its Douglas DC-6 and DC-7 aircraft without a flight engineer during flightcrew training, ferry, and test flights conducted in preparation for firefighting operations under Part 137 of the FAR. Exemption No. 2956, as amended, will expire on April 30, 1990.

Docket No.: 25030.
Petitioner: Pan Am Express, Inc.
Regulations Affected: 14 CFR 93.123 and 93.129.
Description of Relief Sought: Authorization to conduct one additional operation in the 1800 hour time period and one additional operation in the 1900 hour time period at John F. Kennedy International Airport.

Docket No.: 25988.
Petitioner: Soloy Dual Pac, Inc.
Sections of the FAR Affected: 14 CFR 21.19.
Description of Relief Sought: To allow petitioner to obtain a supplemental type certificate for Cessna Caravan aircraft in which the existing engines have been replaced with single propeller, dual engine Soloy Dual Pacs.

Docket No.: 25918.
Petitioner: AFM Corporation.
Sections of the FAR Affected: 14 CFR 91.191(a)(4) and 135.165(b).
Description of Relief Sought: To allow petitioner to operate specific aircraft in extended overwater flight with single long-range navigation systems and single high-frequency communications systems in the Western Atlantic Ocean, the Caribbean Sea, and the Gulf of Mexico. GRANT, November 9, 1989, Exemption No. 5112.

[FR Doc. 89-27840 Filed 11-27-89; 8:45 am]
BILLING CODE 4910-13-M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

Date: November 21, 1989.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reductin Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Office listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 2224, 15th and Pennsylvania Avenue, NW., Washington, DC 20220.

Financial Management Service

OMB Number: 1510-0028.
Form Number: POD 134.
Type of Review: Extension.
Title: Release Form.
Description: This form is used by 'Eligible Recipients of a Postal Savings' account of a deceased depositor to transfer their rightful share to another person.
Respondents: Individuals or households.
Estimated Number of Respondents: 20
Estimated Burden Hours Per Response: 30 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 10 hours.

OMB Numer: 1510-0030.
Form Number: POD 1690.
Type of Review: Extension.
Title: Certification of Bill from Undertaker.
Description: This form is used when application is made by the funeral home for the funeral expenses of a deceased postal depositor. This form is completed by a relative of the deceased depositor certifying that the bill submitted by the funeral home is correct. Entitlement to the funds are based on this data to insure proper payment.
Respondents: Individuals or households.
Estimated Number of Respondents: 10.
Estimated Burden Hours Per Response: 3 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 3 hours.

OMB Number: 1510-0034.
Form Number: POD 315.
Type of Review: Extension.
Title: Depositor's Application to Withdraw Postal Savings.
Description: This form is used as an application for payment by depositor or other "Legal Representatives." This form serves to identify the depositor and insures payment is made to the proper person.
Respondents: Individuals or households.
Estimated Number of Respondents: 1,075.
Estimated Burden Hours Per Response: 30 minutes.
Frequency of Response: Other (as needed).
Estimated Total Reporting Burden: 538 hours.

Clearance Officer: Mary MacLeod, (301) 436-5300 Financial Management Service, Room 500-A, 3700 East West Highway Hayattsville, MD 20782.

OMB Reviewer: Milo Sunderhauf (202) 395-6880 Officer of Management and Budget, Room 3208, New Executive Office Building Washington, DC 20503

Lois K. Holland,

Departmental Reports, Management Officer.

[FR Doc. 89-27775 Filed 11-27-89; 8:45 am]
BILLING CODE 4810-25-M

Public Information Collection Requirements Submitted to OMB for Review

Date: November 21, 1989.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the

Treasury, room 2224, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Bureau of Alcohol, Tobacco and Firearms

OMB Number: 1512-0092.

Form Number: ATF F 5100.31 (1648/1649/1650).

Type of Review: Extension.

Title: Application for Certification/Exemption of Label/Bottle Approval under the Federal Alcohol Administration Act.

Description: The Federal Alcohol Administration Act regulates the labeling of alcoholic beverages and designates the Treasury Department to oversee compliance with regulations. This form is completed by the regulated industry and submitted to Treasury as an application to label their products. Treasury oversees label applications to prevent consumer deception and to deter falsification of unfair advertising practices on alcoholic beverages.

Respondents: Businesses or other for-profit, Small businesses or organizations.

Estimated Number of Respondents: 6,060.

Estimated Burden Hours Per Response: 30 minutes.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 27,300 hours.

OMB Number: 1512-0204.

Form Number: ATF F 5110.38.

Type of Review: Extension.

Title: Formula for Distilled Spirits under the Federal Alcohol Administration Act (Supplemental).

Description: ATF F 5110.38 is used to determine the classification of distilled spirits for labeling and for consumer protection. The form describes the person filing, type of product to be made, and restrictions to the labeling and manufacture. The form is used by ATF to ensure that a product is made and labeled properly and to audit distilled spirits operations.

Respondents: Small businesses or organizations.

Estimated Number of Respondents: 200.

Estimated Burden Hours Per Response: 1 hour.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 4,000 hours.

Clearance Officer: Robert Masarsky, (202) 566-7077, Bureau of Alcohol, Tobacco and Firearms, Room 7011, 1200 Pennsylvania Avenue, NW., Washington, DC 20226.

OMB Reviewer: Milo Sunderhauf, (202) 395-6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports, Management Officer.

[FR Doc. 89-27776 Filed 11-27-89; 8:45 am]

BILLING CODE 4810-25-M

Internal Revenue Service

Meeting—Electronic Filing Systems

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of electronic filing systems meeting.

SUMMARY: The Electronic Filing Systems Office has scheduled a meeting to be held from 9:00 a.m. to 4:00 p.m., on Wednesday, January 3, 1990, in the IRS Auditorium, 7th Floor, 1111 Constitution Ave., NW., Washington, DC.

Items on the Agenda: Relationship between the banking industry and Electronic Filing of Individual Returns; Automated Deposit of Electronic Payments for Taxes (ADEPT); Refund Anticipation Loans (RAL); Filing of Forms 1041 on magnetic media.

Members of the banking industry are invited to participate to discuss issues relevant to the Electronic Filing System.

DATE: Wednesday, January 3, 1990—9:00 a.m.-4:00 p.m.

ADDRESS: IRS Auditorium, 7th Floor, 1111 Constitution Ave., NW., Washington, DC.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to explore the relationship between the banking industry and electronic filing. Members of IRS and Financial Management Service (FMS) will conduct a briefing on the agenda items and members of the banking industry will have the opportunity to submit questions and comments.

Individuals wishing to attend must make reservations no later than December 22, 1989. To make reservations or obtain additional information, call Karyn Wallace at (202) 343-0012.

Leonard Holt,

Chief, Operations and Marketing Branch.

[FR Doc. 89-27742 Filed 11-27-89; 8:45 am]

BILLING CODE 4830-01-M

Sunshine Act Meetings

Federal Register
Vol. 54, No. 227
Tuesday, November 28, 1989

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL ENERGY REGULATORY COMMISSION

DATE AND TIME: November 29, 1989, 10:00 a.m.

PLACE: 825 North Capitol Street, NE., Room 9306, Washington, DC 20426.

STATUS: Open.

MATTERS TO BE CONSIDERED: Agenda.

Note.—Items listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION: Lois D. Cashell, Secretary, Telephone (202) 357-8400.

This is a list of matters to be considered by the Commission. It does not include a listing of all papers relevant to the items on the agenda; however, all public documents may be examined in the Reference and Information Center.

Consent Power Agenda, 906th Meeting—November 29, 1989, Regular Meeting (10:00 a.m.)

CAP-1.
Project No. 4660-017, Independence County, Arkansas
CAP-2.
Project No. 2833-021, Public Utility District No. 1, Lewis County, Washington
CAP-3.
Project No. 8133-008, B.S. Inc.
CAP-4.
Project No. 8936-007, BES Hydro Company
CAP-5.
Project No. 8863-003, Northeast Hydrodevelopment Corporation
CAP-6.
Project No. 9840-001, Appomattox River Water Authority
CAP-7.
Omitted
CAP-8.
Project Nos. 4632-004 and 006, Clifton Power Corporation
CAP-9.
Project No. 5376-010, Horseshoe Bend Hydroelectric Company
CAP-10.
Docket No. ER89-678-000, System Energy Resources, Inc.
CAP-11.
Docket No. ER89-636-000, Potomac Electric Power Company
CAP-12.
Docket No. ER89-355-001, CP National Corporation
CAP-13.
Docket No. ER88-316-002, Commonwealth Edison Company
CAP-14.
Docket No. EL86-26-005, San Diego Gas and Electric Company v. Alamito Company
Docket No. ER87-47-003, Alamito Company
CAP-15.
Docket No. ER89-529-000, Kanawha Valley Power Company
CAP-16.
Docket No. EL88-39-001, Northern States Power Company (Wisconsin)
Docket No. EL89-9-001, Northern States Power Company (Minnesota)
CAP-17.
Omitted
CAP-18.
Docket No. EL89-24-000, Louisiana Power & Light Company
CAP-19.
Docket No. EL89-23-000, The Villages of Edgerton and Montpelier, Ohio v. Ohio Power Company
CAP-20.
Docket Nos. ER86-107-005, ER87-327-002 and ER88-397-001, Pacific Gas and Electric Company
Docket No. EL89-34-000, Northern California Power Agency v. Pacific Gas and Electric Company
CAP-21.
Omitted
CAP-22.
Docket No. EL89-17-000, San Diego Gas & Electric Company v. Alamito Company
Docket No. EL89-18-000, Arizona Corporation Commission v. Alamito Company
CAP-23.
Docket No. EL89-53-000, Blue Ridge Power Agency, Central Virginia Electric Cooperative Inc., and Craig-Botetourt Electric Cooperative, Inc. v. Appalachian Power Company
CAP-24.
Omitted.
CAP-25.
Project No. 3021-018, Allegheny Hydro No. 8. L. P. and Allegheny No. 9, L. P.

Consent Miscellaneous Agenda

CAM-1.
Docket No. RM89-16-000, Final Regulations Implementing the Natural Gas Wellhead Decontrol Act of 1989
CAM-2.
Docket No. GP88-22-000, Woods Petroleum Corporation
CAM-3.
Docket No. GP89-30-000, Realitos Energy Corporation
CAM-4.
Docket No. GP89-35-001, Jennings Exploration Company
CAM-5.
Docket No. GP89-38-000, Corinne B. Grace, Complainant v. El Paso Natural Gas Company, Respondent
CAM-6.
Docket Nos. RP83-42-006 and GP84-56-007, Midwest Gas Users Association v. Northwest Central Pipeline Corporation

Consent Gas Agenda

CAG-1.
Docket Nos. RP90-24-000 and TM90-2-26-000, Natural Gas Pipeline Company of America
CAG-2.
Docket Nos. RP90-25-000, 001 and TM90-2-24-000, Transwestern Pipeline Company
CAG-3.
Docket Nos. RP90-26-000 and TM90-2-21-000, Columbia Gas Transmission Corporation
CAG-4.
Docket No. RP90-30-000, Texas Eastern Transmission Corporation
CAG-5.
Docket No. RP90-29-000, The Inland Gas Company, Inc.
CAG-6.
Docket Nos. RP89-119-000 and RP89-208-000, Texas Gas Transmission Corporation
CAG-7.
Docket No. TM90-4-30-000, Trunkline Gas Company
CAG-8.
Docket Nos. TA90-1-53-000 and 001, K N Energy, Inc.
CAG-9.
Docket No. TQ90-3-4-000, Granite State Gas Transmission, Inc.
CAG-10.
Docket No. TQ90-2-63-000, Carnegie Natural Gas Company
CAG-11.
Docket Nos. TQ90-1-20-000 and 001, Algonquin Gas Transmission Company
CAG-12.
Docket Nos. TM90-7-28-000 and TM90-8-28-000, Panhandle Eastern Pipe Line Company
CAG-13.
Docket Nos. RP90-17-000 and CP89-1121-002, Mississippi River Transmission Corporation
CAG-14.
Docket No. RP90-22-000, Algonquin Gas Transmission Company
CAG-15.
Docket No. RP90-20-000, Great Lakes Gas Transmission Company
CAG-16.
Docket Nos. RP90-23-000 and RP89-237-000, North Penn Gas Company
CAG-17.
Docket Nos. RP90-21-000 and 001, CNG Transmission Corporation
CAG-18.
Docket No. RP90-28-000, United Gas Pipe Line Company
CAG-19.
Docket No. RP90-27-000, CNG Transmission Corporation
CAG-20.

Docket No. RP89-7-000, Columbia Gas Transmission Corporation

CAG-21.
Docket No. TA90-1-32-001, Colorado Interstate Gas Company

CAG-22.
Docket Nos. RP86-169-012, RP86-105-014 and RP87-25-002, ANR Pipeline Corporation

CAG-23.
Docket Nos. RP89-138-004, RP88-27-017, 013, RP88-264-011, 014 and CP87-524-008, United Gas Pipe Line Company

CAG-24.
Docket Nos. TQ90-1-9-001 and TM90-1-9-001, Tennessee Gas Pipeline Company

CAG-25.
Docket No. RP89-234-001, Moraine Pipeline Company

CAG-26.
Docket Nos. RP89-230-003 and TM90-1-33-002, El Paso Natural Gas Company

CAG-27.
Docket No. RP89-233-001, Williams Natural Gas Company

CAG-28.
Docket No. CP82-487-022, Williston Basin Interstate Pipeline Company

CAG-29.
Docket Nos. RP89-219-002 and TM90-1-37-002, Northwest Pipeline Corporation

CAG-30.
Docket Nos. RP89-132-005, RP88-184-010 and TA88-1-33-003, El Paso Natural Gas Company

CAG-31.
Docket No. RP82-80-029, ANR Pipeline Company

CAG-32.
Docket Nos. RP89-229-001 and TM89-7-21-001, Columbia Gas Transmission Corporation

CAG-33.
Docket No. TQ89-4-63-001, Carnegie Natural Gas Company

CAG-34.
Docket Nos. CP89-470-002 and CP88-522-007, Tennessee Gas Pipeline Company

CAG-35.
Docket Nos. RP90-97-059, Tennessee Gas Pipeline Company

CAG-36.
Docket Nos. RP89-73-005 and 003, Pelican Interstate Gas System

CAG-37.
Omitted

CAG-38.
Docket Nos. RP82-55-039, 040, RP87-7-045 and 046, Transcontinental Gas Pipe Line Corporation

CAG-39.
Docket Nos. TQ90-1-16-002 and TM90-1-16-002, National Fuel Gas Supply Corporation

CAG-40.
Docket Nos. RP88-240-000, RP89-10-000 and RP89-125-000, Panhandle Eastern Pipe Line Company

CAG-41.
Docket Nos. RP89-50-000, CP68-179-013, CP89-555-000 and CP89-556-000, Florida Gas Transmission Company

CAG-42.
Docket Nos. ST85-956-003, ST85-1572-001, ST86-6-001, ST86-1010-000, ST86-1064-000, ST86-1647-000, ST86-1792-000, ST86-2087-000, ST86-2505-000, ST86-430-000, ST87-588-000, ST87-589-000, ST87-1126-000, ST87-1525-000, ST87-1526-000, ST87-1527-000, ST87-1974-000, ST87-2399-000, ST87-3708-000, ST87-3709-000, ST87-3710-000, ST87-3711-000, ST87-3874-000, ST87-4257-000, ST88-585-000, ST88-1440-000, and ST87-1441-000, Acadian Gas Pipeline System
Docket Nos. ST88-5599-001, ST88-5761-001, ST88-5762-001, ST88-5763-001, ST88-5764-001, ST88-5765-001, ST88-5766-001, ST88-5767-001, ST88-5768-001, ST88-5769-001 and ST88-5770-001, Gulf South Pipeline Company

CAG-43.
Docket No. ST88-5804-001, Acacia Natural Gas Corporation

CAG-44.
Docket Nos. ST89-3298-000, ST89-3375-000, ST89-3765-000 and ST89-3949-000, Enogex, Inc.

CAG-45.
Docket No. CI89-465-000, Union Pacific Fuels, Inc.

CAG-46.
Docket No. CP88-570-003, Mobile Bay Pipeline Projects

CAG-47.
Docket No. CP88-311-001, Williston Basin Interstate Pipeline Company

CAG-48.
Docket No. CP89-539-001, Transwestern Pipeline Company

CAG-49.
Docket No. CP87-408-001, Owens-Corning Fiberglas Corporation v. Transcontinental Gas Pipe Line Corporation

CAG-50.
Omitted

CAG-51.
Docket No. CP87-451-021, Northeast U.S. Pipeline Projects
Docket Nos. CP86-329-001 and CP86-330-001, Erie Pipeline System
Docket Nos. CP86-523-000, 001, 002, 003, CP86-524-000 and CP88-198-000, Iroquis Gas Transmission System
Docket Nos. CP88-168-000 and CP88-169-000, Champlain Pipeline Company
Docket Nos. CP88-173-000, CP88-174-000 and CP88-176-000, Tennessee Gas Pipeline Company
Docket No. CP88-175-000, Northeastern Gas Transmission Company
Docket Nos. CP88-182-000 and -001, PennEast Gas Service Company, CNG Transmission Corporation and Eastern Transmission Corporation
Docket Nos. CP88-189-000, CP88-192-000 and -001, Algonquin Gas Transmission Company
Docket Nos. CP88-190-000 and CP88-191-000, Greater Northeast Pipeline Corporation
Docket No. CP88-193-000, Eastern American States Transmission Company

CAG-52.
Docket Nos. CP88-6-005 and RP88-8-010, United Gas Pipe Line Company

CAG-53.
Docket Nos. CP89-1991-000 and CP89-2001-000, Mississippi River Transmission Corporation

CAG-54.
Docket No. CP89-2034-000, Northern Natural Gas Company, Division of Enron Corp.

CAG-55.
Docket No. CP89-982-000, Natural Gas Pipeline Company of America

CAG-56.
Docket No. CP89-1325-000, Northern Natural Gas Company, Division of Enron Corp.

CAG-57.
Docket No. CP88-555-000, Gas Utility District No. 1 of Tangipahoa Parish, Louisiana, Applicant, Southern Natural Gas Company, Respondent

CAG-58.
Docket No. CP89-267-000, Atlantic Richfield Company and Intalco Aluminum Corporation

CAG-59.
Docket No. CP88-332-004, El Paso Natural Gas Company

CAG-60.
Docket No. RP82-55-046, Transcontinental Gas Pipe Line Corporation

CAG-61.
Docket No. RP89-119-001, Texas Gas Transmission Corporation

CAG-62.
Docket Nos. RP88-10-006 and RP88-211-006, CNG Transmission Corporation

CAG-63.
Docket Nos. RP87-62-000 and RP86-148-000, Pacific Gas Transmission Company

CAG-64.
Docket No. RP88-131-003, Carnegie Natural Gas Company

CAG-65.
Docket No. RP88-69-000, Stingray Pipeline Company

CAG-66.
Docket Nos. CP83-254-332 and CP83-335-252, Williston Basin Interstate Pipeline Company

CAG-67.
Docket No. CP81-296-018, Tennessee Gas Pipeline Company

I. Licensed Project Matters

P-1.
Project Nos. 8142-005, 006, 007 and 014, Henwood Associates, Inc. Order on rehearing of May 2, 1989, order.

P-2.
Project No. 7267-006, Joseph Martin Keating. Order regarding water quality certification

II. Electric Rate Matters

ER-1.
Docket Nos. ER84-604-000 and ER85-156-001, Southwestern Public Service Company. Opinion and order on initial decision establishing just and reasonable rates.

ER-2.
Docket Nos. ER85-461-001, ER85-521-001, ER86-258-001, ER86-478-001, ER86-567-001, ER87-404-001 and ER88-120-000, Kansas Gas and Electric Company. Opinion and order on initial decision concerning prudence of Wolf Creek.

Miscellaneous Agenda

M-1.

Docket No. RM87-33-001, Hydroelectric Relicensing Regulations Under the Federal Power Act. Order on rehearing.

M-2.
Reserved

M-3.
Docket No. RM87-34-000, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol. Final Rule.

I. Pipeline Rate Matters

RP-1.
Docket Nos. CP88-434-001 and RP88-185-001, El Paso Natural Gas Company. Concerning gas inventory charge application.

II. Producer Matters

CI-1.
Reserved

III. Pipeline Certificate Matters

CP-1.
Docket No. CP89-2114-000, United Gas Pipe Line Company. Order regarding United's restructuring proposals.

Lois D. Cashell,
Secretary.

[FR Doc. 89-27958 Filed 11-24-89; 3:23 pm]

BILLING CODE 6717-01-M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 54 FR 47860, November 17, 1989.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Approximately 10:30 a.m., Wednesday, November 22, 1989, following a recess at the conclusion of the open meeting.

CHANGES IN THE MEETING: One of the items announced for inclusion at this meeting was consideration of any agenda items carried forward from a previous meeting; the following such closed item(s) was added:

Federal Reserve Bank and Branch director appointments. (This item was originally announced for a closed meeting on October 30, 1989.)

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204.

Dated: November 22, 1989.

Jennifer J. Johnson,
Associate Secretary of the Board.

[FR Doc. 89-27907 Filed 11-24-89; 10:08 am]

BILLING CODE 6210-01-M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: 10:30 a.m., Monday, December 4, 1989.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED.

1. Matters relating to the Plans administered under the Federal Reserve System's employee benefits program.
2. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
3. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: November 24, 1989.

Jennifer J. Johnson,
Associate Secretary of the Board.

[FR Doc. 89-27957 Filed 11-24-89; 3:13 pm]

BILLING CODE 6210-01-M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of November 27, December 4, 11, and 18, 1989.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of November 27

Thursday, November 30

2:00 p.m.
Briefing on DOE Views on Advanced Light Water Reactor Design and Certification (Public Meeting)

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting)
a. Rulemaking on Sequestration of Witnesses Interviewed Under Subpoena/Exclusion of Attorneys
b. Request for Hearing on St. Lucie Exemptions

Week of December 4—Tentative

Tuesday, December 5

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of December 11—Tentative

Thursday, December 14

10:00 a.m.
Briefing on Status of Implementation of the Severe Accident Master Integration Plan and Status of Licensee Progress on IPE (Public Meeting)

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of December 18—Tentative

Tuesday, December 19

10:00 a.m.
Briefing on Risk Communication (Public Meeting)

Wednesday, December 20

2:00 p.m.
Briefing by DOE on Status of Civilian High Level Waste Program (Public Meeting)

Thursday, December 21

2:00 p.m.
Briefing on NRC Actions for Cleanup of Contaminated Sites Under NRC Jurisdiction (Public Meeting)

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Friday, December 22

10:00 a.m.
Briefing by Executive Branch (Closed—Ex. 1)

Note.—Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

To verify the status of meetings call (recording)—(301) 492-0292.

CONTACT PERSON FOR MORE INFORMATION: William Hill, (301) 492-1661.

Dated: November 22, 1989.

William M. Hill, Jr.,
Office of the Secretary.

[FR Doc. 89-27917 Filed 11-24-89; 11:07 am]

BILLING CODE 7590-01-M

federal register

Tuesday
November 28, 1989

Part II

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 2, 4, 5, et al.
Federal Acquisition Regulation (FAR); Miscellaneous Amendments; Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 5, 8, 9, 10, 14, 15, 25, 28, 32, 36, 42, 45, 47, 48, 49, 52, and 53

[Federal Acquisition Circular 84-53]

RIN 9000-AC35, 9000-AC32, 9000-AC00, 9000-AC53, 9000-AC68, 9000-AD57, 9000-AC83, 9000-AC86, 9000-AC87, 9000-AD45, 9000-AD38, 9000-AD15, 9000-AC41, 9000-AC47, 9000-AD46, 9000-AB84, 9000-AD44

Federal Acquisition Regulation (FAR); Miscellaneous Amendments

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: Federal Acquisition Circular (FAC) 84-53 amends the Federal Acquisition Regulation (FAR) with respect to the following: Late Bids and Proposals; Contractor Records Retention; Contract Simplification Program; Approval of Requirements for the Acquisition of Printing; Individual Sureties; Threshold, Part 10; Buy American Act List of Exempt Items; Yarn, 50 Denier Rayon; Rabbit Fur Felt; Accounting Deficiencies, Suspension of Progress Payments; Architect-Engineer Short Selection Threshold; Hazardous Materials; Report of Shipment; Special Tooling; Small Purchase References in Part 47; Guaranteed Maximum Shipping Weights and Dimensions; Incorporating Provisions and Clauses; Examination of Records; and Editorial Changes.

DATES: *Effective Dates*: December 28, 1989, except for Parts 9, 28, 49, and related sections in Parts 52 and 53 (Item V-Individual Sureties) February 26, 1990.

FOR FURTHER INFORMATION CONTACT: Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523-4755. Please cite FAC 84-53.

SUPPLEMENTARY INFORMATION:

A. Background

FAC 84-53, Item III. This final rule provides simplified contract formats for use in acquisitions of supplies or services proposed to be acquired under firm-fixed-price or fixed-price with economic adjustment contracts. In conjunction with the simplified contract format, a new contract form, Standard Form 1447, Solicitation/Contract, is being issued.

The rule also provides for the use of annual representations and certifications.

FAC 84-53, Item V. This final rule is issued to make revisions to the FAR procedures governing the use of individual sureties in support of a bonding requirement. Among other things, the revisions would:

1. Require individual sureties to pledge specific assets to support a bond.
2. Identify and limit the types of assets which are acceptable for pledge based upon a standard of identifiable value and ready marketability.
3. Require objective evidence of asset ownership and unencumbered value.
4. Require a Government security interest in the pledged assets by means of a lien or real property or the establishment of an escrow account for acceptable personal property.
5. Provide for the Governmentwide suspension or debarment of sureties who commit serious improprieties.

FAC 84-53, Item X. The clarification has been made to eliminate the appearance that suspension of all progress payments is required even if only a portion of an accounting system is deficient. The revision to FAR 32.503-6(b) states explicitly that the suspension of progress payments for accounting deficiencies should be applied only to the portion of payments associated with the deficiency.

FAC 84-53, Item XI. FAR 36.602-3(c) required that discussions be held with at least three of the most highly qualified firms regarding concepts and the relative utility of alternative methods of furnishing the required services, when the prospective architect-engineer fees shall not be considered in these discussions. This statement is not consistent with Pub. L. 92-582, and therefore the FAR is revised to clarify this inconsistency.

Federal agencies have expressed a need for increasing the short selection process dollar threshold from the present $10,000 to $25,000. When the present threshold of $10,000 was established, the small purchase threshold was also $10,000. An increase in the short selection process dollar threshold to $25,000 would facilitate an early award of A-E contracts that are within the small purchase limitation.

FAR 52.236-20, Special Requirements, has been required for all cost-reimbursement construction contracts. The provisions of the clause were either unnecessary, or were duplicative of the provisions of the clause at 52.236-7, Permits and Responsibilities, and the clause at 52.236-5, Material and Workmanship. Therefore, 52.236-20 is removed, and the applications of 52.236-7 and 52.236-5 are expanded to permit their use for cost-reimbursement contracts.

FAR 36.201(a) is revised to eliminate unnecessary requirements to evaluate contractor performance and to prepare performance reports using the Standard Form 1420, Performance Evaluation (Construction Contracts).

FAC 84-53, Item XVI. On June 5, 1985, the Defense Acquisition Regulatory Council granted the Department of the Army authority to deviate from the provisions of FAR 47.305-16(b) and the clause at 52.247-60 to the extent necessary to request additional information regarding shipping characteristics from offerors and to provide that offers submitted without shipping characteristics would be evaluated on the basis of the shipping characteristics submitted with any offer that produces the highest transportation costs. The Army deviation has ensured that the contract administration office receives the information in the contract necessary to establish the liability of the successful offeror for any increased transportation costs incurred by the Government as a result of misinformation furnished by the offeror. This final rule extends the advantages of the Army deviation to all Government agencies and departments, and revises existing coverage to reflect the Government's intent that contract price reduction be on the basis of actual costs incurred, not costs computed when the offer was evaluated.

FAC 84-53, Item XVII. This case was established as a result of difficulties experienced by DoD field activities which have automated systems that intermingle the full text clauses and provisions with those incorporated by reference when generating solicitations and contracts. The FAR, as revised in FAC 84-37, currently provides for the grouping of clauses and provisions incorporated by reference.

B. Regulatory Flexibility Act

FAC 84-53, Items I, IV, VI, VII, VIII, IX, X, XI, XII, XV, XVI, and XVII. The Regulatory Flexibility Act (Pub. L. 96-354) does not apply to these final rules because each revision is not a significant revision as defined in FAR 1.501-1; i.e., it does not alter the substantive meaning of any coverage in the FAR having a significant cost or administrative impact on contractors or offerors, or a significant effect beyond the internal operating procedures of the issuing agencies.

FAC 84-53, Items II, XIII, and XVIII. DoD, GSA, and NASA certify that these final rules in FAC 84-53 will not have a

significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) because—

Item II. The extension of time for retention of records only applies to a limited number of contractors, of which an even smaller number are small entities, which fail to meet the 90-day requirement for indirect cost rate submissions. The retention requirement being imposed for computer data only affects those contractors who already maintain this type of data in their normal course of business. The burden of storing this additional data along with records already required to be obtained is minimal.

Item XIII. This final rule does not affect the competitive posture of, or preference for small businesses, solicitation or small purchase procedures, impose nonreimbursed administrative costs, or required professional skill requirements or business systems beyond those normally available in-house to small businesses.

Item XVIII. The revisions merely illustrate the nature of records Government personnel have access to and do not change existing requirements.

Therefore, the Regulatory Flexibility Act does not apply.

FAC 84-53, Items III, V, and XIV. A Final Regulatory Flexibility Analysis pertaining to the following items has been prepared for each item in accordance with the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) and each is on file in the FAR Secretariat and will be submitted to the Chief Counsel for Advocacy, Small Business Administration—

Item III—Contract Simplification Program

Item V—Individual Sureties

Item XIV—Special Tooling

C. Paperwork Reduction Act

FAC 84-53, Items I, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XV, XVI, and XVII. The Paperwork Reduction Act (Pub. L. 96-511) does not apply because these final rules do not impose any reporting or recordkeeping requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, et seq.

FAC 84-53, Item II. This final rule will not impose any recordkeeping or information collection requirements from offerors, contractors, or members of the public which require approval of OMB under 44 U.S.C. 3501, et seq. The coverage has been revised to clarify that (1) computer data need not be retained in its original form, provided the integrity of source data is maintained and an audit trail is established by the contractor; and (ii) only computer data that meets the definition of records as defined under paragraph (a) of section 4.703(b)(3) and (d) need to be retained. OMB Control Number 9000-0034 has been approved under 44 U.S.C. 3501, et seq.

FAC 84-53, Item V. Public comments concerning the information collection requirements under OMB Control Numbers 9000-0001 and 9000-0045 and pertaining to the proposed rule were previously invited in the **Federal Register** on November 29, 1988 (53 FR 48035). The Paperwork Reduction Act (Public Law 96-511) applies because the final rule contains an information collection requirement. Accordingly, the information collection requirements are being submitted to OMB under 44 U.S.C. 3501, et seq. for an expedited review by OMB within 20 days of receipt. Public comments concerning the revised information collection requirements should be submitted to OMB, Ms. Eyvette Flynn, FAR Desk Officer, Room 3235, NEOB, Washington, DC 20503.

FAC 84-53, Item XIV. Public comments concerning the information collection requirements under OMB Control Number 9000-0075 and pertaining to the proposed rule were invited in the **Federal Register** on September 27, 1988 (53 FR 37629) and the information collection requirements were approved by the Office of Management and Budget (OMB) as required by 44 U.S.C. 3501, et seq. However, those estimates underestimated the usage requirement of DoD concerning special tooling. In addition, this final rule consolidates the initial and updated listing requirements. Therefore, a revised Paperwork Reduction Act Analysis depicting a more realistic estimate of burden impact has been submitted to OMB for review. This identification and use information is used by the contractor in performing its contract and then it is used by the Government buying offices and logistics offices to determine whether any of the special tooling can be used by the Government or contractors subsequent to its use during production by the acquiring contractor. In addition, the information enables the Government to direct retention or disposition of the special tooling following its use in major systems, components, and parts. The *annual reporting burden* for OMB Control Number 9000-0075 is estimated as follows: Number of respondents, 10,000; responses per respondent, 2; annual responses, 20,000; preparation hours per response, 1; annual response burden hours, 20,000. The *annual recordkeeping burden* is estimated as follows: Recordkeepers, 10,000; annual hours per recordkeeper, 40; and total recordkeeping burden hours, 400,000. Public comments concerning this request should be submitted to OMB, Ms. Eyvette Flynn, FAR Desk Officer, Room 3235, NEOB, Washington, DC 20503 by December 18, 1989.

FAC 84-53, Item XVIII. This final rule does not change any recordkeeping or information collection requirements on offerors, contractors, or members of the public which require approval of OMB under 44 U.S.C. 3501, et seq.

D. Public Comments

FAC 84-53, Items I, II, III, IV, VII, XII, XIII, XIV, XVI, and XVIII. The comments that were received were considered by the Councils in the development of the following final rules:

Item I. On March 23, 1985, and on August 15, 1988, proposed rules were published in the **Federal Register** (50 FR 11522) and (53 FR 30818).

Item II. On June 17, 1988, a proposed rule was published in the **Federal Register** (53 FR 23105).

Item III. On October 27, 1987, a proposed rule was published in the **Federal Register** (52 FR 41390).

Item IV. On August 29, 1988, a proposed rule was published in the **Federal Register** (53 FR 33017).

Item VII. On February 8, 1989, a proposed rule was published in the **Federal Register** (54 FR 6251).

Item XII. On February 28, 1989, a proposed rule was published in the **Federal Register** (54 FR 8492).

Item XIII. On July 1, 1988, a proposed rule was published in the **Federal Register** (53 FR 25102).

Item XIV. On August 29, 1988, a proposed rule was published in the **Federal Register** (53 FR 33020).

Item XVI. On August 21, 1987, a proposed rule was published in the **Federal Register** (52 FR 31722).

Item XVIII. On August 17, 1988, a proposed rule was published in the **Federal Register** (53 FR 31280).

FAC 84-53, Item V. On November 3, 1988, a proposed rule was published in the **Federal Register** (53 FR 44564), and an extension of the comment period was published on December 30, 1988 (53 FR 53361), to revise the individual surety procedures in the FAR.

Comments received, 426. Of those, 209 comments were favorable or recommended further tightening of the procedures governing the use of individual sureties. Comments opposed to the rule or recommended measures to reduce the impact of the rule, 195. Other

respondents indicating no comment, 12. The comments of all respondents and the views of Congress were considered in developing this final rule. As a result, the final rule makes the following changes from the coverage proposed:

1. The requirement in the proposed rule with respect to Miller Act bonds that 100 percent of the individual surety's assets will be maintained for the duration of the expected obligation of the surety has been modified to permit the contracting officer to release a portion of the individual surety's assets based upon substantial performance of the obligations under the contract.

2. The prohibition on the use of letters of credit as an acceptable asset has been modified to permit the use of irrevocable letters of credit issued by a Federally insured financial institution.

3. Coverage in 49.402-3 has been added requiring the Government to notify the surety when contract default appears imminent and if the contract is subsequently terminated for default.

4. The proposed Optional Form, Satisfaction of Pledge, has been converted to Optional Form 90, Release of Lien on Real Property, and Optional Form 91, Release of Personal Property from Escrow.

5. Other miscellaneous changes have been made.

List of Subjects in 48 CFR Parts 2, 4, 5, 8, 9, 10, 14, 15, 25, 28, 32, 36, 42, 45, 47, 48, 49, 52, and 53.

Government procurement.

Dated: November 20, 1989.

Albert A. Vicchiolla,

Director, Office of Federal Acquisition Policy.

Federal Acquisition Circular

[Number 84-53]

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 84-53 is effective December 28, 1989, except for Parts 9, 28, 49, and related sections in Parts 52 and 53 (Item V.—Individual Sureties) February 26, 1990.

Eleanor Spector,

Assistant Secretary of Defense for Procurement, Department of Defense.

Richard H. Hopf, III,

Associate Administrator for Acquisition Policy, General Services Administration.

L. E. Hopkins,

Deputy Assistant Administrator for Procurement, National Aeronautics and Space Administration.

Federal Acquisition Circular (FAC) 84-53 amends the Federal Acquisition Regulation as specified below:

Item I—Late Bids and Proposals

FAR 2.101, 14.201-6(c)(3), 14.201-6(r), 14.301 (a), (c), and (d), 14.303(a), 14.304-1 (a)(1), (a)(2), (b), and (e), 15.407 (c)(6) and (c)(8), 15.412(e), 52.214-3, 52.214-5, 52.214-7, and 52.214-23, and 52.215-9 and 52.215-10 are revised. FAR 14.201-6(c) (4), (v), and (w), 14.202-7, 14.304-1(a) (3) and (d), 14.304-2, 15.402 (i) and (j), 15.407 (c)(9) and (j), 52.214-31, 52.214-32, 52.214-33, 52.215-18, and 52.215-36 are added. The changes pertaining to sealed bidding (1) correct language in the current 5-day late bid rule concerning acceptable evidence to establish the date of mailing of a late bid, modification, or withdrawal sent by registered or certified mail; (2) provide a 2-day late bid rule for bids mailed by U.S. Postal Service Express Mail Next Day Service; (3) provide separate late bid rules for bids outside the U.S. and Canada; and (4) allow contracting officers the option of permitting the use of facsimile equipment for the submission of bids, acknowledgments of amendments to solicitations, and modifications or withdrawals of bids. Corresponding changes are made with respect to contracting by negotiation.

Item II—Contractor Records Retention

FAR 4.703 (b)(3) and (d) are revised to extend the record retention period for contractors who submit late annual indirect cost rate proposals and clarify the meaning of "record" to include computer input data.

Item III—Contract Simplification Program

FAR 5.503(c)(1)(i), 14.201-1 (a)(5) and (c), 14.201-2 (a)(1), (a)(2), and (b), 14.201-6 (i) and (u), 14.407-1(d), 15.406-1(b), 15.406-2 (a)(1) and (a)(3), 15.407(f), 15.414, 52.214-15, 53.205-1, 53.106(b), and 53.215-1(d) are revised, and FAR 14.201-9, 14.213, 15.406-1(a)(8), 15.407 (c)(9), (i), and (j), 52.102-2(c), 52.214-36, 52.215-35, 53.214(d), 53.215-1(g), and 53.301-1447 (Standard Form (SF) 1447) are added to provide (1) a new SF 1447, (2) simplified contract format for acquisition of noncomplex supplies and services proposed to be acquired under firm-fixed-price or fixed-price with economic price adjustment contracts; and (3) for offeror submission of annual representations and certifications.

Item IV—Approval of Requirements for the Acquisition of Printing

FAR 8.802 (a) and (c) are revised to clarify the legal status of the requirement to obtain the approval of the Congressional Joint Committee on Printing. The previous coverage caused confusion as to the contracting officer's responsibilities in procuring local printing services.

Item V—Individual Sureties

FAR 9.405, 28.101-4, 28.106-1, 28.202, 28.203, 28.204, and 49.402-3(e)(2) are revised, the clause at 52.228-11 is added, and 53.228 is revised to prescribe revised Standard Forms (SF's) 24, 25, 25-A, 28, 34, 35, and 1416 and new Optional Forms (OF's) 90 and 91. The revisions modify existing coverage regarding the use of individual sureties in support of a Government bonding requirement. Implementation of the rule has been delayed to allow time to obtain OMB approval under the Paperwork Reduction Act and to facilitate the printing and stocking of the SF's 24, 25, 25-A, and 28.

SF's 34, 35, and 1416 have been submitted to OMB for approval. When approved, they will be authorized for local reproduction.

OF's 90 and 91 also will be authorized for local reproduction.

Draft copies of the standard and optional forms prescribed by the rule are displayed in this Federal Acquisition Circular 84-53 for information only. After OMB approval, all the forms prescribed by this rule will be displayed in a subsequent FAC. Those forms authorized for local reproduction will be provided in the looseleaf edition of a subsequent FAC for the user to reproduce as required.

Item VI—Threshold, Part 10

FAR 10.006(a)(1)(ii) is revised to clarify that the exception applies to both purchases and contracts that do not exceed the small purchase threshold.

Item VII—Buy American Act List of Exempt Items

FAR 25.102, 25.108, 25.202, and the clause at 52.225-1 are revised to clarify that the Buy American List of Exempt Items at 25.108 is provided for information only, and that each agency is responsible for making a determination that an item is exempt from provisions of the Buy American Act. The rule is needed to ensure that the FAR is consistent with the provisions of the Buy American Act.

Item VIII—Yarn, 50 Denier Rayon

FAR 25.108(d)(1) is revised to add the item, Yarn, 50 denier rayon, to the Buy American List of Exempt Items.

Item IX—Rabbit Fur Felt

FAR 25.108(d)(1) is revised to add the item, rabbit fur felt, to the Buy American List of Exempt Items.

Item X—Accounting Deficiencies, Suspension of Progress Payment

FAR 32.503-6(b) is revised to clarify that the suspension of progress payments for accounting deficiencies should be applied only to the portion of the progress payments associated with a deficiency.

Item XI—Architect-Engineer Short Selection Threshold

FAR 36.201(a)(1), 36.505, 36.507, 36.602-3(c), 36.602-5, and the clauses at 52.236-5 and 52.236-7 are revised, 36.520 is removed, and 36.521 is redesignated as 36.520 to clarify when discussions will be held with architect-engineer (A-E) firms, and to permit the short selection process to be used to select A-E firms for contracts not to exceed the small purchase threshold. The clause at 52.236-20 is removed and the submission of performance reports using the Standard Form (SF) 1420, Performance Evaluation (Construction Contracts), is simplified.

Item XII—Hazardous Materials

FAR 42.302(a)(39) and the clause at 52.223-3(d) are revised to remove the implication that contract administration services are responsible for administering statutory and regulatory requirements for hazardous materials.

Item XIII—Report of Shipment

FAR 42.1406-1 and 42.1406-2 and the clause at 52.242-12 are revised to require contractors to provide advance notice of shipment for categories of material requiring preparation by the consignee for safety and security considerations.

Item XIV—Special Tooling

FAR 45.306-2, 45.306-3, 45.307-1(b), and 45.308 are revised, 45.305 and 45.306-4 are removed, and the clauses at 52.245-2 and 52.245-17 are revised to improve the management of special tooling, the retention and disposal decisions made by the Government, and the opportunities for using the special tooling to increase competition when contracting for postproduction requirements. Corresponding changes are made at FAR clauses 52.245-18 and 52.245-19.

FAR 45.306, and the clause at 52.245-17, Special Tooling, clarify that the clause is used in fixed-price contracts when the Government will furnish special tooling to the contractor, or the Government intends to maintain rights to the special tooling until such time that the Government decides it wants full title to the special tooling or has no further interest in the special tooling.

Under the revised Special Tooling clause, the types of information which contractors must maintain in their property control systems is delineated. The periodic reporting of this information to the Government is also defined.

Other changes are made to 45.305, 45.307, and 45.308 to locate the prescriptions for the Special Test Equipment clause and the Government Property Furnished "As Is" clause in the FAR sections which address the policy on the use of these clauses. These changes are intended to clarify when the clauses are to be used.

Item XV—Small Purchase References in Part 47

FAR 47.104-4(b) and 52.247-1(b) are revised to provide editorial changes to reference the small purchase limitation in section 13.000 and to provide consistency with the FAR's standard "small purchase limitation" terminology.

Item XVI—Guaranteed Maximum Shipping Weights and Dimensions

FAR 47.305-16(b) and 52.247-60 are revised to more specifically describe the information required from the offeror concerning shipping characteristics, to provide that offers submitted without the requested information will be evaluated on the basis of the shipping characteristics submitted with any offer that produces the highest transportation costs, and to provide that the contract price of the successful offer will be reduced by an amount equal to the difference between the transportation costs actually incurred and the costs which would have been accurate.

Item XVII—Incorporating Provisions and Clauses

FAR 52.102-1(d) is removed and FAR 52.107(a) and (b), 52.252-1, and 52.252-2 are revised to eliminate Alternate I, which required contracting officers to identify provisions and clauses incorporated by reference and to group them separately from the provisions and clauses incorporated in full text. This change is made to accommodate buying activities that use automated programs to generate solicitations and contracts. The automated programs generally intermingle provisions and clauses incorporated by reference with those incorporated by full text and do not separately list provisions and clauses incorporated by reference. A notice to the offeror and contractor that some provisions and clauses are incorporated by reference replaces the deleted requirements.

Item XVIII—Examination of Records

FAR 52.215-2 is revised to illustrate the type and form of contractor cost and financial information which is to be made available to Government personnel for conducting reviews of contract costs. This change should help to eliminate time-consuming and inefficient access to records arguments that have occurred between Government personnel and contractors.

Item XIX—Editorial Changes

FAR 10.002(a) is revised to correct a reference to read "41 U.S.C. 253a(a)".

FAR 14.203-2(a) is revised to read "display of invitations for bids".

FAR 28.204-1 is revised to correct a citation to read "31 U.S.C. 9309" and to revise the date of Treasury Department Circular No. 154.

FAR 52.204-1 is revised to correct bracketed instruction in the clause.

FAR 52.212-4(a) and (b) are revised to correct the title of the referenced clause (see 52.249-8).

FAR 52.243-1, Alternate V, paragraph (b) introductory text is corrected to read "or time required for" vice "or item required for". Error was made from the Phase II to Executive Review preparation of the FAR.

FAR 52.244-3(b) is revised to correct reference to read "15.903(d)".

FAR 52.246-19(a)(5)(i) is revised to remove the incorrect reference.

FAR 53.222(e) is revised to display the latest edition of SF 1413. Under the Paperwork Reduction Act, there is a requirement to update the OMB Control Number, and to include a burden statement and the expiration date of the paperwork clearance.

FAR 53.301-1413 illustrates the revised SF 1413.

Therefore, 48 CFR parts 2, 4, 5, 8, 9, 10, 14, 15, 25, 28, 32, 36, 42, 45, 47, 48, 49, 52, and 53 are amended as set forth below:

1. The authority citation for 48 CFR parts 2, 4, 5, 8, 9, 10, 14, 15, 25, 28, 32, 36, 42, 45, 47, 48, 49, 52, and 53 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 2—DEFINITIONS OF WORDS AND TERMS

2. Section 2.101 is amended by alphabetically adding a definition "Facsimile" to read as follows:

2.101 Definitions.

* * * * *

Facsimile means electronic equipment that communicates and reproduces both printed and handwritten material. If used in conjunction with a reference to a

document, e.g., facsimile bid, the term refers to a document (in the example given, a bid) that has been transmitted to and received by the Government via facsimile.

* * * * *

PART 4—ADMINISTRATIVE MATTERS

3. Section 4.703 is amended by adding paragraph (b)(3) and by revising paragraph (d) to read as follows:

4.703 Policy.

* * * * *

(b) * * *

(3) The contractor does not meet the original 90-day due date for submission of final indirect cost rate proposals specified in subparagraph (d)(2) of the clause at 52.216–7, Allowable Cost and Payment, and subparagraph (c)(2) of the clause at 52.216–13, Allowable Cost and Payment—Facilities. Under these circumstances, the retention periods in 4.705 shall be automatically extended one day for each day the proposal is not submitted after the original 90-day due date.

* * * * *

(d) If the information described in paragraph (a) of this section is maintained on a computer, contractors shall retain the computer data on a reliable medium for the time periods prescribed. Contractors may transfer computer data in machine readable form from one reliable computer medium to another. Contractors' computer data retention and transfer procedures shall maintain the integrity, reliability, and security of the original computer data. Contractors shall also retain an audit trail describing the data transfer. For the record retention time periods prescribed, contractors shall not destroy, discard, delete, or write over such computer data.

PART 5—PUBLICIZING CONTRACT ACTIONS

5.503 [Amended]

4. Section 5.503 is amended in paragraph (c)(1)(i) by adding the phrase "or Standard Form 1447, Solicitation/Contract," following the words "Award/Contract,".

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

5. Section 8.802 is amended by removing the existing paragraphs (a) and (c); by redesignating the existing paragraphs (b), (d), and (e) as (a), (b) and (c); by removing in the first sentence of paragraph (c) the words "in the District of Columbia" and inserting in their place "within the District of Columbia"; and by revising in new paragraph (b) the first sentence to read as follows:

8.802 Policy

* * * * *

(b) The head of each agency shall designate a central printing authority; that central printing authority may serve as the liaison with the Congressional Joint Committee on Printing (JCP) and the Public Printer on matters related to printing.

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

6. Section 9.405 is amended by adding paragraph (c) to read as follows:

9.405 Effect of listing.

* * * * *

(c) Contractors debarred, suspended, or proposed for debarment are excluded from acting as individual sureties (see Part 28).

PART 10—SPECIFICATIONS, STANDARDS, AND OTHER PURCHASE DESCRIPTIONS

10.002 [Amended]

7. Section 10.002 is amended by removing in the introductory text of paragraph (a) the reference "41 U.S.C. 253A(a)" and inserting in its place "41 U.S.C. 253a(a)".

8. Section 10.006 is amended by revising paragraph (a)(1)(ii) to read as follows:

10.006 Using specifications and standards.

(a) * * *

(1) * * *

(ii) Under the small purchase limitation in 13.000;

* * * * *

PART 14—SEALED BIDDING

9. Section 14.201–1 is amended by adding paragraph (a)(5) and by revising in paragraph (c) the fourth sentence to read as follows:

14.201–1 Uniform contract format.

(a) * * *

(5) Firm-fixed-price or fixed-price with economic price adjustment acquisitions that use the simplified contract format (see 14.201–9).

* * * * *

(c) * * * Award by acceptance of a bid on the award portion of Standard Form 33, Solicitation Offer and Award (SF 33), Standard Form 26, Award/Contract (SF 26), or Standard Form 1447, Solicitation/Contract (SF 1447). incorporates Section K, Representations, certifications, and other statements of bidders, in the resultant contract even though not physically attached.

* * * * *

10. Section 14.201–2 is amended by revising paragraphs (a)(1), (a)(2), and the second sentence in paragraph (b) to read as follows:

14.201–2 Part I—The Schedule.

* * * * *

(a) * * * (1) Prepare the invitation for bids on SF 33, or the SF 1447, unless otherwise permitted by this regulation. The SF 33 is the first page of the solicitation and includes Section A of the uniform contract format. When the SF 1447 is used as the solicitation document, the information in subdivisions (a)(2)(i) and (a)(2)(iv) of this subsection shall be inserted in block 9 of the SF 1447.

(2) When the SF 33 or SF 1447 is not used, include the following on the first page of the invitation for bids:

* * * * *

(b) * * * The SF 33 and SF 1447 may be supplemented as necessary by the Optional Form 336 (OF 336), Continuation Sheet (53.302–336).

11. Section 14.201–6 is amended by revising paragraphs (c)(3) and (r); by adding in the introductory text of paragraph (i), following "SF 33" the words "or SF 1447"; and by adding paragraphs (c)(4), (u), (v), and (w) to read as follows:

14.201–6 Solicitation provisions.

* * * * *

(c) * * *

(3) 52.214–7, Late Submissions, Modifications, and Withdrawals of Bids, for solicitations issued in the United States and Canada for submission of bids to a contracting office in the United States or Canada.

(4) 52.214–32, Late Submissions, Modifications, and Withdrawals of Bids (Overseas), for solicitations under which bids are to be submitted to a contracting office outside the United States or Canada.

* * * * *

(r) The contracting officer shall insert the provision at 52.214–23, Late Submissions, Modifications, and Withdrawals of Technical Proposals under Two-Step Sealed Bidding, in solicitations for technical proposals in step one of two-step sealed bidding issued in the United States and Canada for submission of technical proposals to a contracting office in the United States or Canada.

* * * * *

(u) The contracting officer shall insert the provision at 52.214–30, Annual Representations and Certifications-Sealed Bidding, in invitations for bids if annual representations and certifications are used (see 14.213).

(v) The contracting officer shall insert the provision at 52.214–33, Late Submissions, Modifications, and Withdrawals of Technical Proposals under Two-Step Sealed Bidding (Overseas), in solicitations for technical proposals in step one of two-step sealed bidding under which technical proposals are to be submitted to a contracting office outside the United States or Canada.

(w) The contracting officer shall insert the provision at 52.214–31, Facsimile Bids, in solicitations if facsimile bids are authorized (see 14.202–7).

12. Section 14.201–9 is added to read as follows:

14.201–9 Simplified contract format.

Policy. For firm-fixed-price or fixed-price with economic price adjustment acquisitions of supplies and services, the contracting officer may use the simplified contract format in lieu of the uniform contract format (see 14.201–1). The contracting officer has flexibility in preparation and organization of the simplified contract format. However, the following format should be used to the maximum practical extent:

(a) *Solicitation/contract form.* Standard Form (SF) 1447, Solicitation/Contract, shall be used as the first page of the solicitation.

(b) *Contract schedule.* Include the following for each contract line item:

(1) Contract line item number.

(2) Description of supplies or services, or data sufficient to identify the requirement.

(3) Quantity and unit of issue.

(4) Unit price and amount.

(5) Packaging and marking requirements.

(6) Inspection and acceptance, quality assurance, and reliability requirements.

(7) Place of delivery, performance and delivery dates, period of performance, and F.o.b. point.

(8) Other item-peculiar information as necessary (e.g., individual fund citations).

(c) *Clauses.* Include the clauses required by this regulation. Additional clauses shall be incorporated only when considered absolutely necessary to the particular acquisition.

(d) *List of documents and attachments.* Include if necessary.

(e) *Representations and instructions*—(1) *Representations and certifications.* Insert those solicitation provisions that require representations, certifications, or the submission of other information by offerors.

(2) *Instructions, conditions, and notices.* Include the solicitation provisions required by 14.201–6. Include any other information/instructions necessary to guide offerors.

(3) *Evaluation factors for award.* Insert all necessary evaluation factors for award.

(4) Upon award, the contracting officer need not physically include the provisions in subparagraphs (e)(1), (2), and (3) of this subsection in the resulting contract, but shall retain them in the contract file. Award by acceptance of a bid on the award portion of SF 1447 incorporates the representations, certifications, and other statements of bidders in the resultant contract even though not physically attached.

13. Section 14.202–7 is added to read as follows:

14.202–7 Facsimile bids.

(a) Unless prohibited or otherwise restricted by agency procedures, contracting officers may authorize facsimile bids (see 14.201–6(w)). In determining whether or not to authorize facsimile bids, the contracting officer shall consider factors such as—

(1) Anticipated bid size and volume;

(2) Urgency of the requirement;

(3) Frequency of price changes;

(4) Availability, reliability, speed, and capacity of the receiving facsimile equipment; and

(5) Adequacy of administrative procedures and controls for receiving, identifying, recording, and safeguarding facsimile bids, and ensuring their timely delivery to the bids opening location.

(b) If facsimile bids are authorized, contracting officers may, after the date set for bid opening, request the apparently successful offeror to provide the complete original signed bid.

14.203–2 [Amended]

14. Section 14.203–2 is amended in paragraph (a) by adding the words "invitations for" between the words "display of" and "bids".

15. Section 14.213 is added to read as follows:

14.213 Annual submission of representations and certifications.

(a) Submission of offeror representations and certifications on an annual basis, as an alternative to submission in each solicitation, may be authorized by agencies subject to the requirements of this section. The decision to use annual representations and certifications shall be made in accordance with agency procedures.

(b) In accordance with agency procedures, each contracting office utilizing annual representations and certifications shall establish procedures and assign responsibilities for centrally requesting, receiving, storing, verifying and updating offeror's annual submissions. Generally, the representations and certifications shall be effective for a period of 1 year from date of signature.

(c) The contracting officer shall not include in individual solicitations the full text of provisions that are contained in the annual representations and certifications.

(d) Offerors shall make changes that affect only one solicitation by completing the appropriate section of the provision at 52.214–30, Annual Representations and Certifications—Sealed Bidding.

16. Section 14.301 is amended by revising paragraph (a); by redesignating existing paragraph (c) as (d); and by adding new paragraph (c) to read as follows:

14.301 Responsiveness of bids.

(a) To be considered for award, a bid must comply in all material respects with the invitation for bids. Such compliance enables bidders to stand on an equal footing and maintain the integrity of the sealed bidding system.

* * * * *

(c) Facsimile bids shall not be considered unless permitted by the solicitation (see 14.202–7).

* * * * *

17. Section 14.303 is amended by revising paragraph (a) to read as follows:

14.303 Modifications or withdrawal of bids.

(a) Bids may be modified or withdrawn by written or telegraphic notice received in the office designated in the invitation for bids not later than the exact time set for opening of bids. Unless proscribed by agency regulations, a telegraphic modification or withdrawal of a bid received in such office by telephone from the receiving telegraph office shall be considered. However, the message shall be confirmed by the telegraph company by sending a copy of the written telegram that formed the basis for the telephone call. If the solicitation authorizes facsimile bids, bids may be modified or withdrawn via facsimile received at any time before the exact time set for receipt of bids, subject to the conditions specified in the provision prescribed in 14.201–6(w). Modifications received by telephone (including a record of those telephoned by the telegraph company) or facsimile shall be sealed in an

envelope by a proper official. The official shall write on the envelope (1) the date and time of receipt and by whom, and (2) the number of the invitation for bids, and shall sign the envelope. No information contained in the envelope shall be disclosed before the time set for bid opening.

* * * * *

18. Section 14.304–1 is amended by revising paragraphs (a)(1), (a)(2), and (b); by redesignating existing paragraph (d) as (e); and by adding new paragraphs (a)(3) and (d) to read as follows:

14.304–1 General.

* * * * *

(a) * * *

(1) It was sent to a contracting office in the United States or Canada by registered or certified mail not later than 5 calendar days before the bid receipt date specified;

(2) It was sent by mail (or, if authorized by the solicitation, was sent by telegram or via facsimile) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or

(3) It was sent to a contracting office in the United States or Canada by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee not later than 5:00 PM at the place of mailing 2 working days prior to the date specified for receipt of bids. The term "working days" excludes weekends and Federal holidays.

(b) The only acceptable evidence to establish the date of mailing of a late bid, modification, or withdrawal sent to a contracting office in the United States or Canada either by registered or certified mail is a U.S. or Canadian Postal Service postmark both on the envelope or wrapper and on the original receipt from the U.S. or Canadian Postal Service. Both postmarks must show a legible date, or the bid, modification, or withdrawal shall be deemed to have been mailed late. (The term "postmark" means a printed, stamped, or otherwise placed impression (exclusive of a postage meter machine impression) that is readily identifiable without further action as having been supplied and affixed on the date of mailing by employees of the U.S. or Canadian Postal Service. Therefore, bidders should request the postal clerk to place a legible hand cancellation bull's-eye postmark on both the receipt and the envelope or wrapper.)

* * * * *

(d) The only acceptable evidence to establish the date of mailing of a late bid, modification, or withdrawal sent by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee is the date entered by the post office receiving clerk on the "Express Mail Next Day Service-Post Office to Addressee" label and the postmark on the envelope or wrapper and on the original receipt from the U.S. Postal Service. "Postmark" has the same meaning as defined in paragraph (b) of this subsection, excluding postmarks of the Canadian Postal Service. Therefore, bidders should request the postal clerks to place a legible hand cancellation bull's-eye postmark on both the receipt and the envelope or wrapper.

* * * * *

19. Section 14.30–2 is revised to read as follows:

14.304–2 Notification to late bidders.

When a bid, modification of bid, or withdrawal of bid is received late and it is clear from available information that it cannot be considered, the contracting officer shall promptly notify the bidder accordingly. However, when a late bid, modification of bid, or withdrawal of bid is transmitted to a contracting office in the United States or Canada by registered or certified mail or by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee and is received before award, the bidder shall be promptly notified substantially as follows: Your bid in response to Invitation for Bids Number _____ dated _____ for _____ [*insert subject matter or short title*] was received after the time for opening specified in the Invitation. Accordingly, your bid will not be opened or considered for award unless there is received from you by _____ [*insert date*] the original post office receipt for (*insert one of the following, as appropriate*):

(a) Registered or certified mail showing a date of mailing not later than the fifth calendar day before the date specified for opening (e.g., a bid submitted in response to a solicitation requiring receipt of bids by the 20th of the month must have been mailed by the 15th or earlier); or

(b) U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee showing a date of mailing not later than 5:00 PM two Federal working days prior to the date specified for opening.

20. Section 14.407–1 is amended by revising paragraph (d) to read as follows:

14.407–1 General.

* * * * *

(d)(1) Award is generally made by using the Award portion of Standard Form (SF) 33, Solicitation, Offer, and Award, or SF 1447, Solicitation/Contract (see 53.214). If an offer on an SF 33 leads to further changes, the resulting contract shall be prepared as a bilateral document on SF 26, Award/Contract.

(2) Use of the Award portion of SF 33, SF 26, or SF 1447, does not preclude the additional use of informal documents, including telegrams, as notices of awards.

PART 15—CONTRACTING BY NEGOTIATION

21. Section 15.402 is amended by adding paragraphs (i) and (j) to read as follows:

15.402 General.

* * * * *

(i) Unless prohibited or otherwise restricted by agency procedures, contracting officers may authorize facsimile proposals (see 15.407(i)). In determining whether or not to authorize facsimile proposals, the contracting officer shall consider such factors as—

(1) Anticipated proposal size and volume;

(2) Urgency of the requirement;

(3) Frequency of price changes;

(4) Availability, reliability, speed, and capacity of the receiving facsimile equipment; and

(5) Adequacy of administrative procedures and controls for receiving, identifying, recording, and safeguarding facsimile proposals, and ensuring their timely delivery to the proposal opening location.

(j) If facsimile proposals are authorized, contracting officers may, after the date set for receipt of proposal, request offeror(s) to provide the complete original signed proposal.

22. Section 15.406–1 is amended by adding paragraph (a)(8); and in the third sentence of paragraph (b) by removing the words "SF 33 or SF 26" and inserting in their place "SF 33, SF 26, or SF 1447" to read as follows:

15.406–1 Uniform contract format.

* * * * *

(a) * * *

(8) Contracts utilizing the simplified contract format (see 15.416).

* * * * *

23. Section 15.406–2 is amended by revising paragraphs (a)(1), the introductory text of paragraph (a)(3), and paragraph (a)(3)(vii) by inserting a period following the words "Zip Code"; and removing the remainder of the sentence to read as follows:

15.406-2 Part I—The Schedule.

(a) * * *

(1) Prepare RFP's on Standard Form 33, Solicitation, Offer and Award (53.301-33) or Standard Form 1447, Solicitation/Contract (53.301-1447), unless otherwise permitted by this regulation. The first page of the SF 33 or SF 1447 is the first page of the solicitation. The first page of the SF 33 includes section A of the uniform contract format. When the SF 1447 is used as the solicitation document, ensure the information in subdivisions (a)(3)(i) and (a)(3)(iv) of this subsection are inserted in block 9 of the SF 1447.

* * * * *

(3) When other than SF 33, SF 18, or SF 1447 is used, include the following on the first page of the solicitation:

* * * * *

24. Section 15.407 is amended by revising paragraphs (c)(6) and (c)(8); by adding in paragraph (f) the words "or SF 1447" following the words "SF 33"; and by adding paragraphs (c)(9), (i), and (j) to read as follows:

15.407 Solicitation provisions.

* * * * *

(c) * * *

(6) 52.215-10, Late Submissions, Modifications, and Withdrawals of Proposals, for solicitations issued in the United States and Canada for submission of offers to a contracting office in the United States or Canada;

* * * * *

(8) 52.215-12, Restriction on Disclosure and Use of Data; and

(9) 52.215-36, Late Submissions, Modifications, and Withdrawals of Proposals (Overseas), for solicitations under which offers are to be submitted to a contracting office outside the United States or Canada.

* * * * *

(i) The contracting officer shall insert the provision at 52.215-35, Annual Representations and Certifications—Negotiation, in requests for proposals if annual representations and certifications are utilized (see 14.213).

(j) The contracting officer shall insert the provision at 52.215-18, Facsimile Proposals, in solicitations if facsimile proposals are authorized (see 15.402(i)).

25. Section 15.412 is amended by revising paragraph (e) to read as follows:

15.412 Late proposals and modifications.

* * * * *

(e) When a late proposal or modification is transmitted to a contracting officer in the United States or Canada by registered or certified mail or by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee and is received before award, the offeror shall be promptly notified substantially in accordance with the notice in 14.304-2, appropriately modified to relate to proposals.

* * * * *

26. Section 15.414 is revised to read as follows:

15.414 Forms.

(a) Standard Form 33 (SF 33), Solicitation, Offer and Award (see 53.301-33), shall be used in connection with the solicitation and award of negotiated contracts. Award may be made using the Award portion of SF 33, except as provided in paragraph (b) of this section.

(b) Standard Form 26 (SF 26), Award/Contract (see 53.301-26), shall be used when entering into negotiated contracts when the prospective contractor has amended its offer, unless—

(1) The contract is for the construction, alteration, or repair of buildings, bridges, roads, or other real property;

(2) The acquisition is one for which the FAR prescribes special contract forms; or

(3) Use of a purchase order is appropriate.

(c) Standard Form 1447 (SF 1447), Solicitation/Contract (see 53.301-1447), shall be used in connection with negotiated acquisitions that use the simplified contract format and may be used in lieu of the SF 26 or SF 33 for other acquisitions. Award is generally made using the award portion of the SF 1447 (see 53.215-1).

27. Section 15.416 is added to read as follows:

15.416 Simplified contract format.

For firm-fixed-price or fixed-price with economic price adjustment acquisitions of supplies and services, the contracting officer may use the simplified contract format in lieu of the uniform contract format (see 14.201-1).

PART 25—FOREIGN ACQUISITION

25.102 [Amended]

28. Section 25.102 is amended in paragraph (a)(4) by removing the words "one or more agencies have determined."

29. Section 25.108 is amended by revising paragraphs (a) and (b); and by alphabetically adding in paragraph (d)(1) the items "Rabbit fur felt", and "Yarn, 50 Denier rayon" to read as follows:

25.108 Excepted articles, materials, and supplies.

(a) One or more agencies have determined that the articles, materials, and supplies listed in paragraph (d) of this section are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The list in paragraph (d) of this section is furnished for information only; an article, material or supply listed therein may be treated as domestic only when the agency concerned has made a determination that it is not mined, produced, or manufactured in the United States in sufficient and reasonably available quantities of a satisfactory quality.

(b) Agencies making determinations under 25.102(a)(4) or 25.202(a)(3) for unlisted articles, materials, or supplies shall submit a copy of these determinations to the appropriate FAR Council for possible addition of items to the list.

* * * * *

25.202 [Amended]

30. Section 25.202 is amended in paragraph (a)(3) by removing the words "One or more agencies have determined that the" and inserting in their place the word "The".

PART 28—BONDS AND INSURANCE

31. Section 28.101-4 is revised to read as follows:

28.101-4 Noncompliance with bid guarantee requirements.

(a) In sealed bidding, noncompliance with a solicitation requirement for a bid guarantee requires rejection of the bid, except in the situations described in paragraph (c) of this subsection when the noncompliance shall be waived.

(b) In negotiation, noncompliance with a solicitation requirement for a bid guarantee requires rejection of an initial proposal as unacceptable, if a determination is made to award the contract based on initial proposals without discussion, except in the situations described in paragraph (c) of this subsection when noncompliance shall be waived. (See 15.610(a) for conditions regarding making awards based on initial proposals.) If the conditions for awarding based on initial proposals are not met, deficiencies in bid guarantees submitted by offerors determined to be in the competitive range shall be addressed during discussions and the offeror shall be given an opportunity to correct the deficiency.

(c) Noncompliance with a solicitation requirement for a bid guarantee shall be waived in the following circumstances unless the contracting officer determines in writing that acceptance of the bid would be detrimental to the Government's interest when—

(1) Only one offer is received. In this case, the contracting officer may require the furnishing of the bid guarantee before award;

(2) The amount of the bid guarantee submitted is less than required, but is equal to or greater than the difference between the offer price and the next higher acceptable offer;

(3) The amount of the bid guarantee submitted, although less than that required by the solicitation for the maximum quantity offered, is sufficient for a quantity for which the offeror is otherwise eligible for award. Any award to the offeror shall not exceed the quantity covered by the bid guarantee;

(4) The bid guarantee is received late, and late receipt is waived under 14.304;

(5) A bid guarantee becomes inadequate as a result of the correction of a mistake under 14.406 (but only if the bidder will increase the bid guarantee to the level required for the corrected bid);

(6) A telegraphic offer modification is received without corresponding modification of the bid guarantee, if the modification expressly refers to the previous offer and the offeror corrects any deficiency in bid guarantee;

(7) An otherwise acceptable bid bond was submitted with a signed offer, but the bid bond was not signed by the offeror;

(8) An otherwise acceptable bid bond is errroneously dated or bears no date at all; or

(9) A bid bond does not list the United States as obligee, but correctly identifies the offeror, the solicitation number, and the name and location of the project involved, so long as it is acceptable in all other respects.

32. Section 28.106–1 is amended by revising the first sentence of the introductory text and paragraphs (e), (h), (i), and (j); and by adding paragraphs (n) and (o) to read as follows:

28.106–1 Bonds and bond-related forms.

The following Standard Forms (SF's) and Optional Forms (OF's) shown in 53.301 and 53.302 shall be used, except in foreign countries, when a bid bond, performance or payment bond, or an individual surety is required. * * *

* * * * *

(e) SF 28, Affidavit of Individual Surety (see 28.203).

* * * * *

(h) SF 273, Reinsurance Agreement for a Miller Act Performance Bond (see 28.202(a)(4)).

(i) SF 274, Reinsurance Agreement for a Miller Act Payment Bond (see 28.202(a)(4)).

(j) SF 275, Reinsurance Agreement in Favor of the United States (see 28.202(a)(4)).

* * * * *

(n) OF 90, Release of Lien on Real Property (see 28.203–5).

(o) OF 91, Release of Personal Property from Escrow (see 28.203–5).

28.202 [Removed]

33. Section 28.202 is removed.

28.202–1 [Redesignated as 28.202]

34. Section 28.202–1 is redesignated as new section 28.202, and the section title and paragraph (d) are revised to read as follows:

28.202 Acceptability of corporate sureties.

* * * * *

(d) The Department of the Treasury Circular 570 may be obtained from the U.S. Department of the Treasury, Financial Management Service, Surety Bond Branch, 401 14th St., SW, 2nd Floor—West Wing, Washington, DC 20227.

28.202–2 [Removed]

35. Section 28.202–2 is removed.

28.203–1 [Redesignated as 28.204–1]

36. Section 28.203–1 is redesignated as 28.204–1.

28.203–2 [Redesignated as 28.204–2]

37. Section 28.203–2 is redesignated as 28.204–2.

28.203 [Redesignated as 28.204]

38. Section 28.203 is redesignated as 28.204, and new section 28.203 is added to read as follows:

28.203 Acceptability of individual sureties.

(a) An individual surety is acceptable for all types of bonds except position schedule bonds. The contracting officer shall determine the acceptability of individuals proposed as sureties, and shall ensure that the surety's pledged assets are sufficient to cover the bond obligation. (See 28.203–7 for information on excluded individual sureties.)

(b) An individual surety must execute the bond, and the unencumbered value of the assets (exclusive of all outstanding pledges for other bond obligations) pledged by the individual surety, must equal or exceed the penal amount of each bond. The individual surety shall execute the Standard Form 28 and provide a security interest in accordance with 28.203–1. One individual surety is adequate support for a bond, provided the unencumbered value of the assets pledged by that individual surety equal or exceed the amount of the bond. An offeror may submit up to three individual sureties for each bond, in which case the pledged assets, when combined, must equal or exceed the penal amount of the bond. Each individual surety must accept both joint and several liability to the extent of the penal amount of the bond.

(c) If the contracting officer determines that no individual surety in support of a bid guarantee is acceptable, the offeror utilizing the individual surety shall be rejected as nonresponsible, except as provided in 28.101–4. A finding of nonresponsibility based on unacceptability of an individual surety, need not be referred to the Small Business Administration for a competency review. (See 19.602–1(a)(2)(i) and 61 Comp. Gen. 456 (1982).)

(d) A contractor submitting an unacceptable individual surety in satisfaction of a performance or payment bond requirement may be permitted a reasonable time, as determined by the contracting officer, to substitute an acceptable surety for a surety previously determined to be unacceptable.

(e) When evaluating individual sureties, contracting officers may obtain assistance from the office identified in 28.202(d).

(f) Contracting officers shall obtain the opinion of legal counsel as to the adequacy of the documents pledging the assets prior to accepting the bid guarantee and payment and performance bonds.

(g) Evidence of possible criminal or fraudulent activities by an individual surety shall be referred to the appropriate agency official in accordance with agency procedures.

39. Section 28.203–1 is added to read as follows:

28.203–1 Security interests by an individual surety.

(a) An individual surety may be accepted only if a security interest in assets acceptable under 28.203–2 is provided to the Government by the individual surety. The security interest shall be furnished with the bond.

(b) The value at which the contracting officer accepts the assets pledged must be equal to or greater than the aggregate penal amounts of the bonds required by the solicitation and may be provided by one or a combination of the following methods:

(1) An escrow account with a federally insured financial institution in

the name of the contracting agency. (See 28.203-2(b)(2) with respect to Government securities in book entry form.) Acceptable securities for deposit in escrow are discussed in 28.203-2. While the offeror is responsible for establishing the escrow account, the terms and conditions must be acceptable to the contracting officer. At a minimum, the escrow account shall provide for the following:

(i) The account must provide the contracting officer the sole and unrestricted right to draw upon all or any part of the funds deposited in the account. A written demand for withdrawal shall be sent to the financial institution by the contracting officer, after obtaining the concurrence of legal counsel, with a copy to the offeror/contractor and to the surety. Within the time period specified in the demand, the financial institution would pay the Government the amount demanded up to the amount on deposit. If any dispute should arise between the Government and the offeror/contractor, the surety, or the subcontractors or suppliers with respect to the offer or contract, the financial institution would be required, unless precluded by order of a court of competent jurisdiction, to disburse monies to the Government as directed by the contracting officer.

(ii) The financial institution would be authorized to release to the individual surety all or part of the balance of the escrow account, including any accrued interest, upon receipt of written authorization from the contracting officer.

(iii) The Government would not be responsible for any costs attributable to the establishment, maintenance, administration, or any other aspect of the account.

(iv) The financial institution would not be liable or responsible for the interpretation of any provisions or terms and conditions of the solicitation or contract.

(v) The financial institution would provide periodic account statements to the contracting officer.

(vi) The terms of the escrow account could not be amended without the consent of the contracting officer.

(2) A lien on real property, subject to the restrictions in 28.203-2 and 28.203-3.

40. Section 28.203-2 is redesignated as 28.204-2 and new section 28.203-2 is added to read as follows:

28.203-2 Acceptability of assets.

(a) The Government will accept only cash, readily marketable assets, or irrevocable letters of credit from a federally insured financial institution from individual sureties to satisfy the underlying bond obligations.

(b) Acceptable assets include—

(1) Cash, or certificates of deposit, or other cash equivalents with a federally insured financial institution;

(2) United States Government securities at market value. (An escrow account is not required if an individual surety offers Government securities held in book entry form at a depository institution. In lieu thereof, the individual shall provide evidence that the depository institution has (i) placed a notation against the individual's book entry account indicating that the security has been pledged in favor of the respective agency; (ii) agreed to notify the agency prior to maturity of the security; and (iii) agreed to hold the proceeds of the security subject to the pledge in favor of the agency until a substitution of securities is made or the security interest is formally released by the agency);

(3) Stocks and bonds actively traded on a national U.S. security exchange with certificates issued in the name of the individual surety. National security exchanges are—(i) the New York Stock Exchange; (ii) the American Stock Exchange; (iii) the Boston Stock Exchange; (iv) the Cincinnati Stock Exchange; (v) the Midwest Stock Exchange; (vi) the Philadelphia Stock Exchange; (vii) the Pacific Stock Exchange; and (viii) the Spokane Stock Exchange. These assets will be accepted at 90 percent of their 52-week low, as reflected at the time of submission of the bond. Stock options and stocks on the over-the-counter (OTC) market or NASDQ Exchanges will not be accepted. Assistance in evaluating the acceptability of securities may be obtained from the Securities and Exchange Commission, Division of Enforcement, 450 Fifth Street NW., Washington, DC 20549.

(4) Real property owned in fee simple by the surety without any form of concurrent ownership, except as provided in subdivision (c)(3)(iii) of this subsection, and located within the 50 United States, its territories, or possessions. These assets will be accepted at 100 percent of the most current tax assessment value (exclusive of encumbrances) or 75 percent of the properties' unencumbered market value provided a current appraisal is furnished (see 28.203-3).

(5) Irrevocable letters of credit (ILC) issued by a federally insured financial institution in the name of the contracting agency and which identify the agency and solicitation or contract number for which the ILC is provided.

(c) Unacceptable assets include but are not limited to—

(1) Notes or accounts receivable;

(2) Foreign securities;

(3) Real property as follows:

(i) Real property located outside the United States, its territories, or possessions.

(ii) Real property which is a principal residence of the surety.

(iii) Real property owned concurrently regardless of the form of co-tenancy (including joint tenancy, tenancy by the entirety, and tenancy in common) except where all co-tenants agree to act jointly.

(iv) Life estates, leasehold estates, or future interests in real property.

(4) Personal property other than that listed in paragraph (b) of this subsection (e.g., jewelry, furs, antiques);

(5) Stocks and bonds of the individual surety in a controlled, affiliated, or closely held concern of the offeror/contractor;

(6) Corporate assets (e.g., plant and equipment);

(7) Speculative assets (e.g., mineral rights);

(8) Letters of credit, except as provided in 28.203-2(b)(5).

41. Sections 28.203-3 through 28.203-7 are added to read as follows:

28.203-3 Acceptance of real property.

(a) Whenever a bond with a security interest in real property is submitted, the individual surety shall provide—

(1) Evidence of title in the form of a certificate of title prepared by a title insurance company approved by the United States Department of Justice. This list entitled List of Approved Attorneys, Abstracters, and Title Companies is available from the Title Unit, Land Acquisition Section, Land and Natural Resource Division, Department of Justice, Washington, DC 20530. This title evidence must show fee simple title vested in the surety along with any concurrent owners; whether any real estate taxes are due and payable; and any recorded encumbrances against the property, including the lien filed in favor of the Government under paragraph (d) of this subsection;

(2) Evidence of the amount due under any encumbrance shown in the evidence of title;

(3) A copy of the current real estate tax assessment of the property or a current appraisal dated no earlier than 6 months prior to the date of the bond, prepared by a professional appraiser who certifies that the appraisal has been conducted in accordance with the generally accepted appraisal standards as reflected in the Uniform Standards of

Professional Appraisal Practice as promulgated by the Appraisal Foundation, 1029 Vermont Avenue NW, Washington, DC 20005.

(b) Failure to provide evidence that the lien has been properly recorded will render the offeror nonresponsible.

(c) The individual surety is liable for the payment of all administrative costs of the Government, including legal fees, associated with the liquidation of pledged real estate.

(d) The following format, or any document substantially the same, shall be used by the surety and recorded in the local recorder's office when a surety pledges real estate on Standard Form 28, Affidavit of Individual Surety.

Lien on Real Estate

I/we agree that this instrument constitutes a lien in the amount of $_____ on the property described in this lien. The rights of the United States Government shall take precedence over any subsequent lien or encumbrance until the lien is formally released by a duly authorized representative of the United States. I/we hereby grant the United States the power of sale of subject property, including the right to satisfy its reasonable administrative costs, including legal fees associated with any sale of subject property, in the event of contractor default if I/we otherwise fail to satisfy the underlying ( ) bid guarantee, ( ) performance bond, ( ) or payment bond obligations as an individual surety on solicitation/contract number _____. The lien is upon the real estate now owned by me/us described as follows: (legal description, street address and other identifying description)

IN WITNESS HEREOF, I/we have hereunto affixed my/our hand(s) and seal(s) this _____ DAY OF _____ 19____.

_____

WITNESS:

_____

(SEAL)

I, _____, a Notary Public in and for the (CITY) _____, (STATE) _____, do hereby certify that _____, a party or parties to a certain Agreement bearing the date _____ day of _____ 19 ____, and hereunto annexed, personally appeared before me, the said _____ being personally well known to me as the person(s) who executed said lien, and acknowledged the same to be his/her/their act and deed. GIVEN under my hand and seal this _____ day of _____ 19____.

_____

NOTARY PUBLIC, STATE

My Commission expires:

28.203-4 Substitution of assets.

An individual surety may request the Government to accept a substitute asset for that currently pledged by submitting a written request to the responsible contracting officer. The contracting officer may agree to the substitution of assets upon determining, after consultation with legal counsel, that the substitute assets to be pledged are adequate to protect the outstanding bond or guarantee obiligations. If acceptable, the substitute assets shall be pledged as provided for in Subpart 28.2

28.203-5 Release of lien.

(a) After consultation with legal counsel, the contracting officer shall release the security interest on the individual surety's assets using the Optional Form 90, Release of Lien on Real Property, or Optional Form 91, Release of Personal Property from Escrow, or a similar release as soon as possible consistent with the conditions in subparagraphs (a) (1) and (2) of this subsection. A surety's assets pledged in support of a payment bond may be released to a subcontractor or supplier upon Government receipt of a Federal district court judgment, or a sworn statement by the subcontractor or supplier that the claim is correct along with a notarized authorization of the release by the surety stating that it approves of such release.

(1) *Contracts subject to the Miller Act.* The security interest shall be maintained for the later of (i) 1 year following final payment, (ii) until completion of any warranty period (applicable only to performance bonds), or (iii) pending resolution of all claims filed against the payment bond during the 1-year period following final payment.

(2) *Contracts not subject to the Miller Act.* The security interest shall be maintained for 90 days following final payment or until completion of any warranty period (applicable only to performance bonds), whichever is later.

(b) Upon written request, the contracting officer may release the security interest on the individual surety's assets in support of a bid guarantee based upon evidence that the offer supported by the individual surety will not result in contract award.

(c) Upon written request by the individual surety, the contracting officer may release a portion of the security interest on the individual surety's assets based upon substantial performance of the contractor's obligations under its performance bond. Release of the security interest in support of a payment bond must comply with the subparagraphs (a) (1) and (2) of this subsection. In making this determination, the contracting officer will give consideration as to whether the unreleased portion of the lien is sufficient to cover the remaining contract obligations, including payments to subcontractors and other potential liabilities. The individual surety shall, as a condition of the partial release, furnish an affidavit agreeing that the release of such assets does not relieve the individual surety of its obligations under the bond(s).

28.203-6 Contract clause.

Insert the clause at 52.228-11 in solicitations and contracts which require the submission of bid guarantees, performance, or payment bonds.

28.203-7 Exclusion of individual sureties.

(a) An individual may be excluded from acting as a surety on bonds submitted by offerors on procurement by the executive branch of the Federal Government, by the acquiring agency's head or designee utilizing the procedures in Subpart 9.4. The exclusion shall be for the purpose of protecting the Government.

(b) An individual may be excluded for any of the following causes:

(1) Failure to fulfill the obligations under any bond.

(2) Failure to disclose all bond obligations.

(3) Misrepresentation of the value of available assets or outstanding liabilities.

(4) Any false or misleading statement, signature or representation on a bond or affidavit of individual suretyship.

(5) Any other cause affecting responsibility as a surety of such serious and compelling nature as may be determined to warrant exclusion.

(c) An individual surety excluded pursuant to this subsection shall be included on the list entitled Parties Excluded from Procurement Programs. (See 9.404.)

(d) Contracting officers shall not accept the bonds of individual sureties whose names appear on the list entitled Parties Excluded from Procurement Programs (see 9.404) unless the acquiring agency's head or a designee states in writing the compelling reasons justifying acceptance.

(e) An exclusion of an individual surety under this subsection will also preclude such party from acting as a contractor in accordance with Subpart 9.4.

28.204-1 [Amended]

42. Section 28.204-1, as redesignated from 28.203-1, is amended by removing in the first sentence the citation "6 U.S.C. 15" and inserting in its place "31 U.S.C. 9303"; and by removing the date "February 6, 1935" and inserting in its place "July 1, 1978".

43. Section 28.204-2, as redesignated from 28.203-2, is amended by revising the section heading to read as follows:

28.204-2 Certified or cashiers checks, bank drafts, money orders, or currency.

* * * * *

PART 32—CONTRACT FINANCING

44. Section 32.503-6 is amended by revising in paragraph (b)(1) the third sentence to read as follows:

32.503-6 Suspension or reduction of payments.

* * * * *

(b) * * * If the system or controls are deemed inadequate, progress payments shall be suspended (or the portion of progress payments associated with the unacceptable portion of the contractor's accounting system shall be suspended) until the necessary changes have been made.

* * * * *

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

45. Section 36.201 is amended by revising paragraph (a)(1) to read as follows:

36.201 Evaluation of contractor performance.

(a) *Preparation of performance evaluation reports.* (1) The contracting activity shall evaluate contractor performance and prepare a performance report using the SF 1420, Performance Evaluation (Construction Contracts), for each construction contract of—

(i) $500,000 or more; or

(ii) More than $10,000, if the contract was terminated for default.

* * * * *

46. Section 36.505 is revised to read as follows:

36.505 Material and workmanship.

The contracting officer shall insert the clause at 52.236-5, Material and Workmanship, in solicitations and contracts for construction contracts.

47. Section 36.507 is revised to read as follows:

36.507 Permits and responsibilities.

The contracting officer shall insert the clause at 52.236-7, Permits and Responsibilities, in solicitations and contracts when a fixed-price or cost-reimbursement construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated.

36.520 [Removed]

48. Section 36.520 is removed.

36.521 [Redesignated as 36.520]

49. Section 36.521 is redesignated as 36.520.

36.602-3 [Amended]

50. Section 36.602-3 is amended in the first sentence of paragraph (c) by inserting a period following the word "services" and removing the phrase ", when the prospective architect-engineer contract is estimated to exceed $10,000."

36.602-5 [Amended]

51. Section 36.502-5 is amended in the section title and in the first sentence of the introductory text by removing in each place the figure "$10,000" and inserting in each place the words "the small purchase limitation".

PART 42—CONTRACT ADMINISTRATION

52. Section 42.302 is amended by revising paragraph (a)(39) to read as follows:

42.302 Contract administration functions.

(a) * * *

(39) Ensure contractor compliance with contractual safety requirements.

* * * * *

53. Section 42.1406-1 is amended by revising the second sentence to read as follows:

42.1406-1 Advance notice.

* * * Generally, this notification is required only for classified material; sensitive, controlled, and certain other protected material; explosives, and some other hazardous materials; selected shipments requiring movement control; or minimum carload or truckload shipments. * * *

54. Section 42.1406-2 is revised to read as follows:

42.1406-2 Contract clause.

The contracting officer shall insert the clause at 52.242-12, Report of Shipment (REPSHIP), in solicitations and contracts when advance notice of shipment is required for safety or security reasons, or where carload or truckload shipments will be made to DoD installations or, as required, to civilian agency facilities.

PART 45—GOVERNMENT PROPERTY

45.305 [Removed and Reserved]

55. Section 45.305 is removed and reserved.

56. Section 45.306-2 is amended by revising the section and the title to read as follows:

45.306-2 Special tooling under cost-reimbursement contracts.

Title to special tooling under cost-reimbursement contracts is acquired by the Government in all cases. The clause used for this purpose is 52.245-5, Government Property (Cost-Reimbursement, Time-and-Material, or Labor-Hour Contracts).

57. Section 45.306-3 is amended by revising the section and the title to read as follows:

45.306-3 Special tooling under fixed-price contracts.

(a) *Criteria for acquisition.* In deciding whether or not to acquire title to special tooling, or rights to title, under fixed-price contracts, the contracting officer shall consider the following factors:

(1) The current or probable future need of the Government for the items involved (including in-house use) and the estimated cost of producing them if not acquired.

(2) The estimated residual value of the items.

(3) The administrative burden and other expenses incident to reporting, recordkeeping, preparation, handling transportation, and storage.

(4) The feasibility and probable cost of making the items available to other offerors in the event of future acquisitions.

(5) The amount offered by the contractor for the right to retain the items.

(6) The affect on future competition and contract pricing.

(b) *Decision not to acquire special tooling.* In contracts in which the Government will not acquire title to special tooling, or rights to title, special requirements may be included in the Schedule of the contract (e.g., requirement governing the contractor's capitalization of special tooling costs).

45.306-4 [Removed and Reserved]

58. Section 45.306-4 is removed and reserved.

59. Section 45.306-5 is added to read as follows:

45.306-5 Contract clause.

The contracting officer shall insert the clause at 52.245-17, Special Tooling, in solicitations and contracts when a fixed-price contract is contemplated, and either the contract will include special tooling provided by the Government or the Government will acquire title or right to title in special tooling to be

acquired or fabricated by the contractor for the Government, other than special tooling to be delivered as an end item under the contract. The Special Tooling clause shall apply to all special tooling accountable to the contract.

45.307-1 [Amended]

60. Section 45.307-1 is amended by removing in paragraph (b) the reference "45.306-2(c)" and inserting in its place the reference "45.306-3(a)".

61. Section 45.307-3 is added to read as follows:

45.307-3 Contract clause.

The contracting officer shall insert the clause at 52.245-18, Special Test Equipment, in solicitations and contracts when contracting by negotiation and the contractor will acquire or fabricate special test equipent for the Government but the exact identification of the special test equipment to be acquired or fabricated is unknown.

45.308 [Amended]

62. Section 45.308 is amended by removing paragraphs (a) and (b). The section heading remains.

63. Section 45.308-1 is added to read as follows:

45.308-1 General.

(a) The contracting officer may provide Government production and research property on an "as is" basis for performing fixed-price, time-and-material, and labor-hour contracts. It may also be furnished under a facilities contract, in which case the contract shall state that the contractor will not be reimbursed for transporting, installing, modifying, repairing, or otherwise making the property ready for use.

(b) When the property is provided under other than a facilities contract, the solicitation shall state that—

(1) Offerors may inspect the property before submitting offers and the conditions under which it may be inspected;

(2) The property is offered in its current condition, f.o.b. present location (provide specific locations);

(3) Offerors must satisfy themselves that the property is suitable for their use;

(4) The successful offeror shall bear the cost of transporting, installing, modifying, repairing, or otherwise making the property suitable for use; and

(5) Evaluations will be made in accordance with Subpart 45.2 to eliminate any competitive advantage resulting from using the property.

64. Section 45.308-2 is added to read as follows:

45.308-2 Contract clause.

The contracting officer shall insert the clause at 52.245-19, Government Property Furnished "As Is," in solicitations and contracts when a contract other than a consolidated facilities contract, a facilities acquisition contract, or a facilities use contract is contemplated and Government production and research property is to be furnished "as is" (see 45.106 for additional clauses that may be required).

PART 47—TRANSPORTATION

65. Section 47.104-4 is amended by revising paragraph (b) to read as follows:

47.104-4 Contract clause.

* * * * *

(b) The contracting officer may insert the clause at 52.247-1, Commercial Bill of Lading Notations, in solicitations and contracts awarded within the small purchase limitation at 13.000 when it is contemplated that the delivery terms will be f.o.b. origin.

66. Section 47.305-16 is amended by revising the section title and by revising paragraph (b) to read as follows:

47.305-16 Shipping characteristics.

* * * * *

(b) *Guaranteed shipping characteristics.* (1) The contracting officer shall insert in soliciations and contracts, excluding those awarded under the small purchase procedures of Part 13, the clause at 52.247-60, Guaranteed Shipping Characteristics, when shipping and other characteristics are required to evaluate offers as to transportation costs. When all of the shipping characteristics listed in paragraph (a) of the clause at 52.247-60 are not required to evaluate offers as to transportation costs, the contracting officer shall delete the characteristics not required from the clause.

(2) The award document shall show the shipping characteristics used in the evaluation.

* * * * *

PART 49—TERMINATION OF CONTRACTS

67. Section 49.402-3 is amended by revising paragraph (e)(2) to read as follows:

49.402-3 Procedure for default.

* * * * *

(e) * * *

(2) When a termination for default appears imminent, the contracting officer shall provide a written notification to the surety. If the contractor is subsequently terminated for default, a copy of the notice of default shall be sent to the surety.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.102-1 [Amended]

68. Section 52.102-1 is amended by removing paragraph (d).

69. Section 52.102-2 is amended by adding paragraph (c) to read as follows:

52.102-2 Incorporation in full text.

* * * * *

(c) Provisions completed as annual representations and certifications are not required to be incorporated in solicitations in full text.

70. Section 52.107 is amended by revising paragraphs (a) and (b) to read as follows:

52.107 Provisions and clauses prescribed in Subpart 52.1.

(a) The contracting officer shall insert the provision at 52.252-1, Solicitation Provisions Incorporated by Reference, in solicitations in order to incorporate provisions by reference.

(b) The contracting officer shall insert the clause at 52.252-2, Clauses Incorporated by Reference, in solicitations and contracts in order to incorporate clauses by reference.

* * * * *

52.204-1 [Amended]

71. Section 52.204-1 is amended by removing in the title of the clause the date "(MAR 1989)" and inserting in its place "(DEC 1989)"; and by removing within the brackets in the clause the words "[fill in name of agency official]" and insert in their place "[identify title of designated agency official here]".

52.212-4 [Amended]

72. Section 52.212-4 is amended in paragraphs (b) and (c) by removing the words "Termination for Default-Supplies and Services" and by inserting in their place "Default-Fixed-Price Supply and Service".

73. Section 52.214-3 is amended by removing in the title of the provision the date "(NOV 1988)" and inserting in its place "(DEC 1989)"; and by revising paragraph (b) to read as follows:

52.214-3 Amendments to Invitations for Bids.

* * * * *

(b) Bidders shall acknowledge receipt of any amendment to this solicitation (1) by signing and returning the amendment, (2) by identifying the amendment number and date

in space provided for this purpose on the form for submitting a bid, (3) by letter or telegram, or (4) by facsimile, if facsimile bids are authorized in the solicitation. The Government must receive the acknowledgment by the time and at the place specified for receipt of bids.

* * * * *

74. Section 52.214–5 is revised to read as follows:

52.214–5 Submission of Bids.

As prescribed in 14.201–6(c)(1), insert the following provision:

Submission of Bids (DEC 1989)

(a) Bids and bid modifications shall be submitted in sealed envelopes or packages (unless submitted by electronic means) (1) addressed to the office specified in the solicitation number, and name and address of the bidder, and (2) showing the time specified for receipt, the solicitation number, and the name and address of the bidder.

(b) Telegraphic bids will not be considered unless authorized by the solicitation; however, bids may be modified or withdrawn by written or telegraphic notice.

(c) Facsimile bids, modifications, or withdrawals, will not be considered unless authorized by the solicitation.

(End of provision)

75. Section 52.214–7 is revised to read as follows:

52.214–7 Late Submissions, Modifications, and Withdrawals of Bids.

As prescribed in 14.201–6(c)(3), insert the following provision:

Late Submissions, Modifications, and Withdrawals of Bids (December 1989)

(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it—

(1) Was sent by registered or certified mail not later than the fifth calendar day before the date specified for receipt of bids (e.g., a bid submitted in response to a solicitation requiring receipt of bids by the 20th of the month must have been mailed by the 15th);

(2) Was sent by mail or, if authorized by the solicitation, was sent by telegram or via facsimile and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or

(3) Was sent by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee, not later than 5:00 P.M. at the place of mailing two working days prior to the date specified for receipt of bids. The term "working days" excludes weekends and U.S. Federal holidays.

(b) Any modification or withdrawal of a bid is subject to the same conditions as in paragraph (a) of this provision.

(c) The only acceptable evidence to establish the date of mailing of a late bid, modification, or withdrawal sent either by registered or certified mail is the U.S. or Canadian Postal Service postmark both on the envelope or wrapper and on the original receipt from the U.S. or Canadian Postal Service. Both postmarks must show a legible date or the bid, modification, or withdrawal shall be processed as if mailed late. "Postmark" means a printed, stamped, or otherwise placed impression (exclusive of a postage meter machine impression) that is readily identifiable without further action as having been supplied and affixed by employees of the U.S. or Canadian Postal Service on the date of mailing. Therefore, bidders should request the postal clerk to place a legible hand cancellation bull's-eye postmark on both the receipt and the envelope or wrapper.

(d) The only acceptable evidence to establish the time of receipt at the Government installation is the time/date stamp of that installation on the bid wrapper or other documentary evidence of receipt maintained by the installation.

(e) The only acceptable evidence to establish the date of mailing of a late bid, modification, or withdrawal sent by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee is the date entered by the post office receiving clerk on the "Express Mail Next Day Service-Post Office to Addressee" label and the postmark on the envelope or wrapper and on the original receipt from the U.S. Postal Service. "Postmark" has the same meaning as defined in paragraph (c) of this provision, excluding postmarks of the Canadian Postal Service. Therefore, bidders should request the postal clerk to place a legible hand cancellation bull's-eye postmark on both the receipt and the envelope or wrapper.

(f) Notwithstanding paragraph (a) of this provision, a late modification of an otherwise successful bid that makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

(g) Bids may be withdrawn by written notice or telegram (including mailgram) received at any time before the exact time set for receipt of bids. If the solicitation authorizes facsimile bids, bids may be withdrawn via facsimile received at any time before the exact time set for receipt of bids, subject to the conditions specified in the provision entitled "Facsimile Bids." A bid may be withdrawn in person by a bidder or its authorized representative if, before the exact time set for receipt of bids, the identity of the person requesting withdrawal is established and the person signs a receipt for the bid.

(End of provision)

52.214–15 [Amended]

76. Section 52.214–15 is amended in the introductory text by inserting a colon following the word "provision" and removing the remainder of the sentence.

77. Section 52.214–23 is revised to read as follows:

52.214–23 Late Submissions, Modifications, and Withdrawals of Technical Proposals Under Two-Step Sealed Bidding.

As prescribed in 14.201–6(r), insert the following provision:

Late Submissions, Modifications, and Withdrawals of Technical Proposals Under Two-Step Sealed Bidding (December 1989)

(a) Any technical proposal under step one of two-step sealed bidding received at the office designated in this solicitation after the exact time specified for receipt will not be considered unless it is received before the invitation for bids in step two is issued and it—

(1) Was sent by registered or certified mail not later than the fifth calendar day before the date specified for receipt of technical proposals (e.g., technical proposal submitted in response to a solicitation requiring receipt of technical proposals by the 20th of the month must have been mailed by the 15th);

(2) Was sent (i) by mail, or (ii) if authorized, by telegram (including mailgram) or via facsimile, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation;

(3) Was sent by U.S. Postal Service Express Mail Next Day Service-Post Office To Addressee, not later than 5:00 P.M. at the place of mailing 2 working days prior to the date specified for receipt of technical proposals. The term "working days" excludes weekends and U.S. Federal holidays; or

(4) Is the only technical proposal received.

(b) Any modification of a technical proposal is subject to the same conditions as in paragraph (a) of this provision, except that (1) the use of a telegram (or mailgram) is authorized, and (2) if the solicitation authorizes facsimile bids, technical proposals may be modified via facsimile received at any time before the exact time set for receipt of bids under step two, subject to the conditions specified in the provision entitled "Facsimile Bids."

(c) Technical proposals may be withdrawn by written notice or telegram (including mailgram) received at any time before the exact time set for receipt of bids under step two. If the solicitation authorizes facsimile bids, technical proposals may be withdrawn via facsimile received at any time before the exact time set for receipt of bids under step two, subject to the conditions specified in the provision entitled "Facsimile Bids." Technical proposals may be withdrawn in person by the submitter or the submitter's authorized representative if, before the exact time set for receipt of bids in step two, the identity of the person requesting withdrawal is established and that person signs a receipt for the technical proposal.

(d) The only acceptable evidence to establish the date of mailing of a late technical proposal, modification, or withdrawal of a technical proposal sent either by registered or certified mail is the U.S. or Canadian Postal Service postmark both on the envelope or wrapper and on the original receipt from the U.S. or Canadian Postal Service. Both postmarks must show a

legible date, or the technical proposal, modification, or withdrawal of technical proposal shall be processed as if mailed late. "Postmark" means a printed, stamped, or otherwise placed impression (exclusive of a postage meter machine impression) that is readily identifiable without further action as having been supplied and affixed by employees of the U.S. or Canadian Postal Service on the date of mailing. Therefore, submitters of technical proposals should request the postal clerk to place a legible hand cancellation bull's-eye postmark on both the receipt and the envelope or wrapper.

(e) The only acceptable evidence to establish the time of receipt at the Government installation is the time/date stamp of that installation on the proposal wrapper or other documentary evidence of receipt maintained by the installation.

(f) The only acceptable evidence to establish the date of mailing of a late technical proposal, modification, or withdrawal sent by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee is the date entered by the post office receiving clerk on the "Express Mail Next Day Service-Post Office to Addressee" label and the postmark on the envelope or wrapper and on the original receipt from the U.S. Postal Service. "Postmark" has the same meaning as defined in paragraph (d) of this provision, excluding postmarks of the Canadian Postal Service. Therefore, submitters of technical proposals should request the postal clerk to place a legible hand cancellation bull's-eye postmark on both the receipt and the envelope or wrapper.

(End of provision)

78. Section 52.214-30 is added to read as follows:

52.214-30 Annual Representations and Certifications—Sealed Bidding.

As prescribed in 14.201-6(u), insert the following provision:

Annual Representations and Certifications—Sealed Bidding (December 1989)

The bidder certifies that annual representations and certifications (check the appropriate block):

☐ (a) Dated _____ *(insert date of signature of submission)*, which are incorporated herein by reference, have been submitted to the contracting office issuing this solicitation and that the submittal is current, accurate, and complete as of the date of this bid, except as follows (insert changes that affect only this solicitation; if "none," so state):

☐ (b) Are enclosed.

(End of provision)

79. Sections 52.214-31, 52.214-32, and 52.214-33 are added to read as follows:

52.214-31 Facsimile Bids.

As prescribed in 14.201-6(w), insert the following provision:

Facsimile Bids (December 1989)

(a) Definition. "Facsimile bid," as used in this solicitation, means a bid, modification of a bid, or withdrawal of a bid that is transmitted to and received by the Government via electronic equipment that communicates and reproduces both printed and handwritten material.

(b) Bidders may submit facsimile bids as responses to this solicitation. These responses must arrive at the place and by the time, specified in the solicitation.

(c) Facsimile bids that fail to furnish required representations or information or that reject any of the terms, conditions, and provisions of the solicitation may be excluded from consideration.

(d) Facsimile bids must contain the required signatures.

(e) The Government reserves the right to make award solely on the facsimile bid. However, if requested to do so by the Contracting Officer, the apparently successful bidder agrees to promptly submit the complete original signed bid.

(f) Facsimile receiving data and compatibility characteristics are as follows:

(1) Telephone number of receiving facsimile equipment:

_____

(2) Compatibility characteristics of receiving facsimile equipment (e.g., make and model number, receiving speed, communications protocol):

_____

_____

(g) If the bidder chooses to transmit a facsimile bid, the Government will not be responsible for any failure attributable to the transmission or receipt of the facsimile bid including, but not limited to, the following:

(1) Receipt of garbled or incomplete bid.

(2) Availability or condition of the receiving facsimile equipment.

(3) Incompatibility between the sending and receiving equipment.

(4) Delay in transmission or receipt of bid.

(5) Failure of the bidder to properly identify the bid.

(6) Illegibility of bid.

(7) Security of bid data.

(End of provision)

52.214-32 Late Submissions, Modifications, and Withdrawals of Bids (Overseas).

As prescribed in 14.201-6(c)(4), insert the following provision:

Late Submissions, Modifications, and Withdrawals of Bids (Overseas) (December 1989)

(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it was sent by mail or, if authorized by the solicitation, was sent by telegram or via facsimile, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

(b) Any modification or withdrawal of a bid is subject to the same conditions as in paragraph (a) of this provision.

(c) The only acceptable evidence to establish the time of receipt at the Government installation is the time/date stamp of that installation on the bid wrapper or other documentary evidence of receipt maintained by the installation.

(d) Notwithstanding paragraph (a) of this provision, a late modification of an otherwise successful bid that makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

(e) Bids may be withdrawn by written notice or telegram (including mailgram) received at any time before the exact time set for receipt of bids. If the solicitation authorizes facsimile bids, bids may be withdrawn via facsimile received at any time before the exact time set for receipt of bids, subject to the conditions specified in the provision entitled "Facsimile Bids." A bid may be withdrawn in person by a bidder or its authorized representative if, before the exact time set for receipt of bids, the identity of the person requesting withdrawal is established and that person signs a receipt for the bid.

(End of provision)

52.214-33 Late Submissions, Modifications, and Withdrawals of Technical Proposals Under Two-Step Sealed Bidding (Overseas).

As prescribed in 14.201-6(v), insert the following provision:

Late Submissions, Modifications, and Withdrawals of Technical Proposals Under Two-Step Sealed Bidding (Overseas) (December 1989)

(a) Any technical proposal under step one of two-step sealed bidding received at the office designated in this solicitation after the exact time specified for receipt will not be considered unless it is received before the invitation for bids in step two is issued and it—

(1) Was sent (i) by mail, or (ii) if authorized by the solicitation, was sent by telegram (including mailgram) or via facsimile, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or

(2) Is the only technical proposal received.

(b) Any modification of a technical proposal is subject to the same conditions as in paragraph (a) of this provision except that (1) the use of a telegram (or mailgram) is authorized, and (2) if the solicitation authorizes facsimile bids, technical proposals may be modified via facsimile received at any time before the exact time set for receipt of bids under step two, subject to the conditions specified in the provision entitled "Facsimile Bids."

(c) Technical proposals may be withdrawn by written notice or telegram (including mailgram) received at any time before the exact time set for receipt of bids under step two. If the solicitation authorizes facsimile bids, technical proposals may be withdrawn via facsimile received at any time before the exact time set for receipt of bids under step two, subject to the conditions specified in the provision entitled "Facsimile Bids." Technical proposals may be withdrawn in person by the submitter or the submitter's authorized

representative if, before the exact time set for receipt of bids in step two, the identity of the person requesting withdrawal is established and that person signs a receipt for the technical proposal.

(d) The only acceptable evidence to establish the time of receipt at the Government installation is the time/date stamp of that installation on the proposal wrapper or other documentary evidence of receipt maintained by the installation.

(End of provision)

80. Section 52.215-2 is amended by removing in the title of the clause the date "(APR 1988)" and inserting in its place the date "(DEC 1989)"; by revising paragraphs (a), (b), and (e) of the clause; and by adding paragraph (f) to read as follows:

52.215-2 Audit-Negotiation.

* * * * *

(a) *Examination of costs.* If this is a cost-reimbursement, incentive, time-and-materials, labor-hour, or price redeterminable contract, or any combination of these, the Contractor shall maintain—and the Contracting Officer or representatives of the Contracting Officer shall have the right to examine and audit—books, records, documents, and other evidence and accounting procedures and practices, regardless of form (e.g., machine readable media such as disk, tape, etc.) or type (e.g., data bases, applications software, data base management software, utilities, etc.), sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred in performing this contract. This right of examination shall include inspection at all reasonable times of the Contractor's plants, or parts of them, engaged in performing the contract.

(b) *Cost or pricing data.* If, pursuant to law, the Contractor has been required to submit cost or pricing data in connection with pricing this contract or any modification to this contract, the Contracting Officer or representatives of the Contracting Officer who are employees of the Government shall have the right to examine and audit all of the Contractor's books records, documents, and other data, regardless of form (e.g., machine readable media such as disk, tape, etc.) or type (e.g., data bases, applications software, data base management software, utilities, etc.), including computations an projections, related to proposing, negotiating, pricing, or performing the contract or modification, in order to evaluate the accuracy, completeness, and currency of the cost or pricing data. The right of examination shall extend to all documents necessary to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used.

* * * * *

(e) Except as otherwise provided in FAR Subpart 4.7, Contractor Records Retention, the Contractor may transfer computer data in machine readable form from one reliable computer medium to another. The Contractor's computer data retention and transfer procedures shall maintain the integrity, reliability, and security of the original data. The contractor's choice of form or type of materials described in paragraphs (a), (b), and (c) of this clause affects neither the Contractor's obligations nor the Government's rights under this clause.

(f) The Contractor shall insert a clause containing all the terms of this clause, including this paragraph (f), in all subcontracts over $10,000 under this contract, altering the clause only as necessary to identify properly the contracting parties and the Contracting Officer under the Government prime contract.

(End of clause)

81. Section 52.215-8 is amended by removing in the title of the provision the date "November 1988)" and inserting in its place "(December 1989)"; and by revising paragraph (b) to read as follows:

52.215-8 Amendments to Solicitations.

* * * * *

(b) Offerors shall acknowledge receipt of any amendments to this solicitation by (1) signing and returning the amendment, (2) identifying the amendment number and date in the space provided for this purpose on the form for submitting an offer, (3) letter or telegram, or (4) facsimile, if facsimile offers are authorized in the solicitation. The Government must receive the acknowledgment by the time specified for receipt of offers.

* * * * *

82. Section 52.215-9 is revised to read as follows:

52.215-9 Submission of Offers.

As prescribed in 15.407(c)(5), insert the following provision:

Submission of Offers (December 1989)

(a) Offers and modifications thereof shall be submitted in sealed envelopes or packages (1) addressed to the office specified in the solicitation, and (2) showing the time specified for receipt, the solicitation number, and the name and address of the offeror.

(b) Telegraphic offers will not be considered unless authorized by the solicitation; however, offers may be modified by written or telegraphic notice.

(c) Facsimile offers, modifications or withdrawals will not be considered unless authorized by the solicitation.

(d) Item samples, if required, must be submitted within the time specified for reciept of offers. Unless otherwise specified in the solicitation, these samples shall be (1) submitted at no expense to the Government, and (2) returned at the sender's request and expense, unless they are destroyed during preaward testing.

(End of provision)

83. Section 52.215-10 is revised to read as follows:

52.215-10 Late Submissions, Modifications, and Withdrawals of Proposals.

As prescribed in 15.407(c)(6), insert the following provision in requests for proposals:

Late Submissions, Modifications, and Withdrawals of Proposals (December 1989)

(a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it—

(1) Was sent by registered or certified mail not later than the fifth calendar day before the date specified for receipt of offers (e.g., and offer submitted in response to a solicitation requiring receipt of offers by the 20th of the month must have been mailed by the 15th);

(2) Was sent by mail or, if authorized by the solicitation, was sent by telegram or via facsimile and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation;

(3) Was sent by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee, not later than 5:00 p.m. at the place of mailing two working days prior to the date specified for receipt of proposals. The term "working days" excludes weekends and U.S. Federal holidays; or

(4) Is the only proposal received.

(b) Any modification of a proposal or quotation, except a modification resulting from the Contracting Officer's request for "best and final" offer, is subject to the same conditions as in subparagraphs (a)(1), (2), and (3) of this provision.

(c) A modification resulting from the Contracting Officer's request for "best and final" offer received after the time and date specified in the request will not be considered unless received before award and the late receipt is due solely to mishandling by the Government after receipt at the Government installation.

(d) The only acceptable evidence to establish the date of mailing of a late proposal or modification sent either by U.S. Postal Service registered or certified mail is the U.S. or Canadian Postal Service postmark both on the envelope or wrapper and on the original receipt from the U.S. or Canadian Postal Service. Both postmarks must show a legible date or the proposal, quotation, or modification shall be processed as if mailed late. "Postmark" means a printed, stamped, or otherwise placed impression (exclusive of a postage meter machine impression) that is readily identifiable without further action as having been supplied and affixed by employees of the U.S. or Canadian Postal Service on the date of mailing. Therefore, offerors or quoters should request the postal clerk to place a legible hand cancellation bull's eye postmark on both the receipt and the envelope or wrapper.

(e) The only acceptable evidence to establish the time of receipt at the Government installation is the time/date stamp of that installation on the proposal

wrapper or other documentary evidence of receipt maintained by the installation.

(f) The only acceptable evidence to establish the date of mailing of a late offer, modification, or withdrawal sent by Express Mail Next Day Service-Post Office to Addressee is the date entered by the post office receiving clerk on the "Express Mail Next day Service-Post Office to Addressee" label and the postmark on both the envelope or wrapper and on the original receipt from the U.S. Postal Service. "Postmark" has the same meaning as defined in paragraph (d) of this provision, excluding postmarks of the Canadian Postal Service. Therefore, offerors or quoters should request the postal clerk to place a legible hand cancellation bull's eye postmark on both the receipt and the envelope or wrapper.

(g) Notwithstanding paragraph (a) of this provision, a late modification of an otherwise successful proposal that makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

(h) Proposals may be withdrawn by written notice or telegram (including mailgram) received at any time before award. If the solicitation authorizes facsimile proposals, proposals may be withdrawn via facsimile received at any time before award, subject to the conditions specified in the provision entitled "Facsimile Proposals." Proposals may be withdrawn in person by an offeror or an authorized representative, if the representative's identity is made known and the representative signs a receipt for the proposal before award.

(End of provision)

84. Section 52.215–18 is added to read as follows:

§ 52.215–18 Facsimile Proposals.

As prescribed in 15.407(i), insert the following provision:

Facsimile Proposals (December 1989)

(a) Definition. "Facsimile proposal," as used in this solicitation, means a proposal, modification of a proposal, or withdrawal of a proposal that is transmitted to and received by the Government via electronic equipment that communicates and reproduces both printed and handwritten material.

(b) Offerors may submit facsimile proposals as responses to this solicitation. These responses must arrive at the place, and by the time, specified in the solicitation.

(c) Facsimile proposals that fail to furnish required representations or information, or that reject any of the terms, conditions, and provisions of the solicitation, may be excluded from consideration.

(d) Facsimile proposals must contain the required signatures.

(e) The Government reserves the right to make award solely on the facsimile proposal. However, if requested to do so by the Contracting Officer, the apparently successful offeror agrees to promptly submit the complete original signed proposal.

(f) Facsimile receiving data and compatibility characteristics are as follows:

(1) Telephone number of receiving facsimile equipment: _____

(2) Compatibility characteristics of receiving facsimile equipment (e.g., make and model number, receiving speed, communications protocol): _____

(g) If the offeror chooses to transmit a facsimile proposal, the Government will not be responsible for any failure attributable to the transmission or receipt of the facsimile proposal including, but not limited to, the following:

(1) Receipt of garbled or incomplete proposal.

(2) Availability or condition of the receiving facsimile equipment.

(3) Incompatibility between the sending and receiving equipment.

(4) Delay in transmission or receipt of proposal.

(5) Failure of the offeror to properly identify the proposal.

(6) Illegibility of proposal.

(7) Security of proposal data.

(End of provision)

85. Section 52.215–35 is added to read as follows:

52.215–35 Annual Representations and Certifications—Negotiation.

As prescribed in 15.407(i), insert the following provision:

Annual Representations and Certifications—Negotiation (December 1989)

The offeror certifies that annual representations and certifications (check the appropriate block):

☐ (a) Dated _____ (insert date of signature on submission) which are incorporated herein by reference, have been submitted to the contracting office issuing this solicitation and that the submittal is current, accurate, and complete as of the date of this bid, except as follows (insert changes that affect only this solicitation; if "none," so state):

☐ (b) Are enclosed.

(End of provision)

86. Section 52.215–36 is added to read as follows:

52.215–36 Late Submissions, Modifications and Withdrawals of Proposals (Overseas).

As prescribed in 15.407(c)(9), insert the following provision:

Late Submissions, Modifications, and Withdrawals of Proposals (Overseas) (December 1989)

(a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it—

(1) Was sent by mail or, if authorized by the solicitation, was sent by telegram or via facsimile, and it is determined by the Government the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or

(2) Is the only proposal received.

(b) Any modification of a proposal or quotation, except a modification resulting from the Contracting Officer's request for "best and final" offer, is subject to the same conditions as in subparagraph (a)(1) of this provision.

(c) A modification resulting from the Contracting Officer's request for "best and final" offer received after the time and date specified in the request will not be considered unless received before award and the late receipt was due solely to mishandling by the Government after receipt at the installation.

(d) The only acceptable evidence to establish the time of receipt at the Government installation is the time/date stamp of the installation on the proposal wrapper or other documentary evidence of receipt maintained by the installation.

(e) Notwithstanding paragraph (a) of this provision, a late modification of an otherwise successful proposal that makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

(f) Proposals may be withdrawn by written notice or telegram (including mailgram) received at any time before award. If the solicitation authorizes facsimile proposals, proposals may be withdrawn via facsimile at any time before award, subject to the conditions specified in the provision entitled "Facsimile Proposals." Proposals may be withdrawn in person by an offeror or an authorized representative, if the representative's identity is made known and the representative signs a receipt for the proposal before award.

(End of provision)

87. Section 52.223–3 is amended by removing in the title of the clause the date "(AUG 1987)" and inserting in its place the date "(DEC 1989)" and by revising paragraph (d) of the clause to read as follows:

52.223–3 Hazardous Material Identification and Material Safety Data.

* * * * *

(d) Nothing contained in this clause shall relieve the Contractor from complying with applicable Federal, state, and local laws, codes, ordinances, and regulations (including the obtaining of licenses and permits) in connection with hazardous material.

* * * * *

52.225–1 [Amended]

88. Section 52.225–1 is amended by inserting a colon in the introductory text following the word "provision" and removing the remainder of the sentence; by removing in the title of the provision the date "(APR 1984)" and inserting in its place the date "(DEC 1989)"; by removing in the last paragraph of the provision the parenthetical phrase "(listed at 25.108 of the Federal Acquisition Regulation)"; and by removing the derivation lines following "(End of provision)".

89. Section 52.228-11 is added to read as follows:

52.228-11 Pledges of Assets.

As prescribed in 28.203-6, insert the following clause:

Pledges of Assets (February 1990)

(a) Offerors shall obtain from each person acting as an individual surety on a bid guarantee, a performance bond, or a payment bond—

(1) Pledge of assets; and

(2) Standard Form 28, Affidavit of Individual Surety.

(b) Pledges of assets from each person acting as an individual surety shall be in the form of—

(1) Evidence of an escrow account containing cash, certificates of deposit, commercial or Government securities, or other assets described in FAR 28.203-2 (except see 28.203-2(b)(2) with respect to Government sureties held in book entry form) and/or;

(2) A recorded lien on real estate. The offeror will be required to provide—

(i) Evidence of title in the form of a certificate of title prepared by a title insurance company approved by the United States Department of Justice. This title evidence must show fee simple title vested in the surety along with any concurrent owner: whether any real estate taxes are due and payable; and any recorded encumbrances against the property, including the lien filed in favor of the Government as required by FAR 28.203-3(d);

(ii) Evidence of the amount due under any encumbrance shown in the evidence of title;

(iii) A copy of the current real estate tax assessment of the property or a current appraisal dated no earlier than 6 months prior to the date of the bond, prepared by a professional appraiser who certifies that the appraisal has been conducted in accordance with the generally accepted appraisal standards as reflected in the Uniform Standards of Professional Appraisal Practice, as promulgated by the Appraisal Foundation.

(End of clause)

52.236-5 [Amended]

90. Section 52.236-5 is amended in the introductory text by inserting a colon following the word "clause" and removing the remainder of the sentence.

52.236-7 [Amended]

91. Section 52.236-7 is amended in the introductory text by inserting a colon following the word "clause" and removing the remainder of the sentence.

52.236-20 [Removed and Reserved]

92. Section 52.236-20 is removed and reserved.

93. Section 52.242-12 is amended in the introductory text by inserting a colon following the word "clause" and removing the reminder of the sentence; by removing in the title of the clause the date "(APR 1984)" and inserting in its place "(DEC 1989)"; by removing the derivation line following "(End of clause)"; and by revising the first sentence of the clause to read as follows:

52.242-12 Report of Shipment (REPSHIP).

As prescribed in 42.1406-2, insert the following clause:

* * * * *

Unless otherwise directed by the Contracting Officer, the Contractor shall send a prepaid notice of shipment to the consignee transportation officer for all shipments of classified material, protected sensitive, and protected controlled material; explosives and poisons, classes A and B; radioactive materials requiring the use of a III bar label; or when a truckload/carload shipment of supplies weighing 20,000 pounds or more, or a shipment of less weight that occupies the full visible capacity of a railway car or motor vehicle, is given to any carrier (common, contract or private) for transportation to a domestic (i.e., within the United States excluding Alaska or Hawaii, or if shipment originates in Alaska or Hawaii within Alaska or Hawaii respectively) destination (other than a port for export). * * *

* * * * *

52.243-1 [Amended]

94. Section 52.243-1 is amended in the introductory text of Alternate V, paragraph (b), by removing the words "item required" and inserting in their place "time required".

52.244-3 [Amended]

95. Section 52. 244-3 is amended in paragraph (b) by removing the reference "16.301-4" and inserting in its place "15.903(d)".

96. Section 52.245-2 is amended by removing in the title of the clause the date "(APR 1984)" and inserting in its place the date "(DEC 1989)"; by adding in paragraph (c)(2) a second sentence; by removing the six derivation lines following "(End of clause)"; and by revising paragraph (c)(3) to read as follows:

52.245-2 Government Property (Fixed-Price Contracts).

As prescribed in 45.106(b)(1), insert the following clause:

* * * * *

(c) * * *

(2) * * * However, special tooling accountable to this contract is subject to the provisions of the Special Tooling clause and is not subject to the provisions of this clause. * * *

(3) Title to each item of facilities and special test equipment acquired by the Contractor for the Government under this contract shall pass to and vest in the Government when its use in performing this contract commences or when the Government has paid for it, whichever is earlier, whether or not title previously vested in the Government.

* * * * *

97. Section 52.245-17 is revised to read as follows:

52.245-17 Special Tooling.

As prescribed in 45.306-5, insert the following clause:

Special Tooling (December 1989)

(a) *Definition.* "Special tooling" means jigs, dies, fixtures, molds, patterns, taps, gauges, other equipment and manufacturing aids, all components of these items, and replacements of these items that are of such a specialized nature that without substantial modification or alteration their use is limited to the development or production of particular supplies or parts thereof or performing particular services. It does not include material, special test equipment, facilities (except foundations and similar improvements necessary for installing special tooling), general or special machine tools, or similar capital items. Special tooling for the purpose of this clause, includes all special tooling acquired or fabricated by the Contractor for the Government (other than special tooling to be delivered as a line item) or furnished by the Government for use in connection with and under the terms of the contract.

(b) *Title.* The Government retains title to Government-owned special tooling and option to take title to all special tooling subject to this clause until such time as title or option to take title is relinquished by the Contracting Officer as provided for in subparagraphs (j)(2) and (j)(3) of this clause.

(c) *Risk of loss.* Except to the extent that the Government shall have otherwise assumed the risk of loss to special tooling applicable to this clause, in the event of the loss, theft or destruction of or damage to any such property, the repair or replacement shall be accomplished by the Contractor at its own expense.

(d) *Special tooling furnished by the Government.* (1) Except as otherwise provided in this contract, all Government-furnished special tooling is provided "as is." The Government makes no warranty whatsoever with respect to special tooling furnished "as is," except that the property is in the same condition when placed at the f.o.b. point specified in the solicitation as when last available for inspection by the Contractor under the solicitation.

(2) The Contractor may repair any special tooling made available on an "as is" basis. Such repair will be at the Contractor's expense, except as otherwise provided in this clause. Such property may be modified as necessary for use under this contract at the Contractor's expense, except as otherwise directed by the Contracting Officer. Any repair or modification of property furnished "as is" shall not affect the title of the Government.

(3) If there is any change in the condition of special tooling furnished "as is" from the time inspected or last available for inspection under the solicitation to the time placed on board at the location specified in the

solicitation or the Government directs a change in the quantity of special tooling furnished or to be furnished, and such change will adversely affect the Contractor, the Contractor shall, upon receipt of the property, notify the Contracting Officer detailing the facts, and, as directed by the Contracting Officer, either (i) return such items at the Government's expense or otherwise dispose of the property or (ii) effect repair to return the property to its condition when inspected under the solicitation or, if not inspected, last available for inspection under the solicitation. After completing the directed action and upon written request of the Contractor, the Contracting Officer shall equitably adjust any contractual provisions affected by the return, disposition, or repair in accordance with procedures provided for in the Changes clause of this contract. The foregoing provisions for adjustment are the exclusive remedy available to the Contractor, and the Government shall not be otherwise liable for any delivery of special tooling in a condition or in quantities other than that when originally offered.

(e) *Use of special tooling.* The Contractor may use special tooling subject to this clause on other Government effort when specifically approved in writing by the Contracting Officer for this contract and the Contracting Officer for the contract under which the special tooling will be used. Any other use of the special tooling shall be subject to advance written approval of the Contracting Officer. In the event the Government elects to remove any speical tooling that is required for continued contract performance, the contract shall be equitably adjusted in accordance with paragraph (m) of this clause.

(f) *Property control.*—(1) *Records.* The Contractor's special tooling records shall provide the following minimum information regarding each item of special tooling subject to this clause and shall be made available for Government inspection at all reasonable times:

(i) Number or code of the contract to which the tooling is accountable and the number or code of the contract for which the tooling was originally acquired or fabricated.

(ii) Retention codes as defined below:

(A) *Primary Code.* Assign one of the following to each item of special tooling:

Code A. Spares Tooling. Required to produce a provisioned spare part or assembly.

Code B. Judgment (Insurance) Tooling. Fabrication tools for parts that are not provisioned spares but which in the judgment of the Contractor will be required at some time for logistic support of the end item.

Code C. Rate Tooling. Necessary to economically produce at increased rates (e.g., for mobilization or surge) but not essential for parts fabrication at low production rates.

Code D. Assembly Tooling. Required for manufacture of the end product but not required for production of spare parts. Those items having no postproduction need except for potential modification or resumed production programs.

(B) *Secondary Code.* Assign one or more of the following codes, as applicable, to each item of special tooling:

Code 1. Repair Tooling. Items which are capable of being used for repair of provisioned parts or assemblies.

Code 2. Replaceable Tooling. Spares or judgment tooling (primary retention codes A or B) which, in the opinion of the Contractor, can be effectively and economically replaced by "soft" tooling on an "as required" basis in lieu of retention of the "hard" production tooling for supporting postproduction requirements.

Code 3. Maintenance Tooling. Items which are capable of being used for depot level maintenance of the applicable end item or components thereof.

Code 4. Crash Damage Tooling. Items which apply to provisioned or nonprovisioned parts or assemblies which are designated as or have the potential of being required for crash damage repairs.

(iii) Nomenclature, function, or comparable code.

(iv) Tool part number or code.

(v) Tool identification number, or quantity of each tool part number or code, if tool identification number is not assigned.

(vi) Part number(s) of item(s) on which used (complete hierarchy of part numbers).

(vii) Unit price. (Estimates are acceptable.)

(viii) Storage method code. Assign one of the following:

Code J. Inside storage.

Code K. Outside storage.

Code L. Other.

(ix) Estimated weight of tool, if over 25 pounds.

(x) Estimated volume of tool, if over 3 cubic feet.

(xi) Location of Contractor, subcontractor, vendor for each item. Use Federal Supply Code for Manufacturers (FSCM), or name and address if code is not available.

(xii) All operation sheets or other data as are necessary to show the manufacturing operation or processes for which such items were used, designed, or modified.

(2) *Identification or tagging.* To the extent practicable, the Contractor shall identify all special tooling subject to this clause in accordance with the Contractor's identification procedures.

(g) *Maintenance.* The Contractor shall maintain special tooling in accordance with sound industrial practice. These requirements do not apply to those items designated by the Contracting Officer for disposal as scrap or identified as of no further interest to the Government under paragraph (j), Disposition instructions, of this clause.

(h) *Identification of excess special tooling.* The Contractor shall promptly identify and report all special tooling in excess of the amounts needed to complete full performance under this contract (see subdivision (i)(2)(i) of this clause).

(i) *Lists of special tooling.* The Contractor shall periodically prepare and distribute lists of special tooling as described below:

(1) *Special tooling list.* The list shall be furnished within 60 days after delivery of the first production end item under this contract or completion of the initial provisioning process, whichever is later, and shall include all special tooling subject to this clause as of the reporting date. However, if this contract represents the final production contract, the Contractor shall provide this list of all tools not later than 180 days prior to scheduled delivery of the last production end item. If this is a contract for storage of special tooling, the list shall be provided within 60 days of contract implementation.

(2) *Excess special tooling list*—(i) *Excess special tooling.* Except for items subject to subdivision (i)(2)(ii) of this clause, lists of special tooling excess to this contract shall be furnished within 60 days of the date that the item is determined to be excess. The Contractor shall include in this list the information prescribed in Format of lists, subparagraph (i)(3) of this clause, as well as the applicable excess code as follows:

Code V. Excess to contract requirements with no follow-on requirements.

Code W. Excess to contract requirements but can be used to support actual or anticipated follow-on requirements.

Code X. Excess due to changes in design or specification of the end items.

Code Y. Excess due to nonserviceable or nonrepairable condition.

Code Z. Other.

(ii) *Termination inventory.* These items shall be submitted on SF 1432 or by computer list attached to an SF 1432 in accordance with FAR 45.606. Format and content of this submission will be as prescribed by Format of lists, subparagraph (i)(3) of this clause, but will contain information as prescribed by FAR subpart 45.6, in effect on the date of award of this contract.

(3) *Format of lists.* Lists furnished by the Contractor shall state the type of list and shall include all information from subparagraph (f)(1), Records, of this clause, items (i) through (xi). All lists will be grouped by primary retention code as prescribed in subdivision (f)(1)(ii)(A) of this clause and further listed in tool part number sequence.

(4) *Distribution of lists.* The Contractor shall submit two copies of lists to each of the following recipients unless otherwise directed:

(i) The Contracting Officer.

(ii) The Administrative Contracting Officer.

(iii) The inventory control point designated by the contracting office.

(j) *Disposition instructions.* The Contracting Officer shall provide the Contractor with written disposition instructions within 180 days of receipt of the list as prescribed by subparagraph (i)(1) of this clause and within 90 days of the receipt of excess special tooling lists reported in accordance with subparagraph (i)(2) of this clause. The Contracting Officer may direct disposition by any of the methods listed in subparagraphs (j)(1) through (j)(3) of this clause, or a combination of such methods. The Contractor shall comply with such disposition instructions.

(1) The Contracting Officer may identify specific items of special tooling to be retained or give the Contractor a list specifying the products, parts, or services including follow-on requirements for which the Government may require special tooling and request the Contractor to identify all usable items of special tooling on hand that were designed for or used in the production or performance of such products, parts, or services. Once

items of usable special tooling required by the Government are identified, the Contracting Officer may—

(i) Direct the Contractor to transfer specified items of special tooling to follow-on contracts requiring their use. Those items shall be furnished for use on the contract(s) as specified by the Contracting Officer and shall be subject to the provisions of the gaining contracts(s); or

(ii) Request the Contractor to enter into an appropriate storage contract for special tooling specified to be retained by the Contractor for the Government. Tooling to be stored shall be stored pursuant to a storage contract between the Government and the Contractor; or

(iii) Direct the Contractor to transfer title to the Government (to the extent not previously transferred) and deliver to the Government those items of special tooling which are specified for removal from the Contractor's plant.

(2) The Contracting Officer may direct the Contractor to sell, or dispose of as scrap, for the account of the Government, any special tooling not specified by the Government pursuant to subparagraph (j)(1) of this clause. To the extent that the Contractor incurs any costs occasioned by compliance with such direction, for which it is not otherwise compensated, the contract price shall be equitably adjusted in accordance with the Changes clause of this contract. The net proceeds of all sales shall either be credited to the cost of contract performance or shall be otherwise paid to the Government as directed by the Contracting Officer. Sale of special tooling to the prime Contractor or any of its subcontractors is subject to the prior written approval of the Contracting Officer.

(3) The Contracting Officer may furnish the Contractor with a statement disclaiming further Government interest or right in specified special tooling.

(4) Restoration of Contractor's premises. Unless otherwise provided in this contract, the Government has no obligation to restore or rehabilitate the Contractor's premises under any circumstances (e.g., abandonment, disposition upon completion of need, or upon contract completion). However, if special tooling is withdrawn or if other special tooling is substituted, then the equitable adjustment under paragraph (m) of this clause may properly include restoration or rehabilitation costs.

(k) *Access to special tooling.* The Contractor shall provide access to special tooling subject to this clause at all reasonable times to all individuals designated by the Contracting Officer.

(l) *Storage or shipment.* The Contractor shall promptly arrange for either the shipment or the storage of special tooling specified in accordance with the final disposition instructions in subdivisions (j)(1)(ii) or (j)(1)(iii) of this clause. Tooling to be shipped shall be properly packaged, packed, and marked in accordance with the directions of the Contracting Officer. All operation sheets or other appropriate data necessary to show the manufacturing operations or processes for which the items were used or designed shall accompany special tooling to be shipped or stored or shall otherwise be provided to the Government as directed by the Contracting Officer. To the extent that the Contractor incurs costs for storage, shipment, packing, crating, or handling under this paragraph and not otherwise compensated for, the contract price shall be equitably adjusted in accordance with the Changes clause of this contract.

(m) *Equitable adjustment.* When this clause specifies an equitable adjustment, it shall be made to any affected contract provision in accordance with the procedures of the Changes clause. When appropriate, the Contracting Officer may initiate an equitable adjustment in favor of the Government. The right to an equitable adjustment shall be the Contractor's exclusive remedy. The Government shall not be liable to suit for breach of contract for—

(1) Any delay in delivery of Government-furnished special tooling;

(2) Delivery of Government-furnished special tooling in a condition not suitable for its intended use;

(3) A decrease in or substitution of special tooling; or

(4) Failure to repair or replace Government-furnished special tooling for which the Government is responsible.

(n) *Subcontract provisions.* In order to perform this contract, the Contractor may place subcontracts (including purchase orders) involving the use of special tooling. If the full cost of the tooling is charged to those subcontracts, the Contractor agrees to include in the subcontract appropriate provisions to obtain Government rights and data comparable to the rights of the Government under this clause (unless the Contractor and Contracting Officer agree in writing that such rights are not of interest to the Government). The Contractor agrees to exercise such rights for the benefit of the Government as directed by the Contracting Officer.

(End of clause)

52.245-18 [Amended]

98. Section 52.245-18 is amended by removing in the introductory text the reference "45.305(b)" and inserting in its place the reference "45.307-3".

99. Section 52.245-19 is amended by revising the introductory text to read as follows:

52.245-19 Government Property Furnished "As Is."

As prescribed in 45.308-2, insert the following clause:

* * * * *

52.246-19 [Amended]

100. Section 52.246-19 is amended by removing in the title of the clause the date "(APR 1984)" and inserting in its place the date "(DEC 1989)"; by removing in paragraph (c)(5)(i) the words "as required in paragraph (c)(1)(ii) below"; and by removing the derivation line following "(End of clause)".

101. Section 52.247-1 is amended by revising paragraph (b) of the introductory text to read as folows:

52.247-1 Commercial Bill of Lading Notations.

* * * * *

(b) As prescribed in 47.104-4(b), the contracting officer may insert the following clause:

* * * * *

102. Section 52.247-60 is revised to read as follows:

52.247-60 Guaranteed Shipping Characteristics.

As prescribed in 47.305-16(b)(1), insert the following clause:

Guaranteed Shipping Characteristics (December 1989)

(a) The offeror is requested to complete subparagraph (a)(1) of this clause, for each part or component which is packed or packaged separately. This information will be used to determine transportation costs for evaluation purposes. If the offeror does not furnish sufficient data in subparagraph (a)(1) of this clause, to permit determination by the Government of the item shipping costs, evaluation will be based on the shipping characteristics submitted by the offeror whose offer produces the highest transportation costs or in the absence thereof, by the Contracting Officer's best estimate of the actual transportation costs. If transportation costs for evaluation purposes. If the offeror does not furnish sufficient data in subparagraph (a)(1) of this clause, to permit determination by the Government of the item shipping costs, evaluation will be based on the shipping characteristics submitted by the offeror whose offer produces the highest transportation costs or in the absence thereof, by the Contracting Officer's best estimate of the actual transportation costs. If the item shipping costs, based on the actual shipping characteristics, exceed the item shipping costs used for evaluation purposes, the Contractor agrees that the contract price shall be reduced by an amount equal to the difference between the transportation costs actually incurred, and the costs which would have been incurred if the evaluated shipping characteristics had been accurate.

(1) To be completed by the offeror:

(i) Type of container: Wood Box ____, Fiber Box ____, Barrel ____, Reel ____, Drum ____, Other (Specify) ____;

(ii) Shipping configuration: Knocked-down____, Set-up ____, Nested ____, Other (specify) ____;

(iii) Size of container ____" (Length), x ____" (Width), x ____" (Height) = ____ Cubic FT;

(iv) Number of items per container ____ Each;

(v) Gross weight of container and contents____ LBS

(vi) Palletized/skidded ____ Yes ____ No;

(vii) Number of containers per pallet/skid____;

(viii) Weight of empty pallet bottom/skid and sides ____ LBS;

(ix) Size of pallet/skid and contents ____ LBS Cube ____;

(x) Number of containers or pallets/skid per railcar ____*—

Size of railcar ____

Type of railcar ____

(xi) Number of containers or pallets/skids per trailer ____*—

Size of trailer ____ FT

Type of trailer ____

(2) To be completed by the Government after evaluation but before contract award:

(i) Rate used in evaluation ____;

(ii) Tender/Tariff ____;

(iii) Item ____;

(b) The guaranteed shipping characteristics requested in subparagraph (a)(1) of this clause do not establish actual transportation requirements, which are specified elsewhere in this solicitation. The guaranteed shipping characteristics will be used only for the purpose of evaluating offers and establishing any liability of the successful offeror for increased transportation costs resulting from actual shipping characteristics which differ from those used for evaluation in accordance with paragraph (a) of this clause.

(End of clause)

52.252-1 [Amended]

103. Section 52.252-1 is amended by removing Alternate I of the clause.

52.252-2 [Amended]

104. Section 52.252-2 is amended by removing Alternate I of the clause.

PART 53—FORMS

53.106 [Amended]

105. Section 53.106 is amended in paragraph (b) by adding the Standard Form number ", 1447" following "33".

106. Section 53.205-1 and the title are revised to read as follows:

53.205-1 Paid advertisements.

SF 26, Award/Contract, SF 1447, Solicitation/Contract, or OF 347, Order for Supplies. SF 26, prescribed in 53.214(a), SF 1447, prescribed in 53.215-1(g), and OF 347 (or an approved agency form), prescribed in 53.213(e), shall be used to place orders for paid advertisements within the dollar limitations and as otherwise specified in 5.503(c).

107. Section 53.214 is amended by revising the title and by adding paragraph (d) to read as follows:

53.214 Sealed bidding.

* * * * *

(d) *SF 1447 (5/88), Solicitation/Contract.* SF 1447, prescribed in 53.215-1(g), shall be used in soliciting bids for supplies or services and for awarding contracts that result from the bids. It shall be used when the simplified contract format is used (see 14.201-9) and may be used in place of the SF 26 or SF 33 with other solicitations and awards. Agencies may prescribe additional detailed instructions for use of the form.

* * * * *

108. Section 53.215-1 is amended by revising the title and paragraph (d); and by adding paragraph (g) to read as follows:

53.215-1 Solicitation and receipt of proposals and quotations.

* * * * *

(d) *SF 33, Solicitation, Offer, and Award.* SF 33, prescribed in 53.214(c), shall be used in connection with the solicitation and award of negotiated contracts. Award of such contracts may be made by either SF 33 or SF 26, as specified in 15.406-1(b) and 15.414.

* * * * *

(g) *SF 1447, Solicitation/Contract.* SF 1447 is prescribed for use in soliciting offers for supplies or services and for awarding contracts that result from the offers. It shall be used in connection with solicitations and contracts which use the simplified contract format (see 15.416) and may be used in place of the SF 26 or SF 33 with other solicitations (see 15.414(c)). Agencies may prescribe additional detailed instructions for use of the form.

53.222 [Amended]

109. Section 53.222 is amended in the introductory text of paragraph (e) by removing the words "SF 1413 (10/83)" and inserting in their place "SF 1413 (REV. 6/89)".

110. Section 53.228 is amended by revising the title and paragraphs (a), (b), (c), (e), (f), (g), and (m), and by adding paragraphs (n) and (o) to read as follows:

53.228 Bonds and insurance (SF's 24, 25, 25-A, 25-B, 28, 34, 35, 273, 274, 275, 1414, 1415, 1416, OF's 90 and 91).

* * * * *

(a) *SF 24 (REV. X/XX), Bid Bond.* (See 28.106-1.)

(b) *SF 25 (REV. X/XX), Performance Bond.* (See 28.106-1(b).)

(c) *SF 25-A (REV. X/XX), Payment Bond.* (See 28.106-3(c).)

* * * * *

(e) *SF 28 (REV. X/XX), Affidavit of Individual Surety.* (See 28.106-1(e) and 28.203(b).)

(f) *SF 34 (REV. X/XX), Annual Bid Bond.* (See 28.106-1(f).)

(g) *SF 35 (REV. X/XX), Annual Performance Bond.* (See 28.106-1.)

* * * * *

(m) *SF 1416 (REV. X/XX), Payment Bond for Other than Construction Contracts.* (See 28.106-1(m).)

(n) *OF 90 (REV. X/XX), Release of Lien on Real Property.* (See 28.106-1(n) and 28.203-5(a).)

(o) *OF 91 (REV. X/XX), Release of Personal Property from Escrow.* (See 28.106-1(o) and 28.203-5(a).)

111. Section 53.301-1413 is revised to read as follows:

53.301-1413 Standard Form 1413, Statement and Acknowledgment.

BILLING CODE 6820-JC-M

*Number of complete units (contract line item) to be shipped in carrier's equipment.

STATEMENT AND ACKNOWLEDGMENT

FORM APPROVED OMB NO. 9000-0014

Public reporting burden for this collection of information is estimated to average .15 hours 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 FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000-0014), Washington, D.C. 20503.

PART I - STATEMENT OF PRIME CONTRACTOR

1. PRIME CONTRACT NO.	2. DATE SUBCONTRACT AWARDED	3. SUBCONTRACT NUMBER

4. PRIME CONTRACTOR (Name, address and ZIP code)	5. SUBCONTRACTOR (Name, address and ZIP code)

6. The prime contractor states that under the contract shown in Item 1, a subcontract was awarded on date shown in Item 2 by (Name of Awarding Firm) _____

to the subcontractor identified in Item 5, for the following work:

7. PROJECT	8. LOCATION

9. NAME AND TITLE OF PERSON SIGNING	10. BY (Signature)	11. DATE SIGNED

PART II - ACKNOWLEDGMENT OF SUBCONTRACTOR

12. The subcontractor acknowledges that the following clauses of the contract shown in Item 1 are included in this subcontract:

- Contract Work Hours and Safety Standards Act - Overtime Compensation - Construction
- Payrolls and Basic Records
- Withholding of Funds
- Disputes Concerning Labor Standards
- Davis-Bacon Act
- Apprentices and Trainees
- Compliance with Copeland Regulations
- Subcontracts
- Contract Termination-Debarment
- Certification of Eligibility

13. NAME(S) OF ANY INTERMEDIATE SUBCONTRACTORS, IF ANY

14. NAME AND TITLE OF PERSON SIGNING	15. BY (Signature)	16. DATE SIGNED

NSN 7540-01-151-4297
Previous edition is usable

EXPIRATION DATE 3-31-92

1413-102

STANDARD FORM 1413 (REV. 6-89)
Prescribed by GSA - FAR (48 CFR) 53.228(e)

BILLING CODE 6820-JC-C

112. Section 53.301–1447 is revised to read as follows:

53.301–1447 Standard Form 1447, Solicitation/Contract.

BILLING CODE 6820–JC–M

SOLICITATION/CONTRACT

BIDDER/OFFEROR TO COMPLETE BLOCKS 11, 13, 15, 21, 22, & 27

1 THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 350) | RATING | PAGE 1 OF

2. CONTRACT NO | 3. AWARD/EFFECTIVE DATE | 4. SOLICITATION NUMBER | 5 SOLICITATION TYPE ☐ SEALED BIDS (IFB) ☐ NEGOTIATED (RFP) | 6. SOLICITATION ISSUE DATE

7. ISSUED BY CODE

NO COLLECT CALLS

8. THIS ACQUISITION IS
☐ UNRESTRICTED
☐ SET ASIDE % FOR
☐ SMALL BUSINESS
SIC: SIZE STANDARD
☐ LABOR SURPLUS AREA CONCERNS
☐ COMBINED SMALL BUSINESS & LABOR SURPLUS AREA CONCERNS
☐ OTHER

9. (AGENCY USE)

10. ITEMS TO BE PURCHASED (BRIEF DESCRIPTION)

☐ SUPPLIES ☐ SERVICES

11. IF OFFER IS ACCEPTED BY THE GOVERNMENT WITHIN _____ CALENDAR DAYS (60 CALENDAR DAYS UNLESS OFFEROR INSERTS A DIFFERENT PERIOD) FROM THE DATE SET FORTH IN BLK 9 ABOVE. THE CONTRACTOR AGREES TO HOLD ITS OFFERED PRICES FIRM FOR THE ITEMS SOLICITED HEREIN AND TO ACCEPT ANY RESULTING CONTRACT SUBJECT TO THE TERMS AND CONDITIONS STATED HEREIN.

12. ADMINISTERED BY CODE

13. CONTRACTOR OFFEROR CODE FACILITY CODE

TELEPHONE NO. DUNS NO.

☐ CHECK IF REMITTANCE IS DIFFERENT AND PUT SUCH ADDRESS IN OFFER

14. PAYMENT WILL BE MADE BY CODE

SUBMIT INVOICES TO ADDRESS SHOWN IN BLOCK:

15. PROMPT PAY-DISCOUNT

16. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION ☐ 10 U.S.C. 2304 (C) ( ) ☐ 41 U.S.C. 253 (C)-( )

17. ITEM NO.	18. SCHEDULE OF SUPPLIES/SERVICES	19. QUANTITY	20. UNIT	21. UNIT PRICE	22. AMOUNT

23. ACCOUNTING AND APPROPRIATION DATA

24. TOTAL AWARD AMOUNT (FOR GOVT USE ONLY)

25. ☐ CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN COPIES TO ISSUING OFFICE. CONTRACTOR AGREES TO FURNISH AND DELIVER ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED ABOVE AND ON ANY CONTINUATION SHEETS SUBJECT TO THE TERMS AND CONDITIONS SPECIFIED HEREIN.

26. ☐ AWARD OF CONTRACT. YOUR OFFER ON SOLICITATION NUMBER SHOWN IN BLOCK 4 INCLUDING ANY ADDITIONS OR CHANGES WHICH ARE SET FORTH HEREIN, IS ACCEPTED AS TO ITEMS :

27. SIGNATURE OF OFFEROR/CONTRACTOR

28. UNITED STATES OF AMERICA (SIGNATURE OF CONTRACTING OFFICER)

NAME AND TITLE OF SIGNER (TYPE OR PRINT) | DATE SIGNED | NAME OF CONTRACTING OFFICER | DATE SIGNED

NSN 7540-01-218-4338 1447-101 STANDARD FORM 1447 (5-88) Prescribed by GSA FAR (48 CFR 53.215-1(g))

NO RESPONSE FOR REASONS CHECKED			
	CANNOT COMPLY WITH SPECIFICATIONS		CANNOT MEET DELIVERY REQUIREMENT
	UNABLE TO IDENTIFY THE ITEM(S)		DO NOT REGULARLY MANUFACTURE OR SELL THE TYPE OF ITEMS INVOLVED
	OTHER (Specify)		
	WE DO		WE DO NOT, DESIRE TO BE RETAINED ON THE MAILING LIST FOR FUTURE PROCUREMENT OF THE TYPE OF ITEM(S) INVOLVED

NAME AND ADDRESS OF FIRM (Include Zip Code)	SIGNATURE
	TYPE OR PRINT NAME AND TITLE OF SIGNER

FROM:

AFFIX STAMP HERE

TO:

SOLICITATION NO. _____

DATE AND LOCAL TIME _____

GPO: 1988 200-498 (PO107)(m)

SF 1447 (5-88) BACK

BILLING CODE 6820-JC-C

113. Section 53.301-24 is illustrated for information as follows and will not appear in the Code of Federal Regulations.

53.301-24 Standard Form 24, Bid Bond.

BILLING CODE 6820-JC-M

BID BOND (See instructions on reverse)	DATE BOND EXECUTED (Must not be later than bid opening date)	FORM APPROVED OMB NO. 9000-0045

Public reporting burden for this collection of information is estimated to average 25 minutes 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 FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000-0045), Washington, D.C. 20503.

PRINCIPAL (Legal name and business address)

TYPE OF ORGANIZATION ("X" one)

☐ INDIVIDUAL ☐ PARTNERSHIP
☐ JOINT VENTURE ☐ CORPORATION

STATE OF INCORPORATION

SURETY(IES) (Name and business address)

PENAL SUM OF BOND					BID IDENTIFICATION	
PERCENT OF BID PRICE	AMOUNT NOT TO EXCEED				BID DATE	INVITATION NO.
	MILLION(S)	THOUSAND(S)	HUNDRED(S)	CENTS	FOR (Construction, Supplies or Services)	

OBLIGATION:

We, the Principal and Surety(ies) are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit of liability is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The Principal has submitted the bid identified above.

THEREFORE:

The above obligation is void if the Principal – (a) upon acceptance by the Government of the bid identified above, within the period specified therein for acceptance (sixty (60) days if no period is specified), executes the further contractual documents and gives the bond(s) required by the terms of the bid as accepted within the time specified (ten (10) days if no period is specified) after receipt of the forms by the principal; or (b) in the event of failure to execute such further contractual documents and give such bonds, pays the Government for any cost of procuring the work which exceeds the amount of the bid.

Each Surety executing this instrument agrees that its obligation is not impaired by any extension(s) of the time for acceptance of the bid that the Principal may grant to the Government. Notice to the surety(ies) of extension(s) are waived. However, waiver of the notice applies only to extensions aggregating not more than sixty (60) calendar days in addition to the period originally allowed for acceptance of the bid.

WITNESS:

The Principal and Surety(ies) executed this bid bond and affixed their seals on the above date.

PRINCIPAL			
SIGNATURE(S)	1. (Seal)	2. (Seal)	Corporate Seal
NAME(S) & TITLE(S) (Typed)	1.	2.	

INDIVIDUAL SURETY(IES)		
SIGNATURE(S)	1. (Seal)	2. (Seal)
NAME(S) (Typed)	1.	2.

CORPORATE SURETY(IES)					
SURETY A	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		

NSN 7540-01-152-8059 EXPIRATION DATE 24-108 STANDARD FORM 24 (REV.
Previous edition not usable. Prescribed by GSA - FAR (48 CFR) 53.228(a)

CORPORATE SURETY(IES) (Continued)

SURETY B	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY C	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY D	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY E	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY F	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY G	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		

INSTRUCTIONS

1. This form is authorized for use when a bid guaranty is required. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. The bond may express penal sum as a percentage of the bid price. In these cases, the bond may state a maximum dollar limitation (e.g., 20% of the bid price but the amount not to exceed _____ dollars).

4. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)." In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning its financial capability.

5. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal"; and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

6. Type the name and title of each person signing this bond in the space provided.

7. In its application to negotiated contracts, the terms "bid" and "bidder" shall include "proposal" and "offeror."

114. Section 53.301-25 is illustrated for information as follows and will not appear in the Code of Federal Regulations.

53.301-25 Standard Form 25, Performance Bond.

BILLING CODE 6820-JC-M

PERFORMANCE BOND (See instructions on reverse)	DATE BOND EXECUTED (Must be same or later than date of contract)	FORM APPROVED OMB NO. 9000-0045

Public reporting burden for this collection of information is estimated to average 25 minutes 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 FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000-0045), Washington, D.C. 20503.

PRINCIPAL (Legal name and business address)

TYPE OF ORGANIZATION ("X" one)

☐ INDIVIDUAL ☐ PARTNERSHIP

☐ JOINT VENTURE ☐ CORPORATION

STATE OF INCORPORATION

SURETY(IES) (Name(s) and business address(es))

PENAL SUM OF BOND

MILLION(S)	THOUSAND(S)	HUNDRED(S)	CENTS

CONTRACT DATE	CONTRACT NO.

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit of liability is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The principal has entered into the contract identified above.

THEREFORE:

The above obligation is void if the Principal –

(a)(1) Performs and fulfills all the undertakings, covenants, terms, conditions, and agreements of the contract during the original term of the contract and any extensions thereof that are granted by the Government, with or without notice to the Surety(ies), and during the life of any guaranty required under the contract, and (2) performs and fulfills all the undertakings, covenants, terms conditions, and agreements of any and all duly authorized modifications of the contract that hereafter are made. Notice of those modifications to the Surety(ies) are waived.

(b) Pays to the Government the full amount of the taxes imposed by the Government, if the said contract is subject to the Miller Act, (40 U.S.C. 270a-270e), which are collected, deducted, or withheld from wages paid by the Principal in carrying out the construction contract with respect to which this bond is furnished.

WITNESS:

The Principal and Surety(ies) executed this performance bond and affixed their seals on the above date.

PRINCIPAL

SIGNATURE(S)	1. (Seal)	2. (Seal)	Corporate Seal
NAME(S) & TITLE(S) (Typed)	1.	2.	

INDIVIDUAL SURETY(IES)

SIGNATURE(S)	1. (Seal)	2. (Seal)
NAME(S) (Typed)	1.	2.

CORPORATE SURETY(IES)

SURETY A	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		

NSN 7540-01-152-8060 Previous edition not usable. EXPIRATION DATE 25-107 STANDARD FORM 25 (REV. Prescribed by GSA - FAR (48 CFR) 53.228(b))

CORPORATE SURETY(IES) (Continued)

SURETY B	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY C	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY D	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY E	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY F	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.			
SURETY G	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		

BOND PREMIUM	RATE PER THOUSAND	TOTAL
	$	$

INSTRUCTIONS

1. This form is authorized for use in connection with Government contracts. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of the approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)." In the space designated "SURETY(IES)" on the face of the form insert only the letter identification of the sureties.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning its financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

115. Section 53.301-25-A is illustrated for information as follows and will not appear in the Code of Federal Regulations.

53.301-25A Standard Form 25-A, Payment Bond.

BILLING CODE 6820-JC-M

PAYMENT BOND (See instructions on reverse)	DATE BOND EXECUTED (Must be same or later than date of contract)	FORM APPROVED OMB NO. 9000-0045

Public reporting burden for this collection of information is estimated to average 25 minutes 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 FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000-0045), Washington, D.C. 20503.

PRINCIPAL (Legal name and business address)	TYPE OF ORGANIZATION ("X" one) ☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☐ CORPORATION
	STATE OF INCORPORATION
SURETY(IES) (Name(s) and business address(es))	PENAL SUM OF BOND: MILLION(S) / THOUSAND(S) / HUNDRED(S) / CENTS
	CONTRACT DATE / CONTRACT NO.

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit of liability is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The above obligation is void if the Principal promptly makes payment to all persons having a direct relationship with the Principal or a subcontractor of the Principal for furnishing labor, material or both in the prosecution of the work provided for in the contract identified above, and any authorized modifications of the contract that subsequently are made. Notice of those modifications to the Surety(ies) are waived.

WITNESS:

The principal and Surety(ies) executed this payment bond and affixed their seals on the above date.

PRINCIPAL			
SIGNATURE(S)	1. (Seal)	2. (Seal)	Corporate Seal
NAME(S) & TITLE(S) (Typed)	1.	2.	

INDIVIDUAL SURETY(IES)		
SIGNATURE(S)	1. (Seal)	2. (Seal)
NAME(S) (Typed)	1.	2.

CORPORATE SURETY(IES)					
SURETY A	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		

NSN 7540-01-152-8061 Previous edition not usable. EXPIRATION DATE 25-205 STANDARD FORM 25-A (REV. Prescribed by GSA - FAR (48 CFR) 53.228(c)

CORPORATE SURETY(IES) (Continued)

SURETY B	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY C	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY D	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY E	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY F	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY G	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		

INSTRUCTIONS

1. This form, for the protection of persons supplying labor and material, is used when a payment bond is required under the Act of August 24, 1935, 49 Stat. 793 (40 U.S.C. 270a–270e). Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)." In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28) for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

116. Section 53.301-28 is illustrated for information as follows and will not appear in the Code of Federal Regulations.

53.301-28 Standard Form 28, Affidavit of Individual Surety.

BILLING CODE 6820-JC-M

AFFIDAVIT OF INDIVIDUAL SURETY

(See instructions on reverse)

FORM APPROVED OMB NO. 9000-0001

Public reporting burden for this collection of information is estimated to average 3 hours 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 FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000-0001), Washington, D.C. 20503.

STATE OF

COUNTY OF

SS.

I, the undersigned, being duly sworn, depose and say that I am: (1) the surety to the attached bond(s); (2) a citizen of the United States; and of full age and legally competent. I also depose and say that, concerning any stocks or bonds included in the assets listed below, that there are no restrictions on the resale of these securities pursuant to the registration provisions of Section 5 of the Securities Act of 1933. I recognize that statements contained herein concern a matter within the jurisdiction of an agency of the United States and the making of a false, fictitious or fraudulent statement may render the maker subject to prosecution under Title 18, United States Code Sections 1001 and 494. This affidavit is made to induce the United States of America to accept me as surety on the attached bond.

1. NAME (First, Middle, Last) (Type or Print)

2. HOME ADDRESS (Number, Street, City, State, ZIP Code)

3. TYPE AND DURATION OF OCCUPATION

4. NAME AND ADDRESS OF EMPLOYER (If Self-employed, so State)

5. NAME AND ADDRESS OF INDIVIDUAL SURETY BROKER USED (If any) (Number, Street, City, State, ZIP Code)

6. TELEPHONE NUMBER

HOME -

BUSINESS -

7. THE FOLLOWING IS A TRUE REPRESENTATION OF THE ASSETS I HAVE PLEDGED TO THE UNITED STATES IN SUPPORT OF THE ATTACHED BOND:

(a) Real estate (include a legal description, street address and other identifying description; the market value; attach supporting certified documents including recorded lien; evidence of title and the current tax assessment on the property. For market value approach, also provide a current appraisal.)

(b) Assets other than real estate (describe the assets, the details of the escrow account, and attach certified evidence thereof).

8. IDENTIFY ALL MORTGAGES, LIENS, JUDGEMENTS, OR ANY OTHER ENCUMBRANCES INVOLVING SUBJECT ASSETS INCLUDING REAL ESTATE TAXES DUE AND PAYABLE.

9. IDENTIFY ALL BONDS, INCLUDING BID GUARANTEES, FOR WHICH THE SUBJECT ASSETS HAVE BEEN PLEDGED WITHIN 3 YEARS PRIOR TO THE DATE OF EXECUTION OF THIS AFFIDAVIT.

DOCUMENTATION OF THE PLEDGED ASSET MUST BE ATTACHED.

10. SIGNATURE

11. BOND AND CONTRACT TO WHICH THIS AFFIDAVIT RELATES (Where appropriate)

12. SUBSCRIBED AND SWORN TO BEFORE ME AS FOLLOWS:

a. DATE OATH ADMINISTERED

MONTH DAY YEAR

b. CITY AND STATE (Or other jurisdiction)

Official Seal

c. NAME AND TITLE OF OFFICIAL ADMINISTERING OATH (Type or print)

d. SIGNATURE

e. MY COMMISSION EXPIRES

INSTRUCTIONS

1. Individual sureties on bonds executed in connection with Government contracts, shall complete and submit this form with the bond. (See 48 CFR 28.203, 53.228(e).) The surety shall have the completed form notarized.

2. No corporation, partnership, or other unincorporated associations or firms, as such, are acceptable as individual sureties. Likewise members of a partnership are not acceptable as sureties on bonds which partnership or associations, or any co-partner or member thereof is the principal obligor. However, stockholders of corporate principals are acceptable provided (a) their qualifications are independent of their stockholdings or financial interest therein, and (b) that the fact is expressed in the affidavit of justification. An individual surety will not include any financial interest in assets connected with the principal on the bond which this affidavit supports.

3. United States citizenship is a requirement for individual sureties. However, only a permanent resident of the place of execution of the contract and bond is required for individual sureties in the following locations - any foreign country; the Commonwealth of Puerto Rico; the Virgin Islands; the Canal Zone; Guam; or any other territory or possession of the United States.

4. All signatures on the affidavit submitted must be originals. Affidavits bearing reproduced signatures are not acceptable. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of firm, partnership, or joint venture, or an officer of the corporation involved.

DRAFT

BILLING CODE 6820-JC-C

117. Section 53.301-34 is illustrated for information as follows and will not appear in the Code of Federal Regulations.

53.301-34 Standard Form 34, Annual Bid Bond.

BILLING CODE 6820-JC-M

ANNUAL BID BOND (See instructions on reverse)	DATE BOND EXECUTED	FORM APPROVED OMB NO. 9000-0045

Public reporting burden for this collection of information is estimated to average 25 minutes 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 FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000-0045), Washington, D.C. 20503.

PRINCIPAL (Legal name and business address)	TYPE OF ORGANIZATION ("X" one) ☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☐ CORPORATION STATE OF INCORPORATION

SURETY(IES) (Name, business address, and State of incorporation)

AGENCY TO WHICH BIDS ARE TO BE SUBMITTED	BIDS TO BE SUBMITTED DURING FISCAL YEAR ENDING September 30, 19____

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the penal sum or sums that is sufficient to indemnify the Government in case of the default of the Principal as provided herein. For payment of the penal sum or sums, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally.

CONDITIONS:

The Principal contemplates submitting bids from time to time during the fiscal year shown above to the department or agency named above for furnishing supplies or services to the Government. The Principal desires that all of those bids submitted for opening during the fiscal year be covered by a single bond instead of by a separate bid bond for each bid.

THEREFORE:

The above obligation is void and of no effect if the Principal – (a) upon acceptance by the Government of any such bid within the period specified therein for acceptance (sixty (60) days if no period is specified), executes the further contractual documents and gives the bond(s) required by the terms of the bid as accepted within the time specified (ten (10) days if no period is specified) after receipt of forms by him; or (b) in the event of failure to execute the further contractual documents and give the bond(s), pays the Government for any cost of acquiring the work which exceeds the amount of the bid.

WITNESS:

The Principal and Surety(ies) executed this bid bond and affixed their seals on the above date.

SIGNATURES	NAMES AND TITLES (Typed)	
	PRINCIPAL	
1. (Seal)	1.	Corporate Seal
2. (Seal)	2.	
	INDIVIDUAL SURETIES	
1. (Seal)	1.	
2. (Seal)	2.	
	CORPORATE SURETY	
1.	1.	Corporate Seal
2.	2.	

AUTHORIZED FOR LOCAL REPRODUCTION
Previous edition not usable

EXPIRATION DATE

34-105

STANDARD FORM 34 (REV.
Prescribed by GSA - FAR (48 CFR) 53.228(f)

INSTRUCTIONS

1. This form is authorized for use in the acquisition of supplies and services, excluding construction, in lieu of Standard Form 24 (Bid Bond). Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning its financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal"; and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

6. In its application to negotiated contracts, the terms "bid" and "bidder" shall include "proposal" and "offeror."

STANDARD FORM 34 (REV. BACK

BILLING CODE 6820-JC-C

118. Section 53.301-35 is illustrated for information as follows and will not appear in the Code of Federal Regulations.

53.301-35 Standard Form 35, Annual Performance Bond.

BILLING CODE 6820-JC-M

ANNUAL PERFORMANCE BOND (See instructions on reverse)	DATE BOND EXECUTED	FORM APPROVED OMB NO. 9000-0045

Public reporting burden for this collection of information is estimated to average 25 minutes 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 FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000-0045), Washington, D.C. 20503.

PRINCIPAL (Legal name and business address)

TYPE OF ORGANIZATION ("X" one)

☐ INDIVIDUAL ☐ PARTNERSHIP

☐ JOINT VENTURE ☐ CORPORATION

STATE OF INCORPORATION

SURETY(IES) (Name, business address, and State of incorporation)

PENAL SUM OF BOND

MILLION(S)	THOUSAND(S)	HUNDRED(S)	CENTS

FISCAL YEAR ENDING

September 30, 19____

AGENCY REPRESENTING THE GOVERNMENT

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally.

CONDITIONS:

The Principal contemplates entering into contracts, from time to time during the fiscal year shown above, with the Government department or agency shown above, for furnishing supplies or services to the government. The Principal desires that all of those contracts be covered by one bond instead of by a separate performance bond for each contract.

THEREFORE:

The above obligation is void if the Principal – (a) performs and fulfills all the undertakings, covenants, terms, conditions, and agreements of any and all of those contracts entered into during the original term and any extensions granted by the Government with or without notice to the surety(ies) and during the life of any guaranty required under the contracts; and (b) performs and fulfills all the undertakings, covenants, terms, conditions, and agreements of any and all duly authorized modifications of those contracts, that subsequently are made. Notice of those modifications to the surety(ies) is waived.

WITNESS:

The Principal and Surety(ies) executed this performance bond and affixed their seals on the above date.

SIGNATURES	NAMES AND TITLES (Typed)	
PRINCIPAL		
1. (Seal)	1.	Corporate Seal
2. (Seal)	2.	
INDIVIDUAL SURETIES		
1. (Seal)	1.	
2. (Seal)	2.	
CORPORATE SURETY		
1.	1.	Corporate Seal
2.	2.	

INSTRUCTIONS

1. This form is authorized for use in the acquisition of supplies and services, excluding construction, in lieu of Standard Form 25 (Performance Bond). Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning its financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal"; and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

6. In its application to negotiated contracts, the terms "bid" and "bidder" shall include "proposal" and "offeror."

BILLING CODE 6820-JC-C

119. Section 53.301-1416 is illustrated for information as follows and will not appear in the Code of Federal Regulations.

53.301-1416 Standard Form 1416, Payment Bond for Other than Construction Contracts.

BILLING CODE 6820-JC-M

PAYMENT BOND FOR OTHER THAN CONSTRUCTION CONTRACTS (See instructions on reverse)	DATE BOND EXECUTED (Must be same or later than date of contract)	FORM APPROVED OMB NO. 9000-0045

Public reporting burden for this collection of information is estimated to average 25 minutes 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 FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000-0045), Washington, D.C. 20503.

PRINCIPAL (Legal name and business address) (Include ZIP Code)	TYPE OF ORGANIZATION (Check one) ☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☐ CORPORATION
	STATE OF INCORPORATION
SURETY(IES) (Name(s) and business address(es)) (Include ZIP Code)	PENAL SUM OF BOND: MILLION(S) / THOUSAND(S) / HUNDRED(S) / CENTS
	CONTRACT DATE / CONTRACT NO.

We, the Principal and Surety(ies) are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the surety. If no limit of liability is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The principal has entered into the contract identified above.

THEREFORE:

(a) The above obligation is void if the Principal promptly makes payment to all persons (claimants) having a contract relationship with the Principal or a subcontractor of the Principal for furnishing labor, material or both in the prosecution of the work provided for in the contract identified above and any duly authorized modifications thereof. Notice of those modifications to the Surety(ies) are waived.

(b) The above obligation shall remain in full force if the Principal does not promptly make payments to all persons (claimants) having a contract relationship with the Principal or a subcontractor of the Principal for furnishing labor, material or both in the prosecution of the contract identified above. In these cases, persons not paid in full before the expiration of ninety (90) days after the date of which the last labor was performed or material furnishing, have a direct right of action against the Principal and Surety(ies) on this bond for the sum or sums justly due. The claimant, however, may not bring a suit or any action -

(1) Unless claimant, other than one having a direct contract with the Principal, had given written notice to the Principal within ninety (90) days after the claimant did or performed the last of the work or labor, or furnished or supplied the last of the materials for which the claim is made. The notice is to state with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished or supplied, or for whom the work or labor was done or performed. Such notice shall be served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the Principal at any place where an office is regularly maintained for the transaction of business, or served in any manner in which legal process is served in the state in which the contract is being performed, save that such service need not be made by a public officer.

(2) After the expiration of one (1) year following the date on which claimant did or performed the last of the work or labor, or furnished or supplied the last of the materials for which the suit is brought.

(3) Other than in the United States District Court for the district in which the contract, or any part thereof, was performed and executed, and not elsewhere.

WITNESS:

The Principal and Surety(ies) executed this payment bond and affixed their seals on the above date.

PRINCIPAL			
SIGNATURE(S)	1. (Seal)	2. (Seal)	Corporate Seal
NAME(S) & TITLE(S) (Typed)	1.	2.	
INDIVIDUAL SURETY(IES)			
SIGNATURE(S)	1. (Seal)	2. (Seal)	
NAME(S) & TITLE(S) (Typed)	1.	2.	
CORPORATE SURETY(IES)			
SURETY A — NAME & ADDRESS		STATE OF INC. / LIABILITY LIMIT $	Corporate Seal
SURETY A — SIGNATURE(S)	1.	2.	
SURETY A — NAME(S) & TITLE(S) (Typed)	1.	2.	
SURETY B — NAME & ADDRESS		STATE OF INC. / LIABILITY LIMIT $	Corporate Seal
SURETY B — SIGNATURE(S)	1.	2.	
SURETY B — NAME(S) & TITLE(S) (Typed)	1.	2.	

INSTRUCTIONS

1. This form is authorized for use when payment bonds are required under FAR (48 CFR) 28.103-3, i.e., payment bonds for other than construction contracts. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)." In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual Sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning its financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal"; and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

120. Section 53.302–90 is illustrated for information as follows and will not appear in the Code of Federal Regulations.

53.302–90 Optional Form 90, Release of Lien on Real Property.

BILLING CODE 6820–JC–M

RELEASE OF LIEN ON REAL PROPERTY

Whereas _____, of _____, by a bond
(Name) (Place of Residence)
for the performance of U.S. Government Contract Number _____, became a surety for the complete and successful performance of said contract, which bond includes a lien upon certain real property further described hereafter, and

Whereas said surety established the said lien upon the following property

and recorded this pledge on _____
(Name of Land Records)
in the _____ of _____.
(Locality) (State)
and

Whereas, I, _____, being a duly authorized representative of the United States Government as a warranted contracting officer, have determined that the lien is no longer required to ensure further performance of the said Government contract or satisfaction of claims arising therefrom,
and

Whereas the surety remains liable to the United States Government for continued performance of the said Government contract and satisfaction of claims pertaining thereto.

Now, therefore, this agreement witnesseth that the Government hereby releases the aforementioned lien.

[Date]

[Signature]

Seal

OPTIONAL FORM 90 (REV.
Prescribed by GSA
FAR (48 CFR) 53.228(n)

AUTHORIZED FOR LOCAL REPRODUCTION

BILLING CODE 6820-JC-C

121. Section 53.302-91, is illustrated for information as follows and will not appear in the Code of Federal Regulations.

53.302-91 Optional Form 91, Release of Personal Property from Escrow.

BILLING CODE 6820-JC-M

RELEASE OF PERSONAL PROPERTY FROM ESCROW

Whereas _____, of _____, by a bond
(Name) (Place of Residence)
for the performance of U.S. Government Contract Number _____,
became a surety for the complete and successful performance of said contract, and

Whereas said surety has placed certain personal property in escrow

In Account Number _____ on deposit

at _____
(Name of Financial Institution)

located at _____, and
(Address of Financial Institution)

Whereas I, _____, being a duly authorized representative of the United States Government as a warranted contracting officer, have determined that retention in escrow of the following property is no longer required to ensure further performance of the said Government contract or satisfaction of claims arising therefrom:

and

Whereas the surety remains liable to the United States Government for the continued performance of the said Government contract and satisfaction of claims pertaining thereto.

Now, therefore, this agreement witnesseth that the Government hereby releases from escrow the property listed above, and directs the custodian of the aforementioned escrow account to deliver the listed property to the surety. If the listed property comprises the whole of the property placed in escrow in the aforementioned escrow account, the Government further directs the custodian to close the account and to return all property therein to the surety, along with any interest accruing which remains after the deduction of any fees lawfully owed to _____.
(Name of Financial Institution)

[Date]

[Signature]

Seal

OPTIONAL FORM 91
Prescribed by GSA
FAR (48 CFR) 53.228(o)

AUTHORIZED FOR LOCAL REPRODUCTION

[FR Doc. 89-27616 Filed 11-27-89; 8:45 am]
BILLING CODE 6820-JC-C

federal register

Tuesday
November 28, 1989

Part III

Housing and Urban Development

Office of the Assistant Secretary for Fair Housing and Equal Opportunity

Fair Housing Initiatives Program; Competitive Solicitation; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Fair Housing and Equal Opportunity

[Docket No. N-2063; FR-2709-N-1]

Fair Housing Initiatives Program; Competitive Solicitation

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice of Funding Availability.

SUMMARY: This notice solicits applications, from eligible State and local fair housing agencies and from public or private organizations formulating or carrying out programs to prevent or eliminate discriminatory housing practices, for funding under the Education and Outreach Initiative of the Fair Housing Initiatives Program (FHIP). Applicants must meet specific eligibility criteria set forth in this notice and in 24 CFR part 125 to qualify for consideration under this program. This notice pertains to competitive funding applications under the Education and Outreach Initiative which are national, State, local or regional in scope.

FOR FURTHER INFORMATION CONTACT: Marion F. Connell, Director, Programs Division, Office of Fair Housing and Equal Opportunity, Room 5212, 451 Seventh Street, SW., Washington, DC 20410-2000. Telephone: (202) 755-0455. (V and TDD) (This is not a toll-free number.) Application kits are available upon written or telephone request from the above. To ensure a prompt response, it is suggested that requests for application kits be made by telephone.

DATES: An application for funding under this notice must be submitted between November 28, 1989 and December 28, 1989 unless it qualifies for a late application exception as specified in the application kit and is received before funds are awarded.

SUPPLEMENTARY INFORMATION: The legislation creating the Fair Housing Initiatives Program (FHIP), approved by the President on February 5, 1988, authorizes the Secretary to provide funding to State and local governments or their agencies, public or private non-profit organizations, or other public or private entities formulating or carrying out programs to prevent or eliminate discriminatory housing practices. These funds will enable the recipients to carry out activities designed to obtain enforcement of the rights granted by the Fair Housing Act or by substantially equivalent State or local fair housing laws, and education and outreach activities designed to inform the public concerning rights and obligations under such Federal, State or local laws prohibiting discrimination.

The FHIP has three funding categories: The Administrative Enforcement Initiative, the Education and Outreach Initiative, and the private Enforcement Initiative. This notice announces the availability of funding under the Education and Outreach Initiative for applications which are national, state, local or regional in scope.

Funds under the Education and Outreach Initiative which are national, state, local or regional in scope are available to State and local fair housing agencies, Community Housing Resource Boards, traditional civil rights organizations and other governmental, public and private agencies and organizations. Funding will be based upon the submission of applications for projects designed to inform and educate the general public and housing groups about fair housing rights and responsibilities under Federal, State and local fair housing laws.

Organizations funded by the FHAP or the CHRB Program to carry out education and outreach activities in Fiscal Year 1989 will not be funded under this NOFA. In addition, all future education and outreach activities to further Fair Housing, funded by HUD, will be coordinated between the FHAP and FHIP programs.

Background

Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. 3601-19 (The Fair Housing Act), charges the Secretary of Housing and Urban Development with responsibility to accept and investigate complaints alleging discrimination based on race, color, religion, sex, handicap, familial status or national origin in the sale, rental, or financing of most housing. In addition, the Fair Housing Act directs the Secretary to coordinate with State and local agencies administering fair housing laws and to cooperate with and to render technical assistance to public or private entities carrying out programs to prevent or eliminate discriminatory housing practices.

Section 561 of the Housing and Community Development Act of 1987 (Pub. L. 100-242, approved February 5, 1988) established the Fair Housing Initiatives Program to strengthen the Department's effort to enforce the Fair Housing Act and to further fair housing. This program is intended to assist projects and activities designed to enhance compliance with the Fair Housing Act and substantially equivalent State and local fair housing laws.

On April 25, 1989, HUD published a Notice of Funding Availability (NOFA) for $300,000, inviting applications for ten awards of approximately $30,000 per award. The response to that Notice was the receipt of over 180 applications. Therefore, HUD decided to issue this NOFA for an additional $1.7 million.

The basic activities to be assisted by approximately $1 million of such funding are the same as those announced in the April 25, 1989 notice. Individual awards for State, local or regional campaigns may be up to $75,000. HUD invites those applicants who previously applied to resubmit their applications if they so desire.

This NOFA also provides for awards totaling up to $700,000 for national education and outreach campaigns for applications which were not requested in the previous NOFA. HUD expects to fund the most effective product(s) or source material for use by States, local governments and private entities. The replicability of the potential source material solicited in this NOFA is therefore important. Applications for national education and outreach campaigns will be scored and ranked separately from State, local or regional applications.

Other Matters

The program components of the Fair Housing Initiatives Program are described in the Catalog of Federal Domestic Assistance at 14.408, Administrative Enforcement Initiative; 14.409, Education and Outreach Initiative; and 14.410, Private Enforcement Initiative.

Application requirements associated with this program have been approved by OMB and assigned approval number 2529-0033.

I. General Provisions Governing Applications for Assistance

Each application for funding under the Fair Housing Initiatives Program must contain the information set forth below. Each application will be assessed against the general selection criteria set forth in this Notice of Funding Availability. Recipients will be expected to comply with the requirements of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and 24 CFR part 8. Section 504 prohibits discrimination based on handicap in Federally assisted programs.

A. A description of the practice or practices at the community, regional or national level which have adversely affected the achievement of the goal of

fair housing. This description must include a discussion and analysis of the housing practices identified, including available information and studies relating to discriminatory housing practices and their historical background, and relevant demographic data indicating the nature and extent of the impact of such practices on persons seeking dwellings or services related to the sale, rental and financing of dwellings, in the general location where the applicant proposes to undertake activities;

B. A description of the specific activities to be conducted with FHIP funds, including the final products and any reports to be produced, the cost of each activity proposed and a schedule for completion of the funded activities;

C. A description of the applicant's experience in formulating or carrying out programs to prevent or eliminate discriminatory housing practices;

D. A statement indicating the need for Federal funding in support of the proposed project; and an estimate of such other public or private resources as may be available to assist the proposed activities;

E. A description of the procedures to be used by the applicant for monitoring the conduct and for assessing the results of the proposed activities;

F. A description of the benefits which successful completion of the project will produce to enhance fair housing and the concerns identified, and the indicators by which these benefits are to be measured; and

G. A description of the expected long term viability of project results.

II. General Selection Criteria for Ranking Applications for Assistance

All projects proposed in applications will be ranked on the basis of the following criteria for selection:

A. The anticipated impact of the project proposed on the concerns identified in the application (25 points);

B. The extent to which the applicant's professional and organizational experience will further the achievement of project goals (25 points);

C. The extent to which the project will provide benefits in support of fair housing after funded activities have been completed (20 points);

D. The extent to which the project utilizes other public or private resources that may be available (20 points); and

E. The extent to which the project will provide the maximum impact on the concerns identified in a cost-effective manner (10 points).

F. Further Clarification of Factors for Award

1. In determining the anticipated impact of the proposed project, HUD will consider the degree to which a proposed project addresses problems and issues that are significant fair housing problems and issues. Clarity and thoroughness of project description will be considered in this determination.

2. In determining the extent to which the applicant's professional and organizational experience will further the achievement of project goals, HUD will consider the experience and qualifications of existing personnel identified for key project positions, or a description of the process and qualifications to be used for selection of key personnel, including subcontractors/consultants, as well as the organization's past and current experience. Such experience should include both fair housing experience and experience in implementing education, outreach, or public information programs.

3. In determining the extent to which the project will provide the maximum impact on the concerns identified in a cost-effective manner, HUD will consider reasonableness of the proposed timetable for implementation and completion of the project, as well as the adequacy and clarity of proposed procedures to be used by the agency for monitoring progress of the project and ensuring timely completion. HUD will also consider information provided regarding how the project is cost effective.

4. In determining the extent to which the project will provide benefits after funded activities have been completed, HUD will consider the degree to which the project is of continuing value in dealing with housing discrimination.

G. Cost Factors—Cost will be the deciding factor when complete and eligible applications are evaluated against the factors for award and considered to be technically equivalent. Furthermore, an application may not be funded when costs are determined to be unrealistically low or unreasonably high.

H. Program Policy Factor—After eligible applications are evaluated against the factors for award, the Assistant Secretary will review the geographical distribution of potential recipients. In making awards, the Assistant Secretary may exercise discretion to make awards out of rank order for the purpose of ensuring equitable geographic distribution.

III. The Education and Outreach Initiative

A. Eligibility

The following types of organizations are eligible to receive funding under the Education and Outreach Initiative:

1. State or local governments;

2. Public or private non-profit organizations or institutions and other public or private entities (including Community Housing Resource Boards) that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices.

B. Scope

Applications are solicited for specialized project proposals as described in 24 CFR 125.303 and in this Section III.B.

This notice announces funding under the Education and Outreach Initiative for the development of a national, state, regional or local education or outreach campaigns or other special efforts, including education of the general public and housing industry groups about fair housing rights and obligations and media campaigns concerning availability of housing opportunities.

All projects must address or have relevance to housing discrimination based on race, color, religion, sex, handicap, familial status or national origin.

Educational projects that may be funded under the Education and Outreach Initiative may include (but are not limited to) the following:

1. Developing informative material on fair housing rights and responsibilities;

2. Developing fair housing and affirmative marketing instructional material for education programs for National, State, regional and local housing industry groups;

3. Providing educational seminars and working sessions for civic associations, community-based organizations and other groups; and

4. Developing educational material targeted at persons in need of specific or additional information on their fair housing rights.

Outreach projects that may be funded under the Education and Outreach Initiative may include (but are not limited to) the following:

1. Developing national, State, regional or local media campaigns regarding fair housing;

2. Bringing housing industry and civic or fair housing groups together to identify illegal real estate practices and to determine how to correct them;

3. Designing specialized outreach projects to inform persons of the availability of housing opportunities;

4. Developing and implementing a response to new or more sophisticated practices that result in discriminatory housing practices; and

5. Developing mechanisms for the identification of and quick response to housing discrimination cases involving the threat of physical harm.

C. Applications for Funding

In addition to meeting the application requirements contained in Section I. above, all applications for Education and Outreach Initiative funding must describe how the activities or the final products of the project can be used by other agencies and organizations and what modifications, if any, would be necessary for that purpose.

D. Coordination of Activities

Each non-governmental applicant for funding which is located within the jurisdiction of a State or local enforcement agency or agencies administering a fair housing law which has been recognized by the Department under 24 CFR part 115 as being a substantially equivalent fair housing law must provide, with its application, evidence that it has consulted with the agency or agencies to coordinate activities to be funded under the Education and Outreach Initiative. This coordination will ensure that the activities of one group will minimize duplication and fragmentation of the other.

E. Program Totals and Funding Estimates

Approximately $1.7 million is available in total under this Notice for Education and Outreach funding. HUD estimates that it could fund up to $700,000 for national education and outreach campaigns. HUD will use the remaining funds for State, local or regional campaigns. No single award for a State, local or regional campaign will be greater than $75,000.

F. Applications

An applicant may submit only one application, but may propose more than one type of activity under this Initiative. Applicants must submit all information required in the application kit and must include sufficient information to establish that the application meets the criteria set forth at sections I., II and III.C, above.

Applicants must provide information to establish that they meet the eligibility criteria in III.A. above. Projects should be no longer than 12 months in duration.

Projects shall not be proposed that are planned for implementation with applicant funds and would simply substitute FHIP funds for applicant funds. Data gathering activities will require OMB approval under the Paperwork Reduction Act before commencement of the activity.

G. Award Procedures

Applications for funding under this Initiative will be evaluated competitively and awarded points based on the Factors for Award identified in section II, above. Applications will be reviewed by a HUD Technical Evaluation Panel. The final decision on awarding of funds rests with the Assistant Secretary or the Assistant Secretary's designee.

IV. Applicant Notification and Award Procedures

The following procedures are applicable to all funding under this NOFA:

A. Notification

No information will be available to applicants during the period of HUD evaluation, except for notification in writing to those applicants that are determined to be ineligible. Awards are expected to be announced by HUD within three months of the closing date for applications.

B. Negotiations

After HUD has ranked the applications and made an initial determination of applicants whose scores are above the funding threshold (but before the actual award), HUD may require that applicants in this group participate in negotiations and submit application revisions resulting from those negotiations. In cases where it is not possible to conclude the necessary negotiations successfully, awards will not be made. Successful negotiations include resolution of all administrative matters such as the adequacy of the applicants accounting system for tracking costs under cost reimbursement awards. Negotiations will not be used to raise the rankings of applications that would otherwise fall below the funding threshold.

If an award is not made to an applicant whose application is above the initial funding threshold because of an inability to complete successful negotiations, and if funds are available to fund any applications that may have fallen below the initial threshold, HUD will establish a new funding threshold and proceed as described in the preceding paragraph.

C. Funding Instrument

HUD expects to award a cost reimbursement cooperative agreement or grant to each successful applicant. HUD reserves the right, however, to use the form of assistance agreement determined to be most appropriate after negotiation with the applicant.

Authority: Sec. 561 of the Housing and Community Development Act of 1987 (Pub. L. 100-242, approved February 5, 1988); Title VIII, Civil Rights Act of 1968 (42 U.S.C. 3601-19); Sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Dated: November 6, 1989.

Leonora L. Guarraia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 89-27750 Filed 11-27-89; 8:45 am]

BILLING CODE 4210-28-M

federal register

Tuesday,
November 28, 1989

Part IV

Department of Labor

Employment and Training Administration

Job Training Partnership Act: Research and Demonstration (R&D) Field-Initiated Proposal Competition for Program Year 1989 and Thereafter; Notice

DEPARTMENT OF LABOR

Employment and Training Administration

Job Training Partnership Act: Research and Demonstration (R&D) Field-Initiated Proposal Competition for Program Year 1989 and Thereafter

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (DOL) announces the establishment of a competitive process for awarding field-initiated research and demonstration grants. Field-initiated projects are those that are generated by interested individuals and organizations in the public and private sectors, and are not in response to DOL generated Solicitations for Grant Applications (SGAs) or Requests for Proposals (RFPs). The process will begin with publication of this notice and continue in future Program Years (PY), which begin July 1, and end on June 30 of each calendar year.

This notice explains the process which will be followed and specifies the topic areas for PY 1989. The notice solicits grant applications, and announces ETA's intention to direct priority funding support toward field-initiated projects that are more in line with agency goals and objectives.

DATES: Proposals will be accepted from November 28, 1989 through the close of business on March 31, 1990.

ADDRESS: Proposals shall be submitted in writing (original plus three (3) copies) to: James C. DeLuca, Grant Officer, Employment and Training Administration, 200 Constitution Avenue, NW., Room C-4305, Washington, DC 20210.

SUPPLEMENTARY INFORMATION:

Introduction

The Employment and Training Administration (ETA) of the Department of Labor (Department or DOL) announces a process for reviewing and selecting field-initiated research and demonstration proposals. This notice officially begins the process for Program Year (PY) 1989 which began on July 1, and invites applications for topic areas outlined under part II. Applications for PY 1989 will be accepted through March 31, 1990.

Approved topic areas of interest to ETA for PY 1989 are summarized, and examples of proposals unlikely to be funded are included. Interested parties are advised that field-initiated research and demonstration proposals will be funded primarily through this competitive process. Any funding of proposals submitted outside of the process announced in this notice will be on a limited basis.

This solicitation for Grant Applications (SGA) is unrestricted. Proposals may be submitted by individuals and organizations from the public and private sectors. Grant awards resulting from this solicitation will not be fee-bearing.

Part I—Background

Section 452 of title IV, part D, of the Job Training Partnership Act (JTPA) provides for the establishment of research and demonstration (R&D) programs to overcome employment and training problems and improve employment opportunities of low-skilled and disadvantaged workers. Section 453 provides for financial assistance to pilot projects assisting persons who face particular disadvantages in gaining employment, and to such projects addressing skills shortages critical to national objectives. Other sections of Part D provide for multistate, evaluation and training and technical assistance programs which may not always be relevant to this solicitation.

Historically, ETA has managed its responsibilities for the provision of Research, Demonstration and Evaluation (RD&E) programs through three basic approaches: (1) Annual competitions for grants and contracts; (2) annual funding for grantees with established, long-term relationships with ETA; and (3) proposals submitted from interested individuals and organizations. In the past several years, ETA has increased the proportion of its RD&E competitive awards, resulting in a decrease in the number of field-initiated proposals funded. However, significant numbers of field-initiated proposals have continued to be submitted during the last two program years.

Part II—The New Competitive Process for Field-Initiated R&D Proposals

To improve the review and selection of field-initiated proposals, ETA is instituting a process of competing virtually all proposals throughout the course of the PY. This procedure will not only increase the competitive base of the R,D&E program, but will also add to the consistency, and therefore fairness, of the review process itself. Notification of the competition will be made each PY in the **Federal Register**.

ETA will describe its major topics of interest and will clearly indicate what will not be acceptable. Other submissions will be accepted and reviewed but will be awarded on a limited basis. All offerors may enter this competition at any time during the PY. Panels will be established quarterly, to the extent possible, to review all proposals received during that three-month period. All offerors will be notified of the disposition of their proposals, and winners will be announced in the **Federal Register**.

This procedure is designed to supplement not supplant the competitive process for individual grants and contracts announced in the **Federal Register** and the *Commerce Business Daily*. Proposals will be accepted in the areas noted below unless they appear to be circumventing an announced SGA or Request for Proposals (RFP) competition. The areas of interest are sufficiently broad to permit consideration of unique, innovative aspects of research and demonstration beyond the scope of announced competitions.

A. Program Year 1989 Agenda

On September 6, 1989, ETA announced in the **Federal Register** (54 FR 37033) the PY 1989 Research, Evaluation, Pilot and Demonstration (R,E,P&D) agenda describing the topic areas of major interest to the Administration which included the following:

—Workplace 2000
—Youth Opportunities
—Workplace Literacy
—Workplace Adjustment Assistance and Adult Programs.

Applications submitted through this SGA should address these priority topics. Focused projects within some of these areas are also planned to be awarded through major procurement competitions.

1. Workplace 2000

The U.S. economy is expected to continue to grow at least at its current rate through the year 2000. Nonetheless, the efficiency of our labor markets will be severely tested. More sophisticated jobs will demand greater skills. Fewer young people will be entering the labor market, and a growing fraction will be minorities, who as a group, are educationally disadvantaged. Greater flexibility will be demanded of all workers, but particularly the middle-aged worker. In the anticipated tight labor market of the year 2000, employers will be forced to either seek out and invest in workers heretofore underutilized, or to bid up wages or export jobs overseas.

Employer-based training is one such method of investing in workers. Recent

study findings indicate that it is a primary source of productivity improvement. However, there are gaps in the research needed to fully understand learning in the workplace. More information is needed on how to make learning on the job more effective and efficient for both workers and employers.

Workplace 2000 proposals should focus on the preparation of workers and changes and trends in employment as we approach the turn of the century. Recent studies have predicted the need to increase the following: workers' skill levels for the jobs of the near future, worker flexibility to new working conditions, the involvement of population groups not now fully utilized, employer involvement in worker training, and options for fringe benefits. Briefly, more time, attention and funds must be directed to improving human capital if we are to be a productive and competitive force in world economies.

2. Youth Opportunities

Improving the educational preparedness of workers is a challenge we must meet to be competitive into the 21st century. This is most important for our young people. Today's youth at risk of dropping out of school are our entry level workers of the next two decades. They face jobs demanding higher skills in math, reading and communications. Yet recent studies have shown that many of these youth are reading, writing, and computing at levels below present day expectations. Further, many of these youth are disillusioned with schools, and fail to see education's connection with good paying jobs. In some inner cities, as many as 50 percent of youth drop out of school. Further efforts must also be focused on young people who complete high school but do not go to college. Businesses report that their levels of job preparedness are frequently inadequate.

Proposals are invited that offer new concepts to motivate and train youth for tomorrow's workforce, to increase the basic skills and employability of at-risk youth, including innovative and replicable programs/options for returning dropouts to school, and unique, workable concepts for remedial and job training programs. Innovative research studies on selected youth employability issues are also invited.

3. Workplace Literacy

As the remainder of this century unfolds, it is expected that jobs requiring higher levels of literacy and analytic skills will increase, and those requiring only strength and manual ability will shrink. Further, the population groups presently in jobs with lesser skill requirements can expect a more difficult time in the job markets ahead unless their literacy skills are increased. In addition to increased skills, increased flexibility will be required to enable workers to adapt to new working conditions, new technology and new environments. In the rapidly growing service sector, the demand for workers will shift frequently in response to customer demand. Worker mobility will be necessary to fill these jobs. Effective mobility will require a universal method of certifying skill levels in order to facilitate the movement of workers from one employer to another.

In the past several years, ETA has undertaken a wide variety of programs to explore, test and demonstrate new learning techniques and programs for groups in particular need of enhancing their workplace literacy skills, and efforts to assess literacy skill levels.

Improving the workplace literacy levels of Americans of all ages continues to be a major priority. As technology changes, workers are required to keep up with it to retain or grow in their jobs. Workplace literacy includes math and analytical thinking skills along with the ability to read, comprehend and communicate. Studies have shown that learning these skills "in context,"—i.e., relating them to the workplace—is an effective approach for many learners.

Applications are invited for research or demonstrations in the broad arena of increasing the workplace literacy of youth and adults. Offerors should direct their efforts to unique methods, tools or technologies for training more efficiently and effectively, and should focus their studies or demonstration on learning on the job or in a workplace context.

4. Work Adjustment Assistance and Adult Programs

Workers needing adjustment assistance are many and varied. Changes in the economy and technologies have displaced many workers. Many of these workers, displaced from manufacturing sectors, are ill prepared for evolving jobs, primarily in the service sectors. Trade Adjustment Assistance (TAA) (Chapter 2 of Title II of the Trade Act of 1974) and Economic Dislocation and Worker Adjustment Assistance (EDWAA) (Title III of JTPA) programs are available to assist dislocated workers to train for and find new employment. Major new legislation was enacted last year substantially revising and expanding these important programs.

Other workers face conflicts between their jobs and family responsibilities, including the care of children and elders. Women, work and family issues are also included under this topic. Since the mid-1940's the labor force participation rate for women has grown dramatically from about 33 percent to more than 70 percent. In 1987, 66.7 percent of women with children participated in the labor force. The rate for mothers with young toddlers was 55.2 percent, more than double the rate of only 20 years ago. Contrary to popular belief, most working women (78 percent) work full time, and only 17 percent work part time voluntarily. Estimates for the remainder of the century indicate that women will increase their labor force participation, but at a slower rate. By the year 2000, the labor force participation rate for women is expected to reach 81 percent, while that of men will be nearly 93 percent.

Applications are invited that seek to improve the employability of these workers and potential workers. Proposals might include concepts and projects to assist dislocated workers and disadvantaged men and women (including single mothers on welfare) to receive job training and employment, or new ways to provide training or job adjustments that also allow for appropriate care for children and/or elderly family members. Additional innovative projects are invited which assist JPA-eligible disadvantaged, handicapped, limited English speaking, and other targeted groups in need of special assistance to prepare for and gain employment at a living wage, and projects geared to improving the delivery of JTPA programs at all levels.

B. Application Procedures

Proposals are expected to be complete and readily understandable. No contracts will be made to elicit further information from the offeror or to clarify meaning. At a minimum, proposals should include the following:

Technical Proposal—Part A

1. Statement of the problem and brief summary of the proposed solution/project.

2. As appropriate, a brief history of research or projects leading to the proposed project.

3. An outline of the proposed research methodology or operational design envisioned, including a summary of personnel and/or equipment required.

4. As applicable, information on the number and location of sites to be involved, the target group(s) to be

served, the projected number of people to be served, the contemplated duration of the project (and its phases, if appropriate) and the expected measures of success, and goals to be reached. (Typically funding is for 12 months, and seldom exceeds 18 months.)

5. A description of program linkages or shared/leveraged research efforts, as appropriate. (Indicate dollars leveraged or matched in Part B only.)

6. A description of key staff and the name and telephone number of the person to be contacted for further information.

Cost Proposal—Part B

1. A budget which includes a breakdown of personnel costs, fringe benefits, other direct costs, overhead requirements and equipment.

2. A description and the amount of matching or leveraging resources.

All information needed for submittal of proposals is included in this notice. An original and three (3) copies of the proposal shall be submitted. The proposal package shall consist of two separate and distinct parts. Part A shall contain a detailed technical proposal and Part B shall contain a detailed budget. Part A shall not include or make reference to costs. Proposals shall be submitted to: James C. DeLuca, Grant Officer, Employment and Training Administration, 200 Constitution Avenue, NW., Room C-4305, Washington, DC 20210.

C. Criteria for Evaluation

The proposals will be reviewed and paneled quarterly. To the extend possible, proposals will be reviewed in the quarter they are received. The panel's evaluation is advisory to the ETA Grant Officer. The final decision to award a grant will be made by the Grant Officer, after considering the panel's review. The Grant Officer's decision will be based on what he determines is most advantageous to the Government in terms of technical quality and other factors. The evaluation criteria are as follows:

- The *quality and soundness* of the project design, methodology and approach. (35 points)
- *Qualifications* and capability of *personnel and the organization.* (20 points)
- The *innovativeness or uniqueness* of the concept, methodology or approach. (20 points)
- The *relevance* to government training and employment policy and the potential for *broad application* of project results. (15 points)
- *Matching or contributed resources* in support of the project and, for demonstrations, the *ability to continue* the project without these R, D&E funds beyond the grant period. (10 points)

Cost will be reviewed in terms of its reasonableness and what is most advantageous to the government. (Projects in excess of $300,000 are seldom funded due to budget constraints and the desire to fund a variety of research and demonstrations.)

D. Proposals Outside Agency Priorities

The JTPA program is not authorized to fund certain projects, and due to the need to conserve limited resources, will restrict its funding to projects that are in line with agency goals and objectives. The following list is not all-inclusive, but does indicate proposals that are frequently submitted but not funded; such proposals will not be considered for funding:

—Proposals that include costs associated with purchasing buildings, capital equipment, or extensive computer equipment. This does not preclude submissions that include reasonable computer costs associated with word or data processing to manage the research, pilot or demonstration effort.

—Proposals for the establishment of small businesses, even if the direct outcome of that business is the employment and training of disadvantaged individuals.

—Proposals for loans or grants for personal financial assistance.

—Proposals for projects/operations providing on-going training and employment assistance using established service delivery methods. Such successful program operators should contact the State or local JTPA Administrator if they seek to become service providers.

—Proposals for local one-time labor market studies.

—Proposals for projects or functions that are, have been, or are planned to be publicly completed.

—Proposals that fail to provide sufficient information for an adequate assessment of their merits.

The Proposal Review Process

All proposals will be acknowledged when they are received; offerors will be notified of the approximate time of the next panel. Two to three times a year, all proposals received will be reviewed by a panel composed of representatives from the major offices within ETA and others as appropriate.

Each proposal will be reviewed by all panel members who will rate them on their individual merits using the criteria established in this SGA. The panel will make recommendations for funding to the ETA Grant Officer.

All offerors will be informed of the disposition of their proposals.

Signed at Washington, DC, this 16th Day of November, 1989.

Roberts T. Jones,

Assistant Secretary for Employment and Training.

[FR Doc. 89-27704 Filed 11-27-89; 8:45 am]

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Tuesday
November 28, 1989

Part V

Oversight Board Resolution Trust Corporation

12 CFR Parts 1506 and 1606

Qualification of, Ethical Standards of Conduct for, and Restrictions on the Use of Confidential Information by Independent Contractors; Joint Notice of Proposed Rulemaking

OVERSIGHT BOARD

12 CFR Part 1506

RESOLUTION TRUST CORPORATION

12 CFR Part 1606

RIN 3205-AA01

Qualification of, Ethical Standards of Conduct for, and Restrictions on the Use of Confidential Information by Independent Contractors

AGENCY: Oversight Board and Resolution Trust Corporation.

ACTION: Joint notice of proposed rulemaking.

SUMMARY: This proposed rule establishes the minimum qualifications, ethical standards of conduct, and the restrictions on the use of confidential information relating to independent contractors who seek or contract to provide services to the Resolution Trust Corporation ("RTC") in connection with its management and resolution of failing and failed thrift institutions. The Oversight Board and the RTC are required by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") to promulgate rules and regulations applicable to independent contractors governing conflicts of interest, ethical responsibilities and the use of confidential information consistent with the goals and purposes of titles 18 and 41 of the United States Code within 180 days from enactment of the Act. FIRREA further requires the Oversight Board to prescribe by regulations, procedures for ensuring that any individual who performs any function or service on behalf of the RTC meets minimum standards of competence, experience, integrity, and fitness, and to review all rules, regulations, principles, procedures, and guidelines that may be adopted or announced by the RTC.

Consistent with these requirements, the rule proposed jointly by the Oversight Board and the RTC is intended to assure fair competition in the award of contracts by precluding improper use of personal relationships or influence, and to prevent personal gain from the improper use of confidential information obtained through performance of a contract. The proposed rule, in a separate section, also contains the proposed procedures prescribed by the Oversight Board to ensure that those who perform services for or on behalf of the RTC meet minimum standards of competence, fitness, integrity, and experience and adhere to the highest standards of ethical conduct in performing services for the RTC. The proposed rule is also consistent with the relevant goals and objectives contained in the strategic plan published in the **Federal Register** on November 3, 1989, 54 FR 46574.

As noted in the proposed strategic plan, FIRREA requires the RTC to utilize the private sector in carrying out its duties, including real estate and loan portfolio asset management, property management, auction marketing, and brokerage services, to the extent that such services are available and their utilization by the RTC is practicable and efficient. The Board and the RTC are determined to utilize the private sector's extensive experience and expertise in the program. Such services will, however, have to be rendered to the RTC consistent with the high ethical standards mandated by the FIRREA. To assure that both Congressional objectives are fully met, the Board and the RTC are determined that the rule as finally promulgated preserves the integrity of the system, while, at the same time, assures the private sector's participation in the program to the maximum extent feasible. The Oversight Board and the RTC are seeking comment on whether the proposed rule would accomplish these objectives. The private sector is urged to participate in the rulemaking process. In the formulation of the final rule, the Oversight Board and the RTC will give due consideration to all comments and recommendations received.

DATES: Comments must be submitted on or before January 12, 1990.

ADDRESSES: Comments may be mailed to John M. Buckley, Jr., Executive Secretary, Resolution Trust Corporation, 550 17th Street NW., Washington, DC 20429. Comments may be hand-delivered to room 6097 on business days between 8:30 a.m. and 5:00 p.m. All comments will be considered by both the Oversight Board and the RTC.

FOR FURTHER INFORMATION CONTACT: Katherine A. Corigliano, Assistant Executive Secretary (Ethics), Office of the Executive Secretary, (202) 898-7272, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429 or Kevin Morse, Executive Secretary, (202) 387-7667, Oversight Board, 1825 Connecticut Avenue NW., Washington, DC 20036.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act: The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the collections of information should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503; and to the Assistant Executive Secretary (Administration), Room 6090, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

The collections of information proposed by these regulations are contained in §§ 1506.4, 1606.6, 1606.7, and 1606.10. As a group, the collections are entitled "Fitness and Integrity Certifications for Independent Contractors with RTC." This information will be used by the RTC to (1) determine if a competing contractor is barred by statute from doing business with the RTC and (2) evaluate competing contractors' fitness and integrity.

The estimated annual burden for the collections of information imposed by these regulations is summarized as follows: number of respondents 12,000; total annual responses 12,000; hours per response 6; and total annual burden hours 72,000.

It has been determined that these proposed regulations do not constitute a major rule for purposes of E.O. 12291.

Background: The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, enacted on August 9, 1989, amended the Federal Home Loan Bank Act, 12 U.S.C. 1421 *et seq.*, by adding section 21A, which establishes the Oversight Board and the Resolution Trust Corporation ("RTC"). Section 21A(b) provides that, in carrying out the duties of the RTC, the services of private persons (including real estate and loan portfolio asset management, property management, auction marketing, and brokerage services) shall be utilized if deemed practicable and efficient by the RTC.

In authorizing the RTC to perform its functions through the use of independent contractors, Congress made it clear that regulations implementing section 21A(p) must ensure that the independent contractors act for the public good. To this end, Congress required the Oversight Board to prescribe regulations to ensure that the independent contractors the RTC employs meet minimum standards of competence, integrity, fitness, and experience. Congress barred certain classes of persons from contracting with the RTC. Persons who are subject to those statutory bars are those who have:

(i) Been convicted of a felony;

(ii) Been removed from, or prohibited from participating in the affairs of, any insured depository institution pursuant

to any final enforcement action by any federal banking agency;

(iii) Demonstrated a pattern or practice of defalcation regarding obligations to insured depository institutions; or

(iv) Caused a substantial loss to the federal deposit insurance funds.

The Oversight Board and the RTC share Congress' concern that persons whose activities contributed to the decline of the thrift industry play no role in contracting with the RTC. Accordingly, the proposed rules interpret these statutory bars strictly, without unfairly penalizing persons who were unwittingly caught by changes in the economic climate of a region. Consequently, to have demonstrated a pattern or practice of defalcation within the meaning of these regulations, a person must be subject to continuing legal claims arising from two or more uncured defaults that are alleged to have resulted in losses aggregating in excess of $50,000 to one or more financial institutions. For a person to be subject to this restriction, both elements—uncured defaults and losses to one or more institutions—must have occurred. If defaults have been cured, for example, by a nonrecourse borrower tendering deeds in lieu of foreclosures, one of the necessary elements for defalcation is missing.

In considering the appropriate lines to draw with regard to causing a substantial loss to the federal deposit insurance funds, the Oversight Board and the RTC believes that the Congress, by using the word "substantial," clearly intended that not every action that resulted in a loss to the insurance funds should bar an individual from contracting with the RTC. Therefore, a "substantial loss" is deemed to be $50,000 or more that is caused in one of three ways. Such a loss to the funds can occur whenever (i) there is an outstanding final judgment obtained by the Federal Deposit Insurance Corporation ("FDIC"), the Federal Savings and Loan Insurance Corporation ("FSLIC") and its successors, or the RTC arising from a note or other obligation or from legal action on any theory including fraud, negligence, or breach of fiduciary duty; (ii) there is an outstanding final judgment obtained in favor of an insured depository institution which is now held by the FDIC, the FSLIC or its successor, or the RTC; or (iii) the insurer, having a continuing legal claim, suffers a substantial loss as a result of the disposition of an asset. Thus, for the purposes of FIRREA conflict provisions, not all losses sustained by the insurance funds are deemed to have been "caused" by a borrower. A nonrecourse borrower on a loan involving a loss to a federal deposit insurance fund, for example, would not *per se* be regarded as causing a substantial loss to such fund. On the other hand, a participant in an unsafe and unsound banking practice that resulted in such substantial loss would not meet minimum standards.

The Oversight Board and the RTC have also determined that, in addition to the classes of persons Congress deemed ineligible to contract with the RTC, persons who are currently in default on an obligation to the FDIC, the RTC, or an insured depository institution under the jurisdiction of the RTC, will also be ineligible to contract with the RTC.

Contractor Fitness and Integrity: The proposed regulations contain procedures for determining contractor fitness and integrity and avoiding conflicts of interest, as well as prohibitions designed to protect nonpublic information and the integrity of the contracting process. Because of the large numbers of contractors who wish to contract with the RTC, and the urgent need to resolve cases involving failing and failed thrifts, the regulations require contractors (including offerors) to provide certifications that will assist the RTC in evaluating contractor fitness and integrity. Each contractor will be required to retain for two years after the termination date of the contract information upon which the contractor based any certification. Moreover, contractor certifications will be subject to independent monitoring and review by the RTC. The rule further provides that knowingly or intentionally providing false information to the RTC can result in the rescission of a contract, a permanent bar against contracting with the RTC, and can subject a contractor to criminal penalties pursuant to 18 U.S.C. 1001.

Contractors will be required to demonstrate that they meet minimum standards of competence and experience by providing information about relevant business experience, financial stability, and licenses necessary to perform the contract work. To establish fitness and integrity, contractors will have to provide certifications concerning relationships with insured depository institutions, actions or investigations by governmental authorities, present or potential liabilities to federal banking authorities, and liabilities to clients for fraudulent activities and will have to disclose whether they are within one of the classes of persons ineligible to contract with the RTC.

The certifications required by these regulations will apply to practitioners in several professions and a number of industries, including, but not limited to, law firms, accounting firms, investment banking firms, real estate brokers, appraisers, property managers, and auction marketing experts. Thus, the certifications detailed in the regulations primarily reflect the core information which will be required of everyone. It is likely that these core certifications will be augmented by additional requirements depending upon the nature of the contract.

Since many contractors will be corporate entities, the integrity of the contractor cannot be ascertained unless information is supplied about the activities of persons or entities controlling the company and directing the contractor's performance on the contract. Therefore, contractors will be required to provide certifications not only regarding their own activities but also concerning those of their related entities. The term "related entities" has been defined as (i) the contractor's management officials who have decisionmaking or policymaking responsibilities with regard to the contract; (ii) persons or entities controlled by or which control the contractor; (iii) organizations related to the contractor that will perform contract work; and (iv) successors and assigns of the contractor. Contractors will also be required to certify that they will not employ (i) any person to participate personally and substantially in performing work on the contract whether through decision, approval, disapproval, recommendation, or the rendering of advice, or (ii) any subcontractor to perform contract work, who is a member of one of the classes deemed ineligible to perform contract work. The definitions of persons, management officials, and related entities, limit the scope of the application of the statute to those persons having significant decisionmaking or discretionary authority to perform work on the contract.

From the information provided, the RTC will determine whether each contractor meets minimum standards of fitness and integrity. In some situations, even though the contractor is not barred by the statutory provisions from performing contract work, the RTC may determine that the contractor does not meet minimum standards of fitness and integrity. In such case, the contractor will be notified within 30 days of such determination.

The Oversight Board and the RTC are aware that the process of determining contractor fitness and integrity and the

procedures for avoiding conflicts of interest are likely to require consideration of specific circumstances in individual cases. Therefore, the RTC is designating a Contractors' Conflicts Committee comprised of officials of the RTC and the FDIC to resolve questions which arise under these regulations and relate to independent contractors, other than law firms. Similar questions which relate to law firms will be resolved by the Outside Counsel Conflicts Committee of the FDIC.

The Contractors' Conflicts Committee will delegate certain responsibilities to regional and consolidated offices and may, at its discretion, refer particular matters to the Board of Directors of the RTC for consideration. The committee will be required to refer to the Board of Directors of the RTC for determination those matters in which it believes that a contractor has a significant conflict of interest but nevertheless should be hired because the contractor has a special expertise not otherwise available or because engagement of the contractor is otherwise in the best interest of the Government. Decisions issued by the Contractors' Conflicts Committee and the Board of Directors of the RTC shall be in writing and made available to the public upon request.

Conflicts of Interest: Contractors will be required to provide information and certifications with regard to two types of conflicts of interest: (i) Organizational conflicts arising from the structure and relationships of the contractor and its related entities, and (ii) personal conflicts of interest of those performing work on the contract. Organizational conflicts are present if (i) performance of the contract may provide a contractor with an unintended advantage that can be used for the benefit of the contractor or any related entity or affiliate, or (ii) a private interest or relationship exists within the contractor's organization that could impair the contractor's or a related entity's ability to objectively perform the contract work.

To determine whether organizational conflicts exist, each contractor will be required to provide information about its relationships as controlling shareholder, officer, or director of any insured depository institution, and descriptions of businesses organizationally related to the contractor. The contractor will also be required to obtain similar information from its related entities and to certify that its related entities have no organizational conflicts of interest.

In addition, each contractor will be responsible for ensuring that its management officials and other employees who participate personally and substantially on the contract work have no personal, business, or financial interests that conflict with the contractor's responsibilities to the RTC. Accordingly, contractors will be required to obtain certain information from these individuals prior to allowing them to perform contract work. That information will primarily concern the relationships of these officials and employees, and those of their spouses and minor children, with the depository institution whose assets are the subject of the contract and relationships with persons having an interest in the assets that are the subject of the particular contract. Contractors will also be required to establish procedures to ensure that they are advised of subsequent conflicts of interest that may arise.

Contractors and their related entities also will be required to adhere to certain general requirements during the term of a contract. Generally, the contractor and its related entities are prohibited from (i) continuing to perform work for the RTC if a conflict of interest is discovered that has not been previously disclosed, (ii) soliciting or accepting gifts from persons with interests in the contract or the contractor's performance, (iii) improperly using property controlled by reason of the contract for the personal benefit of the contractor or any other person or entity, and (iv) making unauthorized promises or commitments on behalf of the RTC.

Fairness and Integrity in the Contracting Process: The Oversight Board and the RTC intend the RTC's contracting process to be fair to all competing contractors. The proposed regulations describe three situations in which contractors may have an undue advantage over competitors because of previous or current work done for the RTC. In those circumstances, restrictions (subject to waiver by the Contractors' Conflicts Committee) are imposed on the contractors and their related entities to avoid their benefiting from such undue advantage.

Specifically, the regulations provide that a contractor who is engaged by the RTC to develop a plan of action for a specific insured institution cannot, without a waiver, enter into subsequent contracts with the RTC to implement its recommendations or assist others in a contract that would implement its recommendations. Similarly, when a contractor is engaged to manage, lease, value, or establish a sales price for an asset or group of assets, the contractor cannot enter into a subsequent contract with the RTC to purchase such asset or assets or assist someone else in purchasing such asset or assets from the RTC. Finally, a contractor is prohibited from acting for the RTC in the same particular matter in which is has a business or financial interest. The contractor is similarly prohibited if a related entity has a business or financial interest unless the entity is screened in a manner satisfactory to the RTC.

The integrity of the RTC's procurement activities is further protected by certain restrictions on communications by competing contractors with RTC employees. These provisions are modeled on the procurement integrity provisions in title 41, United States Code. They prohibit a contractor, during the course of any procurement, from offering any business opportunity or future employment to any RTC employee who has personal or direct responsibility for that procurement. Contractors are also prohibited from giving or offering anything of value to RTC employees, and from soliciting from RTC employees any proprietary or source selection information concerning the procurement. Prior to the award of a contract, each contractor will be required to provide a certification that its employees who prepared the bid, offer, or proposal were aware of the foregoing restrictions and the contractor knows of no violations or possible violations of the provisions.

Confidentiality of Information: The RTC shall identify for each contractor information it deems to be confidential with regard to a particular contract. The contractor and its related entities are prohibited from disclosing such information, except as necessary to perform contract work, and from using or allowing the use of such confidential information to further a private interest or other than as contemplated by the contract. The contractor is responsible for taking appropriate measures to ensure that the confidentiality of such information is maintained and that it is not inappropriately used. The regulations describe minimum measures that contractors must take to ensure the confidentiality of information.

Use of Consultants: The Oversight Board and the RTC intend to avoid improper influences on the contracting process. While contractors may wish to obtain the services of consultants or advisors to assist them in obtaining contracts, the Oversight Board and the RTC believe that reasonable limitations should apply to the use of consultants. Therefore, these regulations prohibit contractors from engaging consultants on a contingent fee basis. And, consistent with requirements recently enacted by Congress, contractors shall be required to include with any bid, offer, or proposal made to the RTC

information concerning consulting contracts and payments made to consultants to obtain contracts with the RTC.

Rescission of Contracts: The proposed regulations provide that the RTC may rescind a contract if (i) the contractor fails to disclose a material fact to the RTC; (ii) there are any material changes in the representations or certifications made by the contractor; (iii) a personal or organizational conflict arises which is not waived; (iv) the contractor is subsequently determined to be ineligible to contract with the RTC; (v) the contractor has been subject to a final enforcement action by any bank regulatory agency; or (vi) the contractor violates any provisions of these regulations.

If the RTC deems it appropriate to rescind a contract, the contractor will be ineligible to enter into further contracts with the RTC. Disqualification under these circumstances shall also apply to related entities of the contractor, unless determined otherwise by the Contractors' Conflicts Committee. The RTC may seek damages from any contractor or subcontractor whose actions caused the rescission, as well as pursue any additional rights and remedies provided by law.

Regulatory Flexibility Analysis: The Oversight Board and the RTC hereby certify that the proposed regulations will not, it promulgated, have a significant economic impact on a substantial number of small business entities within the meaning of the regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The proposed regulations establish rules to be used by the RTC to (1) determine if a competing contractor is barred by statute from doing business with the RTC and (2) evaluate competing contractor's fitness and integrity.

Regulations Promulgation: The Oversight Board and the RTC are proposing to promulgate identical regulations applicable to independent contractors governing conflicts of interest, ethical responsibilities and the use of confidential information consistent with the goals and purposes of titles 18 and 41 of the United States Code and are proposing to codify these regulations in their respective parts of title 12 of the Code of Federal Regulations. Since the regulations are identical, the text of the regulations is set out only once at the end of the common preamble. The part heading, table of contents, and authority citation for the regulations as they will appear in each CFR title follow the text of the proposed common rule.

Text of Proposed Rule

The text of the proposed common rule, as adopted by the agencies in this document, appears below:

PART ——— QUALIFICATION OF, ETHICAL STANDARDS OF CONDUCT FOR, AND RESTRICTIONS OF THE USE OF CONFIDENTIAL INFORMATION BY INDEPENDENT CONTRACTORS

Sec.

———.1 Authority, purpose, and scope.
———.2 Definitions.
———.3 Contractors' Conflicts Committee and Outside Counsel Conflicts Committee.
———.4 [Reserved]
———.6 Organizational conflicts of interest.
———.7 Personal conflicts of interest.
———.8 General standards for independent contractor activities.
———.9 Limitations on concurrent and subsequent activities.
———.10 Communications with RTC employees.
———.11 Confidentiality of information.
———.12 Source selection information.
———.13 Use of consultants.
———.14 Rescission of contracts.

§———.1 Authority, purpose, and scope.

(a) *Authority.* This part implements section 21A(p) of the Federal Home Loan Bank Act, 12 U.S.C. 1421 *et seq.*, as amended by section 501 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Pursuant to that section, the Oversight Board and the Resolution Trust Corporation ("the RTC") are required to promulgate rules and regulations applicable to independent contractors governing conflicts of interest, ethical responsibilities, and the use of confidential information consistent with the goals and purposes of title 18 and 41 or the United States Code.

(b) *Purpose.* These regulations seek to ensure that contractors meet minimum standards of competence, integrity, fitness, and experience and are held to the highest standards of ethical conduct in performing services for the RTC. They are intended to prevent:

(1) The direct or indirect use of information gained through performance of a contract with the RTC for personal gain not contemplated by the contract; and

(2) The use of personal relationships or improper influence to gain unfair competitive advantage in obtaining contracts with the RTC.

(c) *Scope.* These regulations apply to all contracts entered into after the effective date of these regulations with law firms, accounting firms, investment banking firms, real estate brokers, appraisers, property managers, and others performing similar services on behalf of the RTC.

§———.2 Definitions.

As used in this part:

(a) *Competing property* means real property which has the same general character as an asset which is the subject of a contract between the contractor and the RTC and concerning which the contractor has an ownership interest.

(b) *Contractor* means the person or entity submitting an offer to perform services for the RTC or having a contractual arrangement with the RTC to perform services.

(c) *Defalcation* means any transaction in which an insured depository institution failed to receive the principal and/or interest payments to which it is entitled, and there is a loss to the institution, and with respect to which the insured depository institution has a continuing legal claim.

(d) *FDIC* means the Federal Deposit Insurance Corporation, which serves as exclusive manager for the RTC.

(e) *FSLIC* means the former Federal Savings and Loan Insurance Corporation.

(f) *Organizational conflict of interest* means a situation in which:

(1) Performance of the contract may provide the contractor with an advantage unintended by the contract which can be used for the benefit of the contractor or any related entity or affiliate; or

(2) A private interest or relationship exists within the organization which could impair the contractor's or a related entity's ability to objectively perform the contract work.

(g) *Pattern or practice of defalcation* means there are two or more instances of uncured defaults as to which there are continuing legal claims, resulting in losses to one or more insured depository institutions, which, in the aggregate, exceed $50,000.

(h) *Person* means an individual who participates personally and substantially, through decision, approval, disapproval, recommendation, or the rendering of advice, in the performance of the contract.

(i) "Related entity" means:

(1) The contractor's management officials and other individuals having decision-making or policy-making functions with respect to formulation or negotiation of, performance under, and/or monitoring for compliance with the contract;

(2) Any person or entity that directly or indirectly controls or is controlled by the contractor;[1]

(3) Any other organization related to the contractor that will perform work pursuant to the contract; and

(4) Any successor or assignee of the contractor.

(j) *RTC employee* means a director, officer, or employee of the RTC, including a special government employee, or an employee of any other government agency who is properly acting on behalf of the RTC.

(k) *Source selection information* means information related to a particular procurement, including any procurement using procedures other than competitive procedures, which, if not available from the government at that stage of the procurement, and, if obtained by a bidder, would give the bidder an advantage in the procurement process.

(l) *Special government employee* means any employee serving the RTC with or without compensation for a period not to exceed 130 days during any 365-day period on a full-time or intermittent basis.

(m) *Subcontractor* means any individual or organization who is required by contract with a contractor (as defined) to perform services related to contracts with the RTC, excluding contracts necessary for the day-to-day operations of the RTC and contracts for routine maintenance and supplies necessary to maintain an asset.

(n) *Substantial loss to the federal deposit insurance funds* means a loss of more than $50,000 to the funds for the protection of depositors maintained and administered by the FDIC or the former FSLIC which was occasioned by or is represented by:

(1) A loss to the insurer as a result of the disposition of, or the failure to satisfy, an obligation at its full value;

(2) An outstanding final judgment obtained by the FDIC, the FSLIC, or the RTC against the maker, endorser, or guarantor of a note or other obligation or arising from a legal action on any theory including fraud, negligence, or breach of fiduciary duty; or

(3) An outstanding final judgment obtained in favor of an insured depository institution which is now held by the FDIC, the FSLIC, or the RTC as a successor.

[1] For purposes of this part, a person or entity shall be deemed to have control of a company or organization if the person or entity directly or indirectly, or acting in concert with one or more persons or through one or more subsidiaries, owns or controls 25 percent or more of the equity, or otherwise controls the management or policies, of the contractor.

§ ——.3 Contractors' Conflicts Committee and Outside Counsel Conflicts Committee.

(a) *Designation.* The Board of Directors of the RTC will designate officials of the FDIC or RTC as members of a Contractors' Conflicts Committee, which will consider issues of conflicts of interest affecting independent contractors, other than law firms, which arise under these regulations. The Outside Counsel Conflicts Committee appointed by the General Counsel of the FDIC will consider conflict of interest issues relating to law firms.[2]

(b) *Authority.* The Contractors' Conflicts Committee and the Outside Counsel Conflicts Committee shall resolve or, as appropriate, delegate responsibility to regional and consolidated offices to resolve conflict of interest issues which arise under these regulations.

(c) *Referrals to the Board of the RTC.* The Contractors' Conflicts Committee shall make referrals of and recommendations to the Board of Directors of the RTC with respect to situations in which the Committee determines that a significant conflict of interest exists but, nevertheless, the contractor should be engaged because the contractor has special expertise not otherwise available or the engagement is otherwise in the best interests of the government.

(d) *Decisions.* Decisions issued either by the Contractors' Conflicts Committee or the Board of Directors of the RTC shall be final. They shall be in writing and shall include statements of the bases for the decisions. Decisions shall be filed with the Executive Secretary of the RTC and shall be made available to the public upon request, with such redactions as may be required by law to protect the privacy interests of identifiable individuals or confidential business information.

§§ ——.4 and ——.5 [Reserved]

§ ——.6 Organizational conflicts of interest.

(a) *Information required about the contractor.* To permit the RTC to make a determination with regard to the existence of organizational conflicts of interest, any bid, proposal, or offer made to the RTC in regard to the rendering of services to the RTC shall include the following information about the business and financial interests of the contractor.

(1) Relationships as controlling shareholder of any federally insured depository institution;

(2) The names of related entities and a description of each related entity's business(es);

(3) The names of any management officials who have been or are directors or officers of an insured depository institution or depository institution holding company;

(4) A list of all competing property of the contractor, if the contract relates to the valuation, disposition, or management of real estate; and

(5) Any other business or financial interest of the contractor which may be requested by the RTC or information concerning any other business or financial interest of the contractor which, in the opinion of the contractor, might conflict with the contractor's obligations to the RTC in the performance of the contract.

(b) *Information to be obtained by the contractor.* Prior to submitting any bid, offer, or proposal to the RTC for a specific contract, the contractor shall obtain the information detailed in paragraph (a) of this section from each of its related entities.

(c) *Certification required.* At the time the contractor submits its bid, offer, or proposal and provides the information required by paragraph (a) of this section concerning its own interests, the contractor shall also provide a certification:

(1) Attesting to the fact that no related entity of the contractor has an interest which, to the best of its knowledge, presents an organizational conflict of interest or, if such interest exists:

(i) Detailing any interest which might conflict with obligations to the RTC;

(ii) Requesting a waiver from the Contractors' Conflicts Committee or its designee; and

(iii) Including with the request any information it deems appropriate to support the issuance of a waiver; and

(2) Agreeing that the contractor will not acquire any business or financial interest during the term of the contract which would result in an organizational conflict of interest without the prior approval of the Contractors' Conflicts Committee or its designee and that, if any of its related entities does so, the contractor will promptly notify the Contractors' Conflicts Committee or its designee.

(d) *Determination required.* Prior to entering into any contract, the RTC must conclude, in writing, that neither the contractor nor any of its related entities

[2] Whenever the Contractors' Conflicts Committee is referred to in these regulations, it should be understood that if the conflict question relates to outside legal counsel, it will be addressed by the Outside Counsel Conflicts Committee rather than the Contractors' Conflicts Committee.

has an organizational conflict of interest with regard to that contract or that, if such conflict exists, engagement of the contractor is, nevertheless, acceptable under the circumstances. Accordingly, if either the contractor or a related entity has an organizational conflict of interest, the matter shall be decided by the Contractors' Conflicts Committee or its designee.

(e) *Retention of information.* Information obtained pursuant to paragraph (b) of this section shall be retained during the term of the contract and for a period of two years following termination or expiration of the contract and shall be made available for review by the RTC upon request.

§ ——.7 Personal conflicts of interest.

(a) *Contractor's responsibility.* A contractor shall ensure that management officials and other persons who exercise discretion with regard to work performed pursuant to the contract have no personal, business, or financial interest which conflicts with responsibilities to the RTC.

(b) *Information required.* At a minimum, a contractor shall obtain from its management officials and other persons the following information about the personal, business, and financial relationships of themselves, their spouses, and minor children:

(1) Loans from, employment by, or an ownership interest in the depository institution whose assets are the subject of the contract;

(2) Current or prior relationships with any other insured depository institution as officer, director, controlling shareholder, or employee;

(3) Financial, business, or personal relationships with any person or entity who has an interest in the assets which are the subject of the contract, including information about negotiations or arrangements for future employemnt with such person or entity;

(4) A list and description of any instance during the preceding five years in which there was a default on any material obligation to an insured depository institution which, in the aggregate, exceeded $50,000; and

(5) Any other information deemed necessary by the RTC because of the nature of the contract.

(c) *Certification.* Based on the information obtained pursuant to paragraph (b) of this section, the contractor shall determine whether any management official or other person has an interest which conflicts with responsibilities to the RTC. The contractor shall disqualify persons with personal conflicts of interest from performing work pursuant to the contract. If appropriate, the contractor may seek a waiver from the Contractor's Conflicts Committee or its designee to allow employment of an individual with a personal conflict of interest on the contract work. In addition, the contractor shall certify to the RTC that all management officials for whom no waiver is sought have no business, personal, or financial interest which conflicts with responsibilities to the RTC and, furthermore, shall establish a procedure to monitor for interests which conflict with the performance of contract responsibilities. At a minimum, the contractor shall require management officials and other persons to provide the required information prior to employment on the contract work and to update information within 10 days of any change.

(d) *Subsequent notification.* Within 10 days after learning of a management official's conflict of interest, the contractor shall notify the RTC of the conflict and either describe the steps it has taken to eliminate the conflict or request a waiver from the Contractors' Conflicts Committee or its designee.

(e) *Retention of information.* Information obtained by a contractor from its management officials pursuant to paragraph (b) of this section shall be retained during the term of the contract and for a period of two years following termination or expiration of the contract and shall be made available for review by the RTC upon request.

§ ——.8 General standards for independent contractor activities.

(a) In connection with the performance of any contract and during the term of such contract, a contractor and its related entities shall adhere to the following standards:

(1) No contractor or related entity shall act for the RTC in any matter in which either the contractor or a related entity has a conflict of interest unless the Contractors' Conflicts Committee or its designee has determined that the participation of the contractor or related entity is appropriate;

(2) No contractor or related entity shall accept or solicit for itself or other favors, gifts, or other items of monetary value from any person or entity whom the contractor knows is seeking official action from the RTC in connection with the contract or has interests which may be substantially affected by the performance or nonperformance of the contractor's duties to the RTC;

(3) No contractor or related entity shall improperly use or allow the improper use of RTC property, or property over which the contractor or related entity has supervision or control by reason of the contract, for the personal benefit of the contractor, a related entity, or any other person or entity; and

(4) No contractor shall make any unauthorized promise or commitment on behalf of the RTC.

(b) Any individual who acts for or on behalf of the RTC pursuant to a contract or any other agreement shall be deemed a public official for purposes of 18 U.S.C. 201. That statute generally prohibits the direct or indirect acceptance by a public official of anything of value in return for being influenced in, or because of, an official act. Violators are subject to criminal penalties.

(c) In their dealings with the RTC, contractors are subject to 18 U.S.C. 1001.[3] Upon receipt of information indicating that any person or entity has violated any provision of title 18 of the U.S. Code or other provision of criminal law, the RTC shall transmit such information to the Department of Justice.

§ ——.9 Limitations on concurrent and subsequent activities.

(a) *Avoiding undue advantage.* The RTC has determined that contractors performing services for the RTC may have an undue advantage over competitors if they seek additional contracts with the RTC or with third parties which relate to work being performed or already performed for the RTC. To prevent such advantage, restrictions, dependent on the scope of contractual responsibilities, must be imposed on the concurrent and subsequent activities of contractors. Accordingly, the following restrictions shall apply unless waived by the Contractors' Conflicts Committee or its designee: [4]

(1) A contractor engaged by the RTC to develop a plan of action concerning a specific insured institution cannot enter into any subsequent contract with the RTC to implement its recommendations or assist others in regard to such contract;

(2) A contractor engaged by the RTC to manage, lease, value, or establish a sales price for an asset or group of assets cannot enter into any subsequent contract with the RTC to purchase that asset or assets or assist someone other than the RTC seeking to purchase that asset or those assets from the RTC; and

[3] Section 1001 of title 18 generally prohibits the making of any false or fraudulent statement to a federal officer.

[4] An open and competitive bidding procedure or evidence that sufficient screening mechanisms are in place may be sufficient to permit the granting of a waiver of the restrictions on concurrent and subsequent activities of a contractor.

(3) A contractor cannot act for the RTC in the same particular matter in which it or a related entity has a business or financial interest unless the entities are screened from one another in a manner satisfactory to the RTC.

(b) *Applicability to related entities.* The restrictions in paragraph (a) of this section shall apply to related entities of the contractor unless determined otherwise by the Contractors' Conflicts Committee or its designee.

§ ———.10 Communications with RTC employees.

(a) *Prohibitions.* During the course of any procurement by the RTC (including any procurement using procedures other than competitive procedures),[5] a competing contractor, its related entities, and employees, representatives, agents, or consultants of the competing contractor or its related entities shall not:

(1) Directly or indirectly make any offer or promise of future employment or business opportunity to, or engage directly or indirectly in any discussion of future employment or business opportunity with, any RTC employee with personal or direct responsibility for that procurement, and competing contractors who wish to discuss employment opportunities with an employee should inquire prior to engaging in such discussions whether the employee has personal or direct responsibility for the procurement in which the contractor will be or is competing; [6]

(2) Offer, give, or promise to offer or give, directly or indirectly, any money, gratuity, or other thing of value to any RTC employee, except as permitted by rules of the RTC; [7] or

(3) Solicit or obtain, directly or indirectly, from any RTC employee, prior to the award of the contract, any proprietary or source selection information regarding such procurement.

(b) *Competing contractor.* For purposes of this section, "competing contractor" with respect to any procurement (including a procurement using procedures other than competitive procedures) means any entity that is, or is reasonably likely to become, a competitor for or recipient of a contract or subcontract under such procurement, and includes any other person acting on behalf of such entity.

(c) *Certification.* The RTC shall not award a contract for the procurement of services to any competing contractor or agree to a modification of a contract unless the officer or employee of the competing contractor responsible for the bid, offer, or proposal submits with it a written certification that:

(1) The officer or employee is aware of the prohibitions of paragraph (a) of this section and, to the best of that officer's or employee's knowledge and belief, he or she has no information concerning a violation or possible violation of paragraph (a) of this section; and

(2) Each officer, employee, agent, representative, and consultant of such competing contractor who participated personally and substantially in the preparation and submission of such bid, offer, proposal, or modification of such contract has certified to the responsible officer or employee that he or she:

(i) Is familiar with and will comply with the requirements of paragraph (a) of this section; and

(ii) Has no information of any violations or possible violations of paragraph (a) of this section and will report immediately to the officer or employee of the competing contractor responsible for the bid, offer, or proposal for any contract or modification of such contract any subsequently gained information concerning a violation or possible violation of paragraph (a) of this section.

§ ———.11 Confidentiality of information.

(a) *Nonpublic information defined.* Any information identified by the RTC as confidential shall be deemed to be nonpublic until the RTC determines otherwise, in writing, or the information becomes part of the body of public information from a source other than the contractor.

(a) *Prohibitions.* The contractor and its related entities are prohibited from:

(1) Disclosing nonpublic information to anyone except as required to perform the contractor's obligations pursuant to the contract; and

(2) Using or allowing the use of any nonpublic information to further a private interest or in a manner other than as contemplated by the contract.

(c) *Contractor's responsibility.* The contractor is required to take appropriate measures to ensure the confidentiality or nonpublic information and to prevent its inappropriate use. At a minimum, such measure shall include:

(1) Notifying all employees, related entities, subcontractors, and other persons to whom the contractor may need to disclose nonpublic information to perform its responsibilities under the contract of the requirement of confidentiality and limitations as to the use of nonpublic information; and

(2) Requiring each person to whom nonpublic information is provided to execute a certification that such person understands the limitations on disclosure and use and will maintain the confidentiality of the information and not use it other than as contemplated by the contract.

§ ———.12 Source selection information.

(a) *Prohibition.* During the conduct of any procurement by the RTC, no person who is given authorized or obtains unauthorized access to source selection information regarding the procurement shall knowingly disclose such information, directly or indirectly, to any person other than a person authorized to receive such information by the Executive Director of the RTC, his or her designee, or the RTC's contracting officer.

(b) *Permitted disclosures.* The Executive Director of the RTC, his or her designee, or the RTC's contracting officer, in accordance with internal procedures developed by the RTC, may authorize persons or classes of persons to obtain access to proprietary or source selection information when access is essential to the conduct of the procurement.

§ ———.13 Use of consultants.

(a) *Contingent fees.* Contractors are prohibited from obtaining the services of a consultant or advisor to assist in obtaining a contract with the RTC pursuant to an agreement in which payment of the consultant or advisor would be contingent on the contractor obtaining the contract.

(b) *Disclosure.* When submitting any bid, offer, or proposal to the RTC, a contractor shall include information about payments, agreements to pay or arrangements for obtaining the services (other than engineering, technical, legal, and accounting services) of consultants or advisors to assist in obtaining the contract that were made by the contractor or a related entity.

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[5] The "course of a procurement" is defined as the period beginning with the development, preparation, and issuance of a procurement solicitation and concluding with the qualification, award, modification, or extension of a contract.

[6] Employees who have no personal or direct responsibility for the procurement may engage in employment discussions if they disqualify themselves from subsequent participation in any matter in which the contractor has an interest. *See* 18 U.S.C. 208(a) and 12 CFR 336.15(b).

[7] Employees of the FDIC are prohibited from soliciting or accepting anything of value from anyone having business with the RTC or the FDIC. *See* 12 CFR 336.8. Regulations applicable to RTC employees shall be no less stringent. *See* section 21A(p)(2) of the Federal Home Loan Bank Act, 12 U.S.C. 1421 *et seq.*, as amended by section 501 of FIRREA.

§ ———.14 Rescission of contracts.

(1) *Circumstances permitting rescission.* The RTC may rescind any contract if:

(1) There is a failure to disclose a material fact to the RTC;

(2) The contractor would be prohibited from contracting with the RTC by § 1506.5(a);

(3) Any person or related entity has been subject to a final enforcement action by any federal banking agency;

(4) There is any material change in the representations or certifications provided to the RTC under § 1506.4;

(5) There arises a personal or organizational conflict of interest not waived by the Contractors' Conflicts Committees or its designee; or

(6) There is violation of any provision of these regulations.

(b) *Contractor liability.* In those situations in which the RTC determines that rescission of a contract pursuant to paragraph (a) of this section is appropriate, the RTC may seek damages from the contractor or subcontractor whose actions caused the rescission as well as pursue any additional rights and remedies provided by law.

(c) *Permanent bar.* Contractors whose contracts with the RTC have been rescinded pursuant to paragraph (a) of this section shall be deemed ineligible to enter into further contracts with the RTC. This ineligibility shall apply to related entities of the contractor, unless determined otherwise by the Contractors' Conflicts Committee.

Proposed Adoption of the Common Rule

The agency specific proposed adoption of the proposed common rule, which appears at the end of the common preamble, appears below:

OVERSIGHT BOARD

12 CFR Part 1506

List of Subjects in 12 CFR Part 1506

Conflict of interests, Government contracts.

Chapter XV of title 12 of the Code of Federal Regulations is proposed to be amended as set forth below:

Daniel P. Kearney,

President and Chief Executive Officer, Oversight Board.

1. Subchapter A is added to chapter XV. The subchapter heading reads as follows:

SUBCHAPTER A—GENERAL PROVISIONS

2. Part 1506 is added to read as set forth at the end of the common preamble.

PART 1506—QUALIFICATION OF, ETHICAL STANDARDS OF CONDUCT FOR, AND RESTRICTIONS ON THE USE OF CONFIDENTIAL INFORMATION BY INDEPENDENT CONTRACTORS

Sec.
1506.1 Authority, purpose, and scope.
1506.2 Definitions.
1506.3 Contractors' Conflicts Committee and Outside Counsel Conflicts Committee.
1506.4–1506.5 [Reserved]
1506.6 Organizational conflicts of interest.
1506.7 Personal conflicts of interest.
1506.8 General standards for independent contractor activities.
1506.9 Limitations on concurrent and subsequent activities.
1506.10 Communications with RTC employees.
1506.11 Confidentiality of information.
1506.12 Source selection information.
1506.13 Use of consultants.
1506.14 Rescission of contracts.

Authority: 12 U.S.C. 1441a(a)(13) and (p)(1)(B), (3), (6), and (7).

3. Part 1506 is further amended by adding § 1506.4 and § 1506.5 to read as follows:

§ 1506.4 Qualification of contractors.

(a) *Requirements.* The RTC shall not enter into a contract with any contractor unless the contractor and its related entities meet minimum standards of competence, integrity, fitness, and experience. In addition to presenting evidence, on a form or forms to be furnished by the RTC for that purpose, of competence and experience, the contractor shall provide a list of any instance during the preceding five years in which there was a default on any material obligation to an insured depository institution which, in the aggregate, exceeded $50,000, and shall be required to certify to the following items:

(1) That the contractor and each of its related entities has all necessary licenses, permits, and approvals to permit it to carry out its obligations under the contract;

(2) That neither the contractor nor any of its related entities has been convicted of a felony;

(3) That neither the contractor nor any of its related entities has been removed from, or prohibited from participating in the affairs of, any insured depository institution pursuant to any final enforcement action by any federal banking agency;

(4) That neither the contractor nor any of its related entities has demonstrated a pattern or practice of defalcation regarding obligations to insured depository institutions;

(5) That neither the contractor nor any of its related entities has caused a substantial loss to the federal deposit insurance funds;

(6) That neither the contractor nor any of its related entities:

(i) Is currently a party to an administrative or judicial proceeding in which any of them is alleged to have engaged in fraudulent activity or has been charged with the commission of a felony or which seeks a remedy that would prevent or materially interfere with its ability to perform on the contract, or

(ii) Is subject, to their knowledge, to an administrative or criminal investigation relating to fraudulent activity or the commission of a felony;

(7) That, during the past five years, neither the contractor nor any of its related entities has been held liable for fraud, dishonesty, misrepresentation, or breach of fiduciary duty where the damages awarded exceeded the lesser of 50 percent of the net worth of the contractor or its related entities or 10 percent of the annual gross revenues of the contractor or its related entities;

(8) That neither the contractor nor any of its related entities is currently excluded from federal procurement or nonprocurement programs;

(9) That neither the contractor nor any of its related entities is subject to an unsatisfied final judgment in favor of the FDIC, the FSLIC, an insured depository institution under RTC's jurisdiction, or the RTC;

(10) That neither the contractor nor any of its related entities is a party to a lawsuit in which the FDIC, the FSLIC, an insured depository institution under RTC's jurisdiction, or the RTC is seeking recovery of money or property from them in excess of $50,000; and

(11) That the contractor will not employ any person or subcontractor to perform work on the contract who:

(i) Has been convicted of any felony;

(ii) Has been removed from, or prohibited from participating in the affairs of, any insured depository institution pursuant to any final enforcement action by any federal banking agency;

(iii) Has demonstrated a pattern or practice of defalcation regarding obligations to insured depository institutions;

(iv) Has caused a substantial loss to the federal deposit insurance funds; or

(v) Is currently in default on an obligation to the FDIC, the FSLIC, an insured depository institution under the RTC's jurisdiction, or the RTC.

Depending upon the nature of the contract, a contractor may be required

to submit such additional certifications or information with respect to its activities and those of its related entities as the RTC deems appropriate.

(b) *Procedures.* (1) A contractor who cannot furnish any one or more of the certifications required by paragraph (a) of this section shall provide information on the form or forms submitted which fully explains the circumstances giving rise to its inability to furnish the certification(s). The Contractors' Conflicts Committee, or its designee, will determine whether a contractor who cannot furnish any one or more of the certifications required by paragraph (a) of this section is deemed to meet minimum standards of fitness and integrity.

(2) A contractor may consolidate the responses of its related entities in furnishing the certifications required by paragraphs (a)(1) through (a)(11) of this section or in providing the information required by paragraph (b)(1) of this section. If a consolidated response is submitted, the contractor shall retain the information obtained from its related entities upon which it relied in preparing the certifications during the term of the contract and for a period of two years following the termination or expiration of the contract and shall make such information available for review by the RTC upon request.

(3) Before permitting any person or subcontractor to perform work pursuant to the contract, the contractor shall obtain such information from such person or subcontractor as will permit it to furnish the certification required by paragraph (a)(11) of this section. The contractor shall retain the information upon which it relied in preparing the certification during the term of the contract and for a period of two years following the termination or expiration of the contract and shall make such information available for review by the RTC upon request. Whenever a contractor receives information indicating that the certification or any information upon which it relied in preparing the certification is incorrect in any material respect, the contractor shall promptly notify the RTC and shall not permit the person or subcontractor to whom the information relates to perform work pursuant to the contract.

§ 1506.5 Disqualification of contractors.

(a) *Mandatory ineligibility.* A contractor shall be deemed not to meet minimum standards of fitness and integrity, and therefore ineligible to contract with the RTC, if the contractor or a related entity has:

(1) Been convicted of a felony;

(2) Been removed from, or prohibited from participating in the affairs of any insured depository institution pursuant to any final enforcement action by any federal banking agency;

(3) Demonstrated a pattern or practice of defalcation regarding obligations to insured depository institutions;

(4) Caused a substantial loss to the federal deposit insurance funds; or

(5) Is currently in default on an obligation to the FDIC, the FSLIC, an insured depository institution under the RTC's jurisdiction, or the RCT.

(b) *Notification of mandatory ineligibility.* A contractor deemed ineligible to contract with the RTC pursuant to paragraph (a) of this section will be advised of its ineligibility and of the basis for such determination not later than 30 days after its ineligibility is determined.

(c) *Discretionary disqualification.* The RTC may determine that a contractor, not subject to mandatory ineligibility pursuant to paragraph (a) of this section, nevertheless does not meet minimum standards of fitness and integrity to perform work for the RTC because the past activities of the contractor or a related entity warrant such determination. A decision to disqualify a contractor shall be within the sole discretion of the RTC with no right of review.

(d) *Notification of discretionary disqualification.* After determining that a contractor should be disqualified pursuant to paragraph (c) of this section, the RTC shall notify the contractor in writing of its determination and of the reason for such determination not later than 30 days after the determination is made.

RESOLUTION TRUST CORPORATION

12 CFR Part 1606

List of Subjects in 12 CFR Part 1606

Conflict of interests, Government contracts.

Title 12 of the Code of Federal Regulations is proposed to be amended as set forth below:

By order of the Board of Directors.

Dated at Washington, DC, this 16th day of November 1989.

Resolution Trust Corporation.

John M. Buckley, Jr.,

Executive Secretary.

1. Chapter XVI is established. The chapter heading reads as follows:

CHAPTER XVI—RESOLUTION TRUST CORPORATION

2. Part 1606 is added to read as set forth at the end of the common preamble.

PART 1606—QUALIFICATION OF, ETHICAL STANDARDS OF CONDUCT FOR, AND RESTRICTIONS ON THE USE OF CONFIDENTIAL INFORMATION BY INDEPENDENT CONTRACTORS

Sec.

1606.1 Authority, purpose, and scope.
1606.2 Definitions.
1606.3 Contractors' Conflicts Committee and Outside Counsel Conflicts Committee.
1606.4–1606.5 [Reserved]
1606.6 Organizational conflicts of interest.
1606.7 Personal conflicts of interest.
1606.8 General standards for independent contractor activities.
1606.9 Limitations on concurrent and subsequent activities.
1606.10 Communications with RTC employees.
1606.11 Confidentiality of information.
1606.12 Source selection information.
1606.13 Use of consultants.
1606.14 Rescission of contracts.

Authority: 12 U.S.C. 1441a(b)(12) and (p)(1)(B), (3), and (7).

[FR Doc. 89–27865 Filed 11–27–89; 8:45 am]

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Part VI

Department of Justice

Federal Prison Industries, Inc. and Bureau of Prisons

28 CFR Part 301
Inmate Accident Compensation; Proposed Rule

28 CFR Parts 540, 549, and 571
Control, Custody, Care, Treatment and Instruction of Inmates; and Proposed Rules and Rule

DEPARTMENT OF JUSTICE

Federal Prison Industries, Inc.

28 CFR Part 301

Inmate Accident Compensation

AGENCY: Federal Prison Industries, Inc., Bureau of Prisons, Justice.

ACTION: Proposed rule.

SUMMARY: In this document, the Bureau of Prisons is proposing to revise its regulations on Inmate Accident Compensation. The regulations are rewritten and reorganized. Major changes include setting the standard rate of payment of lost-time wages at 75%; adding the ability to terminate lost-time wages if the recipient is placed into Disciplinary Segregation; modifying time parameters for filing a claim; adding review provisions similar to those found in other compensation programs; and providing for suspension of benefits upon subsequent incarceration. These changes are designed to improve the efficient operation of the Inmate Accident Compensation program.

DATES: Comments by January 12, 1990.

ADDRESSES: Office of General Counsel, Bureau of Prisons, Room 760, 320 First Street NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Roy Nanovic, Office of General Counsel, Bureau of Prisons, telephone (202) 724-3062.

SUPPLEMENTARY INFORMATION: The Bureau of Prisons is proposing amendments to its final rule on Inmate Accident Compensation. A final rule on this subject was published in the **Federal Register** June 12, 1981 (46 FR 31206 et seq.), and was amended October 22, 1982 (47 FR 47172 et seq.). The current proposed amendment restructures the part into three separate subparts to improve clarity and organization. In subpart A (General), a section on definitions is added. In subpart B (Lost-Time Wages), the standard rate of payment of lost-time wages is set at 75%. This eliminates the need for staff to make a determination of dependent support. The subpart also adds the ability to terminate lost-time wages if the recipient is placed into Disciplinary Segregation. Subpart C (Compensation for Work-Related Physical Impairment or Death) modifies the time parameters for filing a claim. A claim could be filed no more than 45 days prior to the date of an inmate's release, but no less than 15 days prior to the release date. This modification provides a 15 day period prior to release in which the claimant may be examined by Bureau medical staff. A section on review of entitlement is added. This section provides that each monthly compensation recipient shall be required to submit to periodic medical examinations to determine the current status of their physical impairment. It also provides for a reduction in compensation benefits where excessive income is received by the claimant. The subpart also provides for suspension of benefits where a monthly compensation recipient is subsequently incarcerated. Finally, the subpart incorporates a title change from "Associate Commissioner" to "Chief Operating Officer."

Interested persons may participate in this proposed rulemaking by submitting data, views, or arguments in writing to the Bureau of Prisons, Room 760, 320 First Street NW., Washington, DC 20534. Comments received during the comment period will be considered before final action is taken. The proposed rule may be changed in light of the comments received. No oral hearings are contemplated.

The Bureau of Prisons has determined that this rule is not a major rule for the purpose of EO 12291. After review of the law and regulations, the Director, Bureau of Prisons has certified that this rule, for the purpose of the Regulatory Flexibility Act (Pub. L. 96-354), does not have a significant impact on a substantial number of small entities.

List of Subjects in 28 CFR Part 301

Prisoners.

J. Michael Quinlan,

Director, Bureau of Prisons.

In consideration of the foregoing, it is proposed to amend 28 CFR chapter III by revising part 301 as follows:

PART 301—INMATE ACCIDENT COMPENSATION

Subpart A—General

Sec.
301.101 Purpose and scope.
301.102 Definitions.
301.103 Inmate work assignments.
301.104 Medical attention.
301.105 Investigation and report of injury.
301.106 Repetitious accidents.

Subpart B—Lost-Time Wages

301.201 Determination of work-relatedness.
301.202 Payment of lost-time wages.
301.203 Continuation of lost-time wages.
301.204 Appeal of determination.

Subpart C—Compensation for Work-Related Physical Impairment or Death

301.301 Compensable and noncompensable injuries.
301.302 Work-related death.
301.303 Time parameters for filing a claim.
301.304 Representation of claimant.
301.305 Initial determination.
301.306 Appeal of determination.
301.307 Notice, time and place of committee action.
301.308 Committee reconsideration.
301.309 In-person hearing before the committee.
301.310 Witnesses.
301.311 Expenses associated with appearance at committee hearing.
301.312 Notice of committee determination.
301.313 Chief Operating Officer review.
301.314 Establishing the amount of award.
301.315 Review of entitlement.
301.316 Subsequent incarceration of compensation recipient.
301.317 Medical treatment following release.
301.318 Civilian compensation laws distinguished.
301.319 Exclusiveness of remedy.

Authority: 18 U.S.C. 4126, 28 CFR 0.99, and by resolution of the Board of Directors of Federal Prison Industries, Inc.

Subpart A—General

§ 301.101 Purpose and scope.

Pursuant to the authority granted at 18 U.S.C. 4126, the procedures set forth in this part govern the payment of accident compensation, necessitated as the result of work-related injuries, to federal prison inmates or their dependents. Compensation may be awarded via two separate and distinct programs:

(a) Inmate Accident Compensation may be awarded to former federal inmates or their dependents for physical impairment or death resultant from injuries sustained while performing work assignments in Federal Prison Industries, Inc., or in institutional work assignments involving the operation or maintenance of a federal correctional facility; or,

(b) Lost-time wages may be awarded to inmates assigned to Federal Prison Industries, Inc., or to paid institutional work assignments involving the operation or maintenance of a federal correctional facility for work-related injuries resulting in time lost from the work assignment.

§ 301.102 Definitions.

(a) For purposes of this part, the term "work-related injury" shall be defined to include any injury, including occupational disease or illness, proximately caused by the actual performance of the inmate's work assignment.

(b) For purposes of this part, the term "release" is defined as the removal of an inmate from a Bureau of Prisons correctional facility upon expiration of sentence, parole, or transfer to a community corrections center or other non-federal facility, at the conclusion of the period of confinement in which the injury occurred.

(c) For purposes of this part, the term "dependent" is defined as the legally recognized spouse or child of an inmate for whose support the inmate is legally responsible in whole or part.

§ 301.103 Inmate work assignments.

The unit team of each inmate, which ordinarily designates work assignments, or whoever makes institutional work assignments, shall review appropriate medical records, presentence reports, admission summaries, and all other available information prior to the designation of an inmate to a work assignment in an effort to preclude the assignment of an inmate to a work assignment not compatible with the inmate's physical ability or condition.

§ 301.104 Medical attention.

Whenever an inmate worker is injured while in the performance of assigned duty, regardless of the extent of the injury, the inmate shall immediately report the injury to his official work detail supervisor. The work detail supervisor shall immediately secure such first aid, medical, or hospital treatment as may be necessary for the proper treatment of the injured inmate. First aid treatment may be provided by any knowledgeable individual. Medical, surgical, and hospital care shall be rendered under the direction of institution medical staff. Refusal by an inmate worker to accept such medical, surgical, hospital or first aid treatment recommended by medical staff may result in denial of any claim for compensation for any impairment resulting from the injury.

§ 301.105 Investigation and report of injury.

(a) After initiating necessary action for medical attention, the work detail supervisor shall immediately secure a record of the cause, nature, and exact extent of the injury. The work detail supervisor shall complete a BP-140, Injury Report (Inmate), on all injuries reported by the inmate, as well as injuries observed by staff. The injury report shall contain a signed statement from the inmate on how the accident occurred. The names and statements of all staff or inmate witnesses shall be included in the report. If the injury resulted from the operation of mechanical equipment, an identifying description or photograph of the machine or instrument causing the injury shall be obtained, to include a description of all safety equipment used by the injured inmate at the time of the injury. Staff shall provide the inmate with a copy of the injury report. Staff shall then forward the original and remaining copies of the injury report to the institutional safety manager for review.

(b) The institution safety manager shall ensure that a medical description of the injury is included on the BP-140 whenever the injury is such as to require medical attention. The institution safety manager shall also ensure that the appropriate sections of BP-140, Page 2, Injury—Lost-Time Follow-Up Report, are completed and that all reported work injuries are properly documented.

§ 301.106 Repetitious accidents.

If an inmate worker is involved in successive accidents on a particular work site in a comparatively short period of time, regardless of whether injury occurs, and the circumstances of the accidents indicate an awkwardness or ineptitude that, in the opinion of the inmate's work supervisor, implies a danger of further accidents in the task assigned, the inmate shall be assigned to another task more suitable to the inmate's ability.

Subpart B—Lost-Time Wages

§ 301.201 Determination of work-relatedness.

(a) When the institution safety manager receives notice, or has reason to believe, a work-related injury may result in time lost from the work assignment, he or she shall present BP-140, Pages 1 and 2 (with the appropriate sections completed) to the Institution Safety Committee at the Committee's next regularly scheduled meeting. The Safety Committee shall make a determination of the injury's work-relatedness based on the available evidence and testimony. The determination shall be recorded on BP-140, Page 2, a copy of which shall be provided to the inmate.

(b) A determination of work-relatedness for purposes of awarding lost-time wages is not confirmation on the validity of any subsequent claim to receive compensation for work-related physical impairment or death.

§ 301.202 Payment of lost-time wages.

(a) An inmate worker may receive lost-time wages for the number of regular work hours absent from work due to injury sustained in the performance of the assigned work.

(b) Lost-time wages are paid for time lost in excess of three consecutively scheduled workdays. The day of injury is considered to be the first workday regardless of the time of injury.

(c) An inmate may receive lost-time wages at the rate of 75% of the standard hourly rate of the inmate's regular work assignment at the time of the injury.

§ 301.203 Continuation of lost-time wages.

(a) Once approved, the inmate shall receive lost-time wages until the inmate:

(1) Is released;

(2) Is transferred to another institution for reasons unrelated to the work injury;

(3) Returns to the pre-injury work assignment;

(4) Is reassigned to another work area or program for reasons unrelated to the sustained work injury, or is placed into Disciplinary Segregation; or,

(5) Refuses to return to a regular work assignment or to a lighter duty work assignment after medical certification of fitness for such duty.

(b) An inmate medically certified as fit for return to work shall sustain no monetary loss due to a required change in work assignment. Where there is no light duty or regular work assignment available at the same rate of pay as the inmate's pre-injury work assignment, the difference shall be paid in lost-time wages. Lost-time wages are paid until a light duty or regular work assignment at the same pay rate as the inmate's pre-injury work assignment is available.

§ 301.204 Appeal of determination.

An inmate who disagrees with the decision regarding payment of lost-time wages may appeal that decision exclusively through the Administrative Remedy Procedure. (See 28 CFR part 542.)

Subpart C—Compensation for Work-Related Physical Impairment of Death

§ 301.301 Compensable and noncompensable injuries.

(a) No compensation for work-related injuries resulting in physical impairment shall be paid prior to an inmate's release.

(b) Compensation may only be paid for work-related injuries of claims alleging imporper medical treatment of a work-related injury. This ordinarily includes only those injuries suffered during the performance of an inmate's regular work assignment. However, injuries suffered during the performance of voluntary work in the operation or maintenance of the institution, when such work has been approved by staff, may also be compensable.

(c) Compensation is not paid for injuries sustained during participation in institutional programs (such as programs of a social, recreational, or community relations nature) or from maintenance of one's own living quarters. Furthermore, compensation shall not be paid for injuries suffered away from the work

location (e.g., while the claimant is going to or leaving work, or going to or coming from lunch outside of the work station or area).

(d) Injuries sustained by inmate workers willfully or with intent to injure someone else, or injuries suffered in any activity not related to the actual performance of the work assignment are not compensable, and no claim for compensation for such injuries will be approved. Willful violation of rules and regulations may result in denial of compensation for any resulting injury.

§ 301.302 Work-related death.

A claim for compensation as the result of work-related death may be filed by a dependent of the deceased inmate up to one year after the inmate's work-related death. The claim shall be submitted directly to the Claims Examiner, Federal Bureau of Prisons, 320 First Street NW., Washington, DC 20534.

§ 301.303 Time parameters for filing a claim.

(a) No more than 45 days prior to the date of an inmate's release, but no less than 15 days prior to this date, each inmate who feels that a residual physical impairment exists as a result of an industrial or institution work-related injury shall submit a FPI Form 43, Inmate Claim for Compensation on Account of Work Injury. Assistance will be given the inmate to properly prepare the claim, if the inmate wishes to file. In each case a definite statement shall be made by the claimant as to the impairment caused by the alleged injury. The completed claim form shall be submitted to the Institution Safety Manager for processing.

(b) Each claimant shall submit to a medical examination to determine the degree of physical impairment. Refusal, or failure, to submit to such a medical examination shall result in the forfeiture of all rights to compensation. In each case of visible impairment, disfigurement, or loss of member, photographs shall be taken to show the actual condition and shall be transmitted with FPI Form 43.

(c) The claim, after completion by the physician conducting the impairment examination, shall be returned to the Institution Safety Manager for final processing. It shall then be forwarded promptly to the Claims Examiner, Federal Bureau of Prisons, 320 First Street NW., Washington, DC 20534.

(d) It is the responsibility of each claimant to advise the Claims Examiner of his or her current address, in writing, at all times during the pendency of a claim for Inmate Accident Compensation.

(e) When circumstances preclude submission in accordance with the provisions of paragraph (a) of this section, a claim may be accepted up to 60 days following release. Additionally, a claim for impairment may be accepted up to one year after release, for good cause shown. In such cases the claim shall be submitted directly to the Claims Examiner, Federal Bureau of Prisons, 320 First Street NW., Washington, DC 20534.

§ 301.304 Representation of claimant.

(a) Any person may represent the claimant's interest in any proceeding for determination of a claim under this part, so long as that person is not confined in any federal, state or local correctional facility. Written appointment of a representative, signed by the claimant, must be submitted before the representative's authority to act on behalf of the claimant may be acknowledged.

(b) It is not necessary that a claimant employ an attorney or other person to assert a claim or effect collection of an award. Under no circumstances will the assignment of any award be recognized, nor will attorney fees be paid by Federal Prison Industries, Inc.

§ 301.305 Initial determination.

A claim for inmate accident compensation shall be determined by a Claims Examiner under authority delegated by the Board of Directors of Federal Prison Industries, Inc., pursuant to 28 CFR 0.99. In determining the claim, the Claims Examiner will consider all available evidence. Written notice of the determination, including the reasons therefore, together with notification of the right to appeal the determination, shall be mailed to the claimant at the claimant's last known address, or to the claimant's duly appointed representative.

§ 301.306 Appeal of determination.

(a) An Inmate Accident Compensation Committee (hereafter referred to as the "Committee") shall be appointed by the Chief Operating Officer, Federal Prison Industries, Inc., under authority delegated by the Board of Directors of Federal Prison Industries, Inc., pursuant to 28 CFR 0.99. The Committee shall consist of four members and four alternate members, with any three thereof required to form a quorum for decision-making purposes.

(b) Any claimant not satisfied with any decision of the Claims Examiner concerning the amount or right to compensation shall, upon written request made within 30 days after the date of issuance of such determination, or up to 30 days thereafter upon a showing of reasonable cause, be afforded an apportunity for either an in-person hearing before the Committee, or Committee reconsideration of the decision. A claimant may request an in-person hearing or reconsideration by writing to the Inmate Accident Compensation Committee, Federal Bureau of Prisons, 320 First Street NW., Washington, DC 20534.

(c) Upon receipt of claimant's request, a determination will be made regarding the timeliness of the filing. If the request is timely filed, or if reasonable cause exists to accept the request filed in an untimely manner, the request shall be accepted. Once accepted, copy of the information upon which the Claims Examiner's initial determination was based shall be mailed to the claimant at the claimant's last know address, or to claimant's duly appointed representative, provided the release of such information is not determined to pose a threat to the safety of the claimant, any other inmate, or staff.

§ 301.307 Notice, time and place of committee action.

(a) Committee action shall ordinarily occur within 60 days of the receipt of claimant's request, except as provided in this section. Notice of the date set for Committee action shall be mailed to the claimant at the claimant's last known address, or to claimant's duly appointed representative. All Committee action shall be conducted at the Central Office of the Bureau of Prisons, 320 First Street, NW., Washington, DC 20534.

(b) A hearing or reconsideration may be postponed at the option of the Committee, or, if good cause is shown, upon request of the claimant. A claimant may change the request from either hearing to reconsideration or reconsideration to hearing, provided notice of such change is received at least 10 days prior to the previously scheduled action.

§ 301.308 Committee reconsideration.

If the claimant elects to have the Committee reconsider any decision of the Claims Examiner, the claimant may submit documentary evidence which the Committee shall consider in addition to the original record. The Committee must receive evidence no less than 10 days prior the date of reconsideration, and may request additional documentary evidence from the claimant or any other source.

§ 301.309 In-person hearing before the Committee.

(a) The appeal shall be considered to have been abandoned if the claimant

fails to appear at the time and place set for the hearing and does not, within 10 days after the time set for that hearing, show good cause for failure to appear.

(b) In conducting the hearing, the Committee is not bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, but may conduct the hearing in such manner as to best ascertain the rights and obligations of the claimant and the government. At such hearing, the claimant shall be afforded an opportunity to present evidence in support of the claim under review.

(c) The Committee shall consider all evidence presented by the claimant, and shall, in addition, consider any other evidence as the Committee may determine to be useful in evaluating the claim. Evidence may be presented orally and/or in the form of written statements and exhibits.

(d) A representative appointed in accordance with the provisions of this section may make or give, on behalf of the claimant, any request or notice relative to any proceeding before the Committee. A representative shall be entitled to present or elicit evidence or make allegations as to fact and law in any proceeding affecting the claimant and to request information with respect to the claim. Likewise, any request for additional information, or notice to any claimant of any administrative action, determination, or decision, may be sent to the representative of such claimant, and shall have the same force and effect as if it had been sent to the claimant.

(e) In order to fully evaluate the claim, the Committee may question the claimant and any witness(es) appearing before the Committee on behalf of the claimant or government.

(f) Claimant, or claimant's representative, may question the Committee or any witness(es) appearing before the Committee on behalf of the government, but only on matters determined by the Committee to be relevant to its evaluation of the claim.

(g) The hearing shall be recorded, and a copy of the recording or, at the discretion of the Committee, a transcript thereof shall be made available to the claimant upon request, provided such request is made not later than 90 days following the date of the hearing.

§ 301.310 Witnesses.

(a) If a claimant wishes to present witnesses at the hearing, the claimant must provide the Committee, no less than 10 days before the scheduled hearing date, the name and address of each proposed witness, along with an outline of each witness' testimony. The Committee may limit the number of witnesses who may appear at a hearing, however, the Committee has no authority to compel the attendance of any witness.

(b) Any person confined in a Federal, State, or local penal or correctional institution at the time of the hearing may not appear as a witness, but that person's testimony may be submitted in the form of a written statement.

§ 301.311 Expenses associated with appearances at committee hearing.

Federal Prison Industries, Inc., may not assume responsibility for any expenses incurred by the claimant, claimant's representative, or any witness appearing on behalf of the claimant in connection with attendance at the hearing, as well as any other costs relating to any representative, witnesses, or evidence associated with a hearing before the Committee.

§ 301.312 Notice of committee determination.

The Committee shall mail written notice of its decision to affirm, reverse, or amend the Claims Examiner's initial determination, with the reasons for its decision, to the claimant at the claimant's last known address, or to claimant's duly appointed representative, no later than 30 days after the date of the hearing unless the Committee needs to make a further investigation as a result of information received at the hearing. If the Committee conducts a further investigation subsequent to the hearing, the decision notice shall be mailed no later than 30 days after the conclusion of the Committee's investigation.

§ 301.313 Chief Operating Officer review.

Any claimant not satisfied with the Committee's reconsidered decision or decision after a hearing may appeal such decision to the Chief Operating Officer, Federal Prison Industries, Inc., 320 First Street, NW., Washington, DC 20534. A written request for such an appeal must be received no later than 90 days after the date of notice of the Committee's decision. The Chief Operating Officer shall review the record and affirm, reverse or amend the Committee's decision no later than 90 days after receipt of claimant's notice of appeal. Written notice of the Chief Operating Officer's decision shall be mailed to the claimant's last known address, or to the claimant's representative.

§ 301.314 Establishing the amount of award.

(a) If a claim for Inmate Accident Compensation is approved, the amount of compensation shall be based upon the degree of physical impairment existent at the time of the claimant's release regardless of when during the claimant's period of confinement the injury was sustained. No claim for compensation will be approved if full recovery occurs while the inmate is in custody and no impairment remains at the time of release.

(b) In determining the amount of accident compensation to be paid, the permanency and severity of the injury in terms of functional impairment shall be considered. The provisions of the Federal Employees' Compensation Act (FECA) (5 U.S.C. 8101, et seq.) shall be followed when practicable. The FECA establishes a set number of weeks of compensation applicable for injuries to specific body members or organs (Section 8107).

(c) All awards of Inmate Accident Compensation shall be based upon the minimum wage (as prescribed by the Fair Labor Standards Act).

(1) For body members or organs covered under Section 8107, the minimum wage applicable at the time of the award shall be used as the basis for determining the amount of compensation. Awards regarding injury to body members or organs covered under Section 8107 shall be paid in a lump sum. Acceptance of such an award shall constitute full and final settlement of the claim for compensation.

(2) For body members or organs not covered under Section 8107, awards will be paid on a monthly basis because such awards are subject to periodic review of entitlement. The minimum wage applicable at the time of each monthly payment shall be used in determining the amount of each monthly payment. Monthly payments are ordinarily mailed the first day of the month following the month in which the award is effective.

§ 301.315 Review of entitlement

(a) Each monthly compensation recipient shall be required, upon request of the Claims Examiner, to submit to a medical examination, by a physician specified or approved by the Claims Examiner, to determine the current status of his physical impairment. Any reduction in the degree of physical impairment revealed by this examination shall result in a commensurate reduction in the amount of monthly compensation provided. Failure to submit to this physical examination shall be deemed refusal, and shall ordinarily result in denial of future compensation. The cost associated with this examination shall

be borne by Federal Prison Industries, Inc.

(b) Inasmuch as compensation awards are based upon the minimum wage, any income received by a compensation recipient which exceeds the annual income available at the minimum wage (based upon a 40 hour work week), including Social Security or veterans benefits received as the result of the work-related injury for which Inmate Accident Compensation has been awarded, shall be deemed excessive. The amount of compensation payable to a claimant with an income deemed excessive shall be reduced at the rate of one dollar for each two dollars of earned and benefit income which exceeds the annual income available at minimum wage. Each monthly compensation recipient shall be required to provide a statement of earnings on an annual basis, or as otherwise requested. Failure to provide this statement shall result in the suspension or denial of all Inmate Accident Compensation benefits until such time as satisfactory evidence of continued eligibility is provided.

§ 301.316 Subsequent incarceration of compensation recipient.

If, subsequent to an award of compensation on a monthly basis, a claimant becomes incarcerated at any federal, state, or local correctional facility, monthly compensation payments payable to the claimant shall ordinarily be suspended until such time as the claimant is released from the correctional facility.

§ 301.317 Medical treatment following release.

Federal Prison Industries, Inc., may not pay the cost of medical, hospital treatment, or any other related expense incurred after release from confinement unless such cost is authorized by the Claims Examiner in advance, or the Claims Examiner determines that circumstances warrant the waiver of this requirement. Generally, the payment of such costs is limited to impairment evaluations, or treatments intended to reduce the degree of physical impairment, conducted at the direction of the Claim Examiner.

§ 301.318 Civilian compensation laws distinguished.

The Inmate Accident Compensation system is not obligated to comply with the provisions of any other system of worker's compensation except where specifically stated in this part. Awards made under the provisions of the Inmate Accident Compensation procedure differ from awards made under civilian workmen's compensation laws in that hospitalization is usually completed prior to the inmate's release from the institution and, except for a three-day waiting period, the inmate receives wages while absent from work. Other factors necessarily must be considered that do not enter into the administration of civilian workmen's compensation laws. As in the case of federal employees who allege they have sustained work-related injuries, the burden of proof lies with the claimant to establish that the claimed impairment is causally related to the claimant's work assignment.

§ 301.319 Exclusiveness of remedy.

Inmates who are subject to the provisions of these Inmate Accident Compensation regulations are barred from recovery under the Federal Tort Claims Act (28 U.S.C. 2671 et seq.). Recovery under the Inmate Accident Compensation procedure was declared by the U.S. Supreme Court to be the exclusive remedy in the case of work-related injury. *U.S.* v. *Demko*, 385 U.S. 149 (1966).

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Bureau of Prisons

28 CFR Part 540

Control, Custody, Care, Treatment and Instruction of Inmates Contact With the Media

AGENCY: Bureau of Prisons, Justice.

ACTION: Proposed rule.

SUMMARY: The Bureau of Prisons, in response to increased interest in its operations, is proposing to amend its regulations on Contact With the Media. Major changes involve the frequency of interviews, procedures covering access to inmates, and clarification of the prohibition on inmates conducting a business. The proposed regulations are intended to ensure a better informed pulbic, and to offer inmates an opportunity to exercise their First Amendment rights in ways that do not conflict with the security and orderly operation of the institutions where they are confined.

DATES: Comments due by January 12, 1990.

ADDRESSES: Office of General Counsel, Bureau of Prisons, Room 760, 320 First Street NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Roy Nanovic, Office of General Counsel, Bureau of Prisons, phone (202) 724-3062.

SUPPLEMENTARY INFORMATION: The Bureau of Prisons is proposing to amend its regulations on Contact With the Media. A final rule on this subject was published in the **Federal Register** on June 29, 1979 (44 FR 38247).

The Bureau of Prisons has determined that this rule is not a major rule for the purpose of EO 12291. The Bureau of Prisons has determined that EO 12291 does not apply to this rule since the rule involves agency management. After review of the law and regulations, the Director, Bureau of Prisons has certified that this rule, for the purpose of the Regulatory Flexibility Act (Pub. L. 96-354), does not have a significant impact on a substantial number of small entities.

Interested persons may participate in this proposed rulemaking by submitting data, views, or arguments in writing to the Bureau of Prisons, Room 760, 320 First Street, NW., Washington, DC 20534. Comments received furing the comment period will be considered before final action is taken. The proposed rule may be changed in light of the comments received. No oral hearings are contemplated.

List of Subjects in 28 CFR Part 540

Prisoners.

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons in 28 CFR 0.96(q), it is proposed to amend part 540 in subchapter C of 28 CFR, chapter V as set forth below.

Dated: November 22, 1989.

J. Michael Quinlan,

Director, Bureau of Prisons.

SUBCHAPTER C—INSTITUTIONAL MANAGEMENT

PART 540—CONTACT WITH PERSONS IN THE COMMUNITY

1. The authority citation for 28 CFR 540 is revised to read as follows:

Authority: 5 U.S.C. 301, 551, 552a; 18 U.S.C. 3621, 3622, 3624, 4001, 4041, 4042, 4081, 4082 (Repealed as to conduct occurring on or after November 1, 1987), 5006-5024 (Repealed October 12, 1984 as to conduct occurring after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95-0.99, unless otherwise noted.

2. In § 540.2, paragraph (c) and the undesignated paragraph which follows it are designated as new paragraph (i), paragraph (b) is redesignated and revised as paragraph (d), and new paragraphs (b), (c), and (e) through (h) are added to read as follows:

§ 540.2 Definitions.

* * * * *

(b) The term "media" means agencies or organizations whose principal purpose is to gather and disseminate factual information to the public through various mechanisms including, but not limited to print, electronic, and other means of mass communication.

(c) The term "news media" means any segment of the media as defined in paragraph (b) of this section whose principal purpose is the gathering and at least weekly dissemination of current happenings, occurrences, or anything of interest to the general public, including, but not limited to:

(1) A newspaper which qualifies as a general circulation newspaper in the community in which it is published. A newspaper is one of "general circulation" if it circulates among the public and if it publishes news of public interest. A key test to decide whether a newspaper qualifies as a "general circulation" newspaper is to determine whether the paper qualifies for the purpose of publishing legal notices in the community in which it is located or in the area to which it distributes. It is generally held that for a newspaper to be considered, by law, a newspaper of general circulation, and so be qualified to publish legal notices, it must contain items of general interest to the public, such as news of political, religious, commercial, or social affairs;

(2) A news magazine of national circulation that is sold by newsstands and mail subscription to the general public;

(3) A national or international news service; or

(4) A radio or television news program of a station (or other non-print media) outlet holding a Federal Communications Commission license.

(d) "Reporter," or "representative of the media," or "representative of the news media," or "media representative" means a person whose employment is to gather or report news for news-gathering organizations. The following elements can be used to evaluate the status of such a person. The person:

(1) Works for a media organization as defined in this section as a primary occupation;

(2) Works for a media organization as defined in this section for a salary, hourly wage, or any other schedule of compensation, regular or otherwise;

(3) Works as a party to formal or informal arrangements with a news-gathering organization to submit material for publication through any channel, when acting in a capacity other than a member of the general public, such as in a letter to the editor; and

(4) Can present proof of previous professional publication for such a news-gathering organization. Because of the institutional resources needed to screen and process prospective interviews, ordinarily, only a member of the news media, as defined herein, may conduct a face-to-face interview with a specified inmate.

(e) A "business" or "profession" is any activity conducted by an inmate that entails a contractual arrangement or generates income through a non-Bureau of Prisons-approved program or activity, as contrasted with a work assignment or an approved program or activity otherwise regulated by Bureau of Prisons policy. This income could derive from civilian sources directed by the inmate, or be created by the inmate through activities in the institution that are not approved for the generation of income. For this purpose of this policy, any writing or other creative product generated by an inmate in non-BOP approved activity, which generates more than $500 in gross income in any one calendar year, is considered to be business activity, and is prohibited. Approved hobbycraft sales are permitted in accord with the policy regulating those activities, and inmates may receive cash awards or prizes for participation in approved creative programs, up to the $500 limit. The amount of the ceiling on hobbycraft profits shall be raised (in multiples of $50.00) wherever the Commissary purchase authority for inmates is raised, and to a comparable percentage increase.

(f) For the purpose of Bureau of Prisons procedures, a "manuscript" is any pre-publication product of creative writing, including fiction, non-fiction, music, poetry, or cartoons, which contains text, music, lyrics, or other creative writings, other than personal correspondence with the media. Manuscripts are generally submitted for the purpose of publication as a stand-alone literary or musical product, e.g., a book, pamphlet, script, song or other document. Manuscripts are typically prepared over a period of time, and are submitted to publishers or other non-media outlets; because of the time involved in preparation and ultimate publication, manuscripts ordinarily do not relate to current events.

(g) For the purpose of Bureau of Prisons procedures, a "by-lined article" is a written or other communication product published in the media (other than a letter to the editor) that is accompanied by the name of the author; is created and submitted to any media outlet (print or otherwise) for further distribution through a periodical such as a newspaper, magazine, or other mechanism; is ordinarily intended to be published as part of a larger work product; and may deal with contemporary issues.

(h) "Creative writing" includes all forms of writing other than legal documents and social or special mail correspondence. Creative writing activity is intended to encourage creativity and constructive structuring of leisure time, and is not for the purpose of fund-raising; an inmate may not be paid for creative writing activity.

* * * * *

3. Subpart E, consisting of §§ 540.60 through 540.65, is revised to read as follows:

Subpart E—Contact With the Media

Sec.
540.60 Purpose and scope.
540.61 Authorization.
540.62 General institutional visits.
540.63 Personal interviews and other media contacts.
540.64 Media pools.
540.65 Release of information.

Subpart E—Contact With the Media

Authority: 5 U.S.C. 301, 551, 552a; 18 U.S.C. 3621, 3622, 3624, 4001, 4041, 4042, 4081, 4082 (Repealed as to conduct occurring on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to conduct occurring after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

§ 540.60 Purpose and scope.

(a) The Bureau of Prisons recognizes that it is in the public interest to supply information about its operations, and that the media can play a vital role in that information function. To that end, representatives of the media may visit institutions for the purpose of preparing reports about the institution, its programs, and its activities, and to interview inmates. It is not the intent of this rule to provide publicity for an inmate, or special privileges for the media by providing access to inmates in a manner not otherwise available to the general public. These regulations are intended to insure a better informed public, and to offer inmates an opportunity to exercise their First Amendment rights in ways that do not conflict with the security and orderly operation of the institutions where they are confined. An inmate's First Amendment rights to freedom of expression, and access to the institution by media representatives, may be restricted when and if such expression or access would result in potential disruption to the discipline and security of the institution, or material interference with the accomplishment of

its mission. The Bureau of Prisons has a responsibility to protect the privacy and other rights of inmates and members of the staff. Therefore, any media tours or interviews in an institution must be regulated to safeguard those rights, and face-to-face interviews with inmates must be regulated to ensure the safe, orderly operation of the institution.

(b) In general, media contacts fall into two broad categories. The first are contacts of a general nature directed toward institutional programs and activities that have a public education purpose, and do not focus on any individual inmate or discrete group of identifiable inmates. The second type of media contact focuses on an individual inmate, identifiable group of inmates, or some investigative subject. These contacts are not considered to have a general public education purpose, but are rather intended to have a specific expository outcome with regard to the inmates or programs involved. Different types of access and processing are involved for these two very different types of media activity.

(c) These rules apply to inmates in Federal institutions and on authorized furlough from Federal institutions. When a Federal prisoner is confined as a contract boarder in any non-Federal facility or community corrections-type facility, the local or State facility rules and regulations will govern.

§ 540.61 Authorization.

(a) A media representative who desires to make either a public education-type visit or a news media representative who wishes to conduct an inmate interview at an institution must make application in writing to the Warden on the letterhead of the news organization for which the tour or interview is to be conducted. Except as otherwise noted herein, the term "Warden" refers to the Warden or the Warden's designee. The request ordinarily must be received at the institution not less than two working days in advance of the requested visit or interview. It must indicate the scope of the intended interview, and affirm that the media representative is familiar with the rules and regulations of the institution and agrees to comply with them.

(b) Representatives of the media have a professional responsibility to make a reasonable attempt to verify any allegations regarding an inmate, staff member, or institution. To ensure an opportunity to gather complete information regarding both sides of any issue in the institution, a representative of the news media, as a condition of any face-to-face interview granted by the Bureau, shall provide authorized staff of the Bureau of Prisons an opportunity to respond to any allegation that might be published or broadcast.

(c) A representative of the media should collect information only from the primary source, and may not obtain and use personal information from one inmate about another inmate who refuses to be interviewed, an act which would constitute a violation of that inmate's privacy.

(d) A representative of the media who is on an inmate's authorized visiting list will not be granted any form of media access to a Bureau institution. A media representative may not be added to an inmate's visiting list unless that inmate is an immediate family member, in which case, all media privileges will be suspended for that individual within the Bureau of Prisons.

(e) Failure by the media representative to adhere to the provisions set forth by this rule constitutes grounds for denying that media representative, or the organization that he or she represents, permission to conduct future interviews or tours in a BOP facility for up to one year.

(f) Any limitation or denial of media access will be reported to the Regional Public Information Officer. Denial of access beyond a single visit will only be upon written notice to the party involved, after consultation with the Regional and Central Office public information officers, and review of the proposed letter of limitation or denial by the Regional Director.

(g) A representative of the media may appeal any local decision to deny, or otherwise restrict access to the institution, to the Regional Director, and may further appeal any determination made at that level to the Director of the Bureau of Prisons.

(h) After the access limitation period has expired, the individual or organization may reapply for admission, in writing, to the Office of Public Affairs, Central Office, Washington, DC.

(i) The Warden may suspend all categories of media visits during an institutional emergency and for a reasonable time after the emergency. During such a suspension, the local institution may establish a local media center, offer regular informational briefings by the institution Public Information Officer, establish a media pool, and make available such facilities and services as are required, in the Warden's view, to ensure a smooth flow of public information about the emergency.

§ 540.62 General institutional visits.

(a) General institutional visits are contacts of a general nature directed toward institutional programs and activities, which have a public education purpose, and do not focus on any individual inmate or discrete group of identifiable inmates. A media representative shall make advance appointments for this category of visit, which ordinarily should be held during regular business hours for that institution. Institution staff will process all such requests expeditiously, and within two working days of receipt.

(b) The institutional Public Information Officer is responsible for verifying the identity and credentials of all media personnel applying for admission to the institution. All personnel making a request to take part in a media tour or interview should be named in the request for the interview, and each will supply their date of birth and social security number, in order that institutional staff may complete necessary identification procedures prior to approval. Individuals not so identified at the time of the request may not be admitted.

(c) When media representatives visit the institution, photographs of programs and activities may be taken. However, an inmate has the right not to be identifiably photographed or have his or her voice identifiably recorded by the media. Accordingly, a visiting representative of the media is required to obtain written permission from an inmate before identifiably photographing or recording the voice of that inmate, or before distributing it.

(d) Because of the large number of individuals who may potentially seek to obtain access to Bureau institutions under the auspices of other kinds of media activity, tours for representatives of non-news media organizations, and others, such as movie producers, researchers and free-lance writers, are ordinarily not approved. They may be permitted only by special arrangement, with approval of the Warden, and after conferring with the Regional Public Information Officer.

§ 540.63 Personal interviews and other media contacts.

(a) This type of media contact involves an individual inmate, identifiable group of inmates, or some investigative subject. These contacts are not considered to have a general public education purpose, but are rather intended to have specific expository outcome with regard to the inmates or programs involved; they are ordinarily

granted only to news media representatives.

(b) Except as otherwise provided in Bureau policy, an inmate in a Federal institution may not conduct a business, be employed in an employee/employer relationship, execute a contract or legally binding agreement, act as a reporter, publish under a by-line, or execute a power of attorney or other instrument or mechanism that has the effect of circumventing these restrictions or any other provision of this program statement.

(c) Inasmuch as alternate access to the media is an important communication option, an inmate may correspond personally with representatives of the media through established institutional correspondence procedures.

(d) The use of the telephone is a legitimate avenue for inmates to use to contact the media. However, an inmate may not grant an interview that is broadcast live, inasmuch as that process prevents the institution from accomplishing the review and response provisions of this policy. Inmates may not place third-party phone calls to media representatives.

(e) In the interest of institutional security and order, an inmate currently confined in an institution may not be employed or act as a reporter, publish under a byline, or cause to be disseminated for compensation above the amount allowed by § 540.2(e) of this part any manuscript with which his name is associated.

(f) Except as otherwise provided in Bureau policy, an inmate may not receive compensation or any consideration, directly or indirectly, for any creative work or time expended in any creative activity (this includes submission of articles or other published works or any broadcast participation,) or for interviews with the media, whether the nature of the media contact is face-to-face, by phone, or through correspondence. Creative products that draw upon an inmate's criminal activities may be subject to referral to the U.S. Attorney for consideration of forfeiture under Federal statute.

(g) An inmate or a representative of the news media may initiate a request for a face-to-face interview.

(1) Visits by the news media to conduct face-to-face inmate interviews are subject to the same conditions stated in § 540.62. A news media representative shall make a request for a personal interview, ordinarily allowing two working days prior to the requested interview date.

(2) Staff shall notify an inmate of each face-to-face interview request, and shall, as a prerequisite, obtain the inmate's written consent for any interview, photo, or voice recording for the interview prior to the interview taking place.

(h) As a condition of granting the interview, an inmate must authorize institutional staff to respond to comments made in the interview and to release information to the media relative to the interview.

(i) The Warden shall ordinarily approve or disapprove an interview request within two working days of receipt by institution staff of the request.

(j) The Warden shall document any disapproval. A request for interview or visit may be denied for any of the following reasons:

(1) The news media representative, or the organization which he or she represents, does not agree to the conditions established by this rule or has, in the past, failed to abide by the required conditions.

(2) The inmate is physically or mentally unable to participate. This must be supported by a medical officer's statement (a psychologist may be used to verify mental incapacity) to be placed in the inmate's record, substantiating the reason for disapproval by the Warden.

(3) The inmate is a juvenile (under age 18) and written consent has not been obtained from the inmate's parent or guardian. If the juvenile inmate's parents or guardians are not known or their addresses are not known, the Warden of the institution shall notify the news media representative of the inmate's status as a juvenile; and shall then consider the request. The inmate's written consent, as specified in paragraph (g) of this section, is still required.

(4) The interview, in the opinion of the Warden, would endanger the health or safety of the interviewer, or would probably cause serious unrest or disturb the good order of the institution.

(5) The inmate is involved in a pending court action and the court having jurisdiction has issued an order forbidding such interviews.

(6) In the case of unconvicted persons (including competency commitments under 18 USC 4241–43 and 4245–56) held in Federal institutions, interviews are not authorized until there is documented clearance with the court having jurisdiction, which ordinarily will be obtained through the U.S. Attorney's Office.

(7) The Bureau has received objections from other Government agencies which have expressed an interest. Interviews requested with U.S. Immigration and Naturalization (INS) detention cases will be cleared by the local INS office. Interview requests for inmates in whom other Government agencies have expressed an interest will be cause for institution staff to notify that agency of the proposed interview. Interviews for offenders held for other jurisdictions will be approved only with the concurrence of the court or agency having final jurisdiction of the inmate.

(8) The inmate is a "protection" case and disclosure of his or her whereabouts would endanger the inmate's safety.

(k) The Warden will establish the place and time of all media interviews, subject to the following conditions:

(1) Ordinarily, inmate interviews will be scheduled during regular business hours for that institution.

(2) Face-to-face media interviews will ordinarily not be subject to auditory supervision, but at the discretion of the Warden, they may be subject to supervision in the same manner as other visits by the public. The presence of an institutional Public Information Officer or other staff member will not be construed as an opportunity for debate or other exchange of views between the reporter, inmate, and staff member; the employee is present for supervision purposes, not to participate in the interview.

(3) Ordinarily, not more than one face-to-face interview per day will be held in any institution, using an equitable method of apportioning access when requests exceed one per day.

(4) Ordinarily, an inmate will be limited to not more than one face-to-face interview per calendar month; in instances of multiple requests, the inmate will be responsible for choosing which interview will be granted.

(5) The Warden may establish additional limits on the length and number of face-to-face interviews per month an inmate may have if confined in special housing status; e.g., segregation, restricted, holdover, control unit, or hospital status, or if otherwise required by special security, custodial, supervisory, or operational needs.

(6) The Warden may limit the amount of audio, video, and film equipment entering the institution, and limit to five the total number of media personnel and technicians entering the institution; live television or radio broadcasts are not permitted. In the case of a pre-trial inmate, the attorney of record and a representative of the U.S. Attorney's Office may also be present.

(7) In the case of interviews that must be conducted in visiting rooms that are frequently crowded, or in visiting rooms of maximum security institutions, the Warden may limit the equipment to hand-held cameras or recorders, and may impose additional restrictions on

the number of news media representatives or technicians permitted.

(8) News media representatives are encouraged to tour Bureau institutions in conjunction with a personal interview.

§ 540.64 Media pools.

(a) The Warden may establish a media pool whenever he or she determines that the frequency of requests for visits reaches a volume that warrants limitations in order to ensure the efficiency of the tour process or conserve staff resources.

(b) Whenever the Warden establishes a media pool under these circumstances, the Warden shall notify all media representatives who have requested interviews or visits that have not been conducted that a pool will be authorized, and to what areas of the institution the pool will have access. The selected representatives will be admitted to the institution to conduct the interviews under specific guidelines established by the Warden.

(c) The members of the media pool are selected by their peers by a process determined by those media representatives present and wishing to participate; institutional staff will not participate in the selection process. A media pool shall consist of not more than one representative from each of the following groups:

(1) The national and international news services;

(2) The television and radio networks and outlets;

(3) Magazines and newspapers; and

(4) All media in the local community where the institution is located.

If no interest has been expressed by one or more of these groups, no representative from such group need be selected.

(d) All news material generated by such a media pool is made available to all media without right of first publication or broadcast.

(e) In order to preserve the principle that inmates will not use media access for personal notoriety or advancement of any kind, inmates may not convene or conduct a media conference, or be interviewed by the media in a pool situation. However, when in the judgement of the Warden, such a high level of media interest exists regarding one inmate that normal institutional resources cannot meet a legitimate public information need, then pool selection procedures may be modified. In this situation, the Warden may allow a separate interview (not to exceed a total of four) by a single representative of each of the four categories of news media enumerated above, chosen by procedures agreed upon by the members of the media themselves. In this circumstance the successive, individual pool interviews will together count as that inmate's interview for that month.

§ 540.65 Release of information.

(a) The Warden will ordinarily make announcements to the media of facts surrounding unusual or newsworthy incidents. Examples are deaths, escapes, and institution emergencies.

(b) The Warden shall provide information about an inmate that is a matter of public record to the representatives of the media upon request. The information is limited to the inmates:

(1) Name;

(2) Register number;

(3) Place of incarceration;

(4) Age;

(5) Race;

(6) Conviction and sentencing data: this includes the offense(s) for which convicted, the court where convicted, the date of sentencing, the length of sentence(s), the amount of good time earned or available, the parole eligibility date and parole release (presumptive or effective) date, and the date of expiration of sentence, and includes previous Federal, State, and local convictions;

(7) Past movement via transfers or writs;

(8) General institutional assignments; and

(9) Release destination.

(c) The Warden of each institution, or his/her designated representative, is solely responsible for contact with the media.

(d) Information in paragraphs (b)(1) through (9) of this section may not be released if confidential for protection cases, or otherwise in conflict with any provisions of the Privacy Act.

(e) A request for additional information concerning an inmate by a representative of the media shall be referred to the Regional Public Information Officer, or the Office of Public Affairs, Central Office, Washington, DC.

(f) The Public Information Officer, Office of Public Affairs, Central Office, Washington, DC shall release all announcements related to changes in:

(1) Bureau of Prisons policy;

(2) Institutional mission;

(3) Type of inmate population; or

(4) Executive personnel.

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28 CFR Part 549

Control, Custody, Care, Treatment and Instruction of Inmates; HIV Education, Counseling, Testing, Reporting, Treatment and Monitoring

AGENCY: Bureau of Prisons, Justice.

ACTION: Proposed rule.

SUMMARY: In this document the Bureau of Prisons is proposing new regulations concerning Human Immunodeficiency Virus (HIV). These proposed regulations codify Bureau policy on HIV Education, Counseling, Testing, Reporting, Treatment and Monitoring. The intended effect is both to help restrict the spread of HIV and to improve the quality of life for those who are HIV-positive.

DATES: Comments due by January 12, 1990.

ADDRESSES: Office of General Counsel, Bureau of Prisons, Room 760, 320 First Street NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Roy Nanovic, Office of General Counsel, Bureau of Prisons, phone (202) 724-3062.

SUPPLEMENTARY INFORMATION: The Bureau of Prisons is proposing new regulations on HIV Education, Counseling, Testing, Reporting, Treatment and Monitoring. These regulations codify Bureau policy in these areas.

The Bureau of Prisons has determined that this rule is not a major rule for the purpose of EO 12291. After review of the law and regulations, the Director, Bureau of Prisons has certified that this rule, for the purpose of the Regulatory Flexibility Act (Pub. L. 96-354), does not have a significant impact on a substantial number of small entities.

Interested persons may participate in this proposed rulemaking by submitting data, views, or arguments in writing to the Bureau of Prisons, Room 760, 320 First Street, NW., Washington, DC 20534. Comments received during the comment period will be considered before final action is taken. The proposed rule may be changed in light of the comments received. No oral hearings are contemplated.

List of Subjects in 28 CFR Part 549

Prisoners.

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons in 28 CFR 0.96(q), it is proposed to amend part 549 in subchapter C of 28 CFR, chapter V as set forth below.

Dated: November 22, 1989.

J. Michael Quinlan,

Director, Bureau of Prisons.

SUBCHAPTER C—INSTITUTIONAL MANAGEMENT

PART 549—MEDICAL SERVICES

1. The authority citation for 28 CFR part 549 is revised to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 4001, 4005, 4042, 4081, 4082 (Repealed as to conduct occurring on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to conduct occurring after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

2. In part 549, subpart A, consisting of §§ 549.10 through 549.18, is added to read as follows:

Subpart A—HIV Education, Counseling, Testing, Reporting, Treatment and Monitoring

Sec.
549.10 Purpose and scope.
549.11 Intake screening.
549.12 Housing.
549.13 Communal implements.
549.14 Work assignments.
549.15 Education.
549.16 Testing and reporting.
549.17 Counseling.
549.18 Treatment/monitoring.

Subpart A—HIV Education, Counseling, Testing, Reporting, Treatment and Monitoring

§ 549.10 Purpose and scope.

In conjunction with current medical procedures and treatments, the Bureau of Prisons provides programs of education, counseling, testing and reporting for inmates to help restrict the spread of the Human Immunodeficiency Virus (HIV) and to improve the quality of life for those who are HIV-positive.

§ 549.11 Intake screening.

During routine intake screening, all new commitments shall be interviewed to identify those who may be HIV infected. The questions should address specific symptoms such as thrush, fevers, night sweats, cough, unexplained weight loss, lymphadenopathy, and diarrhea. Inmates identified in this manner shall be tested as clinically indicated.

§ 549.12 Housing.

With the exception of the Bureau of Prisons rule set forth in subpart E of 28 CFR 541, there shall be no special housing or quarantining established for HIV positive inmates.

§ 549.13 Communal implements.

Toothbrushes, razors or other personal implements that could become contaminated with blood may not be used by more than one inmate. Multiple use items such as bandage scissors, barber equipment, etc., shall be washed in warm soap water, agitated in disinfectant for not less than 15 seconds, then dried with a clean cloth following each use.

§ 549.14 Work assignments.

HIV antibody screening ordinarily will not be performed as a criterion for work detail assignments. Known HIV positive inmates, however, are not ordinarily assigned to Food Service or to the Hospital.

§ 549.15 Education.

Bureau of Prisons staff shall ensure that HIV education is provided to all inmates during admission and orientation, periodically, and prior to an inmate's release on furlough, parole or Community Corrections Center placement.

§ 549.16 Testing and reporting.

The Bureau's HIV program consists of much more than administering tests. HIV testing is administered only in conjunction with a well developed education and counseling program. Appropriate emphasis must be placed on education, counseling, testing, and treatment.

(a) *New commitments:* All inmates committed to the Bureau of Prisons will be tested on a random basis. All inmates who test negative shall be retested at six months. The new commitment testing program as well as the follow-up testing program is mandatory. Failure to comply shall result in an incident report, and possible disciplinary action.

(b) *Voluntary:* After consultation with a Bureau of Prisons physician or physician assistant, an inmate may request an HIV antibody test, ordinarily not to occur more frequently than once every twelve months.

(c) *Clinically indicated:* Consistent with sound clinical judgment, physicians may order an HIV antibody test if an inmate presents chronic illnesses or symptoms suggestive of an HIV infection. Inmates who are pregnant, inmates receiving live vaccines or, if required, inmates admitted to community hospitals shall be tested in this category. Also, inmates demonstrating promiscuous, assaultive or predatory sexual behavior shall be tested within this category.

(d) *Pre-release/community activities:*

(1) Inmates being considered for parole, furlough, or placement in a Community Corrections Center (CCC) will be tested for the HIV antibody as a condition for participation in the community activity. An inmate who has been tested within one year of this consideration ordinarily will not be required to submit to a repeat test prior to the lapse of the one-year period. Inmates electing not to be tested may not be considered for furlough, or CCC referral. If an inmate is being considered for parole and elects not to be tested, the United States Parole Commission shall be notified. Inmates participating in unescorted community activities shall be tested for the HIV antibody. Refusing to be tested shall be grounds for denying participation in the community activity.

(2) Prior to release on parole, to a CCC or participation in an unescorted community activity, the inmate will be given a reasonable period, ordinarily 5–10 days, in which to notify his/her spouse (legal or common-law) or any identified significant others with whom it could be assumed the inmate might have contact resulting in possible transmission of the virus. Refusal to make such notification may result in denial of CCC placement or participation in unescorted community activities. Institution staff shall personally confirm that these individuals have been notified of the inmate's condition. If an inmate is being considered for parole and refuses to make such contacts, the United States Parole Commission shall be notified.

(3) Inmates being released due to full expiration of sentence or mandatory release shall submit to an antibody test within one year prior to release. Failure to comply shall result in an incident report. Those inmates testing positive shall be encouraged to notify their spouse or significant other of seropositivity.

§ 549.17 Counseling.

Inmates receiving the HIV antibody test shall receive pre and post test counseling, regardless of the test result.

§ 549.18 Treatment/monitoring.

(a) Clinical evaluation and review for HIV positive inmates shall occur at least once a month.

(b) Pharmaceuticals approved by FDA for use in the treatment of AIDS and HIV infected inmates will be offered at the parent institution when indicated.

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federal register

Tuesday
November 28, 1989

Part VII

Federal Trade Commission

Mail Order Merchandise Trade Regulation Rule; Notice of Proposed Rulemaking

FEDERAL TRADE COMMISSION

16 CFR Part 435

RIN 3084-AA19

Mail Order Merchandise Trade Regulation Rule; Notice of Proposed Rulemaking

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Trade Commission is commencing a rulemaking to amend the trade regulation rule "Mail Order Merchandise," 16 CFR part 435 ("the Rule"), to include merchandise ordered by telephone, and to amend the definition of "properly completed order" for credit sales. The Commission is commencing this rulemaking because of the public comments filed in response to its Advance Notice of Proposed Rulemaking, and other information discussed in this notice. The rulemaking proceeding will be limited to consideration of amending the Rule in these respects.[1]

The Commission invites public comment on the proposed amendments to the Rule.

DATES: Written comments must be submitted on or before January 29, 1990. Notification of interest in questioning witnesses must be submitted on or before January 12, 1990. Prepared statements of witnesses and exhibits, if any, must be submitted on or before February 26, 1990. Public hearings commence at 9:30 a.m. on March 28, 1990.

ADDRESSES: Five copies of written comments, notifications of interest, prepared statements of witnesses and exhibits should be submitted to Henry B. Cabell, Presiding Officer, Federal Trade Commission, Washington, DC 20580, 202-326-3642. The public hearings will be held in Room 332, Federal Trade Commission Building, 6th Street and Pennsylvania Avenue, NW., Washington, DC 20580. All submissions should be captioned: "Notice of Proposed Rulemaking—Amendment of the Mail Order Merchandise Rule.

FOR FURTHER INFORMATION CONTACT: Joel N. Brewer, Attorney, Division of Enforcement, Bureau of Consumer Protection (601 Pennsylvania Ave., Rm. 4632), Federal Trade Commission, Washington, DC 20580, 202-326-2967.

SUPPLEMENTARY INFORMATION: [2] This notice sets out the rulemaking procedures to be followed, the text of the Rule provisions to be considered during the rulemaking proceeding, reference to the legal authority for the Rule and the rulemaking proceeding, a statement of the Commission's reasons for commencing the proceeding to amend the Rule, a list of general questions and issues upon which the Commission desires written and oral comment, an invitation for written and oral comments, and instructions for prospective witnesses and other interested persons who desire to present oral statements or otherwise participate in this proceeding.

Background

[1] On October 22, 1975, the Federal Trade Commission published, at 40 FR 49492, the Trade Regulation Rule relating to Mail Order Merchandise, 16 CFR part 435. A Statement of Basis and Purpose for the Rule was published on November 5, 1975, at 40 FR 51582. The Rule became effective on February 2, 1976, and has remained in full force and effect since then. Statutory authority for the Rule and for this rulemaking proceeding to amend the Rule is provided by Section 18 of the Federal Trade Commission Act, 15 U.S.C. 57a, as amended.

[2] Under the Rule, a mail order seller who is unable to ship merchandise within the time stated in the solicitation of the order, or within thirty days of receipt of a properly completed order if no time is stated, must provide the buyer with a notice of delay. If the delay is thirty days or less, the notice must give the buyer the option to cancel the order. If the delay is more than thirty days or is indefinite, the seller must notify the buyer that, unless the buyer expressly consents to such a delay, the order will be automatically cancelled. If the buyer agrees to the delay date given in the first notice but the seller cannot meet the new shipping date, the seller must send out a second notice of delay. The order will then be cancelled automatically unless the buyer expressly consents to a further delay.

[3] The Rule also requires the seller to have a reasonable basis for any claims made about shipping time. Where no claim is made, it is implicitly claimed that merchandise will be shipped within thirty days. Where the seller fails to ship in the time expressly or implicitly claimed, the Rule requires the seller to refund the buyer's money whenever the seller (1) fails to provide any notice of delay and option to cancel required by the Rule; or, (2) provides a first notice of delay and option to cancel and the buyer exercises the option to cancel prior to shipment; or, (3) provides a first notice that shipment will be delayed more than thirty days or for an indefinite time and, within thirty days after the original shipment time, fails to ship and the buyer fails expressly to consent to the delay; or (4) provides a second notice of delay whereby the buyer must expressly consent to any further delay and the buyer does not consent; or, (5) provides the buyer notice of his inability to ship and his decision not to ship. When a refund is required by the Rule, a seller is allowed one billing cycle to take specified action where there is a credit sale, and seven working days to mail a refund where the buyer has made a cash, check or money order payment.

[4] On October 27, 1988, the Commission published its Advance Notice of Proposed Rulemaking (the "ANPR"), which requested comments on whether the Commission should amend the Rule to include shipment of merchandise ordered by telephone or any other means, and to change the definition of a "properly completed order" for credit sales to mean the time the seller receives sufficient information to charge the buyer's account.[3] The Commission received 34 written comments in response to the ANPR.

Extending the Rule's Coverage to Telephone-order Merchandise

[5] Twenty-four of the comments addressed the question of extending the Rule to telephone-order merchandise.

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[1] The Commission is also seeking comment on a note explaining the coverage of the proposed amendment which, if the amendment is adopted and incorporated into the existing Rule, would be designated "Note 8." The proposed note explains that the term "telephone" refers to any direct or indirect use of the telephone to order merchandise, regardless of whether the telephone is activated by, or the language of the sale is that of, human beings, machines or both.

Additionally, the Commission is soliciting comment on whether sections 435.1(b)(3) (i) and (ii) of the Rule should be amended to include means for providing option notices to consumers other than by first class mail. Since any such amendment would give other evidence of compliance with the Rule the same weight that the Rule now gives to option notices provided by first class mail, the Commission views it as not a substantive amendment to or repeal of any portion of the Rule, and so not governed by the provisions of section 18(d)(2)(B) of the FTC Act, 15 U.S.C. section 57(d)(2)(b). The Commission accordingly is not proposing at this time any specific language relating to these provisions, but may at some future time, based on the information elicited in this rulemaking, or otherwise, change these provisions.

[2] To facilitate reference, we have numbered consecutively the paragraphs in each *major* section of this Notice of Proposed Rulemaking. These numbers are bracketed.

[3] Mail Order Merchandise Rule; Advance Notice of Proposed Rulemaking, 53 FR 43448 (Oct. 27, 1988).

The comments largely supported extending the Rule.[4]

[6] The Direct Marketing Association ("DMA"), a trade association of 3500 direct marketers, said that it regarded the Rule's non-coverage of telemarketers as an exception to the Rule for which it saw no justification. DMA nevertheless urged the Commission to develop the evidentiary basis for extending the Rule to telemarketers (ANPR Comment 1).

[7] The comments from consumers provided some anecdotal evidence of a need to extend the Rule.[5] Three other comments provided information based on more widespread experience. Modern stated that it had adopted the policy of rejecting advertising by telephone-order merchants who failed to ship or provide refunds within the times prescribed by the Rule. It rejected over a dozen advertisers over the four years the policy has been in effect. Modern relates that one of the most frequent reasons for rejecting advertising has been the failure to timely ship (ANPR Comment 7, p. 3).

[8] PaBCP noted that since 1985 Pennsylvania has experienced a 39% increase per year in telemarketing complaints it has handled, and that it is presently averaging 100 such complaints a week. The consumer protection agency also notes that, although the actual number of telemarketing complaints is fewer than the number of similar mail order complaints, proportionally the volume of mail order complaints has remained static over the last several years while the volume of telemarketing complaints has increased. Moreover, the dollar value of telephone orders is significantly greater thean the dollar value of mail orders (ANPR Comment 8, p. 2).[6]

[9] Another state consumer protection agency, NWMaDA, also noted a "dramatic increase in the number of [consumer] complaints * * * concerning purchases or leases negotiated by telephone" (ANPR Comment 32, p. 1).

[10] CaDCA's comment traced the history of the amendment in 1986 of the California mail order rule (Bus. & Prof. Code § 17538) to include telephone-order merchandise and services. It said the legislation was preceded by a case brought by the state against a computer software merchant who failed to timely ship telephone-order merchandise to both consumers and businesses. The consumer protection agency stated that the amendment "attracted only minor opposition from the mail order industry" and that it is "not aware of any change in the cost or price of goods or services used by consumers or businesses as a result of the amendments" (ANPR Comment 10, p. 2).

[11] The one comment that flatly opposed extending the Rule to telephone merchandise did so on the basis that the commenter had no evidence that any change in the Rule is needed.[7]

[12] In addition to receiving these comments, Commission staff has prepared a report of a nationally projectable survey of consumer experiences over a six month period with telephone order and mail order merchandise. The field work for this survey was conducted from November 1987 to February 1988 by Opinion Research Corporation ("ORC"), a consumer research organization that specializes in nationally projectable sampling. The results of this survey indicate that consumer expectations with respect to shipment time are about the same for mail order and telephone order merchandise. Similarly, the ORC survey indicates that consumers experience shipment and refund failures, and inadequate notices of delay, at nearly the same rate regardless of the means of ordering.

[13] Staff also has obtained reports of two other surveys. One survey, a mail panel survey, was conducted in 1984 for the Commission by Market Facts. The other is a 1987 Response Analysis survey of behavior and attitudes of telephone shoppers and non-shoppers that was commissioned by AT&T Communications. The reports of these surveys provide validating information in support of the ORC survey, and other helpful information. The staff report of the ORC survey and the underlying data, and the reports of the Market Facts and Response Analysis surveys, are being made available to the public upon publication of this notice.

[14] In addition to the above-referenced surveys, the Commission is placing on this rulemaking record the report of the results of a 1983 telephone survey of small (at that time, annual receipts of less than $7.5 million) and larger mail order firms by Damans and Associates ("Damans"). The Damans survey was commissioned by the FTC to evaluate the impact of the existing Rule under the Regulatory Flexibility Act of 1980. The survey concluded that (1) "[T]otal costs incurred by most small mail order firms for complying [with the Rule] were not viewed as being high, with 75% having total costs under $500;" (2) [T]otal compliance costs for large mail order businesses are higher than they are for small businesses, however, sales are also higher;" (3) "Most mail order business[es,] small and large, are not opposed to the Mail Order Rule;" and (4) "Most mail order firms, large and

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[4] Supporting the extension of the Rule to telephone marketing were CVN Companies, Inc. ("CVN"), a telephone solicitation and order processing agent for direct marketers (ANPR Comment 4); Leo Burnett Co., Inc. ("Burnett"), an advertising agency that handles advertising accounts for direct marketers (ANPR Comment 6); Modern Photography ("Modern"), an advertising medium for direct marketers (ANPR Comment 7); the Pennsylvania Bureau of Consumer Protection ("PaBCP"), a state consumer protection agency (ANPR Comment 8); the California Department of Consumer Affairs ("CaDCA"), a state consumer protection agency (ANPR Comment 9); Anthony Salamone, a columnist for the Easton (Pa) Express (ANPR Comment 14); Jeffrey L. Cashatt, a consumer (ANPR Comment 16); Betty D. Griffin, a consumer (ANPR Comment 18); Alan Flacks, a consumer (ANPR Comment 19); N. M. Loscalzo, a consumer (ANPR Comment 20); Andrew Levitt, a consumer (ANPR Comment 21); John M. Chaplick, a consumer (ANPR Comment 22); Leilani Ponzi, a consumer (ANPR Comment 23); the National Consumers League ("NCL"), a consumer association (ANPR Comment 24); the American Retail Federation ("ARF"), an association of state and national retail associations (ANPR Comment 25); the National Retail Merchants Association ("NRMA"), an association of department, chain, specialty and independent retail stores (ANPR Comment 26); Vrymeer Commodities, Inc., a direct marketer (ANPR Comment 27); the Iowa Consumer Protection Division ("IaCPD"), a state consumer protection agency (ANPR Comment 28); the Wisconsin Attorney General ("WiAG") (ANPR Comment 29); the Maine Attorney General ("MeAG") (ANPR Comment 30); the Department of Justice of North Carolina ("NCDOJ") (ANPR Comment 31); the Consumer Protection Division for the District Attorney for the Northwestern District of Massachusetts ("NWMaDA"), a state consumer protection agency (ANPR Comment 32); and Bernhardt Sandler, a consumer (ANPR Comment 34).

Four consumers commented about marketing practices that are unrelated to shipment delays by direct marketers. These comments accordingly are not included in our analysis of comments *passim*. The comments that are excluded from the analysis include those of Mr. Robert Aichroth (ANPR Comment 12), who objected to what he viewed as paying excessive postage and handling costs; George J. Van Cura (ANPR Comment 15), who objected to the failure of direct marketers to prominently advertise postage and handling costs in the solicitation of orders; Geraldine Huempfner-Gatz (ANPR Comment 17), who objected to outbound (originating with merchant) telephone solicitation as disruptive; and William F. Pryor (ANPR Comment 33), who complained that he received telephone-order merchandise on time, but that it was defective.

[5] *See*, e.g., comments of Leilani Ponzi (ANPR Comment 23) and Bernhardt Sandler (ANPR Comment 34).

[6] PaBCP may have included within the categories "mail order complaints" and "telemarketing complaints" consumer contacts that are not specifically related to the Rule or the proposed amendment to extend it to telephone-order merchandise. However, because these categories probably included some complaints about the timeliness of fulfillments or refunds, they are pertinent and of interest to us. We accordingly invite state or other consumer protection or mediation agencies to provide detailed evidence of such consumer complaints.

[7] Barry J. Cutler, Esq. ("Cutler"), representing unnamed direct marketers (ANPR Comment 2).

small, feel the basis of the Mail Order Rule is sound business practice that enhances the growth and development of mail order business. . . ." [8]

[15] Staff also has collected published information concerning the direct marketing industry and its size to provide background data. This information is being placed in the rulemaking record. Based upon this information and the results of the ORC survey, staff estimates that nearly a third of direct marketing consumer sales of merchandise are now placed by telephone and paid for by credit card. Staff believes that telephone order sales of merchandise to consumers in 1987 totalled between $11 billion and $12.3 billion, while mail order sales totalled between $21 billion and $23.5 billion. Based on this information, staff also believes that these figures can be multiplied by a factor of as much as five to obtain estimates of business-to-business sales of telephone order merchandise.[9]

[16] Upon consideration of the comments and other information obtained by the staff for placement in the rulemaking record, the Commission has determined to issue a Notice of Proposed Rulemaking ("NPR") to commence a proceeding to expand the Rule to cover telephone order merchandise.

Extending the Rule to Other Ordering Means

[17] Twelve of the comments addressed the question of extending the Rule to merchandise ordered by telephone or any other means. Of these comments, seven favored extending the Rule to other means of ordering on the grounds that the Rule governs unfair and deceptive acts with respect to the timely shipment or refund of prepaid merchandise, and the means by which the merchandise is ordered is immaterial to the deceptive acts or practices addressed by the Rule.[10]

[18] Five comments opposed extending the Rule to other ordering technologies on the grounds that the Commission has no basis for assessing either the need for expanding the Rule to include undeveloped marketing technologies, or for assessing the impact of such an expanded Rule.[11]

[19] DMA, while opposing the extension of the Rule to forms of ordering other than the telephone, points out that the extension of the Rule to telephone-order merchandise will necessarily comprise a number of new technologies as they develop. DMA argues that merchandise ordered by any new technology that directly or indirectly involves the use of the telephone by definition will be telephone-order merchandise covered by the extended rule (ANPR Comment 1, p. 2). For example, computer shopping may involve the telephone because the consumer's in-home personal computer may be linked to the merchant's computer by modem and telephone. Arguably the extension of the Rule to telephone-order merchandise would by definition extend it to such computer-ordered merchandise because it was ordered by means that employed the telephone.

[20] Although the Commission agrees that the means by which merchandise is ordered is immaterial to the harm the Rule is meant to remedy, we are unable at this time to assess whether, in the absence of any shipment representation by the merchant, consumer perceptions of shipment time will vary depending on the means used to order merchandise. Accordingly, the Commission has not included the proposal to expand the Rule to cover merchandise in addition to telephone-order merchandise in the NPR. However, the Commission believes that consumer perceptions of shipment time will not vary materially where the telephone is used for ordering, regardless of whether the telephone is activated by, or the language of the sale is that of, human beings, machines, or both. We therefore invite comment on a proposed note to this effect. If the proposed amendment is adopted, this note would be appended to the Rule as "Note 8," and provide that the term "telephone" refers to any direct or indirect use of the telephone to order merchandise, regardless of whether the telephone is activated by, or the language of the sale is that of, human beings, machines, or both.

Revising the Definition of "Properly Completed Order"

[21] Nine comments addressed the ANPR's proposal that the Commission amend the definition of "properly completed order" in the credit sale context. Such an amendment would treat a credit order as "properly completed" from the time the merchant receives sufficient information to charge the buyer's account, instead of from the time the seller charges the buyer's account, as stated by the existing rule. Although there was some division among these comments, there was no disagreement with the assertion of NCL that the use of credit cards and telemarketing "go hand in hand" (ANPR Comment 24). This comment is supported by the ORC and AT&T surveys, which appear to agree that the preponderant method of payment for telephone order merchandise is by credit card. The importance of credit cards in telephone ordering has led the Commission, in proposing to extend the Rule to telephone-order merchandise, to explore anew the Rule's different treatment of credit and other sales governed by the Rule.

[22] When it adopted the Rule the Commission made it clear that it believed that it would be appropriate to impose the same requirements on credit and other sales. The Commission reasoned that, although consumers who pay in advance are more oppressed with delayed delivery than consumers whose accounts are not charged immediately, all consumers are injured when a seller lacks a reasonable basis for his shipment representations. However, in framing the remedies to correct the unfair or deceptive acts or practices of making unsubstantiated shipment representations and failing to obtain consumer consents to delay, it decided to accept the industry suggestion that credit transactions be treated differently because it felt that it had not provided affected industry sufficient notice of this possible regulatory position.[12]

[23] Six comments opposed the proposed change in the definition, albeit three (Cutler, ARF and NRMA) argued simply that the definition should permit a longer shipment time whenever the consumer's order is part of an application to the merchant for credit. In fact, Cutler implies that there would be no difficulty in changing the definition as proposed in the ANPR were it limited to third-party or bank card credit transactions (ANPR Comment 2, p. 2). Similarly, part (c) of section 17538 of the California Business and Professions Code, which covers mail and telephone-order goods and services, makes this distinction. The statute permits an additional 20 days for shipment in credit transactions involving situations in

[8] Regulatory Flexibility Act Review of the Mail Order Rule, 51 FR 1516, 1517 (Jan. 14, 1986).

[9] The Rule reaches merchandise purchased by mail by businesses. *See*, Statement of Basis and Purpose accompanying the Rule (hereinafter referred to as the "SBP"), 40 FR 51582, 51594 (Nov. 5, 1975).

[10] Comments of Burnett (ANPR Comment 6); Modern (ANPR Comment 7); PaBCP (ANPR Comment 8); Christopher Lee, a consumer (ANPR Comment 11); Andrew Levitt (ANPR Comment 21); NCL (ANPR Comment 24; and MeAG (ANPR Comment 32).

[11] Comments of DMA (ANPR Comment 1); Cutler (ANPR Comment 2); Ellett Brothers ("Ellett"), a gun and ammunition wholesaler (ANPR Comment 5); ARF (ANPR Comment 25); and NRMA (ANPR Comment 26).

[12] *See*, *SBP*, 40 FR 51582, 51594 (Nov. 5, 1975).

which a credit application accompanies the order (ANPR Comment 9, pp. 1, 5–6).

[24] On the other hand, DMA and Direct Marketing Enterprises ("DME"), a direct marketer (ANPR Comment 3), argued that any credit transaction is potentially more time consuming than other methods of payment. In this regard, DME suggested that a credit order not be treated as "properly completed" until two weeks following its receipt by the merchant (ANPR Comment 3, p. 3). Similarly, DMA argued for a "reasonable" definite additional time. Although it is conceivable that merchants who solicit credit orders need more time to process them than merchants who do not, the suggestion seems counter-intuitive. For example, it appears that the bulk of the sales made by telephone-order merchants are credit sales while the bulk of mail order sales are paid by cash, check or money order. Nevertheless, of those merchants who make express shipment representations when they solicit orders of merchandise, telephone-order merchants generally promise faster shipment than mail order merchants. We believe that, for the most part, they would not make such representations if they lacked a reasonable basis for them. The Commission accordingly welcomes the development of the rulemaking record with respect to the time needed to process credit orders, a matter that is now far from clear.

[25] CVN pointed to additional problems arising from the possible lack of coordination between direct marketers and their marketing agents whereby, under the proposed amendment, the agent might well provide a notification of delay and option to cancel the order after the merchant had already shipped it (ANPR Comment 4, p. 2). Since such problem may exist in non-credit transactions, the implications of the CVN comment are not entirely clear. In any event, the Commission welcomes the development of the rulemaking record in this respect.

[26] Three comments by state consumer protection agencies favor amending the definition of properly completed order, as suggested in the ANPR.[13]

[27] The Commission notes that the results of the ORC survey indicate that consumer perceptions do not appear to vary greatly depending on the method of payment. But consumers who pay by credit card tend to expect faster shipment than consumers who pay by check or money order. While acknowledging that consumers may expect speedier shipment of credit purchases, DMA argues that such an expectation does not justify a requirement that shipment be made within the same time regardless of the method of payment.

[28] Nevertheless, if consumers widely and reasonably perceive that shipment will occur within the same time regardless of how they pay, it would be unfair and deceptive for the merchant to fail to specify a longer shipment time for credit sales if that is the case. However, even if such consumer expectations are widely held and reasonable, they may be incorrect.

[29] In considering these issues and possible remedies, the Commission will consider a definition of "properly completed order" in the credit context that permits the merchant greater flexibility for various credit transactions. For example, as was previously noted, California permits an additional 20 days when the order is accompanied by a credit application to the merchant (ANPR Comment 9, pp. 1, 5–6).

[30] At this time the Commission is not having any conclusions on these issues. The Commission invites factual information on the usual or customary practices and time required for processing credit sales, whether credit is extended by the merchant or a third party. It also invites the development of the record with respect to the capabilities and practices of direct marketers and their agents to coordinate their fulfillment efforts when payment is by credit.

Option Notices: Narrowing the Rebuttable Presumptions

[31] Comments by Cutler (ANPR Comment 2, p. 6), ARF (ANPR Comment 25), and NRMA (ANPR Comment 26, p. 2) suggested that option notices be permitted by telephone. At the time of the adoption of the existing Rule, the Commission stated that it did not wish to "absolutely bar sellers from making use of other means of communication which are consistent with the requirements of the Rule and which can be demonstrated to be of equal or superior efficacy" to providing any notice or means of exercising an option to cancel and obtain a prompt refund by first class mail.[14] Accordingly, sellers may presently use such means. However, §§ 435.1(b)(3) (i) and (ii) create rebuttable presumptions of non-compliance where first class mail is not used. The comments accordingly indirectly relate to whether these rebuttable presumptions should be changed. The Commission welcomes development of the record with respect to whether mechanisms other than those described in §§ 435.1(b)(3) (i) and (ii) for contracting buyers and providing them the means for response can be demonstrated to insure that "buyers are provided with intelligible information and are given a meaningful opportunity to exercise their option to cancel their order or consent to delayed shipment."[15]

Other Issues

[32] Several comments received in response to the ANPR raised issues that extend beyond the amendments to the Rule proposed by the Commission. The Commission notes these comments below and describes why further discussion of them during the rulemaking proceeding is unnecessary.

[33] A comment from the California Council of the Blind argued that the Rule or any amendment to the Rule should explicitly exempt charitable organizations (ANPR Comment 10). Section 4 of the FTC Act limits its operation to any person, partnership or corporation "organized to carry on business for its own profit or that of its members." Organizations excluded from the coverage of the Act are thus "legitimate bona fide eleemosynary institutions . . .," Ohio Christian College et al., 80 F.T.C. 815, 849 (1972). *See also, Community Blook Bank of the Kansas City Area* v. *FTC*, 405 F. 2d 1011 (8th Cir. 1969); National Commission on Egg Nutrition, 88 F.T.C. 89, 175 (1976). Any trade regulation rule authorized by the FTC Act is derivative: it can reach no further than the FTC Act itself.

[34] A comment from Ellett, a wholesale supplier of guns and ammunition, argued that the amendment should reach only consumer transactions (ANPR Comment 5). Upon analysis of the comment, it appears that Ellett may not appreciate that the existing Rule reaches mail order merchandise purchased by businesses. At the time it adopted the Rule the Commission made it clear that * * * businessmen have encountered the same problems as the general public when dealing with distant mail order sellers * * * [T]here is no compelling reason to treat them differently from other members of the consuming public.[16]

[13] PaBCP (ANPR Comment 8, p. 3), MeAG (ANPR Comment 30, p. 1), and NWMaDA (ANPR Comment 32, p. 2).

[14] *SBP*, 40 FR 51582, 51591 (Nov. 5, 1975).

[15] *Id.*

[16] *SBP*, 40 FR 51582, 51594 (Nov. 5, 1975). Staff has consistently publicized the fact that the Rule covers

Continued

Businesses too can be targets of unscrupulous telemarketers.[17] In the absence of any evidence that businesses are not affected, the Commission declines to limit the coverage of the proposed amendment in a way the existing Rule fails to do.

[35] Finally, comments by PaBCP (ANPR Comment 8, p. 1), NCAG (ANPR Comment 31, pp. 1–2), WiAG (ANPR Comment 29, p. 2), and NWMaDA (ANPR Comment 32, p. 1) suggested that the Commission initiate rulemaking to deal with telemarketing fraud generally or support legislative proposals in Congress that would empower state consumer protection agencies to deal with telemarketing fraud by pursuing perpetrators in federal district court actions. They point to the difficulties states encounter in dealing with fraudulent telemarketers that operate only in interstate, not intrastate commerce, or in dealing with telemarketing operations that are quickly relocated to escape state enforcement efforts. As NCAG points out (ANPR Comment 31, p. 1), generally speaking the telemarketing fraud referred to here does not involve shipment failure, but price or quality misrepresentations. Although it is certainly possible, as NCL argues, that some telemarketing fraud may be spotted earlier if shipment dates are not being met (ANPR Comment 24, p. 2), our experience is that such forms of deception or unfairness are difficult to reach by rulemaking.

Section A. Notice of Proposed Rulemaking; The Current Rule; The Proposed Trade Regulation Rule Relating to Mail and Telephone Order Merchandise and Receipt of a Properly Completed Credit Order

Notice is hereby given that the Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, the provisions of part I, subpart B of the Commission's procedures and rules of practice, 16 CFR 1.7, *et seq.*, and section 553 of subchapter II, chapter 5, title 5 of the U.S. Code (Administrative Procedure), 5 U.S.C. 553, hereby initiates a proceeding to consider whether its Trade Regulation Rule Concerning Mail Order Merchandise (hereinafter cited as "the Rule"), 16 CFR part 435, should be amended to cover merchandise ordered by telephone, and whether the definition of "properly completed order" in the context of credit sales should be amended to refer to the time the merchant receives sufficient information to charge the buyer's account. In the proceeding, the Commission will limit its consideration to these concerns. During the proceeding, all requirements of the Rule which became effective on February 2, 1976, will remain in effect.

The Commission has determined, pursuant to 16 CFR 1.20, to follow the procedures set forth in this notice for this proceeding. The Commission has decided to employ a modified version of the rulemaking procedures specified in Section 1.13 of the Commission's Rules of Practice. The proceeding will have a single Notice of Proposed Rulemaking and neither the Commission nor the Presiding Officer will designate disputed issues.

There are no current requirements in the Rule relating to merchandise ordered by telephone as such. Moreover, the Rule currently defines the term "properly completed order" in the credit context to refer to the time the consumer's account is charged. The proposal would require the addition of references to telephone order merchandise to the current provisions relating to mail order merchandise, and change the definition of "properly completed order" in the credit context, as follows:

1. The proposed amendment would change the title of the Rule to "Mail and Telephone Order Merchandise."

2. In § 435.1 of the Rule, the proposed amendment would refer to mail or telephone order sales in commerce and to merchandise ordered through the mails or by telephone.

3. In § 435.2(b)(1) of the Rule, the proposed amendment would change the definition for receipt of a properly completed order to refer to the time at which the seller receives all the information necessary to charge the buyer's account.

4. Because of the proposed changes, the other sections of the Rule would automatically apply to any merchandise ordered by telephone.

Section B. Section-By-Section Description of Proposed Amendments

[1] As amended, § 435.1 of the Rule would provide that, in connection with either mail or telephone order sales in commerce, it is an unfair method of competition and an unfair or deceptive act or practice for a seller to engage in any of the acts or omissions described in the Rule. Thus both mail order sellers and telephone order sellers would be required to comply with the provisions of the Rule with respect to substantiating any representation with respect to shipment time; providing adequate notification of delay with an option, exercisable at the seller's expense, to cancel the order and obtain a prompt refund, and containing such other information as is required by the Rule; or deeming an order cancelled and providing a prompt refund when appropriate.

[2] As used in the amended Rule, any inbound or outbound use of the telephone to order merchandise would be covered. In interpreting the existing Rule, Commission staff has said that any use of the mails directly or indirectly to complete an order makes it a mail order sale. Similarly, it is the Commission's purpose that any direct or indirect use of the telephone to order merchandise, however the telephone is activated, and whether or not the language of the transaction is that of humans, machines, or both would make an order a telephone order sale.

[3] As with the existing Rule, the proposed Rule would not cover services, only merchandise. The same exemptions applicable to the existing Rule would continue under the proposed Rule. This includes exemptions for certain installments of subscriptions ordered for serial delivery, seeds and growing plants, C.O.D. sales, and transactions governed by the FTC Rule "Use of Negative Option Plans by Sellers in Commerce," 16 CFR part 425. *See*, 16 CFR 435, notes 1–4.

[4] Section 435.1(a)(1) of the proposed Rule would make the solicitation of a mail or telephone order sale without substantiation for any shipment representation, or substantiation for an implicit 30-day shipment representation where no explicit shipment representation is made, an unfair method of competition and an unfair or deceptive act and practice. As with the existing Rule,[18] the Commission is not proposing to make any bright-line determination of how much of what information would constitute substantiation of shipping representations generally. Nor is the Commission proposing to determine the extent and nature of records and other documentary proof that would be adequate to establish the merchant's use of systems and procedures which assure the shipment of merchandise in the ordinary course of business within any applicable time, and that would rebut the presumption of a lack of a reasonable basis for any shipping representation under § 435.1(a)(4) of the Rule. A legal standard based on the acts

business-to-business mail order sales. *See, e.g.*, A Business Guide to the Federal Trade Commission's Mail Order Rule, GPO: 165-646 (1987), p. 15.

[17] *See*, Comments of CaDCA (ANPR Comment 9, p. 1) and Betty D. Griffin (ANPR Comment 18, p. 1).

[18] *See*, *SBP*, 40 FR 51582, 51588 (Nov. 5, 1975).

of a "reasonable and prudent businessman, acting in good faith," *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972), is necessarily flexible: the appropriate level of substantiation for any shipping representation will vary depending on the circumstances.

[5] Section 435.2(b)(1) of the proposed Rule would define "receipt of a properly completed order" in the credit sale situation as the time at which the seller receives all information necessary to charge the buyer's account. Thus, the relevant time period would begin to run when sufficient information was received by the seller to charge the buyer's account, whether the seller charges the account or not. As with the existing Rule, in situations in which it develops that the buyer does not qualify for a credit sale, the order would not be deemed "properly completed" until the seller "receives notice that the buyer qualifies for a credit sale." [19]

Section C. Statement of the Commission's Reasons

1. Bases for the Rule and the Amended Rule

[1] A complete discussion of the reasons that led to the existing Rule and the specific rationale for its various remedial provisions is contained in the Statement of Basis and Purpose for the Rule.[20] However, in summary, the Commission promulgated the Rule to address the failure of mail order merchants to have substantiation for (a) the express or implied shipment representations made in their solicitation of mail order sales or in the notices of delay provided to consumers; (b) the failure to explain indefinite shipment delays; (c) the failure to provide an option to cancel and obtain a prompt refund in situations in which the delayed shipment materially changed (without the customer's consent) the terms of the sales contract; and (d) the failure to cancel automatically in multiple delay situations when the consumer did not expressly consent to further delays.

Telephone-order Merchandise

[2] However, as is pointed out by NRMA, at the time the rulemaking record was developed, "the telephone ordering portion of the market was so small as not to warrant its inclusion," ANPR Comment 26, p. 1. Since then the volume of direct marketing conducted by telephone has grown considerably. According to Burnett, the term "mail order" is becoming a misnomer. "Our advertisers quote that well over 70% of their orders are received by phone," it says (ANPR Comment 6, p. 1).

[3] The proposal to amend the Rule to include telephone-order merchandise is based on the supportive comments filed in response to the ANPR [21] and the results of a nationally projectable survey of consumer expectations of and experiences with mail-order and telephone-order merchandise ordered over a six month period. The field work was done from November, 1987 to February, 1988 by ORC, which specializes in samples of this nature. The data was analyzed by Commission staff, and will be placed in the rulemaking record upon publication of this NPR.

[4] The ORC survey asks consumers about their shipment expectations. According to staff, the results support the conclusion that, in the absence of an express shipping representation, consumer perceptions of the speed with which telephone-order merchandise is shipped are not materially different from consumer perceptions of the speed with which mail-order merchandise is shipped. If anything, consumers expect faster shipment of telephone-order merchandise than mail-order merchandise. When consumers reported that shipment representations were made, it appears that telephone-order merchants generally promised faster shipment than mail-order merchants.

[5] According to staff's analysis of the ORC survey, consumer experiences with shipment delays and notices of delay for telephone-order merchandise were similar to consumer experiences with mail-order merchandise. Telephone-order consumers reported non-receipt or delay of merchandise at nearly the same rate as did mail-order consumers. Staff believes that these instances of non-receipt or delay are, when projected to the national population, widespread. The value of the average delayed telephone order considerably exceeded the value of the average delayed mail order.

[6] Staff reports that, in the ORC survey, in situations in which consumers should have been asked to consent to delayed shipments, both mail order and telephone order merchants failed at nearly the same rate to provide adequate notification and cancellation options.

[7] As in the original rulemaking, the Commission infers from consumer reports of delay that in a significant number of transactions merchants lacked a reasonable basis for their express or implied shipment representations. To similar extents, both mail-order merchants and telephone-order merchants appear to fail to have a reasonable basis for their shipment representations. Thus, the bases underlying such a rule would be identical to those underlying the existing Rule.

Properly Completed Order

[8] When the Commission adopted the existing Rule it considered and rejected the Direct Mail/Marketing Association proposal that credit transactions be exempted. The *SBP* stated:

While the consumer who paid in advance may feel more oppressed when faced with non-delivery or late delivery of merchandise, all consumers who order mail order merchandise are the victims of unfair or deceptive practices when the seller who solicited their orders lacked a reasonable basis for expecting to be able to ship within 30 days of receipt of the orders or within the time stated in the solicitations. * * * Thus the Commission finds that the exclusion of credit transactions would run contrary to the evidence in the record and in addition would seriously dilute and undermine the effectiveness of the Rule.[22]

Because the Commission felt that insufficient advance notice had been given to the public and that the record had not been as fully developed as it might on this point, it chose "to retain the scope of the published revised proposed Rule." [23] The possibility that the Rule may be extended to telephone-order merchandise, which is usually paid for by credit card, has led the Commission to reexamine this determination and to propose the subject change.

[9] The definition of "properly completed order" identifies a rational point in the sales transaction from which to measure the promptness of shipment and compliance with other provisions of the Rule. If the evidence establishes that consumers who pay by credit card expect shipment at least as promptly as consumers who pay by check, the rational point from which to measure the promptness of shipment in credit sales is the time the merchant receives all information necessary to process the order, the same moment chosen by the existing Rule for mail orders paid by check.

[19] 16 CFR § 435.2(b)(2)(iii).

[20] 40 FR 51582 et seq. (Nov. 5, 1975).

[21] *See*, discussion in the section of this notice titled "Supplementary Information," paragraphs 5–10, *supra*.

[22] *SBP*, 40 FR 51582, 51594 (Nov. 5, 1975) *See also*, *id.*, n. 69 and accompanying text.

[23] *Id.*, n. 148.

[10] According to staff's analysis of the ORC survey, consumer perceptions of shipment time do not vary greatly depending on the method of payment. If consumers widely perceive that shipment will occur within the same time regardless of how they pay, it may be unfair and deceptive for the merchant to fail to specify a longer shipment time for credit sales if that is the case.

[11] If credit-sale consumers reasonably expect at least the same treatment as check-sale consumers, then as a matter of remedial discretion it is entirely appropriate to choose the same moment for measuring compliance in both cases. The Commission accordingly does not agree with the position of DMA that, in order to support this change, the Commission must find a widespread and abusive practice of holding charge orders, i.e., avoiding the shipment and notification requirements of the Rule by not processing charges (ANPR Comment 1, p. 4).

[12] As the *SBP* made clear, although the injury may not be as easily measured in situations in which consumer accounts are not charged as in situations in which they are, credit card buyers are injured when there are unauthorized delays in shipping time. Consumers might lose planned use opportunities or forego other purchase options if they are induced to deal with a merchant who has no reasonable basis for shipping within the time promised. Further, consumers might incur costs associated with learning the status of their orders.[24]

[13] Nevertheless, the comments make clear that it may be difficult for merchants to process large volumes of credit orders as quickly as they process other kinds of orders. For this reason, it may be necessary to provide greater flexibility in credit transactions than the proposed amendment would allow. The Commission accordingly encourages the submission of information and views (particularly factual information relating to the usual or expected time for processing numbers of credit orders) that will assist it to determine whether and how to revise the definition in a manner consistent with consumer expectations but which nevertheless permits the merchant reasonable time to process and ship the order.

2. Alternatives to be Considered in This Proceeding

[1] The Commission invites submission of evidence and the views of interested parties concerning whether or not the Commission should amend the Rule to include telephone-order merchandise. No alternatives are suggested with respect to this proposed amendment.

[2] The Commission also invites the submission of evidence and the views of interested parties concerning whether or not the definition of the term "properly completed order" in the credit context should be changed in the existing Rule. The proposed amendment defines receipt of a properly completed order as the time at which the seller receives all the information necessary to charge the buyer's account. Alternative amendments include: (a) Amend the definition as proposed but only with respect to third party credit transactions, thereby retaining the existing definition for the rest; (b) amend the definition as proposed but add 20 days for orders accompanied by credit applications to the merchant; and (c) amend the definition as proposed but allow the merchant an additional two weeks or some other specific reasonable time to ship.

[3] After considering these and all other alternatives proposed during the rulemaking proceeding, the Commission will determine on the basis of the record developed whether or not it would be appropriate to amend the Rule.

Section D. Regulatory Analysis and Regulatory Flexibilty Act Requirements

[1] Under section 22 of the FTC Act,[25] the Commission must issue a preliminary regulatory analysis when it publishes the NPR for a trade regulation rule. The Commission does not have to issue a preliminary regulatory analysis in an amendment proceeding unless the Commission: [26]

1. Estimates that the amendment will have an annual effect on the national economy of $100,000,000 or more;

2. Estimates that the amendment will cause a substantial change in the cost or price of goods or services which are used extensively by particular industries, which are supplied extensively in particular geographic regions, or which are acquired in significant quantities by the Federal Government, or by State or local governments; or

3. otherwise determines that such amendment will have a significant impact upon persons subject to regulation under the amendment and upon consumers.

[2] Under the Regulatory Flexibility Act,[27] at the time the Commission issues the NPR, the Commission must prepare and make available for public comment an initial regulatory flexibility analysis, describing the impact of the proposed rule on small entities;[28] or the Chairman must certify that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.[29] The Commission has considered all the comments in response to the ANPR, and survey and other information mentioned elsewhere in this notice, and particularly the following information, in determining that an initial regulatory flexibility analysis is unnecessary:

[3] According to staff the results of the ORC survey indicate that, in general, telephone order merchants tend to promise faster shipment than mail order merchants. It seems appropriate to the Commission to assume that telephone-order merchants have the capacity to fulfill orders faster than mail order merchants if that is what they generally represent to consumers when they solicit orders. However, we are encouraging the development of the rulemaking record in this regard.

[4] CVN Companies, Inc., a company that provides sales solicitation services for the telemarketing industry, stated that many telemarketers use the same fulfillment and backorder procedures whether an order is received by mail or telephone (ANPR Comment 4, p. 1). Additionally, CVN points out that most companies have procedures in place to keep customers informed on the status of their orders as a matter of customer service and satisfaction, not because of government regulation (*Id.*, p. 2).

[5] CaDCA commented that when the state of California amended its mail order statute in 1986 to include merchandise and services ordered by telephone, there was no apparent "change in the cost or price of goods or services used by consumers or businesses as a result of the amendments" (ANPR Comment 9, p. 2).

[6] The Damans 1983 survey of small and larger mail order firms concluded as follows:

(1) "[T]otal costs incurred by most small mail order firms for complying [with the Rule] were not viewed as being high, with 75% having total costs under $500;"

(2) [T]otal compliance costs for large mail order businesses are higher than

[24] Under the existing Rule, the seller bears the costs of informing buyers of the status of their orders.

[25] 15 U.S.C. 57b-3.

[26] 15 U.S.C. 57b-3(a)(1).

[27] 5 U.S.C. § 601, *et seq.*

[28] 5 U.S.C. § 603. "Small entity" is defined under the Small Business Size Standards, 13 CFR part 121, promulgated by the Small Business Administration. Under the current version of this regulation, mail order houses with annual receipts less than $12.5 million are small entities.

[29] 5 U.S.C. 605.

they are for small businesses, however, sales are also higher;" (3) "Most mail order business[es,] small and large, are not opposed to the Mail Order Rule;" and, (4) "Most mail order firms, large and small, feel the basis of the Mail Order Rule is sound business practice that enhances the growth and development of mail order business . . .," [30]

[7] Several industry comments suggested that any amendment to the definition of a "properly completed order" for credit sales should permit more fulfillment time for some or all credit sales than for other prepaid sales. However, none of the comments presented evidence of the need for more time or the costs to industry if such time is not provided. Elsewhere in this NPR we have invited the development of the rulemaking record on this point.

[8] Based on the available information, it appears that neither the expansion of the Rule's coverage to telephone-order merchandise nor the amendment of the definition of "properly completed order" in credit sales should materially affect the direct marketing industry. For these reasons, the Commission does not believe that the proposed amendments will have an annual effect on the national economy of $100,000,000 or more. Similarly, the Commission does not believe that the proposed extension of the Rule to telephone-order merchandise will cause a substantial change in the cost or price of goods or services which are used extensively by particular industries, which are supplied extensively in particular geographic regions, or which are acquired in significant quantities by the Federal Government, or by State or local governments. Finally, the Commission believes that the proposed amendments will not have a significant negative impact upon persons subject to regulation under the amendment, or upon consumers.

[9] Similarly, for the same reasons, the Commission believes that the proposed amendments should not, if promulgated, have a significant economic impact on a substantial number of small entities.

[10] Consequently, the Commission has decided that it does not have to issue a preliminary regulatory analysis or initial regulatory flexibility analysis in connection with the publication of the NPR in this amendment proceeding. The Chairman's Certificate of No Effect under the Regulatory Flexibility Act follows this notice. The public is invited to comment on this determination.

[30] *Regulatory Flexibility Act Review of the Mail Order Rule*, 51 FR 1516, 1517 (Jan. 14, 1986).

Section E. Invitation To Comment

All interested persons are hereby notified that they may submit data, views, or arguments on any issue of fact, law or policy bearing upon the proposed extension of the Rule to telephone-order merchandise and the amendment of the definition of a "properly completed order" in credit sales. Such comments may be presented either in writing or orally. Written comments will be accepted until January 29, 1990 and should be addressed to Henry B. Cabell, Presiding Officer, Federal Trade Commission, Washington, DC 20580, 202-326-3642. To assure prompt consideration, comments should be identified as "Notice of Proposed Rulemaking—Amendment of the Mail Order Merchandise Rule: Comment." Please furnish five copies of all comments when feasible and not burdensome. (Instructions for persons wishing to present their views orally are found in sections G and H of this notice.)

While the Commission welcomes comments on any issues bearing upon the proposed Rule's telephone-order merchandise requirements and the definition of "properly completed order" in credit sales, questions on which the Commission particularly desires comment are listed in section F, below. All comments and testimony should be referenced specifically to either the Commission's questions or the section of the Rule being discussed. Comments should include reasons and data for the position. Comments opposing either the extension of the Rule to telephone order merchandise or the proposed definition of "properly completed order" for credit sales should, if possible, suggest any specific alternatives. Proposals for alternative regulations should include reasons and data that indicate why the alternatives would better serve the purposes of the proposed Rule's requirements. Comments should include a full discussion of all the relevant facts and be based directly on first-hand knowledge, personal experience or general understanding of the particular issues addressed by the proposed rule.

Section F. General Questions and Issues

Set forth below is a list of specific questions and issues upon which the Commission invites comment and testimony. The list of questions is not intended to be exclusive, nor is it meant as a list of "disputed issues of material fact that are necessary to resolve." Any right to cross-examine or submit rebuttal evidence will be determined with reference to the criteria set forth in the Commission's Rules of Practice. Based upon the rulemaking record, the Commission retains its authority to promulgate a final rule containing requirements which differ from those proposed in ways suggested by these questions.

1. In what ways and to what extent are consumer experiences with untimely shipment, notice of delay and refund alike or different for mail order and telephone order merchandise?

2. In the absence of express shipment representations, in what ways and to what extent are consumer expectations with respect to shipment time alike or different for mail order and telephone order merchandise? Is there any difference in such perceptions depending on whether the merchandise is paid on credit or by credit card instead of cash, check or money order? Is there any difference in perceptions depending on whether the order is accompanied by an initial application for credit?

3. What are the usual or customary practices and times required for processing credit sales by the merchant? Does the time required vary depending on the source of credit and whether the order is accompanied by an application for credit? What other variables may affect the time necessary for processing credit sales?

4. Aside from the means referenced by § 435.1(b)(3) (i) and (ii) of the present Rule, what mechanisms for contacting consumers and providing them the means for response can be demonstrated to insure that they are provided with intelligible information and are given meaningful opportunities to exercise their options to cancel or consent to delayed shipment?

5. What would the costs, benefits, or other effects be of: (a) Amending the Rule to include telephone order merchandise; (b) redefining the term "properly completed order" in the context of a credit sale as proposed; and (c) adopting any of the alternative amendments to the definition of "properly completed order" discussed in this NPR?

6. What would the costs be for small entities [31] of: (a) amending the Rule to include telephone order merchandise; (b) redefining the term "properly completed order" in the context of a credit sale as proposed; and (c) any of the alternative amendments to the definition of "properly completed order" discussed in this NPR?

[31] I.e., mail order houses with annual receipts less than $12.5 million are small entities. *See supra*, n. 28.

7. What would the effects be on industry competition of any of the proposed amendments to the Rule discussed in this NPR?

Section G. Public Hearings

Public hearings will commence on March 28, 1990 at 9:30 a.m. in Room 332, Federal Trade Commission Building, 6th Street and Pennsylvania Avenue NW., Washington, DC 20580. Persons desiring to present their views orally at the hearings are encouraged to advise the Presiding Officer, as soon as possible, and in any event no later than the time for filing the advance notice of oral testimony, as provided in section H, 1., below. The Presiding Officer appointed for this proceeding shall have all powers prescribed in 16 CFR 1.13(c), subject to any limitations described in this notice.

Section H. Instructions to Witnesses

1. Advance Notice

If you wish to testify at the hearings, you must notify the Presiding Officer of your desire to appear and file with him your complete, word-for-word statement no later than February 26, 1990. This advance notice is required so that other interested persons can determine the need to ask you questions and have an opportunity to prepare. Any cross-examination that is permitted may cover any of your written testimony, which will be entered into the record exactly as submitted. Consequently, it will not be necessary for you to repeat this statement at the hearing. You may simply appear to answer questions with regard to your written statement or you may deliver a short summary of the most important aspects of the statement within time limits to be set by the Presiding Officer. As a general rule, your oral summary should not exceed ten minutes.

Prospective witnesses are advised that they may be subject to questioning by designated group representatives of interested parties and by members of the Commission's staff. Such questioning will be conducted subject to the discretion and control of the Presiding Officer and within such time limitations as he may impose. In the alternative, the Presiding Officer may conduct such examination or may determine that full and true disclosure as to any issue or question may be achieved through rebuttal submissions or the presentation of additional oral or written statements. In all such instances, the Presiding Officer shall be governed by the need for a full and true disclosure of the facts and shall permit or conduct such examination with due regard for relevance to the factual issues raised and the testimony delivered by each witness.

2. Use of Exhibits

Use of exhibits during oral testimony is encouraged, especially when they are to be used to help clarify technical or complex matters. If you plan to offer documents as exhibits, file them as soon as possible during the period for submission of written comments so they can be studied by other interested persons. If those documents are unavailable to you during this period, you must file them as soon as possible thereafter and not later than the deadline for filing your advance notice. Mark each of the documents with your name, and number then in sequence (*e.g.*, Jones Exhibit 1). The Presiding Officer has the power to refuse to accept for the public record any hearing exhibits that you have not furnished by the deadline.

3. Expert Witnesses

If you are going to testify as an expert witness, you must attach to your statement a current *curriculum vitae*, biographical sketch, or resume or summary of your professional background; a complete bibliography of your publications; and a summary statement of the area(s) in which you consider yourself expert. You should include in footnotes or appendices documentation for the opinions and conclusions you express. If your testimony is based upon or chiefly concerned with one or more major research studies, a copy of the report of each should be appended as an exhibit to your statement. Apart from such major research studies, you may cite generally publicly available published works in footnotes. Unpublished works or works published in publications that are not widely available should be attached to your statement as exhibits. You should also attach, as an exhibit to your statement, a complete translation of any foreign language work relied upon in your statement.

4. Results of Surveys and Other Research Studies

If in your testimony you will present the results of a survey or other research study, as distinguished from simple references to previously published studies conducted by others, you must also present as an exhibit or exhibits the following:

(a) A complete report of the survey or other research study and the information and documents listed in (b) through (e) below if they are not included in that report.

(b) A description of the sampling procedures and selection process, including the number of persons contacted, the number of interviews completed, and the number of persons who refused to participate in the survey.

(c) Copies of all versions of the questionnaire, protocol, form for interview report, or any other data collection instrument used in conducting the survey or study.

(d) A description of the methodology used in conducting the survey or other research study including the selection of and instructions to interviewers, introductory remarks by interviewers to respondents.

(e) A description of the statistical procedures used to analyze the data and all data tables which underlie the results reported.

Other interested persons may wish to examine the completed protocols, questionnaires, data collection forms and any other underlying data not offered as exhibits and which serve as a basis for your testimony. This information, along with computer tapes that were used to conduct analyses, should be made available (with appropriate explanatory data) upon request by the Presiding Officer. The Presiding Officer will then be in a position to permit their use by the interested persons or their counsel.

5. Identification, Number of Copies, and Inspection

To assure prompt consideration, all materials filed by prospective witnesses pursuant to the instructions contained in paragraphs 1–4 above should be identified as "Notice of Proposed Rulemaking—Amendment of the Mail Order Merchandise Trade Regulation Rule: Prepared Statement" ("and Exhibits," if appropriate), and submitted in five copies when feasible and not burdensome.

6. Reasons for Requirement

The foregoing requirements are necessary to permit the orderly scheduling of your appearance(s) and that of other witnesses. As well, other interested parties must have your expected testimony and supporting documents for study before the hearing so they can decide whether to question you or file rebuttals. If you do not comply with all of the requirements, the Presiding Officer has the power to refuse to let you testify.

7. General Procedures

These hearings will be informal and courtroom rules of evidence will not apply. You will not be placed under oath

unless the Presiding Officer so requires. You also are not required to respond to any questions outside the area of your written statement. However, if such questions are permitted, you may respond if you believe you are prepared and have something to contribute. The Presiding Officer will assure that all questioning is conducted in a fair and reasonable manner and will allocate time according to the number of parties participating, the legitimate needs of the interested groups for full and true disclosure, and the number and nature of the factual issues discussed. The Presiding Officer further has the right to limit the number of witnesses to be heard if the orderly conduct of the hearing so requires.

The deadlines established by this notice will not be extended and hearing dates will not be postponed unless hardship can be demonstrated.

Section I. Notification of Interest

If you wish to avail yourself of the opportunity to question witnesses, you must notify the Presiding Officer by January 12, 1990, of your position with respect to the proposed rulemaking proceeding. Your notification must be in sufficient detail to enable the Presiding Officer to identify groups with the same or similar interests respecting the general questions and issues provided in Section F of this notice. The Presiding Officer may require the submission of additional information if your notification is inadequate. If you fail to file an adequate notification in sufficient detail, you may be denied the opportunity to cross-examine witnesses.

Before the hearings commence, the Presiding Officer will identify groups with the same or similar interests in the proceeding. These groups will be required to select a single representative for the purpose of conducting direct or cross-examination. If they are unable to agree, the Presiding Officer may select a representative for each group. The Presiding Officer will notify all interested persons of the identity of the group representatives at the earliest practicable time. Group representatives will be given an opportunity to question each witness on any issue relevant to the proceeding and within the scope of the testimony. The Presiding Officer may disallow any questioning that is not appropriate for full and true disclosure as to relevant issues. The Presiding Officer may impose fair and reasonable time limitations on the questioning. Given that questioning by group representatives and the staff will satisfy the statutory requirements with respect to disputed issues, no such issues will be designated.

Section J. Post-Hearing Procedures

You will be afforded 45 days after the close of the hearings to file rebuttal submissions, which must be based only upon identified, properly cited matters already in the record. The Presiding Officer will reject all submissions which are essentially additional written comments rather than rebuttal. The 45-day rebuttal period is intended to include the time consumed in securing a complete transcript.

Not later than 120 days after the close of the rebuttal period, the staff shall release its recommendations to the Commission as required by the Commission's Rules of Practice. The Presiding Officer's recommended decision based upon his findings and conclusions as to all relevant and material evidence shall be released not later than 60 days after publication of the staff recommendations. Post-record comments, as described in § 1.13(b) of the Rules of Practice, shall be submitted not later than 60 days after the submission of the Presiding Officer's recommended decision.

Section K. Rulemaking Record

The Commission urges all interested persons to consider the relevance of any material before submitting it for the rulemaking record. While the Commission encourages comments on the proposed amendments to the Rule, the submission of material that is not generally probative of the issues posed by the rulemaking proceeding merely overburdens the rulemaking record and decreases its usefulness, both to those reviewing the record and to interested persons using it during the course of the proceeding. The Commission's rulemaking staff has received similar instruction. The rulemaking record, as defined in 16 CFR 1.18(a), will be made available for examination in Room 130, Public Reference Room, Federal Trade Commission, 6th Street and Pennsylvania Avenue NW., Washington, DC.

List of Subjects in 16 CFR Part 435

Mail order merchandise, Telephone order merchandise, Trade practices.

In consideration of the foregoing, the Commission proposes to amend title 16, chapter I, subchapter D of the Code of Federal Regulations, as follows:

PART 435—MAIL ORDER MERCHANDISE

1. The authority for part 435 continues to read as follows:

Authority: 38 Stat. 717, as amended; 15 U.S.C. 41, *et seq.*

2. The title of the Rule is revised to read as follows:

PART 435—MAIL AND TELEPHONE ORDER MERCHANDISE

3. Section 435.1 introductory text and paragraph (a)(1) is revised to read as follows:

§ 435.1 The rule.

In connection with mail or telephone order sales in commerce, as "commerce" is defined in the Federal Trade Commission Act, it constitutes an unfair method of competition, and an unfair or deceptive act and practice for a seller:

(a)(1) To solicit any order for the sale of merchandise to be ordered by the buyer through the mails or by telephone unless, at the time of the solicitation, the seller has a reasonable basis to expect that he will be able to ship any ordered merchandise to the buyer:

(i) Within that time clearly and conspicuously stated in any such solicitation, or

(ii) If no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer.

* * * * *

4. Section 435.2(b)(1) is revised to read as follows:

§ 435.2 Definitions.

* * * * *

(b) "Receipt of a properly completed order" shall mean:

(1) Where there is a credit sale and the buyer has not previously tendered partial payment, the time at which the seller receives all the information necessary to charge the buyer's account;

* * * * *

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 89-27904 Filed 11-24-89; 9:35 am]

BILLING CODE 6750-01-M

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 571

Control, Custody, Care, Treatment and Instruction of Inmates; Release of Inmates Prior to a Weekend or Legal Holiday

AGENCY: Bureau of Prisons, Justice.

ACTION: Final rule.

SUMMARY: In this document, the Bureau of Prisons is amending its final rule on release of inmates prior to a weekend or legal holiday. The final amendment places into rule language the authority for releasing an inmate on the last preceding weekday before a Saturday, Sunday, or legal holiday for inmates committed under the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984. This amendment is necessitated by a change in the applicable law.

EFFECTIVE DATE: November 28, 1989.

ADDRESSES: Office of General Counsel, Bureau of Prisons, Room 760, 320 First Street NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Roy Nanovic, Office of General Counsel, Bureau of Prisons, phone (202) 724-3062.

SUPPLEMENTARY INFORMATION: The Bureau of Prisons is amending its final rule on release of inmates prior to a weekend or legal holiday. A final rule on this subject was published in the **Federal Register** June 29, 1979 (at 44 FR 38254 et seq.). The present amendment places into rule language the release authority for inmates sentenced under the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984. Since the present amendment is necessitated by a change in the applicable law, the Bureau finds good cause under 5 U.S.C. 553(d) to make this amendment effective immediately, without notice of proposed rulemaking, opportunity for public comment, or delay in the effective date. Members of the public may submit comments concerning this rule by writing the previously cited address. These comments will be considered, but will receive no response in the **Federal Register**.

The Bureau of Prisons has determined that this rule is not a major rule for the purpose of EO 12291. The Bureau of Prisons has determined that EO 12291 does not apply to this rule since the rule involves agency management. After review of the law and regulations, the Director, Bureau of Prisons, has certified that this rule, for the purpose of the Regulatory Flexibility Act (Pub. L. 96-354), does not have a significant impact on a substantial number of small entities.

Summary of Changes/Comments

The title of 28 CFR 571, Subpart D is changed to "Release of Inmates Prior to a Weekend or Legal Holiday." The title of § 571.30 is changed to "Purpose and scope." Former paragraph (a) of § 571.30 becomes introductory text to the section, and the reference in former paragraph (a) to 18 U.S.C. 4163 is deleted because this reference is now located in new paragraph (a). Former paragraph (b) is also incorporated into new paragraph (a). New paragraph (b) discusses the release authority for inmates convicted of offenses occurring on or after November 1, 1987, and who were sentenced under the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984.

List of Subjects in 28 CFR Part 571

Prisoners.

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons in 28 CFR 0.96(q), part 571 in subchapter D of 28 CFR chapter V is amended as set forth below.

Dated: November 17, 1989.

J. Michael Quinlan,

Director, Bureau of Prisons.

SUBCHAPTER D—COMMUNITY PROGRAMS AND RELEASE

PART 571—RELEASE FROM CUSTODY

1. In 28 CFR part 571, subpart D, consisting of § 571.30, is revised to read as follows:

Subpart D—Release of Inmates Prior to a Weekend or Legal Holiday

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082, 4161-4166 and 4201-4218 (Repealed as to conduct occurring on or after November 1, 1987), 5006-5024 (Repealed October 12, 1984 as to conduct occurring after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95-0.99.

§ 571.30 Purpose and scope.

The Bureau of Prisons may release an inmate whose release date falls on a Saturday, Sunday, or legal holiday, on the last preceding weekday unless it is necessary to detain the inmate for another jurisdiction seeking custody under a detainer, or for any other reason which might indicate that the inmate should not be released until the inmate's scheduled release date.

(a) The release authority for inmates convicted of offenses occurring prior to November 1, 1987 is pursuant to 18 U.S.C. 4163. The number of days used under 18 U.S.C. 4163 may not be added to the number of days remaining to be served to release an inmate "as if * * * on parole" (18 U.S.C. 4164) who would otherwise have been released by expiration of sentence.

(b) The release authority for inmates sentenced under the provisions of the Sentencing Reform Act of the Comprehensive Crime Control Act of 1984 for offenses committed on/or after November 1, 1987 is pursuant to 18 U.S.C. 3624(a).

[FR Doc. 89-27867 Filed 11-27-89; 8:45 am]

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