12-29-92
Vol. 57 No. 250
Pages 61759-62144

federal register

Tuesday
December 29, 1992

FEDERAL REGISTER Published daily, Monday through Friday, (not published on Saturdays, Sundays, or on official holidays), by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (49 Stat. 500, as amended; 44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). Distribution is made only by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

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The seal of the National Archives and Records Administration authenticates this issue of the **Federal Register** as the official serial publication established under the Federal Register Act. 44 U.S.C. 1507 provides that the contents of the **Federal Register** shall be judicially noticed.

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1 CFR Parts 305 and 310

Recommendations and Statements of the Administrative Conference Regarding Administrative Practice and Procedure

AGENCY: Administrative Conference of the United States.

ACTION: Recommendations and amendments.

SUMMARY: The Administrative Conference of the United States adopted three recommendations at its Forty-Seventh Plenary Session addressing: The Federal administrative judiciary; administration of the Office of Juvenile Justice and Delinquency Prevention's formula grant program; and de minimis settlements under Superfund.

The Administrative Conference of the United States is a Federal agency established to study the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies in carrying out administrative programs, and to make recommendations for improvements.

At this time, the Conference is removing the texts of certain recommendations and statements from the Code of Federal Regulations because they are deemed to be no longer of continuing general interest.

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: Renee Barnow, Information Officer (202–254–7020).

SUPPLEMENTARY INFORMATION: The Administrative Conference of the United States was established by the Administrative Conference Act, 5 U.S.C. 591–596. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies in carrying out administrative programs, and makes recommendations for improvements to the agencies, collectively or individually, and to the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 594(1)).

At its Forty-Seventh Plenary Session, held December 10–11, 1992, the Assembly of the Administrative Conference of the United States adopted three recommendations. These recommendations were issued December 22, 1992.

Recommendation 92–7, The Federal Administrative Judiciary, is the result of a comprehensive study of federal administrative adjudications. It calls upon Congress, when creating new programs, to preserve the uniformity of process and of qualifications of presiding officers contemplated by the Administrative Procedure Act, and it contains guidelines for assigning adjudications to administrative law judges (ALJs). The Recommendation also urges reform of the ALJ selection process administered by the Office of Personnel Management so that agencies can hire from a larger pool of qualified applicants. More specifically, the Conference recommends elimination of the veterans' preference in the ALJ hiring process in order to make it more possible for agencies to hire qualified women candidates as ALJs. Recommendation 92–7 also recommends that a system of review of ALJ performance be developed, and that it be administered by agency Chief ALJs. The system would include a mechanism for investigating ALJ allegations of improper agency infringement of, or interference with, their decisional independence, and it would include procedures for investigating complaints of ALJ misconduct, such as allegations of bias or prejudice.

Recommendation 92–8, Administration of the Office of Juvenile Justice and Delinquency Prevention's Formula Grant Program, contains Conference recommendations for improving administration of the formula grant program, including changes related to OJJDP's communication and consultation with states, coordination and collaboration at various levels of government, consistency and clarity of policy elaboration, staffing, and training.

Recommendation 92–9, De Minimis Settlements Under Superfund, urges the Environmental Protection Agency to expand its efforts to negotiate settlements with "potentially responsible parties" that have contributed relatively small amounts of hazardous waste at sites covered by the Superfund program. A more active agency role is recommended and suggestions are made for additional guidance from EPA headquarters to regional offices. The recommendation also calls for establishing a central, publicly accessible repository of de minimis settlement documents.

The full texts of the recommendations are set out below. The recommendations will be transmitted to the affected agencies and, if so directed, to the Congress of the United States. The Administrative Conference has advisory powers only, and the decision on whether to implement the recommendations must be made by each body to which the various recommendations are directed.

The transcript of the Plenary Session is available for public inspection at the Conference's offices at suite 500, 2120 L Street NW., Washington, DC. Recommendations and statements of the Administrative Conference are published in full text in the **Federal Register**. Complete lists of recommendations and statements, together with the texts of those deemed to be of continuing interest, are published in the Code of Federal Regulations (1 CFR part 305). Copies of all past Conference recommendations and statements, and the research reports on which they are based, may be obtained from the Office of the Chairman of the Administrative Conference.

The authority citation for parts 305 and 310 is being revised to conform to renumbering of the Administrative Conference Act in Pub. L. 102–354.

List of Subjects in 1 CFR Parts 305 and 310

Administrative practice and procedure, Administrative adjudication, Administrative law judges, Juvenile justice, and Superfund.

Parts 305 and 310 of title 1 of the Code of Federal Regulations are amended as follows:

PART 305—RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1. The authority citation for part 305 is revised to read as follows:

Authority: 5 U.S.C. 591–596.

2. New §§ 305.92–7 through 305.92–9 are added to read as follows:

§ 305.92–7 The Federal Administrative Judiciary (Recommendation No. 92–7).

At the request of the Office of Personnel Management, the Administrative Conference undertook a study of a series of issues relating to the roles of Federal administrative law judges (ALJs) and non-ALJ adjudicators, or administrative judges (AJs),[1] as they have evolved over the last several decades. The study addressed a number of different issues, including those relating to selection and evaluation of ALJs and AJs, the relationship of ALJs and AJs to their employing agencies, including the appropriate level of "independence" of such decisionmakers, and under what circumstances each type of decisionmaker should be used. Many of these issues are controversial, and the Conference has heard strong arguments from those with differing views.

The Administrative Conference takes as its starting point in considering the role of the Federal administrative judiciary the role created for "hearing examiners," now redesignated as "administrative law judges," in the Administrative Procedure Act in 1946.[2] That Act contemplated the existence of impartial factfinders, with substantive expertise in the subjects relevant to the adjudications over which they preside, who would be insulated from the investigatory and prosecutorial efforts of employing agencies through protections concerning hiring, salary, and tenure, as well as separation-of-functions requirements. The decisions of such impartial factfinders were made subject to broad review by agency heads to ensure that the accountable appointee at the top of each agency has control over the policymaking for which the agency has responsibility.

The need for impartial factfinders in administrative adjudications is evident. To ensure the acceptability of the process, some degree of adjudicator independence is necessary in those adjudications involving some kind of hearing.[3] The legitimacy of an adjudicatory process also depends on the consistency of its results and its efficiency.

ALJs possess a degree of independence that dates back to the enactment of the APA and is governed by the APA and related statutes. The APA provides that certain separations of functions must be observed to protect the ALJ from improper pressures from agency investigators and prosecutors. ALJs are selected through a special process overseen by OPM. Their pay is set by statute and OPM regulations. Any attempt by an agency to discipline or remove an ALJ requires a formal hearing at the Merit Systems Protection Board. ALJs are also exempt from the performance appraisal requirements applicable to almost all other Federal employees under the Civil Service Reform Act.

While the number of ALJs in the Federal government has leveled off in the last decade, and has actually decreased outside of the Social Security Administration, some agencies have been making increased use of AJs. The amount of functional independence accorded to AJs varies with the particular agency and type of adjudication; however, AJs generally lack the statutory protections guaranteed to ALJs. AJs are not statutorily exempt from performance appraisals, and several major groups of AJs regulatory undergo such appraisals by the agencies for which they work. In general, however, AJs presiding in agency adjudications in which a hearing is provided are accorded de facto protection from pressure from agency investigators and prosecutors, and, according to the Conference's survey, do not perceive themselves as significantly more subject to agency pressure than do ALJs.

The Conference's general view is that the movement away from the uniformity of qualifications, procedures, and protections of independence that derives from using ALJs in appropriate adjudications is unfortunate. The Conference believes that, to some extent, this movement away from ALJs toward AJs has been fueled by perceptions among agency management of difficulties in selecting and managing ALJs. These recommendations attempt to address these perceived problems. It should be noted that these recommendations are interdependent. For example, recommendations concerning the conversion of AJ positions to ALJ positions, and creation of new ALJ positions in new programs, are premised on the implementation of improvements in the selection and evaluation processes.

Use of ALJs and AJs

There is no apparent rationale undergirding current congressional or agency decisions on the use of ALJs or non-ALJs in particular types of cases. Congress seems to make such choices on an ad hoc basis. Moreover, it is quite clear that similar types of determinations made in different agencies are being made by different types of decisionmakers. For example, disability benefits adjudications at the Social Security Administration are handled by ALJs; at the Department of Veterans Affairs, AJs adjudicate similar types of cases. Moreover, in some contexts, non-ALJ adjudicators preside over cases in which extremely important issues of personal liberty are potentially at stake, such as deportation proceedings and security clearance cases.

The uniform structure established by the APA for on-the-record hearings and for qualifications of presiding officers serves to provide a consistency that helps furnish legitimacy and acceptance of agency adjudication. A rationalized system of determining when ALJs should be used would encourage uniformity not only in procedure, and in the qualifications of the initial decider, but in adjudication of similar interests. The Conference, therefore, recommends that Congress consider the conversion of AJ positions to ALJ positions in certain contexts. While the Conference does not identify specific types of cases for which such conversion should be made, it proposes a series of factors for Congress to consider in making such determinations; these same factors should also apply when Congress creates new programs involving evidentiary hearings.

One critical factor is the nature of the interest being adjudicated. The separation of functions mandated by the APA, as well as the selection criteria designed to ensure the highest quality adjudicators, are of particular value in situations where the most important interests are at stake. Generally speaking, a hearing that is likely to involve a substantial impact on personal liberties or freedom, for example, is one where use of an ALJ likely would be

[1] The term "administrative judge," as used here, includes non-ALJ hearing officers, whatever their title, who preside at adjudicatory hearings.

[2] In 1969, the Conference addressed some of these issues in the context of hearing examiners. See Conference Recommendation 69–9, 1 CFR 305.69–9 (part A) (1988). Many of the recommendations set forth here pertaining to selection and training of ALJs are broadly consistent with the earlier recommendation, but to the extent that they differ, this recommendation is intended to supersede part A of Recommendation 69–9.

[3] The study underlying this recommendation limited its consideration to adjudicators who preside over some kind of hearing. More informal adjudication processes are outside the scope of the study.

appropriate. Similarly, cases that could result in an order carrying with it a criminal-like finding of culpability, imposition of sanctions with a substantial economic effect (such as large monetary penalties or some license revocations),[4] or a determination of discrimination under civil rights laws (unless there is an opportunity for a de novo hearing in court) represent categories of proceedings that may call for ALJ use. This characterization should be done for types of cases rather than for particular cases.

Another factor to consider is whether the procedures established by statute or by rule for cases heard and decided are, or would be, substantially equivalent to APA formal hearings. In such cases, the additional uniformity that would derive from making the cases formally subject to 5 U.S.C. 554, 556, and 557 would argue in favor of ALJs.

ALJs are required to be lawyers. Some AJs who decide cases are not lawyers, but have other needed specialized expertise. For example, certain adjudicators at the Nuclear Regulatory Commission are physicists or engineers who participate on multi-member boards. In determining whether it is appropriate to use ALJs in particular types of cases, Congress should consider whether the benefits of using ALJs are outweighed by the benefits of having other expertise brought to bear. It should also consider whether lawyers serving with nonlawyers on decision panels should be ALJs.

A final consideration, particularly in the context of considering conversion of existing AJ positions to ALJ positions, is the extent to which the current adjudicators closely approximate ALJs in their decisional independence, the criteria for their selection, or their compensation and experience levels. If existing AJs are functioning well and do not approach parity with ALJs on these criteria, there may be no need to make the conversion. On the other hand, if they closely match ALJs on these factors, uniformity interests may weigh in favor of conversion.

Although none of these factors is necessarily intended to be determinative, the more that these factors weigh in favor of ALJ status for the decisionmaker, the more appropriate it is for Congress to mandate such status. It should be noted, however, that these recommendations are not intended to be seen as encouraging increased formalization of administrative adjudicatory processes.

[4] Grant or contract disputes would not fall within this category, unless a monetary penalty was involved.

In situations where Congress does convert AJ positions to ALJ positions, those AJs who can satisfy OPM eligibility qualifications should be eligible for immediate appointment as ALJs. Thus, only those existing AJs meeting the standards for ALJ appointment would become ALJs, but they would not be required to go through the competitive selection process.

Historically, OPM has had responsibility to review and rule on agency requests for additional ALJ positions. In the past, when there were government-wide limits on "supergrade" positions, which included ALJs, this oversight role served a purpose. Those limits no longer exist, and it is no longer necessary for OPM to participate in this process. Agencies should be free, within their normal resource allocation constraints, to determine for themselves whether they need more or fewer ALJs.

ALJ Selection

The selection process for ALJs has been administered by OPM (and its predecessor agency) since 1946. OPM develops the criteria for selection, accepts applications for the register of eligibles, and rates the applicants on the basis of their experience as described in a lengthy statement prepared by the applicant, a personal reference inquiry, a written demonstration of decision-writing ability, and a panel interview. The scores from this process determine an applicant's rank on the register of eligibles. Because OPM has historically considered ALJs as being in the competitive service, OPM follows the statutory requirements for filling vacancies. Thus, OPM rates and ranks eligibles on a scale from 70 to 100, and when an agency seeks to fill a vacancy, OPM certifies the top three names on the register to that agency. In practice, only applicants with scores from 85 to 100 have been certified.

The Veterans' Preference Act, which has historically applied to most civil service hiring, is applicable to selection of administrative law judges. As applied, veterans deemed qualified for the preference are awarded an extra 5 points, and disabled veterans are awarded an extra 10 points in their scores. These extra points have had an extremely large impact, given the small range in unadjusted scores. In addition, under current law, agencies may not pass over a veteran to hire a nonveteran with the same or lower score on the certificate. As a consequence, application of the veterans' preference has almost always been determinative in the ALJ selection system.

There has been concern about the ALJ selection process, arising from the determinative impact of veterans' preference and the very limited selection options available to agencies. In fact, most agencies in recent years have found ways to circumvent this process somewhat, primarily by hiring laterally from other agency ALJ offices, or (in those few agencies that hire substantial numbers of ALJs) by waiting until there are numerous slots to fill at one time, thus entitling them to a larger certificate of eligibles from OPM.

Despite this circumvention, the application of veterans' preference to the ALJ selection process has had a materially negative effect on the potential quality of the federal administrative judiciary primarily because it has effectively prevented agencies from being able to hire representative numbers of qualified women candidates as ALJs. There is also some evidence that application of the veterans' preference may have adversely affected the hiring of racial minorities. Thus, agencies are prevented from being able to select the best qualified ALJs for specific positions from a pool of representative applicants. The Conference recognizes that the general policy of veterans' preference in Federal hiring reflects a valid social concern, particularly as it helps those who leave military service enter the Federal civilian workforce. But, in view of the conflict between this policy and the valid need of Federal agencies to have an opportunity to select the best qualified ALJs from among representative applicants, the Conference recommends that Congress abolish veterans' preference in the particular and limited context of ALJ selection.[5] In that connection, it should be noted that in 1978, Congress created a similar narrow exemption for members of the Senior Executive Service. Moreover, there is no veterans' preference in the selection for any other Federal judicial position.

The Conference's recommendation on the selection of ALJs would leave with OPM the responsibility for preparing the register of eligibles (i.e., for determining the basic qualifications for the position and rating the applicants). OPM is urged to ensure that all applicants placed on the register are in fact qualified to fulfill the responsibilities of being an ALJ.

In conjunction with this, however, the recommendation would also expand the choices that agencies would have in

[5] The Conference has recommended a similar modification to the veterans' preference in this context before. See Conference Recommendation 69–9, 1 CFR 305.69–9 ¶ A(4) (1988).

selecting from among those qualified applicants. Under this recommendation, after OPM rated the applicants, it would compile a register of all applicants deemed qualified following the final rating process. An agency could request a certificate with the names of all applicants whose numerical ratings placed them in the highest-ranked 50 percent of the register. Agencies could also request a certificate containing a smaller number of names or applicants in a higher percentile. The agency would have the authority to hire anyone on the certificate.[6]

In addition, if, following review of the highest-ranked 50 percent, an agency needed to review additional names to find a suitable candidate, it could request an additional certificate from OPM. Such an exception should be invoked rarely, and only upon a showing of exceptional circumstances.

The Conference recognizes that any limitation on the number of qualified candidates on the certificate, including the "top three" limitation now in place, might be criticized as arbitrary. By recommending the highest-ranked 50 percent of the applicants OPM has determined to be qualified, the Conference is attempting to balance two factors. The Conference recognizes the agencies' strong interest in having a substantially larger pool of qualified candidates from which to select ALJs who meet their varying criteria and needs. It also recognizes the importance of ensuring that such a pool is highly qualified, as measured by a uniform objective rating system. The Conference believes that its recommendation provides a reasonable balance of these factors. It provides a pool large enough that agencies should be able to find candidates for ALJ positions who satisfy their varying and specific needs. At the same time, OPM estimates that the top 50 percent of the register corresponds to those applicants with scores of 85 or better out of 100.

Agencies would also have access to a computerized database that would contain the complete application files of individual applicants on their certificate, including numerical ratings, geographical or agency preferences, particular kinds of experience, and veterans status. This database would allow agencies the option to narrow the list of qualified applicants and focus on those whom they would like to consider further. For example, an agency could search for all candidates willing to relocate to New York City, who spoke Spanish, and had ratings in the top 20 percent.

To ensure that the register contains a broad range of qualified applicants, the Conference also recommends that OPM and hiring agencies expand recruitment of women and minority applicants for ALJ positions. In addition, because questions have been raised about OPM's current method of assessing litigation experience for the purposes of scoring applicants for ALJ positions, the Conference recommends that OPM review its rating criteria to determine whether they are appropriate.

For much of the last decade, the register has been closed, thus precluding newly interested applicants from being considered for ALJ positions. Although OPM deferred reopening the register pending the outcome of the Conference's consideration and recommendations, it has announced that the register will be reopened in the spring of 1993. While the Conference's recommendations would significantly affect the ALJ selection process, the impact would come mostly at the end of the process, after OPM has evaluated and rated the new applicants. This procedure is likely to be a time-consuming one, given the expected large influx of applicants. Therefore, the Conference supports reopening the application process, so that OPM can begin rating the candidates now, even though the recommended changes in the later stages have not yet been implemented. This way, when and if those changes are in place, the updated register will be readily available. It should be noted, however, that the Conference is also recommending that OPM review some of its rating criteria, which would need to be done before it begins rating new applicants.

OPM has indicated that it has a planned program to expand recruitment of women and minority applicants for the register. The Conference both encourages OPM to give such a program a high priority, and recommends that OPM and the hiring agencies take steps in particular to recruit among minority bar associations and other institutions with large numbers of minorities or women.

The Conference's view is that implementing these recommendations will provide agencies the opportunity to select ALJs from a broad range of highly qualified candidates and to hire the best applicants from a representative register.

ALJ Evaluation and Discipline

At present, ALJs, virtually alone among Federal employees, are statutorily exempt from any performance appraisal. Although agencies may seek removal or discipline of ALJs "for good cause" by initiating a formal proceeding at the MSPB, the Board has applied standards that have strictly limited the contexts in which such actions may successfully be taken against an ALJ. For example, agency actions premised on low productivity have never been successful before the Board.

The Conference recognizes the importance of independence for ALJs. Their role under the APA as independent factfinders requires that they be protected from pressure in making their decisions. There can be a tension, however, between this independence and the agency's role as final policymaker, including the need for consistency of result and political accountability. Moreover, agencies have a legitimate interest in being able to manage their employees, including ALJs, in order to ensure that the adjudicatory system is an efficient and fair one.

The Conference, therefore, recommends that a system of review of ALJ performance be developed. Chief ALJs would be given the responsibility to coordinate development of case processing guidelines, with the participation of other agency ALJs, agency managers and others. These guidelines, which would address issues such as ALJ productivity and step-by-step time goals,[7] would be one of the bases upon which Chief ALJs would conduct regular (e.g., annual) performance reviews. Judicial comportment and demeanor would be another basis for review. Another factor on the list of bases for performance review, which list is not intended to be exclusive, would be the existence of a clear disregard of, or pattern of nonadherence to, properly articulated and disseminated rules, procedures, precedents and other agency policy. Such performance review systems need not involve quantitative measures or specific performance levels, but they should provide meaningful and useful feedback on performance.[8]

[6] In order to implement this recommendation, Congress would need at a minimum to modify the veterans' preference to eliminate the provision restricting the passing over of veterans, so that agencies would have the ability to hire any qualified applicant on the certificate.

[7] See Conference Recommendation 86-7, "Case Management as a Tool for Improving Agency Adjudication," 1 CFR 305.86-7 (1992), at ¶2.

[8] Many states now use performance reviews for their state court judges and ALJs. The performance of Federal magistrate-judges is evaluated as a condition of reappointment. Even some Federal courts are beginning to experiment with evaluation of judges' performance.

Conversely, ALJs should also have a mechanism for dealing with legitimate concerns about improper agency infringement of, or interference with, their decisional independence. Under the Conference's recommendation, each agency employing ALJs should set up a system for receiving and investigating allegations of such activity by agency management officials and, where warranted, referring them to the appropriate authorities for action.[9] OPM would have oversight responsibility, and could, upon request by an ALJ or at its own discretion, review an agency's response to such allegations, and recommend appropriate further action.

Under the Conference recommendation, the Chief ALJs' responsibilities would also include developing ALJ training and counseling programs designed to enhance professional capabilities and to remedy individual performance deficiencies, and, in appropriate cases, issuing reprimands or recommending disciplinary action.[10]

Recently, attention has been focused on allegations of prejudice against certain classes of litigants by some ALJs.[11] While there is no known evidence that such a problem is widespread, the Conference's view is that it is important to have a mechanism for handling complaints or allegations relating to ALJ misconduct, including allegations of bias or prejudice. The Conference, therefore, recommends that Chief ALJs, either individually or through an ALJ peer review group, receive and investigate such complaints or allegations, and recommend appropriate corrective or disciplinary actions. To the extent practicable, such investigation and the processing of any corrective or disciplinary recommendation should be expedited to protect affected interests and create public confidence in the process. Where appropriate, consensual resolutions are encouraged. The Conference also recommends that agencies publicize the existence of their complaint procedures, in published rules and procedures or in some other appropriate fashion, and inform complainants in a timely manner of the disposition of their complaints.

The Conference is also recommending that OPM assign the various responsibilities relating to ALJs to a specific unit within that agency. Such a unit would, among other things, have responsibility for overseeing personnel, hiring and performance matters involving Chief ALJs, thus providing them additional insulation from agency pressures. Because of the increased importance of the position of Chief ALJ under this proposal, Congress also should consider making the position subject to a term appointment, as it has done for Chief Judges of United States District Courts.

The Conference also recommends that proceedings before the Merit Systems Protection Board involving charges against ALJs be heard by a three-judge panel. Judging administrative law judges is a sensitive process, and the benefit of collegial decisionmaking in this context seems worth the added cost. The panel should be selected from a pool of ALJs. Currently, MSPB has only on ALJ. So long as this is the case, the pool should consist of ALJs from other agencies, but the panel in a particular case should not involve ALJs from the same agency as the respondent ALJ.

Policy Articulation

As discussed, the APA model of agency decisionmaking is based on the use of independent ALJs to find facts and to apply agency policy to those facts. This system requires that ALJs be granted independence as factfinders, but it also must ensure that agency policymakers are able to establish policies in an efficient manner for application by ALJs in individual cases. The methods available to agencies include promulgation of rules of general applicability, the use of a system of precedential decision,[12] or other appropriate practices, such as proper use of policy statements.[13] Such policy statements must be properly disseminated.

Where the agency has made its policies known in an appropriate fashion, ALJs and AJs are bound to apply them in individual cases. Policymaking is the realm of the agency, and the ALJ's (or AJ's) role is to apply such policies to the facts that the judge finds in an individual case.

The Concept of an ALJ Corps

There has been over the last decade considerable discussion of the concept of an ALJ corps. Although there have been differences among the specific proposals, the concept in general includes separating ALJs from individual agencies, and placing them in a new, separate agency. Recent legislative proposals provided, among other things, that new ALJs would be selected by a chief judge of the corps, and that ALJs would be divided into several general subject matter divisions (such as health and benefits; safety and environment; and communications, public utility and transportation regulation).[14]

The Conference discussed these recent legislative proposals to establish a centralized ALJ corps as a means of handling some of the issues addressed in this recommendation. Some of these recommendations are independent of such proposals; others are inconsistent with them. The Conference concluded that there is no basis at this time for structural changes more extensive than those proposed here.

Recommendation

I. Congressionally Mandated Use of ALJs and AJs[15]

A. When Congress considers new or existing programs that involve agency on-the-record adjudications, it should seek to preserve the uniformity of process and of qualifications of presiding officers contemplated by the APA, by providing for the use of administrative law judges (ALJs) in all appropriate circumstances.[16] In order to further this goal, Congress should consider converting certain existing administrative judge (AJ) positions[17] to ALJ positions. In determining the appropriateness of converting existing AJ positions to ALJ status and of requiring the use of ALJs in particular types of new adjudications, Congress should consider the following factors, if present, as indicia to weigh in favor of requiring ALJ status:

1. The cases to be heard and decided are likely to involve:

a. Substantial impact on personal liberties or freedom;

[9] Such authorities might include OPM for certain lesser sanctions, and the Office of Special Counsel or MSPB in more serious cases.

[10] See 43 Op. Att'y Gen. 1 (1977) (discussing certain limitations on agency's authority to reprimand ALJs).

[11] See, e.g., U.S. GAO, Social Security: Racial Difference in Disability Decisions Warrants Further Investigation, GAO/HRD-92-56 (April 1992). Cf. Ninth Circuit Gender Bias Task Force, Preliminary Report (Discussion Draft) (July 1992) at 93-103 (discussing gender bias issues relating to disability determinations).

[12] See Conference Recommendation 89-8, "Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions," 1 CFR 305.89-8 (1992) ¶1 at n. 2.

[13] See Conference Recommendation 92-2, "Agency Policy Statements," 57 FR 30101, 30103 (1992), to be codified at 1 CFR 305.92-2.

[14] See S. 826 and H.R. 3910, 102d Cong.

[15] The recommendations in this Part I are interdependent with those of Parts II and III urging improvements in the selection and evaluation processes for ALJs.

[16] This recommendation is not intended to be seen as encouraging increased formalization of administrative adjudicatory processes.

[17] The term "administrative judge," as used here, includes non-ALJ hearing officers, whatever their title, who preside at adjudicatory hearings.

b. Orders that carry with them a finding of criminal-like culpability;

c. Imposition of sanctions with substantial economic effect; or

d. Determination of discrimination under civil rights or other analogous laws.

2. The procedures established by statute or regulation for the cases heard and decided are, or would be, the functional equivalent of APA formal hearings.

3. The deciders in such cases are, or ought to be, lawyers—taking into consideration the possibility that some programs might require other types of specialized expertise on the part of adjudicators or on panels of adjudicators.

4. Those incumbent AJs in such cases who are required to be lawyers already meet standards for independence, selection, experience, and compensation that approximate those accorded to ALJs.

B. When Congress determines that it should require ALJs to preside over hearings in specific classes of existing federal agency adjudications at which ALJs do not now preside, it should specify that those AJs presiding over such proceedings at that time who can satisfy the Office of Personnel Management's eligibility qualifications for ALJs be eligible for immediate appointments as ALJs.

C. Congress should provide that OPM should no longer be responsible for reviewing and ruling on agency requests for additional ALJ positions. Decisions relating to an agency's need for more or fewer ALJ positions should be made by the individual agencies through the normal resource allocation process.

II. ALJ Selection

A. Congress should authorize where required, and OPM should establish, a process for the selection of qualified ALJs by federal agencies that contains the following elements:

1. OPM should continue to administer the process for determining whether applicants are qualified to be on the register of eligibles for ALJ positions and for rating such applicants. OPM should ensure that all applicants appearing on the register are in fact qualified to fulfill the duties of an ALJ under applicable law, including that they have the capability and willingness to provide impartial, independent factfinding and decisionmaking. To the extent that this may require revising the examination process, OPM should make the appropriate changes.

2. Those applicants determined by OPM to be qualified should be listed on the register with their numerical scores noted. Agencies seeking to fill ALJ positions should be allowed to request a certificate containing the names of those applicants whose numerical ratings place them in the highest-ranking 50 percent of the register of eligible applicants. Agencies should have the discretion to request a certificate with a smaller number of percentage of the register. Agencies should also be given access to a computerized database containing the complete application files of those applicants on the certificate.

3. A hiring agency should be permitted to select any applicant from the certificate who, in the agency's opinion, possesses the qualifications for the particular position to be filled. An agency may request that OPM provide an additional number of names upon a showing of exceptional circumstances.

B. OPM and the hiring agencies should give a high priority to expanding recruitment of women and minority applicants for ALJ positions. OPM also should review its ALJ application criteria to determine whether its current method of assessing litigation experience is appropriate.

C. OPM immediately should implement Parts II (A)(1) and (B), which may involve revisions to the examination or scoring process. Pending implementation of the other recommendations in this Part, OPM should open the register application process as soon as possible, and keep it open continuously.

D. In order to implement the proposals in paragraphs II (A) and (B) above, Congress should abolish the veterans' preference in ALJ selection.

III. ALJ Evaluation and Discipline

Congress should authorize, where necessary, and OPM and the agencies that employ ALJs should establish, the following processes for assisting ALJs and the agencies that employ them to carry out their responsibilities to the public and to individual parties:

A. Organization

1. OPM should assign a specific unit the responsibility for (a) overseeing those matters concerning the selection of ALJs, (b) overseeing all personnel, hiring and performance matters that involve Chief ALJs, (c) acting on allegations of improper interference with decisional independence of ALJs, (d) conducting regular performance reviews of Chief ALJs, and (e) periodically publishing reports on the effectiveness with which OPM's responsibilities are performed and seeking recommendations as to how the program may be improved.

2. Each agency that employs more than one ALJ should designate a Chief ALJ, who is given the responsibility within the agency to do the tasks assigned to the Chief ALJ under this Part III.[18]

3. OPM should provide guidance and assistance to aid Chief ALJs fulfilling the responsibilities given to them under this Part III.

4. OPM and the agencies should ensure that Chief ALJs are insulated from improper agency influence when carrying out the responsibilities described in this Part III.[19]

B. Evaluation and Training

Chief ALJs should be given the authority to:

1. Develop and oversee a training and counseling program for ALJs designed to enhance professional capabilities and to remedy individual performance deficiencies.

2. Coordinate the development of case processing guidelines, with the participation of other agency ALJs, agency managers and, where available, competent advisory groups.

3. Conduct regular ALJ performance reviews based on relevant factors, including case processing guidelines, judicial comportment and demeanor, and the existence, if any, of a clear disregard of or pattern of nonadherence to properly articulated and disseminated rules, procedures, precedents, and other agency policy.

4. Individually, or through involvement of an ALJ peer review group established for this purpose, provide appropriate professional guidance, including oral or written reprimands, and, where good cause appears to exist, recommend that disciplinary action against ALJs be brought by the employing agency at the Merit Systems Protection Board (MSPB), based on such performance reviews.

C. Complaints About ALJs

Each agency that employs ALJs should set up a system for receiving and evaluating complaints or allegations of misconduct by an ALJ, including bias or prejudice.

1. The Chief ALJ in each agency, individually or through involvement of

[18] In agencies with large numbers of ALJs, the Chief ALJ might appropriately delegate some or all such responsibility to deputy or regional chief ALJs.

[19] Congress also should consider making the position of Chief ALJ subject to a term appointment. This suggestion does not result from a finding by the Conference that any number of current Chief ALJs are not functioning effectively. The Conference notes, however, that Chief Judges of United States District Courts are subject to term appointments and believes it is appropriate to consider whether a similar limitation should apply to Chief ALJs.

an ALJ peer review group established for this purpose, should be given responsibility for receiving and investigating such complaints.

2. If a Chief ALJ determines that ALJ misconduct occurred, the Chief ALJ should recommend that the agency take appropriate corrective action, or, in appropriate cases, recommend that disciplinary action against the ALJ be brought by the agency at the MSPB.

3. If a Chief ALJ determines that further investigation by another authority is warranted, he or she should refer the case to that authority.

4. Each agency should make known to interested persons in an appropriate fashion the existence of such complaint procedure.

5. Where allegations of misconduct implicate a Chief ALJ, they should be referred to OPM for such investigation and recommended action.

6. Complainants should be given notice of the disposition of their complaints.

D. Complaints by ALJs

Each agency that employs ALJs should set up a system for receiving and investigating allegations of unlawful agency infringement on ALJ decisional independence or other improper interference in the fulfillment of ALJ responsibilities. Such a system should be subject to OPM oversight. Where investigation reveals the probable occurrence of such an impropriety, the matter should be referred to the appropriate authority for review and recommended action designed to remedy the situation and prevent recurrence, including the issuance of oral or written reprimands and other appropriate sanctions.

E. MSPB Panels

MSPB should assign cases involving charges against ALJs to a three-judge panel of ALJs drawn from a pool. No judge on the panel should be from the same agency as the respondent ALJ.

IV. Policy Articulation

To ensure that ALJs and affected persons are aware of their responsibilities, agencies should articulate their policies through rules of general applicability, a system of precedential decisions, or other appropriate practices.[20] Congress, the President, and the courts should encourage such policy articulation.

V. The Concept of an ALJ Corps

Congress should not at this time make structural changes more extensive than those proposed here, such as those in recent legislative proposals to establish a centralized corps of ALJs.

§ 305.92–8 Administration of the Office of Juvenile Justice and Delinquency Prevention's Formula Grant Program (Recommendation No. 92–8).

In 1974 Congress enacted the Juvenile Justice and Delinquency Prevention ("JJDP") Act, which created the Office of Juvenile Justice and Delinquency Prevention ("OJJDP" or "the Office") within the U.S. Department of Justice. Among OJJDP's responsibilities, then and now, is that of administering a program of formula grants to states and local governments. While the overall purposes of the formula grant program were broadly framed,[1] the statute also required states to achieve several very specific substantive outcomes. Compliance with those mandates,[2] as well as with a variety of other administrative and procedural requirements, continues to determine eligibility for formula grant funds from OJJDP.

Monitoring for levels of state compliance, determining grant eligibility status, reviewing submitted plans and reports, and responding to technical assistance requests all fall to OJJDP's State Relations and Assistance Division (SRAD). Its administration of the formula grant program is guided by a substantial body of regulations, rules, policies and interpretations that OJJDP has developed over the years. Mechanisms such as waivers, exceptions, and de minimis criteria—characteristic features of many regulatory and grant programs—have been adopted by either Congress or the agency over the years.

The Conference, in response to a request from OJJDP, studied OJJDP's administration of the formula grant program, including its efforts to monitor and assist state compliance with the statutory mandates and requirements. As part of this study, the Conference examined issues of communication and consultation with states, coordination and collaboration at various levels of government, consistency and clarity of policy elaboration, staffing, and training.

Recommendation

I. Policymaking

(a) The Department of Justice should ensure that overall policy, priorities, and objectives for all Federal juvenile delinquency programs and activities are coordinated so that related activities and programs advance efforts by OJJDP and the states to achieve and maintain compliance with the substantive mandates of the JJDP Act.

(b) OJJDP should (1) create, and ensure adherence to, internal operating guidelines and (2) assign formula grant staff responsibilities, so that important issues of policy or interpretation are identified and dealt with promptly. Once such an issue has been finally resolved, the Office's policy or interpretation should be made available promptly by appropriate means—whether the **Federal Register** or otherwise—to all state juvenile justice specialists,[3] the National Coalition of State Juvenile Justice Advisory Groups,[4] and other groups and entities, that may have a substantial interest in the policy or interpretation.

(c) In all instances where issues of policy or interpretation may substantially affect interested persons or organizations or the interests of one or more states, the Office should engage in pre-decisional consultation with the affected persons or entities. OJJDP, in selecting a mode of consultation, should take into account the scope and impact of the policy or interpretation and other matters relevant to effective communication of views and efficient decisionmaking.

(d) The Office should ensure that the reasons underlying its policies and

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[20] See generally Conference Recommendation 71–2, "Articulation of Agency Policies," 1 CFR 305.71–2 (1992); Conference Recommendation 87–7, "A New Role for the Social Security Appeals Council," 1 CFR 305.87–7 (1992); Conference Recommendation 89–8, "Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions," 1 CFR 305.89–8 (1992); Conference Recommendation 92–2, "Agency Policy Statements," 57 FR 30101, 30103 (1992), to be codified at 1 CFR 305.92–2.

[1] Funds may be used for a broad variety of programs and services related to juvenile justice and the treatment and prevention of juvenile delinquency. State participation in the formula grant program is strictly voluntary, with state funding levels determined on the basis of relative population under age 18.

[2] The three substantive mandates are as follows:

1. Juveniles who are accused or convicted of status offenses (conduct not considered criminal if committed by an adult, such as running away or truancy) and nonoffenders (such as abused, dependent, or neglected children) must not be placed in secure detention or secure correctional facilities.

2. Juveniles who are accused or adjudicated of delinquency or status offenses must not have regular contact with incarcerated adults where both juveniles and adults are confined in the same institution.

3. No juvenile may be detained or confined in any adult jail or lockup.

[3] State juvenile justice specialists serve as the states' primary staff liaison with OJJDP.

[4] The Coalition consists of the members of the state advisory groups that are appointed by the governors of all states participating in the formula grant program. The JJDP Act provides for the Coalition to play an advisory role to Congress and the Administrator of OJJDP on program operations and related matters.

interpretations, including changes and clarifications, are clearly explained in documents announcing them.

(e) The Office should develop adequate internal procedures to ensure that consistent advice regarding the requirements applicable to the formula grant program is afforded to affected states by the OJJDP state representatives.

2. OJJDP Staffing

(a) The Office should have a general attorney assigned primarily to advising OJJDP state representatives,[5] the SRAD Director, and OJJDP's Administrator concerning general legal issues arising in OJJDP's grant administration.

(b) The Office should take steps to ensure that the evaluation of monitoring data and other information relevant to determining compliance and waiver of grant termination is even-handed and takes into full account Office policies and interpretations. In so doing, the Office should consider reestablishing the position of "monitoring coordinator."

(c) The Office should refrain from so frequently shifting the state assignments of the OJJDP state representatives that the value of familiarity with state programs is lost.

3. Background and Training of OJJDP and State Formula Grant Personnel

(a) The Office should accord due weight to prior general training or experience in the area of juvenile justice and grants management in hiring applicants for the position of state representative.

(b) The Office should train both new and experienced state representatives to ensure that they:

(i) Are fully informed with regard to their roles and responsibilities;

(ii) Have adequate knowledge regarding the Office's procedures and practices for the conduct of their work;

(iii) Have a firm working knowledge of the relevant state and Federal statutes, regulations, and guidelines applicable to the formula grant program; and

(iv) Are kept apprised of recent developments in relevant Office policy and in the area of juvenile justice generally that may affect their work as state representatives.

(c) The Office should ensure that adequate training is provided to states' juvenile justice specialists for their role in the implementation of the formula grant program. This should include regularly scheduled training programs for new and experienced state juvenile justice specialists. The programs should (i) be timed so that necessary training is provided soon after new specialists take their positions, and (ii) make sure that training materials are updated expeditiously to reflect new developments in Office policy and interpretation, juvenile justice generally, and state compliance efforts.

4. Information Dissemination to States

(a) As part of its research and program development functions, the Office should collect information that may be helpful to the states in complying with the statutory mandates; the Office should disseminate this information to state juvenile justice specialists in a timely fashion and accessible format.

(b) The Office should create procedures to ensure that states will be (i) fully consulted in a timely manner regarding applications for special emphasis grants awarded to projects in their respective jurisdictions and (ii) regularly informed about the progress, results, and lessons of those projects.

(c) The Office should advise all states in a timely fashion concerning promising approaches to achieving and maintaining compliance with the substantive mandates of the JJDP Act.

(d) The Office should ensure that state-submitted monitoring data and other information by which it determines compliance and waiver are widely available both to the states and the public generally.

(e) A study should be undertaken to determine whether restructuring of, or improving communications between, the four divisions that have responsibilities for establishing juvenile delinquency and prevention programs, evaluating effective strategies, fostering promising approaches, and disseminating information would help the Office achieve its goals.

5. Enforcement and Administration

To enhance administration of the program, Congress should repeal the existing provision of the JJDP Act that authorizes waiver of the requirement that states submit annual monitoring reports to OJJDP. It should also retain the current requirement that the Office periodically audit state monitoring systems to ensure their reliability.

§ 305.92–9 De Minimis Settlements Under Superfund (Recommendation No. 92–9).

In the last decade, following the passage in 1980 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[1] commonly referred to as Superfund, the nation has begun focusing its attention on the cleanup of hazardous waste sites. The task is a daunting one. There currently are approximately 1200 sites on the National Priorities List (NPL), the list of most hazardous sites, and it is likely that many more will be added to this list in the coming decades. The average cleanup cost at each of these sites is about $25 million. The aggregate cost of remedying the hazardous waste problem has been placed at several hundred billion dollars.

Joint and several liability for these cleanup costs has been imposed on a very broad set of parties—practically any party that had any connection with hazardous substances placed at a site in need of a cleanup, as well as owners and operators of contaminated facilities. Potentially responsible parties, known as PRPs, at typical Superfund sites include not only large industrial firms, but an array of small entities. Under the governing contribution rule, responsibility does not depend on the size of the firm, but rather depends generally on the firm's hazardous waste contribution at the site. Some PRPs therefore bear a large share of the liability at a site because they generated a large proportion of the hazardous substances. Other PRPs, which generated a relatively small proportion, may be responsible for only a few thousand dollars in cleanup costs. The process for apportioning the cleanup costs at a site gives rise to substantial transaction costs, principally legal fees and technical consulting costs. Parties that are responsible for only a small share of the cleanup costs might have to disburse several times this amount in transaction costs.

Congress expressed concern about this situation in 1986 when it reauthorized the program and substantially amended the statute. The Superfund Amendments and Reauthorization Act of 1986 (SARA),[2] included provisions designed to make it easier for such "de minimis parties" to enter into early settlements with EPA, thereby limiting their transaction costs.

SARA set forth a far-reaching scheme for imposing liability for the cleanup of hazardous waste sites. The liability provisions are triggered by the release or threat of release of hazardous substances into the environment. For each site, the

[5] OJJDP state representatives serve in a liaison role between OJJDP and the states, communicating and interpreting federal policy, reviewing state plans and performance, and providing technical assistance to state agencies.

[1] Pub. L. No. 96–510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675).

[2] Pub. L. No. 99–499, 100 Stat. 1613 (1986). This law generally reflects the pro-negotiation approach urged by the Conference in Recommendation 84–4, "Negotiated Cleanup of Hazardous Waste Sites under CERCLA" (1984).

statute establishes four categories of liable parties: The generators of the hazardous substances present at the site, the transporters of these substances to the site, the current owner of the site, and prior owners during whose period of ownership there was disposal of hazardous substances at the site.[3] These parties are liable for the costs of cleanup of the site, as well as for damage to natural resources under the control of the Federal or state governments, or Indian tribes.[4]

The language of the statute has the effect of imposing a strict liability rather than a negligence standard. Moreover, current law holds parties jointly and severally liable if the harm at the site is indivisible. Under the statute, PRPs held jointly and severally liable can seek contribution from other PRPs. The existence of joint and several liability is significant in the Superfund context because, given the significant periods of time—often several decades—between the disposal of hazardous substances and the cleanup, it is particularly likely that some liable parties will not be found, or will be insolvent. The remaining PRPs will then have to bear a disproportionate share of the costs.

The statute provides a limited set of defenses. Generally, a party can escape liability only if it can show by a preponderance of the evidence that the release or threat of release was caused solely by an act of God, an act of war, an act or omission of a third party, or a combination of these causes. Only the third-party defense has been of practical significance. In addition to showing causation by a third party, a PRP seeking to escape liability must show that (i) it took due care with respect to the hazardous substances, (ii) it took precautions against foreseeable acts or omissions of the third party, and (iii) such acts or omissions did not occur in connection with a contractual relationship with the PRP. So, for example, a generator cannot escape liability simply by showing that the problem was caused by the transporter with which it contracted for the disposal of the wastes.

To understand the context for de minimis settlements, it is important to review both the process of cleanup of hazardous waste sites and the allocation of responsibility for this cleanup among EPA and the PRPs. One of the most compelling reasons for offering early settlements to parties who bear only a small share of the liability is the very long time (averaging 12 years) that elapses between the discovery of a site and its ultimate cleanup. Settling with de minimis parties relatively early in this process can save them substantial legal and consulting costs.

The allocation of responsibility between EPA and the major PRPs at a particular site is also of critical importance. Many of the issues raised by a de minimis settlement concern its effect on subsequent settlements pursuant to which the major parties agree to undertake the cleanup of the site.

The early stages in the Superfund process involve the screening of sites to determine which pose the most serious health problems, and should therefore become the focus of EPA's attention. The later stages involve the cleanup of these sites. Obviously, the call for de minimis settlements during the early stages of the process is more compelling because the process is a slow one.

Congress translated these concerns into statutory provisions encouraging settlements in general[5] and de minimis settlements in particular.[6] With regard to de minimis settlements, the statute provides that "whenever practicable and in the public interest," the Administrator "shall as promptly as possible reach a final settlement with a potentially responsible party * * * if such settlement involves only a minor portion of the response costs at the facility." In addition, to qualify for de minimis status, generators and transporters must show that the amount and the effect of their hazardous waste contribution are both minimal in comparison to other hazardous substances at the facility.

Landowners constitute a unique class of PRPs. They may invoke an "innocent landowner" third-party defense to escape liability if they can establish that they (i) "did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility," (ii) "did not contribute to the release or threat of release of a hazardous substance at the facility through any act or omission," and (iii) purchased the property without "actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substances." If they elect, instead of pursuing this defense, to limit their liability by a settlement, they may do so. Since such settlements are entered into under the statutory provisions applicable to do minimis settlements, these landowners are customarily referred to as "de minimis landowner" PRPs.

This recommendation identifies several procedural steps that can be taken by the Environmental Protection Agency to improve the functioning of the de minimis settlement program.

As a general principle, EPA should establish procedures and incentives to negotiate de minimis settlements as a standard practice at all multi-party Superfund sites involving de minimis parties. The Conference's study indicates that the vast majority of de minimis settlements have been entered relatively late in the process, and that the majority of the regional offices have shown little interest in undertaking earlier settlements. They frequently have favored resolving the liability of de minimis parties as part of global settlements pursuant to which the major parties undertake cleanups by requiring de minimis parties to negotiate directly with the major parties to determine their contribution to the cleanup cost. Paragraph 1 expresses the Conference's belief that transaction costs can be reduced significantly by settling with de minimis parties rather than seeking de minimis settlements as part of a global settlement.

The predominant approach to de minimis settlements taken by EPA regional offices has been to wait for groups of de minimis parties to form and take the first step in proposing settlements. However, the formation of such groups requires the expenditure of transaction costs by private parties and can take considerable time, and such group might not represent the smaller de minimis parties that have the greatest interest in settlement. Paragraph 2 recommends that EPA's regional offices take a more active role in seeking such settlements. The Conference also recognizes, however, that reasonable limitations on the negotiation process may be appropriate to avoid unduly protracted negotiations.

The study found significant differences in the approaches of the regional offices, and even across sites in the same region, due to the lack of concrete guidance on several important issues. Perhaps the most significant example is the variation in the volumetric determinant used to determine de minimis status. This lack of uniformity increases the incentives for parties to protest the terms of individual settlements, and increases the probability that such settlements

[3] 42 U.S.C. 9607(a). Under a limited set of circumstances a prior owner can be liable even if there was no disposal during its period of ownership. Liability will attach if the prior owner had actual knowledge of the release or threatened release when it owned the property, and transferred it without disclosing such knowledge. 42 U.S.C. 9607(35)(C).

[4] 42 U.S.C. 9607(a), (f)(1).

[5] 42 U.S.C. § 9622.

[6] 42 U.S.C. § 9622(g).

could be successfully challenged in court. Paragraph 3(a) addresses this concern.

Paragraph 3(b) recognizes that, while current policy guidelines on de minimis landowner settlements contemplate some payment, they do not specify either how to compute this payment or its relationship to estimated costs of cleanup. Such guidelines are necessary because the current "innocent landowner" guidance does not provide any assistance to the regional offices in determining an appropriate settlement figure for such landowners.

Currently, settlement documents are dispersed throughout the regions, making it difficult to determine both the extent to which de minimis settlements are used and the content of the settlements reached. Assurance that similarly situated parties are treated similarly requires knowledge of what actual practice has been, and any efforts to standardize the practice would benefit from knowledge of the variants already employed. Paragraph 3(c) urges creation of a central repository of such documents to address this need.

The explanation given most frequently by the regional offices as to the impracticality of early de minimis settlements is the lack of sufficiently reliable information on cleanup costs. EPA's recent guidance document has attempted to deal with this question on a regional level. Paragraph 4(a) suggests that this task is better accomplished on the national level. In general, there is no reason for a regional office to confine itself to its own sites in determining the costs of similar cleanups, as the inventory of comparable sites that have progressed sufficiently in the cleanup process may be small or nonexistent. Furthermore, there is no central repository for de minimis settlement documents, which might contain relevant data, and no EPA database contains their full terms. While this information can generally be obtained from the individual regional offices, this process is cumbersome and time-consuming.

An element over which there is substantial conflict among EPA and the de minimis and major parties is the premium to be charged in exchange for a waiver of any cost overrun and the risk that future events may trigger the possibility of further action by EPA against a party that has already settled ("reopeners"). The study found wide variation, ranging from approximately 50% to 250%, not readily explained merely by the different stages at which the settlements were entered. Moreover, there does not appear to be a standardized method for calculating premiums. Paragraph 4(b), like paragraph 3(a), intended to reduce the potential for conflict by standardizing the approach.

In general, earlier settlements will be based on less accurate estimates of ultimate cleanup costs than settlement reached at later stages of the process. Paragraph 4(c) suggests that settlements, at the time they are reached, should represent a fair allocation of expected burdens.

The study found some evidence of confusion as to whether EPA can set up an account to finance a cleanup in cases in which it will not perform the cleanup itself and negotiations with the major parties are not sufficiently advanced. In these cases, the funds are generally placed in the Superfund and are not made available to finance a later cleanup by the major parties. These parties, understandably, object to this outcome, and the resulting friction is one of the reasons why several of the regional offices favor global settlements. Paragraph 5 suggests that EPA headquarters seek mechanisms to provide that an appropriate portion of the proceeds from de minimis settlements benefit the parties that take responsibility for the cleanup. Appropriate benefits might include amounts paid for future cleanup costs and premium payments.

Recommendation

1. EPA should make further efforts to establish procedures and incentives to negotiate de minimis settlements as a standard practice at all multi-party Superfund sites involving de minimis parties. EPA should not rely on global settlements as the preferred mechanism for resolving the liability of de minimis parties.

2. EPA's regional offices should actively seek de minimis settlements by informing potentially responsible parties (PRPs) of their potential eligibility and circulating a draft settlement agreement as soon as the required statutory findings can be made.[7] These steps should be taken as soon as is practicable, but in any event no later than the time EPA completes the "waste-in list," which identifies the type and quantity of waste contributed to a site by each PRP. In undertaking settlement negotiations with de minimis parties, EPA regional office should be permitted to impose reasonable limitations on the negotiation process.

3. EPA headquarters should:

(a) Make further efforts to standardize the general terms of de minimis settlements and should establish a procedure to determine site-specific terms,

(b) Provide guidelines for the determination of appropriate payments and terms in de minimis landowner settlements, and

(c) Create and maintain a central repository of de minimis settlement documents, readily accessible to the public.

4. To facilitate de minimis settlements, EPA headquarters should:

(a) Establish a database and methodology to assist and guide the regional offices in estimating site cleanup costs,

(b) Establish principles for determining premiums (additional fees charged to settling parties in exchange for immunity against reopening of their cases) applicable at different stages in the process, and

(c) Make clear that regional offices should seek settlements that, at the time of settlement, represent a fair allocation of expected burdens.

5. To enhance the acceptability of de minimis settlements, EPA headquarters should, to the extent permitted by law, establish mechanisms to ensure that the parties that take responsibility for the cleanup receive appropriate benefits from the proceeds of de minimis settlements.

3. The editorial note preceding Conference recommendations is revised to read as follows:

Note: For an explanation of the publication policy regarding these recommendations, see § 304.2(a) of this chapter. Copies of the texts of Recommendations not published in part 305 may be obtained from the Office of the Chairman, Administrative Conference of the United States, 2120 L Street, NW., suite 500, Washington, DC 20037; telephone: (202) 254-7020.

4. Part 305 is amended by removing the texts (but not the titles or **Federal Register** citations) of the following sections and, in some cases, inserting explanatory notes:

§ 305.79-4 Appropriate Restrictions on Participation by a Former Agency Official in Matters Involving the Agency (Recommendation No. 79-7).

Note: This recommendation has become moot as a result of the Ethics Reform Act of 1989, Pub. L. 101-194, 103 Stat. 1716.

§ 305.83-1 The Certification Requirement in the Contract Disputes Act (Recommendation No. 83-1).

Note: Congress corrected the problem identified by this recommendation in the Court of Federal Claims Technical and Procedural Improvement Act of 1992, Pub. L 102-572, Title IX.

[7] See 42 U.S.C. 9622(g).

§ 305.84–4 Negotiated Cleanup of Hazardous Waste Sites Under CERCLA (Recommendation No. 84–4).

Note: This recommendation was substantially implemented by EPA memorandum and by the Superfund Amendments and Reauthorization Act of 1986.

§ 305.84–6 Disclosure of Confidential Information Under Protective Order in International Trade Commission Proceedings (Recommendation No. 84–6).

§ 305.87–1 Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration (Recommendation No. 87–1).

Note: This recommendation contains advice to OSHA on internal management improvements to its rulemaking; Recommendation 87–10, which is preserved in the Code of Federal Regulations, addresses broader reforms of OSHA rulemaking.

§ 305.87–12 Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies (Recommendation No. 87–12).

Note: This recommendation was implemented by the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101–73, 101 Stat. 183, and by subsequent agency actions.

§ 305.88–4 Deferred Taxation for Conflict-of-Interest Divestitures (Recommendation No. 88–4).

Note: This recommendation was implemented by the Ethics Reform Act of 1989, Pub. L. 101–194, 103 Stat. 1716.

§ 305.88–8 Resolution of Claims Against Savings Receiverships (Recommendation No. 88–8).

Note: The issues addressed by this recommendation were resolved by the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101–73, 101 Stat. 183.

§ 305.89–6 Public Financial Disclosure by Executive Branch Officials (Recommendation No. 89–6).

Note: This recommendation has become moot as a result of the Ethics Reform Act of 1989, Pub. L. 101–194, 103 Stat. 1716.

PART 310—MISCELLANEOUS STATEMENTS

1. The authority citation for part 310 is revised to read as follows:

Authority: 5 U.S.C. 591–596.

2. Part 310 of title 1 CFR is amended by removing the text (but not the title or Federal Register citation) of the following section:

§ 310.14 Statement on Mass Decisionmaking Programs: The Alien Legalization Experience.

Dated: December 21, 1992.

Jeffrey S. Lubbers,

Research Director.

[FR Doc. 92–31365 Filed 12–28–92; 8:45 am]

BILLING CODE 6110–01–M

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AF26

Prevailing Rate Systems

AGENCY: Office of Personnel Management.

ACTION: Final rule with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is deleting Horry County, South Carolina, from the survey area for the Southeastern North Carolina appropriated fund wage area. This action is being taken because Myrtle Beach Air Force Base (AFB), which is located in Horry County, is scheduled to close on March 31, 1993. When Myrtle Beach AFB closes, there will no longer be any Federal Wage System (FWS) appropriated fund employees in the county and no further reason to survey the county. Deleting Horry County will make future surveys in the area easier to administer and less costly.

DATES: This final rule becomes effective on January 12, 1993. In view of its publication without an opportunity for prior comment, comments will still be considered. To be timely, comments must be received on or before January 28, 1993.

ADDRESS: Send or deliver written comments to Barbara L. Fiss, Assistant Director for Compensation Policy, Personnel Systems and Oversight Group, U.S. Office of Personnel Management, room 6H31, 1900 E Street NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Barbara Fudge, (202) 606–2848.

SUPPLEMENTARY INFORMATION: Horry County, South Carolina, was added to the survey area for the Southeastern North Carolina wage area in 1984 under a one-time application of stated criteria to certain counties identified by the Federal Prevailing Rate Advisory Committee. The county was added because there were in the county in 1984 at least 100 FWS employees subject to the regular schedule and at least 10 establishments within the scope of regular survey specifications. Myrtle Beach AFB, which is located in Horry County and is the only employer of FWS appropriated fund employees in the county, is scheduled for closure on March 31, 1993. The closure of Myrtle Beach AFB eliminates the rationale for having Horry County in the wage area survey. In addition, the Department of Defense (DOD) Wage Fixing Authority reports that a review of the last full-scale survey indicates that elimination of data from firms located in Horry County would have no significant impact on the survey sample yield. The deletion of Horry County has the consensus support of the DOD Wage Committee and the Federal Prevailing Rate Advisory Committee.

Under sections 553(b)(3)(B) and 553(d)(3) of title 5 of the United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking and for making this amendment effective in less than 30 days. The closure of Myrtle Beach AFB removes the rationale for retaining Horry County as part of the survey area, and its deletion would have no significant effect on the survey findings. The regulation is being made effective immediately because the next full-scale survey for the Southeastern North Carolina wage area is scheduled to begin on January 12, 1993.

If substantive comments are received, OPM will respond to those comments in a future document.

E.O. 12291, Federal Regulation

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

Regulatory Flexibility Act

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Government employees, Wages.

U.S. Office of Personnel Management.

Douglas A. Brook,

Acting Director.

Accordingly, OPM is amending 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

1. The authority citation for 5 CFR part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552, Freedom of Information Act, Public Law 92–502.

2. Appendix C to subpart B is amended by revising the wage area listing for the Southeastern North Carolina wage area to read as follows:

Appendix C to Subpart B of Part 532—Appropriated Fund Wage and Survey Areas

* * * * *

Southeastern North Carolina

Survey Area

North Carolina:

Brunswick	Lenoir
Carteret	New Hanover
Columbus	Onslow
Craven	Pamlico
Jones	Pender

Area of Application. Survey area plus:

North Carolina:

Beaufort	Hyde
Bertie	Martin
Dare	Pitt
Duplin	Tyrrell
Greene	Washington
Hertford	

South Carolina:

Horry

* * * * *

[FR Doc. 92-31420 Filed 12-28-92; 8:45 am]

BILLING CODE 6325-01-M

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5 CFR Part 532

RIN 3206-AF27

Prevailing Rate Systems

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing an interim regulation to abolish the Horry, South Carolina, Nonappropriated Fund (NAF) Wage Area. The Horry wage area is composed of Horry County, South Carolina (survey area), and New Hanover County, North Carolina (area of application). This regulation redefines Horry County, South Carolina, to the Charleston, South Carolina, wage area as an area of application and New Hanover County, North Carolina, to the Onslow, North Carolina, wage area as an area of application. Because of downsizing associated with a scheduled base closure, the Horry County, South Carolina, survey area will no longer have the required minimum of 26 NAF wage employees, and no local activity within the Horry wage area has the capability to conduct a wage survey.

DATES: This interim rule becomes effective on January 1, 1993. Comments must be received on or before January 28, 1993.

ADDRESSES: Send or deliver comments to Barbara L. Fiss, Assistant Director for Compensation Policy, Personnel Systems and Oversight Group, U.S. Office of Personnel Management, room 6H31, 1900 E Street NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Brenda Roberts (202) 606-2848.

SUPPLEMENTARY INFORMATION: Horry County, South Carolina, is presently defined as a separate wage area for NAF pay-setting purposes. The Department of Defense notified OPM that the host activity for the Horry wage area, Myrtle Beach Air Force Base (AFB), is scheduled to close on March 31, 1993. Downsizing is underway, and most NAF activities are scheduled to close by the end of December 1992. Myrtle Beach AFB will not have the capability to conduct the full-scale wage survey for the Horry, South Carolina, wage area that is required to begin in January 1993, in accordance with appendix B to subpart B of part 532, title 5, Code of Federal Regulations.

In addition, Horry County, South Carolina, will no longer meet the regulatory criteria for an established nonappropriated fund wage area under 5 CFR 532.219. Myrtle Beach AFB and Fort Fisher are the only installations with NAF employment in the Horry wage area. As of March 31, 1993, Myrtle Beach AFB will be closed. Fort Fisher, located in New Hanover County, North Carolina, does not employ the minimum of 26 employees required to establish an NAF wage area. Thus, Horry and New Hanover Counties must both be redefined as areas of application to existing wage areas for pay-setting purposes.

The following criteria are taken into consideration when two or more counties are to be combined to constitute a single wage area:

(1) Proximity of largest activity in each county;

(2) Transportation facilities and commuting patterns; and

(3) Similarities of the counties in:

(i) Overall population;

(ii) Private employment in major industry categories; and

(iii) Kinds and sizes of private industrial establishments.

Geographically, Myrtle Beach AFB in Horry County is closest in proximity (approximately 145 km (90 miles)) to Charleston Naval Air Station in Charleston County, the survey area for the Charleston, South Carolina, wage area. The next closest wage area activity is approximately 217 km (135 miles) distant in Onslow County, North Carolina. Transportation facilities also favor definition to Charleston. Commuting patterns indicate 38,113 workers live and work in Horry County and that 92 Horry residents commute to work in the Richland, South Carolina, wage area. Residents do not commute to any other FWS wage area. Horry is most similar to Onslow County in overall population. However, no one wage area is clearly most similar to Horry in private employment in major industry categories and the kinds and sizes of private industrial establishments.

Geographically, Fort Fisher in New Hanover County is closest in proximity (approximately 97 km (60 miles)) to Camp LeJeune in Onslow County, North Carolina, the survey area for the Onslow, North Carolina, wage area. The next closest wage area activity is approximately 145 km (90 miles) distant in Wayne County, North Carolina. Transportation facilities and commuting patterns also favor Onslow. Although the majority of workers live and work in New Hanover County (36,414), 196 New Hanover residents commute to work in the Onslow, North Carolina, wage area. Residents do not commute from New Hanover to any other FWS wage area. New Hanover is most similar to Onslow County in overall population. However, no one wage area is clearly most similar to New Hanover in private employment in major industry categories and the kinds and sizes of private industrial establishments.

Based on a review of the criteria for establishing and combining wage areas, we find that the Horry, South Carolina, wage area should be abolished on January 1, 1993. In addition, on March 31, 1993, Horry County, South Carolina, should be redefined as an area of application to the Charleston, South Carolina, wage area and New Hanover County, North Carolina, should be redefined as an area of application to the Onslow, North Carolina, wage area. Thus, employees paid from the Horry, South Carolina, wage schedule will remain on their current schedule until the Myrtle Beach AFB officially closes on March 31, 1993. The Federal Prevailing Rate Advisory Committee (FPRAC) reviewed this request and recommended approval by consensus.

In addition, these regulations include a technical amendment to correct an oversight in appendix B to subpart B of part 532 by deleting the listing for the former Imperial, California, wage area in conformance with the previous abolishment of that wage area in appendix D to subpart B.

Pursuant to sections 553(b)(3)(B) and (d)(3) of title 5, United States Code, I find that good cause exists for waiving the general notice of proposed

rulemaking to accommodate changes necessitated by DOD downsizing and expedite this wage area redefinition. By December 1992, Horry County, South Carolina, will not meet the current criteria for establishing nonappropriated fund wage areas. Myrtle Beach AFB will not have the capability to conduct the Horry County full-scale survey that is required to begin in January 1993, and no local activity within the Horry wage area has the capability to conduct a wage survey.

E.O. 12291, Federal Regulation

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

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Government employees, Wages.

U.S. Office of Personnel Management

Douglas A. Brook,

Acting Director.

Accordingly, OPM is amending 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552, Freedom of Information Act, Public Law 92–502.

2. In Appendix B to subpart B, the listing for the Horry, South Carolina, and Imperial, California, wage areas are removed.

3. Appendix D to subpart B is amended by removing the listing for the Horry, South Carolina, wage area and by revising the wage area listings for Onslow, North Carolina, and Charleston, South Carolina, to read as follows:

Appendix D to Subpart B of Part 532—Nonappropriated Fund Wage and Survey Areas

* * * * *

North Carolina
Onslow
Survey Area

North Carolina
Onslow

Area of Application. Survey area plus:
North Carolina:
New Hanover [1]

* * * * *

South Carolina
Charleston
Survey Area

South Carolina:
Charleston

Area of Application. Survey area plus:
South Carolina:
Berkeley
Horry [1]

* * * * *

[1] Effective date March 31, 1993.

[FR Doc. 92–31421 Filed 12–28–92; 8:45 am]

BILLING CODE 6325–01–M

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5 CFR Part 835

RIN 3206–AE72

Debt Collection

AGENCY: Office of Personnel Management.

ACTION: Final regulations.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to establish a new part 835 dealing entirely with debt collection. Collection procedures for both the Civil Service Retirement System (CSRS) and the Federal Employees Retirement System (FERS) will be combined in this part. This regulation establishes a subpart F covering procedures whereby delinquent debts owed to OPM will be referred to the Internal Revenue Service (IRS) for collection by offset against Federal income tax refunds under 31 U.S.C. 3720A. These regulations are necessary for OPM to participate in the Tax Refund Offset Program for the 1992 tax year. Separate regulations will be prepared to cover subparts A through E of part 835.

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: Patricia Rochester, (202) 606–0299.

SUPPLEMENTARY INFORMATION: On October 5, 1992, we published (at 57 FR 45753) proposed regulations describing the procedures OPM would use to refer past-due legally enforceable debts to the IRS for offset against the Federal income tax refunds of persons owing debts to OPM. Interested parties were given 30 days to comment on the proposed regulations. Aside from several questions concerning the applicability of the proposed regulations to other Federal agencies and employees, we did not receive any comments. We did not make any substantive changes to the proposed regulations.

Under section 553(d)(3) of title 5 of the United States Code, I find that good cause exists to make this amendment effective in less than 30 days. The regulation is being made effective immediately because the Internal Revenue Service requires final regulations to be in effect before it will allow participation in the Tax Refund Offset Program. OPM must have final regulations before the end of the year in order to meet its commitment to participate in the Program for the 1992 tax year.

E.O. 12291, Federal Regulation

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

Regulatory Flexibility Act

I certify that this rule will not have a significant economic impact on a substantial number of small entities because it will only affect private persons who owe debts to the Civil Service Retirement and Disability Fund.

List of Subjects in 5 CFR Part 835

Administrative practice and procedure, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Intergovernmental relations, Law enforcement officers, Pensions, Retirement, Survivors.

U.S. Office of Personnel Management.

Douglas A. Brook,

Acting Director.

Accordingly, OPM is adding a new 5 CFR part 835 to read as follows;

PART 835—DEBT COLLECTION

Subparts A–E—[Reserved]

Subpart F—Collection of Debts by Federal Tax Refund Offset

Sec.
835.601 Purpose.
835.602 Past-due legally enforceable debt.
835.603 Notification of intent to collect.
835.604 Reasonable attempt to notify.
835.605 OPM action as a result of consideration of evidence submitted in response to the notice of intent.
835.606 Change in notification to Internal Revenue Service.
835.607 Administrative charges.

Authority 5 U.S.C. 8347(a) and 8461(g). Subpart F also issued under 31 U.S.C. 3720A.

Subparts A–E—[Reserved]

Subpart F—Collection of Debts by Federal Tax Refund Offset

§ 835.601 Purpose.

This subpart establishes procedures for OPM to refer past-due legally enforceable debts to the Internal Revenue Service (IRS) for offset against the income tax refunds of persons owing debts to OPM. It specifies the agency procedures and the rights of the debtor applicable to claims referred under the Federal Tax Refund Offset Program for the collection of debts owed to OPM.

§ 835.602 Past-due legally enforceable debt.

A past-due legally enforceable debt for referral to the IRS is a debt that—

(a) Resulted from—

(1) Erroneous payments made under the Civil Service Retirement or the Federal Employees' Retirement Systems; or

(2) Unpaid health or life insurance premiums due under the Federal Employees' Health Benefits or Federal Employees' Group Life Insurance Programs; or

(3) Any other statute administered by OPM;

(b) Is an obligation of a debtor who is a natural person;

(c) Except in the case of a judgment debt, has been delinquent at least 3 months but not more than 10 years at the time the offset is made;

(d) Is at least $25.00;

(e) With respect to which the individual's rights described in 5 CFR 831.1301 through 831.1309 have been exhausted;

(f) With respect to which either:

(1) OPM's records do not contain evidence that the person owing the debt (or his or her spouse) has filed for bankruptcy under Title 11 of the United States Code; or

(2) OPM can clearly establish at the time of the referral that the automatic stay under 11 U.S.C. 362 has been lifted or is no longer in effect with respect to the person owing the debt or his or her spouse, and the debt was not discharged in the bankruptcy proceeding;

(g) Cannot currently be collected under the salary offset provisions of 5 U.S.C. 5514(a)(1);

(h) Is not eligible for administrative offset under 31 U.S.C. 3716(a) because of 31 U.S.C. 3716(c)(2), or cannot currently be collected as an administrative offset by OPM under 31 U.S.C. 3716(a) against amounts payable to the debtor by OPM; and

(1) Has been disclosed by OPM to a consumer reporting agency as authorized by 31 U.S.C. 3711(f), unless the consumer reporting agency would be prohibited from reporting information concerning the debt by reason of 15 U.S.C. 1681c, or unless the amount of the debt does not exceed $100.

§ 835.603 Notification of intent to collect.

(3) *Notification before submission to the IRS.* A request for reduction of an IRS income tax refund will be made only after OPM makes a determination that an amount is owed and past-due and gives or makes a reasonable attempt to give the debtor 60 days written notice of the intent to collect by IRS tax refund offset.

(b) *Contents of notice.* OPM's notice of intention to collect by IRS tax refund offset (Notice of Intent) will state:

(1) The amount of the debt;

(2) That unless the debt is repaid within 60 days from the date of OPM's Notice of Intent, OPM intends to collect the debt by requesting the IRS to reduce any amounts payable to the debtor as a Federal income tax refund by an amount equal to the amount of the debt and all accumulated interest and other charges;

(3) A mailing address for forwarding any written correspondence and a contract name and a telephone number for any questions; and

(4) That the debtor may present evidence to OPM that all or part of the debt is not past due or legally enforceable by—

(i) Sending a written request for a review of the evidence to the address provided in the notice;

(ii) Stating in the request the amount disputed and the reasons why the debtor believes that the debt is not past-due or is not legally enforceable;

(iii) Including in the request any documents that the debtor wishes to be considered or stating that the additional information will be submitted within the remainder of the 60-day period.

§ 835.604 Reasonable attempt to notify.

In order to constitute a reasonable attempt to notify the debtor, OPM must have used a mailing address for the debtor obtained from the IRS pursuant to 26 U.S.C. 6103(m)(2) within a period of 1 year preceding the attempt to notify the debtor, unless OPM received clear and concise notification from the debtor that notices from the agency are to be sent to an address different from the address obtained from IRS. Clear and concise notice means that the debtor has provided the agency with written notification, including the debtor's name and identifying number (as defined in 26 CFR 301.6109–1), and the debtor's intent to have the agency notices sent to the new address

§ 835.605 OPM action as a result of consideration of evidence submitted as a result of the notice of intent.

(a) *Consideration of evidence.* If, as a result of the Notice of Intent, OPM receives notice that the debtor will submit additional evidence or receives additional evidence from the debtor within the prescribed time period, any notice to the IRS will be stayed until OPM can—

(1) Consider the evidence presented by the debtor; and

(2) Determine whether or not all or a portion of the debt is still past due and legally enforceable; and

(3) Notify the debtor of its determination.

(b) *Notification to the debtor.* Following review of the evidence, OPM will issue a written decision notifying the debtor whether OPM has sustained, amended, or canceled its determination that the debt is past-due and legally enforceable. The notice will advise the debtor of any further action to be taken and explain the supporting rationale for the decision.

(c) *OPM action on the debt.* (1) OPM will notify the debtor of its intent to refer the debt to the IRS for offset against the debtor's Federal income tax refund, if it sustains its decision that the debt is past-due and legally enforceable. OPM will also notify the debtor whether the amount of the debt remains the same or is modified.

(2) OPM will not refer the debt to the IRS for offset against the debtor's Federal income tax refund, if it reverses its decision that the debt is past-due and legally enforceable.

§ 835.606 Change in notification to Internal Revenue Service.

(a) Except as noted in paragraph (b) of this section, after OPM sends IRS notification of an individual's liability for a debt, OPM will promptly notify IRS of any change in the notification, if OPM—

(1) Determines that an error has been made with respect to the information contained in the notification;

(2) Receives a payment or credits a payment to the account of the debtor named in the notification that reduces the amount of the debt referred to the IRS for offset; or

(3) Receives notification that the individual owing the debt has filed for bankruptcy under Title 11 of the United States Code or has been adjudicated bankrupt and the debt has been discharged.

(b) OPM will not notify the IRS to increase the amount of a debt owed by

a debtor named in OPM's original notification to the IRS.

(c) If the amount of a debt is reduced after referral by OPM and offset by the IRS, OPM will refund to the debtor any excess amount and will promptly notify the IRS of any refund made by OPM.

§ 835.607 Administrative charges.

All administrative charges incurred in connection with the referral of the debts to the IRS will be assessed on the debt and thus increase the amount of the offset.

[FR Doc. 92-31599 Filed 12-28-92; 8:45 am]
BILLING CODE 6325-01-M

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 948

[Docket No. FV-92-044FR]

Irish Potatoes Grown in Colorado; Reapportionment of Committee Membership

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule suspends, for an indefinite period, a provision of the marketing order requiring the Colorado Potato Committee (Committee) to be composed of two members and alternate members from each of three area committees. The production area is divided into three regulatory areas and provision is made for the area committees to act as administrative agencies for each of the areas. Area 1 has not been regulated for years, and is not expected to begin commercial interstate potato marketing in the foreseeable future. Because of this, the Committee has had to operate with only four members and alternate members. To allow the Committee to operate at its maximum membership level of six members and alternate members, this final rule also reapportions Committee membership by adding one member and alternate member each to the active Area 2 and 3 committees and not providing representation for the inactive Area 1 committee. In addition, the references to Area 1 are also suspended in the marketing order and regulations, as appropriate. This action will improve the efficiency of the Committee and allow it to remain functional if some members are absent.

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: Dennis L. West, Northwest Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, Green-Wyatt Federal Building, room 369, 1220 SW Third Avenue, Portland, OR 97204, telephone 503-326-2725, or Robert F. Matthews, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523-S, Washington, DC 20090-6456, telephone 202-690-0464.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement No. 97 and Order No. 948 [7 CFR part 948], both as amended, regulating the handling of Irish potatoes grown in Colorado. The marketing agreement and order are authorized by the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601-674], hereinafter referred to as the Act.

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

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. This action is not intended to have retroactive effect. This final rule will policies, unless they present an irreconcilable conflict with this final rule.

The Act provides that administrative proceedings must be exhausted before parties my file suit in court. Under section 8c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After a hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill a equity is filed not later than 20 days after the date of the entry of the ruling.

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), the administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 120 handlers of Colorado potatoes subject to regulation under the marketing order, and approximately 400 producers in the production area. Small agricultural service firms are defined as those whose annual receipts are less than $3,500,000, and small agricultural producers have been defined by the Small Business Administration [15 CFR 121.601] as those having annual receipts of less than $500,000. The majority of potato handlers and producers regulated under the marketing agreement and order may be classified as small entities.

The production area under Marketing Order No. 948 is divided into three separate regulatory areas. Area 1, also called the Western Slope, consists of the northwestern portion of the State of Colorado. Area 2, known as the San Luis Valley, is located in the southwestern part of the State. Area 3, referred to as the Northern Colorado or the Greeley area, covers most of the eastern part of the State. Section 948.50 establishes area committees as administrative agencies for each of the three areas.

The Committee is established, pursuant to § 948.51, consisting of six members, with alternates. Section 948.51 further specifies that two members and alternates for the Committee shall be selected by the Secretary from each area committee. The Committee coordinates activities and affairs of mutual interest among the area committees.

For years, the primary cash crops of Area 1 have been relatively high-value tree fruit crops. As fruit production has increased, potato production has decreased. The small volume of potatoes still produced there is being consumed locally. As a result of such changes in potato production, rising costs of equipment, and crop inputs, the potato industry in Area 1 has diminished significantly.

Consequently, handling regulations have not been implemented and an area committee has not been selected for years. Because of this, the Committee has had no representatives from Area 1 and has had to operate with only four members (two members and alternates each from the Area 2 and 3 committees). The Committee believes that it could function more effectively and obtain a broader cross-section of industry views with six members and alternates, as

provided under § 948.51. Industry representatives believe it unlikely that Area 1 will again increase potato production to significant levels. Thus, it is unlikely that Area 1 will be able to provide the membership necessary to allow the Committee to operate with six members.

In light of this situation, the Committee met November 8, 1991, and unanimously passed a motion requesting the Area 2 and 3 committees to recommend reapportionment of the Committee. It requested that the two member and alternate member positions currently allocated to the Area 1 committee be allocated to the Area 2 and 3 committees so that each committee will have three members and alternates, rather than two members and alternates. On November 21, 1991, the Area 2 committee recommended this reapportionment action, and on December 5, 1991, the Area 3 committee recommended the same action.

In order to so reapportion Committee membership, the second sentence of § 948.51 will be suspended. That sentence specifies that, "Two members and alternates shall be selected from each area committee." With that sentence suspended, § 948.51 specifies that, "The Colorado Potato Committee is hereby established consisting of six members, with alternates. Committeemen shall be selected by the Secretary from nominations of area committee members or alternates." This language permits the Committee to be composed of an equal number of members from each active area committee currently regulating shipments. This makes use of all six authorized member positions. The Committee believes that an additional member and alternate member from each active area provide increased input, interest, and guidance in operating the marketing order. In the unlikely event that Area 1 again becomes a commercially important producer of potatoes, the Committee could again be reapportioned to reflect such changes in production. Such action would be considered by the Secretary at the request of the industry.

In addition, paragraph (a) of §§ 948.4 and 948.50 of the order were to be suspended by the proposed rule. Paragraph (a) of the definition of the term "area" describes Area 1. Paragraph (a) of § 948.50 establishes the composition of Area 1 (Western Slope) with the selection of four producers and handlers. However, this action does not suspend paragraph (a) of § 948.4 as proposed. The definition of Area 1 remains unsuspended for clarity. Paragraph (c) of § 948.4 defines Area 3 in terms of counties not included in Area No. 1 or Area No. 2. A new § 948.151 is added to the regulations concerning Committee membership. In addition to the new section added to the regulations as proposed, this action would also suspend references to Area No. 1 in §§ 948.103 and 948.104 of the regulations concerning the fiscal period and terms of office, respectively.

A proposed rule was published in the **Federal Register** on August 25, 1992 (57 FR 38446). This document contained a proposal to reapportion the Colorado Potato Committee and suspend related provisions. This rule provided that interested persons could file comments through September 9, 1992. No comments were filed.

Based on available information, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities, and that the reapportionment of the Committee benefits Colorado potato producers and handlers.

After consideration of all relevant matter presented, including the information and recommendations submitted by the two area committees, and other available information, it is hereby found that with regard to the suspension of the provisions of the order and the regulations as set forth herein, these provisions no longer tend to effectuate the declared policy of the Act, and that the amendment to the regulations, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because: (1) The reapportioned Committee should be in place as soon as possible to be of maximum benefit to the active growing areas; (2) this action is fully supported by those areas; (3) prompt implementation of this action will allow nominations for the additional positions to be held and a Committee with six, rather than four, members to be selected; and (4) no useful purpose would be served by delaying the effective date of this action.

List of Subjects in 7 CFR Part 948

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 948 is hereby amended as follows:

PART 948—IRISH POTATOES GROWN IN COLORADO

1. The authority citation for 7 CFR part 948 continues to read as follows:

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

§ 948.50 [Amended]

2. In § 948.50, paragraph (a) is suspended for an indefinite period.

§ 948.51 [Amended]

3. In § 948.51, the second sentence is suspended for an indefinite period. With that sentence suspended, § 948.51 reads as follows:

§ 948.51 Colorado Potato Committee.

The Colorado Potato Committee is hereby established consisting of six members, with alternates. Committeemen shall be selected by the Secretary from nominations of area committee members or alternates.

§ 948.103 [Amended]

4. In § 948.103(a), the words, "Area No. 1 and" are suspended for an indefinite period.

§ 948.104 [Amended]

5. In § 948.104(a)(1), the words, "Area No. 1 and" are suspended for an indefinite period.

6. A new § 948.151 is added to Subpart—Rules and Regulations (7 CFR 948.100–948.150) to read as follows:

§ 948.151 Colorado Potato Committee membership.

The Colorado Potato Committee shall be comprised of six members and alternates selected by the Secretary. Three members and three alternates shall be selected from nominations of Area 2 committee members or alternates, and three members and three alternates shall be selected from nominations of Area 3 committee members or alternates.

Dated: December 21, 1992.

John E. Frydenlund,

Deputy Assistant Secretary, Marketing and Inspectión Services.

[FR Doc. 92–31431 Filed 12–28–92; 8:45 am]

BILLING CODE 3410-02-M

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7 CFR Part 959

[Docket No. FV-92-096IFR]

South Texas Onions; Increased Expenses and Establishment of Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule amends a previous interim final rule which authorized administrative expenses for the South Texas Onion Committee (Committee) under M.O. No. 959. This interim final rule increases the level of authorized expenses and establishes an assessment rate to generate funds to pay those expenses. Authorization of this increased budget enables the Committee to incur expenses that are reasonable and necessary to administer the program. Funds to administer this program are derived from assessments on handlers.

DATES: Effective August 1, 1992, through July 31, 1993. Comments received by January 28, 1993, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this action. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523–S, Washington, DC 20090–6456. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Belinda G. Garza, McAllen Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, 1313 East Hackberry, McAllen, TX 78501, telephone (512) 682–2833, or Martha Sue Clark, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523–S, Washington, DC 20090–6456, telephone (202) 720–9918.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement No. 143 and Order No. 959, both as amended (7 CFR Part 959), regulating the handling of onions grown in South Texas. The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the Act.

The Department of Agriculture is committed to carrying out its statutory and regulatory mandates in a manner that best serves the public interest. Therefore, where legal discretion permits, the Department actively seeks to promulgate regulations that promote economic growth, create jobs, are minimally burdensome, and are easy for the public to understand, use, or comply with. In short, the Department is committed to issuing regulations that maximize net benefits to society and minimize costs imposed by those regulations. This principle is articulated in President's Bush's January 28, 1992, memorandum to agency heads, and in Executive Orders 12291 and 12498. The Department applies this principle to the fullest extent possible, consistent with law.

The Department has developed and reviewed this regulatory action in accordance with these principles. Nonetheless, the Department believes that public input from all interested persons can be invaluable in ensuring that the final regulatory product is minimally burdensome and maximally efficient. Therefore, the Department specifically seeks comments and suggestions from the public regarding any less burdensome or more efficient alternative that would accomplish the purposes described in this action. Comments suggesting less burdensome or more efficient alternatives should be addressed to the agency as provided in this rule.

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

This interim final rule has been reviewed under Executive Order 12778, Civil Justice Reform. Under the marketing order provisions now in effect, South Texas onions are subject to assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable onions handled during the 1992–93 fiscal period, which began August 1, 1992, through July 31, 1993. This interim final rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after date of the entry of the ruling.

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 47 producers of South Texas onions under this marketing order, and approximately 34 handlers. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. The majority of South Texas onion producers and handlers may be classified as small entities.

The budget of expenses for the 1992–93 fiscal period was prepared by the South Texas Onion Committee, the agency responsible for local administration of the marketing order, and submitted to the Department of Agriculture for approval. The members of the Committee are producers and handlers of South Texas onions. They are familiar with the Committee's needs and with the costs of goods and services in their local area and are thus in a position to formulate an appropriate budget. The budget was formulated and discussed in a public meeting. Thus, all directly affected persons have had an opportunity to participate and provide input.

The assessment rate recommended by the Committee was derived by dividing anticipated expenses by expected shipments of South Texas onions. Because that rate will be applied to actual shipments, it must be established at a rate that will provide sufficient income to pay the Committee's expenses.

Committee administrative expenses of $100,000 for personnel, office, and travel expenses were recommended in a mail vote completed July 3, 1992. The assessment rate and funding for the research and promotion projects were to be recommended at a later Committee meeting. The Committee administrative expenses of $100,000 were published in

the **Federal Register** as an interim final rule September 25, 1992 (57 FR 44312). That interim final rule added § 959.233, authorizing expenses for the Committee, and provided that interested persons could file comments through October 26, 1992. No comments were filed.

The Committee subsequently met on October 20, 1992, and unanimously recommended slight changes in some of the administrative expense categories and recommended funding for numerous research and promotion projects for a total 1992–93 budget of $339,188. The new budget is $2,417.67 less than the budget for the previous year. Increases include: $13,919 in market development, $2,000 in the fumigation trials research, $2,000 for a new computer and computer program, and $2,400 for monitoring of thrips research. These budget increases will be offset by decreases of $1,000 for furniture and fixtures, $3,600 in the leaf wetness research program, and the elimination of the Texas 1015 DNA research for which $12,000 was budgeted last season.

The Committee also unanimously recommended an assessment rate of $0.07 per 50-pound container or equivalent of onions, the same as last season. This rate, when applied to anticipated shipments of approximately 5 million 50-pound containers or equivalents, will yield $350,000 in assessment income, which will be adequate to cover budgeted expenses. Funds in the reserve as of September 30, 1992, $302,998, were within the maximum permitted by the order of two fiscal periods' expenses.

While this action will impose some additional costs on handlers, the costs are in the form of uniform assessments on handlers. Some of the additional costs may be passed on to producers. However, these costs will be offset by the benefits derived from the operation of the marketing order. Therefore, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

After consideration of all relevant matter presented, including the information and recommendations submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) The Committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis; (2) the fiscal period began on August 1, 1992, and the marketing order requires that the rate of assessment for the fiscal period apply to all assessable onions handled during the fiscal period; (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting and is similar to that taken for the 1991–92 fiscal period; and (4) this interim final rule provides a 30-day comment period, and all comments timely received will be considered prior to finalization of this action.

List of Subjects in 7 CFR Part 959

Marketing agreements, Onions, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 959 is amended as follows:

PART 959—ONIONS GROWN IN SOUTH TEXAS

1. The authority citation for 7 CFR part 959 continues to read as follows:

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

2. Section 959.233 is revised to read as follows:

Note: This section will not appear in the Code of Federal Regulations.

§ 959.233 Expenses and assessment rate.

Expenses of $339,188 by the South Texas Onion Committee are authorized and an assessment rate of $0.07 per 50-pound container or equivalent of onions is established for the fiscal period ending July 31, 1993. Unexpended funds may be carried over as a reserve.

Dated: December 21, 1992.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 92–31347 Filed 12–28–92; 8:45 am]

BILLING CODE 3410–02–M

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7 CFR Part 967

[FV–92–082FR]

Handling Regulation for Celery Grown in Florida

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule with request for comments.

SUMMARY: The U.S. Department of Agriculture is adopting without modification, as a final rule, the provisions of an interim final rule which established the quantity of Florida celery which handlers may ship to fresh markets during the 1992–93 marketing season at 6,612,910 crates or 100 percent of producers' base quantities. The 1992–93 marketing season covers the period August 1, 1992, through July 31, 1993. This final rule is intended to lend stability to the industry, and, thus, help provide consumers with an adequate supply of the product. As in past marketing seasons, the limitation on the quantity of Florida celery handled for fresh shipment is not expected to restrict the quantity of Florida celery actually produced or shipped to fresh markets, because production and shipments are anticipated to be less than the marketable quantity. This action was unanimously recommended by the Florida Celery Committee (Committee), the agency responsible for local administration of the order.

EFFECTIVE DATE: January 28, 1993.

FOR FURTHER INFORMATION CONTACT: Richard Lower, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, room 2523–S, P.O. Box 96456, Washington, DC 20090–6456; telephone: (202) 720–2020.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement and Order No. 967 (7 CFR part 967), both as amended, regulating the handling of celery grown in Florida. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the Act.

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

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. This action establishes the quantity of Florida celery (at 6,612,910 crates or 100 percent of producers' base quantities) which handlers may ship to fresh markets during the 1992–93 marketing season which covers the period August 1, 1992 through July 31, 1993. This final rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any

handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are an estimated seven handlers of celery grown in Florida subject to regulation under the celery marketing order, and approximately seven producers of celery in the production area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. The majority of celery handlers and producers may be classified as small entities.

This action is based upon a recommendation and information submitted by the Committee and upon other available information. The Committee met on June 10, 1992, and unanimously recommended a marketable quantity of 6,612,910 crates of fresh celery for the 1992–93 marketing season beginning August 1, 1992. Additionally, a uniform percentage of 100 percent was recommended which will allow each producer, registered pursuant to § 967.37(f) of the order, to market 100 percent of such producer's base quantity. These recommendations were based on an appraisal of expected 1992–93 supply and demand.

As required by § 967.37(d)(1) of the order, a reserve of 6 percent (396,775 crates) of the 1991–92 total base quantities was made available to new producers and for increases for existing producers. As of May 1, 1992, the deadline for requesting changes in base quantities, no applications for new base quantities or adjustments in base quantities from current producers were received by the Florida Celery Committee.

This final rule will continue to limit the quantity of Florida celery which handlers may purchase from producers and ship to fresh markets during the 1992–93 marketing season to 6,612,910 crates. This marketable quantity is slightly reduced from the 1991–92 marketable quantity, but is more than the average number of crates marketed fresh during the 1987–88 through 1991–92 seasons. It is expected that such quantity will be more than actual shipments for the 1992–93 season. Thus, the 6,612,910 crate marketable quantity is not expected to restrict the amount of Florida celery which growers produce or the amount of celery which handlers ship. For these reasons, the final rule should lend stability to the industry, and, thus, help provide consumers with an adequate supply of the product.

The interim final rule was published in the **Federal Register** with an effective date of September 16, 1992 (57 FR 42689, September 16, 1992). That rule provided a 30-day comment period which ended October 16, 1992. No comments were received.

On the basis of the foregoing, the Administrator of the AMS has determined that issuance of this final rule will not have a significant economic impact on a substantial number of small entities.

After consideration of the information and recommendations submitted by the Committee and other available information, it is found that this final rule will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 967

Celery, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 967 is revised as follows:

PART 967—CELERY GROWN IN FLORIDA

1. The authority citation for 7 CFR part 967 continues to read as follows:

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

Subpart—Administrative Rules and Regulations

2. Accordingly, the interim final rule adding § 967.327, published in the **Federal Register** (57 FR 42689, September 16, 1992), is adopted as a final rule without change.

Note: This section will not be published in the annual Code of Federal Regulations.

Dated: December 21, 1992.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 92–31345 Filed 12–28–92; 8:45 am]

BILLING CODE 3410–02–M

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7 CFR Part 987

[Docket No. FV92–987–1IFR]

Temporary Relaxation of Size Requirements for California Deglet Noor Dates

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule temporarily relaxes the size requirements prescribed for Deglet Noor dates for use domestically and in Canada as whole and pitted dates. This action increases the current tolerance, from 10 percent to 15 percent, through October 31, 1993, for individual Deglet Noor dates weighing less than 6.5 grams (the prescribed minimum). The relaxation is necessary because Deglet Noor dates from the 1992–93 crop are significantly smaller in size and weight than normal. The decrease in size and weight is due to extremely high temperatures experienced in the production area during late August and early September. The relaxation was unanimously recommended by the California Date Administrative Committee (committee) to make a larger quantity of the 1992–93 crop available for use as whole or pitted dates domestically and in Canada.

DATES: This interim final rule is effective December 29, 1992 and continues until October 31, 1993. Comments received by January 28, 1993, will be considered prior to issuance of a final rule.

ADDRESSES: Written comments concerning this rule should be submitted in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456. Comments should reference the docket

number and date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Kellee Hopper, Marketing Specialist, California Marketing Field Office, Fruit and Vegetable Division, Agricultural Marketing Service, USDA, 2202 Monterey Street, suite 102 B, Fresno, CA 93721; telephone (209) 487–5901 or Richard Lower, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, room 2523–S, P.O. Box 96456, Washington, DC 20090–6456; telephone (202) 720–2020.

SUPPLEMENTARY INFORMATION: This interim final rule is issued under Marketing Agreement and Order No. 987 (7 CFR part 987), both as amended, regulating the handling of domestic dates produced or packed in Riverside County, California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the "Act."

The Department of Agriculture is committed to carrying out its statutory and regulatory mandates in a manner that best serves the public interest. Therefore, where legal discretion permits, the Department actively seeks to promulgate regulations that promote economic growth, create jobs, are minimally burdensome, and are easy for the public to understand, use or comply with. In short, the Department is committed to issuing regulations that maximize net benefits to society and minimize costs imposed by those regulations. This principle is articulated in President Bush's January 28, 1992, memorandum to agency heads, and in Executive Orders 12291 and 12498. The Department applies this principle to the fullest extent possible, consistent with law.

The Department has developed and reviewed this regulatory action in accordance with these principles. Nonetheless, the Department believes that public input from all interested persons can be invaluable in ensuring that the final regulatory product is minimally burdensome and maximally efficient. Therefore, the Department specifically seeks comments and suggestions from the public regarding any less burdensome or more efficient alternative that would accomplish the purposes described in the action. Comments suggesting less burdensome or more efficient alternatives should be addressed to the agency as provided in this action.

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

This interim final rule has been reviewed under Executive Order 12778, Civil Justice Reform. This action is not intended to have retroactive effect. This interim final rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempt therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are 25 handlers of California dates subject to regulation under the order each season and approximately 135 date producers in the regulated area. The majority of the date handlers and producers may be classified as small entities.

This interim final rule modifies paragraphs (b)(2) and (c)(2) of § 987.112a to relax the current size requirements for Deglet Noor dates to be used as whole or pitted dates domestically or in Canada. The modification is issued pursuant to § 987.39 of the order.

Section 987.112a prescribes grade, size, and container requirements for each outlet category of dates. Paragraph (b)(2) of that section prescribes such requirements for "DAC" dates, including an individual size requirement for Deglet Noor dates of 6.5 grams with a tolerance of 10 percent per lot for dates weighing less than 6.5 grams. DAC dates are marketable whole or pitted dates that are inspected and certified as meeting the grade, size, container, and applicable identification requirements for handling in the United States and Canada. Paragraph (c)(2) of § 987.112a provides the same requirements for "dates for further processing" (FP dates). FP dates are marketable whole dates acquired by one handler from another handler that are certified as meeting the same grade and size requirements for DAC dates, with the exception of moisture requirements and applicable identification requirements.

Due to exceedingly high temperatures during late August and early September which stressed the date palms, individual fruit of the current crop is significantly smaller in size and weight than normal. Early deliveries of Deglet Noor dates are failing to meet the marketing order requirements of 10 percent tolerance for individual dates in a lot weighing less than 6.5 grams. The size and weight of the dates are not expected to improve as the harvest progresses.

Therefore, at its October 22, 1992, meeting, the committee unanimously recommended that the size requirements for DAC and FP dates be relaxed through October 31, 1993, by increasing the tolerance from 10 to 15 percent for dates weighing less than 6.5 grams. This action is intended to permit a greater quantity of Deglet Noor dates which are of good quality but weigh less than 6.5 grams to meet the requirements for DAC and FP dates. The additional five percent tolerance for undersize dates will allow handlers to use approximately three smaller dates per pound. Thus, more of the crop can be utilized as whole or pitted dates domestically and in Canada. The committee estimates marketable 1992–93 Deglet Noor production at approximately 35.3 million pounds. Making more Deglet Noor dates of satisfactory quality available for use as whole and pitted dates domestically and in Canada will provide for maximum utilization of the 1992–93 crop, thereby

benefiting producers, handlers and consumers.

Based on the available information, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

After consideration of all relevant matter presented, the information and unanimous recommendation submitted by the committee, and other available information, it is found that this action will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it found and determined that upon good cause it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) Compliance with this action will require no special preparation by handlers; (2) it is important that the relaxed size requirements apply to as much of the 1992–93 crop as possible; (3) this action relieves restrictions on handlers and; (4) the rule provides a 30-day comment period, and any comments received will be considered prior to finalization of this interim final rule.

List of Subjects in 7 CFR Part 987

Dates, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 987 is amended as follows:

PART 987—DOMESTIC DATES PRODUCED OR PACKED IN RIVERSIDE COUNTY, CALIFORNIA

1. The authority citation for 7 CFR part 987 continues to read as follows:

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

2. Section 987.112a is amended by revising the second sentence of paragraph (b)(2) and revising the second sentence of paragraph (c)(2) to read as follows:

Note: This section will appear in the annual *Code of Federal Regulations.*

§ 987.112a Grade, size and container requirements for each outlet category.

* * * * *

(b) * * *

(2) * * * Also, with respect to whole dates of the Deglet Noor variety, the individual dates in the sample from the lot shall weigh at least 6.5 grams, but up to 10 percent, by weight, may weigh less than 6.5 grams, except beginning December 29, 1992, and ending October 31, 1993, the 10 percent tolerance shall be increased to 15 percent. * * *

* * * * *

(c) * * *

(2) * * * Also, with respect to whole dates of the Deglet Noor variety, the individual dates in the sample from the lot shall weigh at least 6.5 grams, but up to 10 percent, by weight, may weigh less than 6.5 grams, except beginning December 29, 1992, and ending October 31, 1993, the 10 percent tolerance shall be increased to 15 percent. * * *

* * * * *

Dated: December 21, 1992.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 92–31346 Filed 12–28–92; 8:45 am]

BILLING CODE 3410–02–M

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7 CFR Parts 1006, 1012, and 1013

[DA–92–38]

Milk in the Upper Florida, Tampa Bay, and Southeastern Florida Marketing Areas; Order Suspending Certain Provisions

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Suspension of rule.

SUMMARY: This action suspends a portion of the producer milk definition of the Upper Florida, Tampa Bay, and Southeastern Florida, milk orders. The action suspends the requirement that 10 days' production of a producer be received each month at a pool plant in order to qualify milk produced on other days for diversion to nonpool plants. The suspension was requested by the Florida Dairy Farmers' Association, Tampa Independent Dairy Farmers' Association, Dairymen, Inc., and Southern Milk Sales that want to reduce some inefficient milk movements in order to pool milk normally associated with these markets.

EFFECTIVE DATE: December 1, 1992.

FOR FURTHER INFORMATION CONTACT: Clayton H. Plumb, Chief, Order Formulation Branch, Dairy Division, USDA/AMS/Dairy Division, Order Formulation Branch, room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456, (202) 720–6274.

SUPPLEMENTARY INFORMATION: Prior Document in this proceeding:

Notice of Proposed Suspension: Issued November 16, 1992; published November 23, 1992 (57 FR 54947).

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

This suspension has been reviewed under Executive Order 12778, Civil Justice Reform. This action is not intended to have a retroactive effect. This action will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with the rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provisions of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of an order or to be exempted from the order. A handler is afforded the opportunity for a hearing on the petition. After a hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512–1 and has been determined to be a "non-major" rule under the criteria contained therein.

This order of suspension is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and of the order regulating the handling of milk in the Upper Florida, Tampa Bay and Southeastern Florida marketing areas.

Notice of proposed rulemaking was published in the **Federal Register** on November 23, 1992, (57 FR 54947) concerning a proposed suspension of certain provisions of the orders. Interested persons were afforded opportunity to file written data, views, and arguments thereon. No comments were received.

After consideration of all relevant material, including the proposal in the notice, and other available information,

it is hereby found and determined that beginning December 1, 1992, for an indefinite period, the following provisions of the orders do not tend to effectuate the declared policy of the Act:

In § 1006.13, paragraph (b)(2).
In § 1012.13, paragraph (b)(2).
In § 1013.13, paragraph (b)(2).

Statement of Consideration

This action suspends portions of the producer milk definition of the Upper Florida, Tampa Bay, and Southeastern Florida milk orders. This action suspends the requirement that 10 days' production of a producer be received each month at a pool plan in order to qualify milk produced on other days for diversion to nonpool plants.

The suspension was requested by Florida Dairy Farmers' Association, Tampa Independent Dairy Farmers' Association, Dairymen Inc., and Southern Milk Sales. The proponents have formed and work through a common marketing agency in order to achieve maximum efficiencies in balancing the needs of the fluid milk plants and in disposing of reserve or excess milk supplies. When milk of producers located in other states who supply the Florida market is not needed, it is often diverted to plants located in other states that are regulated by other Federal milk orders.

Milk that is diverted to other order manufacturing plants, but fails to qualify for diversion under the 10-day requirement, becomes producer milk under the other order and lowers blend prices to producers under the other order. The suspension will enable cooperatives to realize efficiencies in diverting the most distant milk from fluid milk plants. The suspension will not threaten the integrity of marketwide pooling because all three orders limit the overall percentage of a handler's milk supply that can be diverted each month. The suspension is needed to be effective for the holiday season because of the need to move excess milk supplies off these markets.

No comments were received in response to the proposed suspension. Accordingly, it is appropriate to suspend the aforesaid provisions.

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

(a) The suspension is necessary to reflect current marketing conditions and to assure orderly marketing conditions in the marketing areas in that this action should enable cooperatives to realize efficiencies in diverting the most distant milk from fluid milk plants;

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

(c) Notice of proposed rulemaking was given interested parties and they were afforded opportunity to file written data, views or arguments concerning this suspension. No comments were received.

Therefore, good cause exists for making this order effective December 1, 1992.

List of Subjects in 7 CFR Parts 1006, 1012, and 1013

Milk marketing orders.

The authority citation for 7 CFR parts 1006, 1012, and 1013 continue to read as follows:

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

It is therefore ordered, That the following provisions of the orders (7 CFR parts 1006, 1012, and 1013) are hereby suspended for an indefinite period.

PART 1006—MILK IN THE UPPER FLORIDA MARKETING AREA

§ 1006.13 [Suspended in Part]

1. In § 1006.13, paragraph (b)(2) is suspended.

PART 1012—MILK IN THE TAMPA BAY MARKETING AREA

§ 1012.13 [Suspended in Part]

1. In § 1012.13, paragraph (b)(2) is suspended.

PART 1013—MILK IN THE SOUTHEASTERN FLORIDA MARKETING AREA

§ 1013.13 [Suspended in Part]

1. In § 1013.13, paragraph (b)(2) is suspended.

Dated: December 21, 1992.

John E. Frydenlund,

Deputy Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 92–31432 Filed 12–28–92; 8:45 am]

BILLING CODE 3410–02–M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 19

RIN 3150–AE11

Exclusion of Attorneys From Interviews Under Subpoena

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations to provide for the exclusion of counsel from a subpoenaed interview when that counsel represents multiple interests in the investigation and there is concrete evidence that the counsel's presence at the interview would obstruct and impede the investigation. These amendments are designed to ensure the integrity and efficacy of the investigative and inspection process. These amendments provide a standard and procedures for making and effectuating the decision to exclude counsel.

EFFECTIVE DATE: March 1, 1993.

FOR FURTHER INFORMATION CONTACT: Roger K. Davis, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: (301) 492–1606.

SUPPLEMENTARY INFORMATION:

Contents

I. Background
II. Response to Public Comments on the Proposed Rule

I. Background

On December 19, 1991 (56 FR 65949), the Nuclear Regulatory Commission (NRC) published proposed amendments to its regulations found at 10 CFR part 19. The proposed amendments provided for the exclusion of counsel from subpoenaed interviews in connection with an NRC investigation when that counsel represents multiple interests in the investigation and there is concrete evidence that such representation would obstruct and impede the investigation. The proposed amendments also provided procedures to be followed by the NRC and individual witnesses in connection with the NRC's exercise of its authority to exclude counsel.

The Commission had published a final rule on the same subject on January 4, 1990 (55 FR 243). That rule provided, *inter alia*, for the exclusion of counsel for a subpoenaed witness when that counsel represented multiple interests and there existed a reasonable basis to believe that such representation would prejudice, impede, or impair the integrity of the inquiry. Upon legal challenge, the United States Court of Appeals for the District of Columbia Circuit struck down the portion of the final rule on attorney exclusion. *Professional Reactor Operator Society* v. *Nuclear Regulatory Commission*, 939 F.2d 1047, 1052 (D.C. Cir. 1991) (hereafter "*PROS*").

Specifically, the Court of Appeals ruled that the NRC must apply the same standard for attorney exclusion that the Court had previously required of the

Securities & Exchange Commission by virtue of the Court's interpretation of the right-to-counsel guarantee of the Administrative Procedure Act (APA), 5 U.S.C. 555(b). The Court stated that to exclude counsel "the agency must come forward with 'concrete evidence' that the counsel's presence would impede its investigation." *PROS*, 939 F.2d at 1049 (*citing SEC* v. *Csapo*, 533 F.2d 7, 11 (D.C. Cir. 1976)). Thus, the Court vacated the attorney exclusion portion of the rule, since its "rational basis" standard was less rigorous than the "concrete evidence" requirement. On December 19, 1991 (56 FR 65948), the Commission responded to the appeals court decision by publishing notice in the **Federal Register** of the Commission's revocation of its rule on attorney exclusion, *i.e.*, the definition of "exclusion" appearing in 10 CFR 19.3 and the standard and procedures for attorney exclusion appearing in 10 CFR 19.18(b)–(e). On December 19, 1991 (56 FR 65949), the Commission also published the proposed amendments in the **Federal Register** that would conform the NRC's attorney exclusion requirements to the Court's ruling.

II. Responses to Public Comments on the Proposed Rule

The Commission received nine comments on the proposed December 19, 1991 rule. The commenters included one individual, the Nuclear Utility Management and Resources Council (NUMARC), three utilities endorsing NUMARC's comments, the Professional Reactor Operators Society (PROS), a law firm commenting on behalf of PROS as well as seven utilities and a major engineering firm, a law firm commenting on behalf of six utilities, and a law firm that represents utilities and individuals holding NRC licenses. All commenters opposed adoption of the proposed rule. The comments are available for inspection and copying in the agency's Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC.

The Commission has considered the comments received, but is not persuaded that the proposed amendments should be withdrawn or modified in substantial ways as some commenters requested. However, the Commission has clarified its description of the standard for exclusion by stating the threshold requirement as "concrete evidence that the presence of an attorney representing multiple interests would obstruct and impede the investigation or inspection * * *" A similar change was made in the definition of "[e]xclusion." The Commission has deleted the phrase "directly or indirectly" from the standard for exclusion of counsel. The Commission has also revised the rule to provide that the interview shall not be rescheduled to a date that precedes the expiration of the time provided under 10 CFR 19.18(d) for appeal of exclusion of counsel, unless the witness consents to an earlier date. In addition, the final rule requires that the written notice of the grounds for counsel's exclusion also describe the right to appeal the exclusion to the Commission and thereby obtain an automatic stay of the effectiveness of the subpoena pending the Commission's decision.

Because these changes are logical outgrowths of the proposed amendments and no other modifications are made, the Commission concludes that the final rule should become effective without further notice and comment. The Commission's responses to the concerns of the commenters are set forth below.

A. Need for the Rule

One commenter argued that the expected rarity of application of the rule demonstrated the absence of a need for the rule. The Commission does expect that the rule will be invoked only in rare and compelling cases. However, the Commission continues to believe that the rule should further expeditious and satisfactory resolution of some investigations and that this is important to the Commission's fulfillment of its statutory mission. By providing to witnesses, counsel, and agency staff both a general standard for determining whether disqualification is appropriate and procedures for implementing and challenging these determinations, the final rule should reduce delay, uncertainty and confusion associated with consideration of the exclusion of counsel.

Although several commenters emphasized the circumstances in which courts have found insufficient grounds for exclusion of counsel by the Securities and Exchange Commission (SEC), the same courts have explicitly recognized the propriety and utility of this type of rule. In *Csapo*, the United States Court of Appeals for the District of Columbia Circuit stated (533 F.2d at 11) with regard to the SEC's sequestration rule that—

> We do not question its utility in preserving the integrity of an investigation and recognize its practical necessity in certain circumstances.

533 F.2d at 11. In *SEC* v. *Higashi*, the Ninth Circuit said that "[t]he reason for and purpose of the [SEC's] sequestration rule are clear and there can be no question as to its necessity and general propriety" (359 F.2d 550, 552 (9th Cir. 1966)). For reasons akin to those motivating the SEC rule, the NRC proposed and now finalizes its attorney exclusion rule.

The NRC's investigation of unsafe practices and potential violations of the Atomic Energy Act and NRC regulations is an important means of ensuring public health and safety in operation of nuclear power plants and other uses of nuclear material (*see* 10 CFR part 19; 10 CFR 1.36). NRC investigators often interview licensees, their officials and employees, and other individuals having possible knowledge of matters under investigation. In many cases, investigating officials conduct extensive and difficult inquiries to determine whether violations were willful and/or whether licensee's management engaged in wrongdoing. Yet, effective identification and correction of unsafe practices or regulatory violations through an investigative or inspection process can depend upon the willingness of individuals having knowledge of the practices or violations to disclose that information to interviewing officials.

Therefore, as specified in 10 CFR 19.2, the rule would apply to all interviews under subpoena within the jurisdiction of the Nuclear Regulatory Commission other than those which focus on NRC employees or its contractors. While the purposes of the rule relate primarily to interviews conducted under subpoena by the NRC's Office of Investigations, the NRC's predominant user of investigative subpoenas, the final rule would also apply to NRC inspections and investigations conducted under subpoena by other NRC officials. The rule does not apply, however, to subpoenas issued pursuant to 10 CFR 2.720, which applies to subpoenas requested in hearings.

Several commenters argued that there is no need for the rule because of the availability of other means for ensuring proper conduct by counsel (*e.g.*, investigation and prosecution under Federal criminal statutes or investigation and disciplinary action or disqualification under standards of professional conduct for lawyers). In some cases, the causes of impairment of the investigation may justify consideration of criminal or other proceedings. However, the Commission's objectives, standard for action, burden of proof, and remedy, *i.e.*, exclusion of counsel from particular interviews, may differ widely from those associated with criminal statutes or rules of conduct. Therefore, the

possibility of collateral or future actions addressing misconduct in some cases pursuant to other authority is an insufficient basis to ignore the potential need for a direct determination of whether the counsel representing multiple interests should be excluded from an interview.

As noted in the supplementary information included in the notice of the proposed rule (56 FR 65949, 65950; December 19, 1991), questions regarding impairment of investigation as a result of multiple representation have arisen in some cases in the past. Several of the commenters argued that the cited cases did not involve any grounds for disqualification of counsel and that any concern about multiple representation in those cases was improper. The Commission believes that the final rule will facilitate resolution of this type of question when it arises in the future. As the Commission has stated (56 FR 65949, 65950; December 19, 1991), the justification for this rule is not premised on whether any *prior* case actually involved "concrete evidence" that the investigation would be impeded.

NUMARC and another commenter indicated that adoption of the proposed rule would be inconsistent with the Commission's efforts to eliminate unnecessary regulatory burdens (*see, e.g.*, 57 FR 4166; February 4, 1992 and 57 FR 39353; August 31, 1992). The Commission disagrees with the suggestion that the rule fails to strike a fair and reasonable balance between the right to counsel and the need for information in investigations. In this case, the Commission is expressly adopting the judicial resolution of that issue. That resolution does not involve a highly prescriptive standard. Rather, it involves a demanding general standard that is expected to have very limited application in a fraction of NRC interviews under subpoena.

NUMARC stated that the rule was unnecessary because NRC rules currently in effect (10 CFR part 2) provide a mechanism for imposing sanctions for attorney misconduct in various contexts. The existing provisions directly relating to standards of practice (10 CFR 2.713) concern appearance and practice in adjudicatory proceedings. By this final rule, however, the Commission intends to provide specific direction for expeditious resolution of decisions to exclude counsel because of obstruction or impediment of investigative interviews resulting from multiple representation. Therefore, the final rule serves purposes that are not met by the general 10 CFR part 2—Rules of practice for domestic licensing proceedings and issuance of orders.

B. Attorney Misconduct

Most commenters indicated that the proposed standard for exclusion of counsel was deficient because it did not require a showing of misconduct or wrongdoing by the attorney representing multiple parties. These commenters generally concede that unethical or illegal conduct by counsel, such as encouraging or condoning perjury or engaging in a pattern of overt disruption of the interview, would supply grounds for exclusion. Concrete evidence that such conduct is obstructing and impeding an investigation could lead to exclusion under the rule. However, the Commission does not find as a matter of logic or law that there is no possibility of a finding of concrete evidence of impairment on grounds other than misconduct or wrongdoing by counsel.

For instance, the Commission does not find it necessary to rule out application of the rule to a case presenting concrete evidence of nondisclosure of information by a witness as a result of the presence of counsel representing multiple interests even though the counsel has not engaged in misconduct. Moreover, whether or not an investigation will be impeded could be irrelevant in a pure misconduct case.

The Commission also does not interpret the legal precedent as permitting disqualification only for misconduct, wrongdoing, or active obstruction by counsel. Indeed, in stating the standard to which the Commission must adhere, the court in *Pros* did not mandate "concrete evidence" of wrongdoing but rather "'concrete evidence' that counsel's presence would impede [the agency's] investigation." *Pros*, 939 F.2d 1049 (*citing SEC* v. *Csapo*, 533 F.2d at 11).

The commenters insisting on the necessity of misconduct or wrongdoing as the essential substantive element for disqualification point to *Csapo*, in which the Court of Appeals agreed with the lower court's finding that the SEC had failed to produce any "concrete evidence" of misconduct (533 F.2d at 8). While that opinion clearly affirmed an evidentiary threshold of "concrete evidence" in relation to the alleged misconduct, the Court of Appeals also found that the record failed to disclose "*any reason* for barring counsel selected" by the witness (*id.*) (emphasis added). And, the Court's specific direction was that "before the SEC may exclude an attorney from its proceedings, it must come forth * * * with 'concrete evidence' that [counsel's] presence would obstruct and impede its investigation." *Id.* at 11. Therefore, the Commission does not interpret *Csapo* as limiting the grounds for exclusion of counsel to "misconduct."

c. Application of the Rule

Most commenters expressed or endorsed the view that the supplementary information in the notice of the proposed rule (56 FR 65949–65950; December 19, 1991) shows that the intended application of the rule is inconsistent with judicial direction. They suggest that the Commission's identification of concerns motivating the rule and of some of the potentially relevant evidence displaces the "concrete evidence" standard.

While "concrete evidence" was not defined expressly in the cases referenced above, the discussion and application of that standard indicates the courts require more than speculation or even reasonable concern about potential impairment. Rather, exclusion of counsel requires real or tangible evidence demonstrating that the investigation would be impeded as a result of the multiple representation. Thus, the Commission recognizes that neither multiple representation nor speculation about a potential for obstruction of an investigation by, for example, the mere sharing of information provided by an interviewee to a subsequent interviewee, is a sufficient basis to exclude counsel.

The Commission cannot predict in any significant detail what set of circumstances will arise in particular investigations that will lead to application of the exclusion rule. In the proposed rule, however, the Commission did endeavor to identify some of the factual circumstances which would tend to support invocation of the rule. For instance, it seems clear that the Commission's interests in the integrity and effectiveness of its investigation may outweigh a witnesses' choice of counsel for multiple interests where there is reliable, factual evidence that a witness is withholding, or will withhold, information critical to the investigation because the information will be shared with the witnesses' employer or supervisor by virtue of multiple representation.

Thus, the Commission continues to believe that evidence that the employee had a concern that his employment would be jeopardized by transmittal of information from the interview to the licensee would be relevant. The Commission believes that evidence that the multiple representation would lead to disclosure of the substance of an interview to a future interviewee or

subject in the investigation would also be relevant although not sufficient unless there was also concrete evidence that the disclosure would obstruct and impede the investigation. However, the Commission expects that it will be a rare case in which there is actual proof that the multiple representation will seriously obstruct and impede the investigation, *e.g.*, critical information is being or will be withheld.

Some commenters misunderstood the Commission's statement that concerns arise about inhibition of the candor of witnesses where the interviewee is represented by counsel who is paid by the licensee and also represents the licensee or licensee's officials under investigation, particularly where the matter at issue is whether the licensee's employees have been, or are being, harassed or intimidated for raising safety issues (56 FR 65949; December 19, 1991). These commenters viewed these statements as examples of cases in which the Commission would deem exclusion to be appropriate. The Commission recognizes that these circumstances do not necessarily lead to non-disclosure of critical information or other serious impairment of the investigation. Exclusion of counsel under the rule is warranted only when there is also concrete evidence, not just mere concern or speculation, that the investigation will be obstructed and impeded as a result of the presence of the counsel representing multiple interests.

Several commenters expressed concern that the Commission would find obstruction and impediment to the investigation where minor inconvenience results from such traditional activities of counsel as endeavoring to learn more about the investigation or to advise clients to testify truthfully but cautiously. The Commission recognizes that these types of activities do not establish real obstruction and impediment to the investigation. Indeed, these traditional activities of counsel are common to legal representation of any witness.

Some commenters fault the proposed rule's statement that disqualification may be based on concrete evidence that multiple representation will "directly or indirectly" impede the investigation. Several commenters state that the Commission's use of these modifiers unjustifiably lessens and obscures the "concrete evidence" standard.

The Commission recognizes that the Court in *Pros* and *Csapo* did not use the modifiers "directly or indirectly" in referring to the requirement of concrete evidence of impediment to the investigation. However, the Commission notes that the same modifiers were present in the final rule published on January 4, 1990 (55 FR 243), and that the court of appeals did not comment on their presence in that rule.

The key requirement is "concrete evidence" of obstruction and impediment. Whether the causation is described as direct or indirect, the question in a particular case will be whether there is concrete evidence that the presence of counsel representing multiple interests would obstruct and impede the investigation. It is the effects of multiple representation, not multiple representation standing alone, that may in some cases impede the investigation. For instance, if there were concrete evidence that a present or future witness will not answer questions or provide evidence because his attorney's representation of multiple interests will necessarily result in the sharing of the witness' testimony or evidence with a represented target, invocation of the rule could be warranted whether the cause of the impairment is described as direct or indirect. Clearly, a mere chain of inferences and speculation would not constitute "concrete evidence." Nonetheless, the "concrete evidence" requirement does not preclude a showing of obstruction and impediment through indirect effects, but rather implicitly embraces the possibility of such a showing. Therefore, the Commission has decided to delete the phrase "directly or indirectly" from the rule as unnecessary.

For increased clarity, the Commission has also revised the standard for exclusion by stating the threshold requirement in § 19.18(b) as "concrete evidence that the presence of an attorney representing multiple interests would obstruct and impede the investigation or inspection. * * *" In the proposed § 19.18(b), the requirement was described as "concrete evidence that the investigation or inspection will be obstructed and impeded, directly or indirectly, by an attorney's representation of multiple interests." A similar change was made in the definition of "[e]xclusion" in § 19.3. The revised language tracks more precisely the judicial articulation of the threshold requirement. Thus the revisions further affirm and clarify the Commission's intent to follow the judicial guidance.

D. Adequacy of the Procedures

NUMARC and another commenter stated that "consultation" by the investigating official with the Office of the General Counsel before a decision to exclude counsel is ineffectual without the requirement of consent by the Office of General Counsel. Another commenter recommended that the investigator be required to obtain a written opinion from the Office of the General Counsel that the standard of "concrete evidence" has been met. The Commission disagrees because it has already added numerous safeguards which it considers to be sufficient, including the "consultation" requirement, to guide agency officials and prevent arbitrary action in the exclusion process. The rule requires that the interviewing official provide a written statement of reasons for the exclusion to the witness whose attorney has been excluded and to the excluded attorney. The interviewing official must consult with the Office of the General Counsel prior to invoking the exclusion rule. The witness whose counsel has been excluded may appeal the decision to the Commission and automatically obtain a stay of the effectiveness of that decision pending decision by the Commission.

Of course, the Commission may also quash or modify the subpoena if it finds that the exclusion of counsel decision is not based upon concrete evidence or if the subpoena is otherwise unreasonable, or requires evidence not relevant to any matter in issue. Moreover, the Commission (like the SEC) must still prevail in court in a subpoena enforcement proceeding if the person under subpoena declines to comply. A court in which the basis for the exclusion is litigated may also conduct an evidentiary hearing if the factual issues require it. *SEC* v. *Csapo*, 533 F.2d at 12.

NUMARC recommended that § 19.18(d) be revised to provide the witness and the witness' counsel an opportunity to appear before the Commission in the course of the Commission's evaluation of the appeal of an interviewing official's decision. The purpose would be to ensure that the adversely affected parties had a right to be heard. The Commission believes that the procedure in the final rule, providing a statement of reasons for exclusion and permitting the filing of a motion to quash, provides a reasonable mechanism for presentation of the views of affected parties. However, nothing in the rule prevents the witness moving to quash the subpoena from requesting an opportunity for an oral presentation in connection with the motion and stating the reasons supporting the need for oral presentation.

The comments of PROS included the suggestion that the rule, if issued, be amended to require that the witness be advised of the right to counsel at the time of an exclusion of counsel and prior to any subsequent interview.

NUMARC recommended that internal procedures to implement the rule should be amended to direct NRC investigators to advise witnesses of the right to counsel, including a right to consent to multiple representation, and of the provisions of § 19.18, including the right to appeal any exclusion of counsel.

As a practical matter, a witness who is already represented by counsel can be expected to consult with counsel about such issues as the right to counsel, consent to multiple representation and witnesses' rights under this final rule. Thus, while an investigator may reasonably inquire about issues of consent to multiple representation in connection with an investigative interview, it does not seem necessary to require that an investigator provide general direction or advice on rights and limitations regarding an attorney's representation of multiple interests to a witness already represented by counsel. Moreover, the Commission was asked to require that investigators advise witnesses of the right to consent to multiple representation, although even under standards of professional conduct for lawyers such consent is subject to various conditions and exceptions. *See, e.g., Wheat* v. *United States*, 486 U.S. 153 (1988) (district court may refuse waiver of conflicts of interest in cases where a potential for conflict exists); *FTC* v. *Exxon*, 636 F.2d 1336, 1342 (D.C. Cir. 1980) (district court's order to retain separate counsel because of potential conflict violated neither due process nor the APA). However, in order to ensure that the witness is aware of the Commission's procedures for appeal of the exclusion decision, the Commission has revised the text of the proposed § 19.18(c) to require that the written notice of the reasons for exclusion include a description of the rights provided in § 19.18(d), regarding the right to appeal the exclusion decision.

NUMARC recommended that proposed 10 CFR 19.18(e) be clarified to assure that a witness' interview is delayed automatically to at least the date of the receipt of the written statement of basis for exclusion. An automatic delay is clearly unnecessary, however, if the witness chooses to proceed without counsel or with new counsel at an earlier time. Moreover, the proposed provision already permits the witness to request a reasonable period of time to obtain new counsel, and the witness may even obtain an automatic stay of the subpoena during an appeal of the exclusion decision to the Commission.

Nonetheless, the Commission would not expect that an interviewing official would proceed with the interview of the witness until more than five days after the receipt by the witness and the counsel of the written statement of reasons for exclusion, unless the witness requests that the interview proceed without counsel or with new counsel at an earlier date. Therefore, the Commission has revised the text of the proposed 10 CFR 19.18(e) to provide that the interview shall not be rescheduled to a date that precedes the expiration of the time provided under 10 CFR 19.18(d) for appeal of the exclusion of counsel, unless the witness consents to an earlier date.

Aside from this minimum delay, however, what constitutes a reasonable period of time for the continuation of an interview after exclusion of counsel must be determined on a case-by-case basis, with the interviewing official taking into account the relevant circumstances, including the availability of substitute counsel, the complexity of the case and the grounds for exclusion, the date of actual notice to the witness and excluded counsel of the grounds for exclusion, and the Commission's need to complete the investigation promptly in order to protect public health and safety.

PROS recommended that the witness whose counsel has been excluded be presented "concrete evidence" that the new counsel has a previous record of accomplishment in, and knowledge of, the nuclear industry that is on the same level as the excluded counsel. The Commission disagrees that it should have the burden of initiating an investigation and making a finding on this question. The witness, not the Commission, would choose new counsel. Many counsel and law firms appear in connection with Commission proceedings and investigations. Moreover, the Commission has already provided that a witness may either proceed without counsel or request a delay for a reasonable period of time to permit retention of new counsel.

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget approval number 3150–0044.

Regulatory Analysis

The APA affords individuals compelled to submit to agency inquiry under subpoena the right to be accompanied by counsel or other representative of choice (5 U.S.C. 555(b)). This right to counsel guarantee is not absolute and may be circumscribed within permissible limits when justice requires. An exception has been recognized for cases in which there is concrete evidence that the presence of counsel representing multiple interests during an investigative interview would impede and obstruct the agency's investigation.

Questions concerning the scope of the right to counsel have arisen in the context of NRC investigative interviews of licensee employees when the employee is represented by counsel who also represents the licensee or other witnesses or parties in the investigation. This arrangement is not improper as a general matter. This final rule provides, however, that counsel representing multiple interests may be excluded from a subpoenaed interview if there is concrete evidence that counsel's presence would obstruct and impede the investigation. This final rule also delineates responsibilities of NRC officials and rights of interviewees in connection with the exercise of the authority to exclude counsel. Thus, the rule is intended to further expeditious and satisfactory resolution of NRC's inquiry into matters concerning public health and safety. Guidance in this area should reduce delay and uncertainty in the completion of an investigation when questions of multiple representation arise. The foregoing discussion constitutes the regulatory analysis for this final rule.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this final rule would not have a significant impact on a substantial number of small entities. The final rule concerns an attorney's appearance at a subpoenaed interview of a licensee's employee or other individual during an NRC investigation or inspection in circumstances where there is concrete evidence that the attorney's representation of multiple interests would obstruct and impede the investigation or inspection. It provides procedures for exercise of the authority to exclude that attorney from the interview in these limited

circumstances and for challenge of a decision to exclude the attorney.

Backfit Analysis

The NRC has determined that a backfit analysis is not required because these amendments do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects in 10 CFR Part 19

Criminal penalties, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Occupational safety and health, Radiation protection, Reporting and recordkeeping requirements, Sex discrimination.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR part 19.

PART 19—NOTICES, INSTRUCTIONS AND REPORTS TO WORKERS: INSPECTION AND INVESTIGATIONS

1. The authority citation for part 19 continues to read as follows:

Authority: Secs. 53, 63, 81, 103, 104, 161, 186, 68 Stat. 930, 933, 935, 936, 937, 948, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2201, 2236, 2282); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841). Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851).

2. In § 19.3, the definition of "Exclusion" is added in alphabetical order to read as follows:

§ 19.3 Definitions.

* * * * *

Exclusion means the removal of counsel representing multiple interests from an interview whenever the NRC official conducting the interview has concrete evidence that the presence of the counsel would obstruct and impede the particular investigation or inspection.

* * * * *

3. In § 19.18, paragraphs (b)–(e) are added to read as follows:

§ 19.18 Sequestration of witnesses and exclusion of counsel in interviews conducted under subpoena.

* * * * *

(b) Any witness compelled by subpoena to appear at an interview during an agency inquiry may be accompanied, represented, and advised by counsel of his or her choice. However, when the agency official conducting the inquiry determines, after consultation with the Office of the General Counsel, that the agency has concrete evidence that the presence of an attorney representing multiple interests would obstruct and impede the investigation or inspection, the agency official may prohibit that counsel from being present during the interview.

(c) The interviewing official is to provide a witness whose counsel has been excluded under paragraph (b) of this section and the witness's counsel a written statement of the reasons supporting the decision to exclude. This statement, which must be provided no later than five working days after exclusion, must explain the basis for the counsel's exclusion. This statement must also advise the witness of the witness' right to appeal the exclusion decision and obtain an automatic stay of the effectiveness of the subpoena by filing a motion to quash the subpoena with the Commission within five days of receipt of this written statement.

(d) Within five days after receipt of the written notification required in paragraph (c) of this section, a witness whose counsel has been excluded may appeal the exclusion decision by filing a motion to quash the subpoena with the Commission. The filing of the motion to quash will stay the effectiveness of the subpoena pending the Commission's decision on the motion.

(e) If a witness' counsel is excluded under paragraph (b) of this section, the interview may, at the witness' request, either proceed without counsel or be delayed for a reasonable period of time to permit the retention of new counsel. The interview may also be rescheduled to a subsequent date established by the NRC, although the interview shall not be rescheduled by the NRC to a date that precedes the expiration of the time provided under § 19.18(d) for appeal of the exclusion of counsel, unless the witness consents to an earlier date.

Dated at Rockville, Maryland, this 18th day of December, 1992.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 92–31247 Filed 12–28–92; 8:45 am]

BILLING CODE 7590–01–M

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10 CFR Parts 34, 35, 50, 73, and 110

RIN 3150–AD58

Material Approved for Incorporation by Reference; Maintenance and Availability

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is amending its regulations to make a needed clarification to previously published requirements governing the availability of material approved for incorporation by reference. The amendment clarifies that copies of material which have been incorporated by reference are maintained and available for review at the NRC Library.

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, Chief, Rules Review Section, Rules Review and Directives Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone (301) 492–7758.

SUPPLEMENTARY INFORMATION:

Background

The Nuclear Regulatory Commission is revising those portions of 10 CFR chapter I that reference the availability of materials that have been approved by the Director of the Office of Federal Register for incorporation by reference. Current references within 10 CFR chapter I indicate that copies of material which have been incorporated by reference are available for inspection at the Commission's Public Document Room. This amendment revises the text of 10 CFR chapter I to indicate the current location where this material is available for inspection. The material which has been approved for incorporation by reference is maintained and available for inspection in the NRC Library, which is located at 7920 Norfolk Avenue, Bethesda, Maryland 20814.

Because this is an amendment dealing with agency practice and procedures, the notice and comment provisions of the Administrative Procedure Act do not apply pursuant to 5 U.S.C. 553(b)(A). The amendment is effective upon publication in the **Federal Register**. Good cause exists to dispense with the usual 30-day delay in the effective date because the amendment is of a minor and administrative nature dealing with the location where referenced documents are available for inspection.

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(2). Therefore neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget, approval numbers 3150–0007, –0010, –0002, and –0036.

List of Subjects

10 CFR Part 34

Criminal penalty, Packaging and containers, Radiation protection, Radiography, Reporting and recordkeeping requirements, Scientific equipment, Security measures.

10 CFR Part 35

Byproduct material, Criminal penalty, Drugs, Health facilities, Health professions, Incorporation by reference, Medical devices, Nuclear materials, Occupational safety and health, Radiation protection, Reporting and recordkeeping requirements.

10 CFR Part 50

Antitrust, Classified information, Criminal penalty, Fire protection, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

10 CFR Part 73

Criminal penalty, Hazardous materials—transportation, Incorporation by reference, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Security measures.

10 CFR Part 110

Administrative practice and procedure, Classified information, Criminal penalty, Export, Import, Incorporation by reference, Intergovernmental relations, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Scientific equipment.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR parts 34, 35, 50, 73, and 110

PART 34—LICENSES FOR RADIOGRAPHY AND RADIATION SAFETY REQUIREMENTS FOR RADIOGRAPHIC OPERATIONS

1. The authority citation for part 34 continues to read in part as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841) ***.

§ 34.20 [Amended]

2. In § 34.20, paragraph (a), remove the words "Nuclear Regulatory Commission Public Document Room, 2120 L Street NW., Lower Level, Washington, DC 20555", and add in their place the words "NRC Library, 7920 Norfolk Avenue, Bethesda, Maryland 20814".

PART 35—MEDICAL USE OF BYPRODUCT MATERIAL

3. The authority citation for part 35 continues to read in part as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841) * * *.

§ 35.632 [Amended]

4. In § 35.632, paragraph (d), remove the words "or may be obtained from the U.S. Nuclear Regulatory Commission, Public Document Room, 2120 L Street, NW., Washington, DC 20555", and add in their place the words "at the NRC Library, 7920 Norfolk Avenue, Bethesda, Maryland 20814".

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

5. The authority citation for part 50 continues to read in part as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841) * * *.

§ 50.34 [Amended]

6. In § 50.34, paragraph (f)(3)(v)(A)(*2*), remove the words "Nuclear Regulatory Commission's Public Document Room, 2120 L Street, NW., Washington, DC", and add in their place the words "NRC Library, 7920 Norfolk Avenue, Bethesda, Maryland 20814".

7. In § 50.55a, paragraph (b) introductory text is revised to read as follows:

§ 50.55a Codes and standards.

* * * * *

(b) The ASME Boiler and Pressure Vessel Code, which is referenced in the following paragraphs, was approved for incorporation by reference by the Director of the Federal Register. A notice of any changes made to the material incorporated by reference will be published in the **Federal Register**. Copies of the ASME Boiler and Pressure Vessel Code may be purchased from the American Society of Mechanical Engineers, United Engineering Center, 345 East 47th St., New York, NY 10017. It is also available for inspection at the NRC Library, 7920 Norfolk Avenue, Bethesda, Maryland 20814.

* * * * *

Appendix H to Part 50 [Amended]

8. In the second paragraph of the introduction to appendix H to part 50, remove the words "at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC", and add in their place the words "at the NRC Library, 7920 Norfolk Avenue, Bethesda, Maryland 20814".

9. In appendix J to part 50, section III, remove footnote number one, redesignate footnote number two as number one, and revise paragraph A 3 (a) to read as follows:

Appendix J to Part 50—Primary Reactor Containment Leakage Testing for Water-Cooled Power Reactors

* * * * *

III. * * *

A. * * *

3. *Test Methods.* (a) All Type A tests shall be conducted in accordance with the provisions of the American National Standards N45.4–1972, "Leakage Rate Testing of Containment Structures for Nuclear Reactors," March 16, 1972. In addition to the Total time and Point-to-Point methods described in that standard, the Mass Point Method, when used with a test duration of at least 24 hours, is an acceptable method to use to calculate leakage rates. A typical description of the Mass Point method can be found in the American National Standard ANSI/ANS 56.8–1987, "Containment System Leakage Testing Requirements," January 20, 1987. Incorporation of ANSI N45.4–1972 by reference was approved by the Director of the Federal Register. Copies of this standard, as well as ANSI/ANS–56.8–1987, "Containment System Leakage Testing Requirements" (dated January 20, 1987) may be obtained from the American Nuclear Society, 555 North Kensington Avenue, La Grange Park, IL 60525. A copy of each of these standards is available for inspection at the NRC Library, 7920 Norfolk Avenue, Bethesda, Maryland 20814.

* * * * *

10. In appendix K to part 50, section I is amended by revising paragraphs A4, A5, C1b, D5, and D7c to read as follows:

Appendix K to Part 50—ECCS Evaluation Models

I. * * *

A. * * *

4. *Fission Product Decay.* The heat generation rates from radioactive decay of fission products shall be assumed to be equal

to 1.2 times the values for infinite operating time in the ANS Standard (Proposed American Nuclear Society Standards—"Decay Energy Release Rates Following Shutdown of Uranium-Fueled Thermal Reactors." Approved by Subcommittee ANS-5, ANS Standards Committee, October 1971). This standard has been approved for incorporation by reference by the Director of the Federal Register. A copy of the standard is available for inspection at the NRC Library, 7920 Norfolk Avenue, Bethesda, Maryland 20814. The fraction of the locally generated gamma energy that is deposited in the fuel (including the cladding) may be different from 1.0; the value used shall be justified by a suitable calculation.

5. *Metal—Water Reaction Rate.* The rate of energy release, hydrogen generation, and cladding oxidation from the metal/water reaction shall be calculated using the Baker-Just equation (Baker, L., Just, L.C., "Studies of Metal Water Reactions at High Temperatures, III. Experimental and Theoretical Studies of the Zirconium-Water Reaction," ANL-6548, page 7, May 1962). This publication has been approved for incorporation by reference by the Director of the Federal Register. A copy of the publication is available for inspection at the NRC Library, 7920 Norfolk Avenue, Bethesda, Maryland 20814. The reaction shall be assumed not to be steam limited. For rods whose cladding is calculated to rupture during the LOCA, the inside of the cladding shall be assumed to react after the rupture. The calculation of the reaction rate on the inside of the cladding shall also follow the Baker-Just equation, starting at the time when the cladding is calculated to rupture, and extending around the cladding inner circumference and axially no less that 1.5 inches each way from the location of the rupture, with the reaction assumed not to be steam limited.

* * * * *

C. * * *

1. * * *

b. *Discharge Model.* For all times after the discharging fluid has been calculated to be two-phase in composition, the discharge rate shall be calculated by use of the Moody model (F.J. Moody, "Maximum Flow Rate of a Single Component, Two-Phase Mixture," Journal of Heat Transfer, Trans American Society of Mechanical Engineers, 87, No. 1, February, 1965). This publication has been approved for incorporation by reference by the Director of the Federal Register. A copy of this publication is available for inspection at the NRC Library, 7920 Norfolk Avenue, Bethesda, Maryland 20814. The calculation shall be conducted with at least three values of a discharge coefficient applied to the postulated break area, these values spanning the range from 0.6 to 1.0. If the results indicate that the maximum clad temperature for the hypothetical accident is to be found at an even lower value of the discharge coefficient, the range of discharge coefficients shall be extended until the maximum clad temperatures calculated by this variation has been achieved.

* * * * *

D. * * *

5. *Refill and Reflood Heat Transfer for Pressurized Water Reactors.* a. For reflood rates of one inch per second or higher, reflood heat transfer coefficients shall be based on applicable experimental data for unblocked cores including FLECHT results ("PWR FLECHT (Full Length Emergency Cooling Heat Transfer) Final Report," Westinghouse Report WCAP-7665, April 1971). The use of a correlation derived from FLECHT data shall be demonstrated to be conservative for the transient to which it is applied; presently available FLECHT heat transfer correlations ("PWR Full Length Emergency Cooling Heat Transfer (FLECHT) Group I Test Report," Westinghouse Report WCAP-7544, September 1970; "PWR FLECHT Final Report Supplement," Westinghouse Report WCAP-7931, October 1972) are not acceptable. Westinghouse Report WCAP-7665 has been approved for incorporation by reference by the Director of the Federal Register. A copy of this report is available for inspection at the NRC Library, 7920 Norfolk Avenue, Bethesda, Maryland 20814. New correlations or modifications to the FLECHT heat transfer correlations are acceptable only after they are demonstrated to be conservative, by comparison with FLECHT data, for a range of parameters consistent with the transient to which they are applied.

b. During refill and during reflood when reflood rates are less than one inch per second, heat transfer calculations shall be based on the assumption that cooling is only by steam, and shall take into account any flow blockage calculated to occur as a result of cladding swelling or rupture as such blockage might affect both local steam flow and heat transfer.

* * * * *

7. * * *

c. Wetting of the channel box shall be assumed to occur 60 seconds after the time determined using the correlation based on the Yamanouchi analysis ("Loss-of-Coolant Accident and Emergency Core Cooling Models for General Electric Boiling Water Reactors," General Electric Company Report NEDO-10329, April 1971). This report was approved for incorporation by reference by the Director of the Federal Register. A copy of the report is available for inspection at the NRC Library, 7920 Norfolk Avenue, Bethesda, Maryland 20814.

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

11. The authority citation for part 73 continues to read in part as follows:

Authority: Sec. 161, 58 Stat. 948, as amended (42 U.S.C. 2201; sec 201, 88 Stat. 1242, as amended (42 U.S.C. 5841) * * *.

12. In § 73.26, paragraph (l)(1) is revised to read as follows:

§ 73.26 Transportation physical protection systems, subsystems, components and procedures.

* * * * *

(l) *Shipment by sea.* (1) Shipments shall be made only on container-ships. The strategic special nuclear material container(s) shall be loaded into exclusive use cargo containers conforming to American National Standards Institute (ANSI) Standard MH5.1—"Basic Requirements for Cargo Containers" (1971) or International Standards Organization (ISO) 1496, "General Cargo Containers" (1978). Locks and seals shall be inspected by the escorts whenever access is possible. The ANSI Standard MH5.1 (1971) and the (ISO) 1496 (1978), have been approved for incorporation by reference by the Director of the Federal Register. A copy of each of these standards is available for inspection at the NRC Library, 7920 Norfolk Avenue, Bethesda, Maryland 20814.

* * * * *

13. In § 73.50, paragraph (d)(1) is revised to read as follows:

§ 73.50 Requirements for physical protection of licensed activities.

* * * * *

(d) Detection aids. (1) All alarms required pursuant to this part shall annunciate in a continuously manned central alarm station located within the protected area and in at least one other continuously manned station, not necessarily within the protected area, such that a single act cannot remove the capability of calling for assistance or otherwise responding to an alarm. All alarms shall be self-checking and tamper indicating. The annunciation of an alarm at the onsite central alarm station shall indicate the type of alarm (e.g., intrusion alarm, emergency exit alarm, etc.) and location. All intrusion alarms, emergency exit alarms, alarm systems, and line supervisory systems shall at minimum meet the performance and reliability levels indicated by GSA Interim Federal Specification W-A-00450 B (GSA-FSS). The GSA Interim Federal Specification has been approved for incorporation by reference by the Director of the Federal Register. A copy of the material is available for inspection at the NRC Library, 7920 Norfolk Avenue, Bethedsa, Maryland 20814.

* * * * *

14. In Appendix B to part 73, section I is amended by revising paragraph B.1.b.(2)(a) and section IV is amended by revising Footnote 2 to the table in paragraph C to read as follows:

Appendix B to Part 73—General Criteria for Security Personnel

* * * * *

I. * * *

B. * * *

1. * * *

b. * * *

(2) Hearing: (a) Individuals shall have no hearing loss in the better ear greater than 30 decibels average at 500 Hz, 1,000 Hz, and 2,000 Hz with no level greater that 40 decibels at any one frequency (by ISO 389 "Standard Reference Zero for the Calibration of Puritone Audiometer" (1975) or ANSI S3.6–1969 (R. 1973) "Specifications for Audiometers"). ISO 389 and ANSI S3.6–1969 have been approved for incorporation by reference by the Director of the Federal Register. A copy of each standard is available for inspection at the NRC Library, 7920 Norfolk Avenue, Bethesda, Maryland 20814.

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IV. * * *

C. * * *

2. As set forth by the National Rifle Association (NRA) in its official rules and regulations, "NRA Target Manufacturers Index," December 1976. The Index has been approved for incorporation by reference by the Director of the Federal Register. A copy of the index is available for inspection at the NRC Library, 7920 Norfolk Avenue, Bethesda, Maryland 20814.

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PART 110—EXPORT AND IMPORT OF NUCLEAR EQUIPMENT AND MATERIAL

15. The authority citation for part 110 continues to read in part as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841) * * *.

16. In § 110.43, paragraph (a)(1) is revised to read as follows:

§ 110.43 Physical security standards.

(a) * * *

(1) Review of the physical security program established by the recipient country and of the implementation of the national requirements, as considered through country visits and other information exchanges, to ensure that the physical security measures provide, as a minimum protection comparable to that set forth in the International Atomic Energy publication INFCIRC/225 Rev. 1, entitled "The Physical Protection of Nuclear Material" (INFCIRC/225), which is incorporated by reference in this part.

This publication has been approved for incorporation by reference by the Director of the Federal Register. Notice of any changes to the publication will be published in the Federal Register. Copies of INFCIRC/225 may be obtained from the Assistant Director for International Security, Office of International Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and are available for inspection at the NRC Library, 7920 Norfolk Avenue, Bethesda, Maryland 20814. A copy is on file in the library of the Office of the Federal Register.

* * * * *

Dated at Rockville, Maryland, this 14th day of December 1992.

For the Nuclear Regulatory Commission.

James M. Taylor,

Executive Director for Operations.

[FR Doc. 92–31249 Filed 12–28–92; 8:45 am]

BILLING CODE 7590–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 92–NM–229–AD; Amendment 39–8451; AD 92–27–16]

Airworthiness Directives; Sabreliner Model NA265 Series Airplanes Equipped With or Converted to Electrical Driven Hydraulic Pump (Single or Double)

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Sabreliner Model NA265 series airplanes. This action requires installation of redundant hydraulic pump/motor ground circuitry. This amendment is prompted by an in-flight fire that occurred inside the aft section of the fuselage shortly after takeoff. The actions specified in this AD are intended to prevent electrical arcing, which could lead to a fire inside the aft section of the fuselage.

DATES: Effective January 13, 1993.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 13, 1993.

Comments for inclusion in the Rules Docket must be received on or before March 1, 1993.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 92–NM–229–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

The service information referenced in this AD may be obtained from Sabreliner Corporation, 18118 Chesterfield Airport Road, Chesterfield, Missouri 63005–1121. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Small Airplane Directorate, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita Kansas; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. C. Dale Bleakney, Aerospace Engineer, Systems and Equipment Branch, ACE–130W, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita Kansas 67209; telephone (316) 946–4135; fax (316) 946–4407.

SUPPLEMENTARY INFORMATION: Recently, a Sabreliner Model NA265–70 series airplane experienced an in-flight fire in the aft section of the fuselage shortly after takeoff. The airplane landed safely at the airport, the flight crew evacuated uninjured, and the fire was extinguished. Subsequent investigation revealed that the fire was caused by inadequate grounding of the hydraulic pump/motors. Such inadequate grounding caused high current flow through the metal braid covering the hydraulic pump pressure and return lines and into the airplane structure, which resulted in softening and rupturing of the high pressure lines and subsequent electrical arcing. Inadequate grounding of the hydraulic pump/motors could result in electrical arcing, which could lead to a fire inside the aft section of the fuselage.

The FAA has reviewed and approved Sabreliner Service Bulletin 92–5, dated December 11, 1992, that describes procedures for installation of redundant hydraulic pump/motor ground circuitry which would preclude the possibility for a fire in the aft section of the fuselage due to loss of ground in the hydraulic pump/motor. This service bulletin also describes procedures for repetitive inspections of the hydraulic pump/motors.

Since an unsafe condition has been identified that is likely to exist or develop on other Sabreliner Model NA265 series airplanes of the same type design, this AD is being issued to prevent electrical arcing caused by inadequate grounding of the hydraulic pump/motors, which could lead to fire inside the aft section of the fuselage. This AD requires installation of redundant hydraulic pump/motor ground circuitry. The actions are required to be accomplished in accordance with the service bulletin described previously.

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

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified under the caption "ADDRESSES." All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 92-NM-229-AD." The postcard will be date stamped and returned to the commenter.

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 determined further 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 Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, 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—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

92-27-16. Sabreliner: Amendment 39-8451. Docket 92-NM-229-AD.

Applicability: Model NA265, NA265-20, -30, -40, -50, -60, -65, -70, and -80 series airplanes equipped with or converted to electrical driven hydraulic pump (single or double); as listed in Sabreliner Service Bulletin 92-5, dated December 11, 1992; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent electrical arcing, which could lead to fire inside the aft section of the fuselage, accomplish the following:

(a) Within 30 days or 10 flight hours after the effective date of this AD, whichever occurs first, install redundant hydraulic pump/motor ground circuitry in accordance with Sabreliner Service Bulletin 92-5, dated December 11, 1992.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Wichita Aircraft Certification Office (ACO), FAA, Small Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Wichita ACO.

NOTE: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Wichita ACO.

(c) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(d) The installation shall be done in accordance with Sabreliner Service Bulletin 92-5, dated December 11, 1992. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Sabreliner Corporation, 18118 Chesterfield Airport Road, Chesterfield, Missouri 63005-1121. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Small Airplane Directorate, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid Continent Airport, Wichita Kansas; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on January 13, 1993.

Issued in Renton, Washington, on December 18, 1992.

Bill R. Boxwell,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 92-31532 Filed 12-28-92; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 92-CE-56-AD; Amendment 39-8455; AD 93-01-02]

Airworthiness Directives; British Aerospace, Regional Aircraft Limited, HP 137 Mk1, Jetstream Models 200, 3101, and 3201 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to British Aerospace (BAe), Regional Aircraft Limited, HP 137 Mk1, Jetstream Models 200, 3101, and 3201 airplanes. This action requires inspecting the tailplane de-icing system for water contamination, draining any water that has accumulated in the system, modifying the tailplane de-icing system, and replacing and relocating the tail unit pressure switch. The Federal Aviation Administration (FAA) has evaluated reports of accidents and incidents where it is believed that ice-induced tailplane stall is a causal factor.

The actions specified by this AD are intended to prevent tailplane de-icing system failure, including false indication of system operation, and subsequent loss of pitch control, which could result in loss of control of the airplane.

DATES: Effective January 22, 1993.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 22, 1993.

Comments for inclusion in the Rules Docket must be received on or before March 5, 1993.

ADDRESSES: Submit comments in triplicate to the FAA, Central Region, Office of the Assistant Chief Counsel, Attention: Rules Docket 92-CE-56-AD, room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Service information that is applicable to this AD may be obtained from British Aerospace, Regional Aircraft Limited, Manager Product Support, Prestwick Airport, Ayrshire, KA9 2RW Scotland; Telephone (44-292) 79888; Facsimile (44-292) 79703; or British Aerospace, Inc., Librarian, Box 17414, Dulles International Airport, Washington, DC, 20041; Telephone (703) 435-9100; Facsimile (703) 435-2628. This information may also be examined at the FAA, Central Region, Office of the Assistant Chief Counsel, room 1558, 601 E. 12th Street, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Raymond A. Stoer, Program Officer, Brussels Aircraft Certification Office, FAA, Europe, Africa, and Middle East Office, c/o American Embassy, B-1000 Brussels, Belgium; Telephone (322) 513.38.30 ext. 2710; Facsimile (322) 230.68.99; or Mr. John P. Dow, Sr., Project Officer, Small Airplane Directorate, Aircraft Certification Service, FAA, 601 E. 12th Street, Kansas City, Missouri 64106; Telephone (816) 426-6932; Facsimile (816) 426-2169.

SUPPLEMENTARY INFORMATION: Accidents and incidents involving certain BAe, Regional Aircraft Limited, HP 137 Mk1, Jetstream Models 200, 3101, and 3201 airplanes where a probable causal factor is believed to be ice-induced tailplane stall has prompted the FAA and the National Transportation Safety Board (NTSB) to investigate the tailplane de-icing system of these airplanes. Results of this investigation showed that (1) water can enter the tailplane de-icing system through small leaks in the tailplane de-icing boots, in particular when the system is selected "Off" and is thus operating in the suction mode; (2) this water collects in a flexible pipe that supplies air to inflate the tailplane de-icing boots on the leading edge of the tailplane; and (3) if sufficient water has collected, ice can form in cold conditions which in turn could restrict or prevent air flow to the tailplane de-icing boots, causing the boots to fail. If failure of the tailplane de-icing boots is not detected and corrected, then flap extension to the landing setting could result in loss of pitch control at an altitude from which recovery is not possible.

BAe, Regional Aircraft Limited, has issued Jetstream Alert Service Bulletin (ASB) 30-A-JA 920444, dated October 30, 1992, which specifies procedures for (1) inspecting the tailplane de-icing system for water contamination; (2) draining any water that has accumulated in the system; (3) modifying the tailplane de-icing system; and (4) replacing and relocating the tail unit pressure switch.

The affected airplane models are manufactured in the United Kingdom and are type certificated for operation in the United States under the provisions of Section 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement. The Civil Airworthiness Authority (CAA), which is the airworthiness authority for the United Kingdom, recently issued CAA AD 009-10-92 in order to assure the continued airworthiness of these airplanes in the United Kingdom.

After examining the circumstances and reviewing all available information related to the accidents and incidents described above, the FAA has determined that AD action should be proposed for products of this type design that are operated in the United States.

Since an unsafe condition has been identified that is likely to exist or develop in other BAe, Regional Aircraft Limited, HP 137 Mk1, Jetstream Models 200, 3101, and 3201 airplanes of the same type design, this AD is being issued to provide actions that are intended to prevent tailplane de-icing system failure, including false indication of system operation, and subsequent loss of pitch control. The AD requires inspecting the tailplane de-icing system for water contamination, draining any water that has accumulated in the system, modifying the tailplane de-icing system, and replacing and relocating the tail unit pressure switch. The actions are accomplished in accordance with BAe, Regional Aircraft Limited, Jetstream ASB 30-A-JA 920444, dated October 30, 1992.

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

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting immediate flight safety and, thus, was not preceded by notice and opportunity to comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 92-CE-56-AD." The postcard will be date stamped and returned to the commenter.

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 Executive Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been determined further 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 Rules 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, Incorporation by reference, 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—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

93-01-02 British Aerospace, Regional Aircraft Limited: Amendment 39-8455; Docket No. 92-CE-56-AD.

Applicability: HP 137 Mk1, Jetstream Models 200, 3101, and 3201 Airplanes (serial numbers 1 through 969 and 971), certificated in any category.

Compliance: Required as indicated, unless already accomplished.

To prevent tailplane de-icing system failure, including false indication of system operation, and subsequent loss of pitch control, which could result in loss of control of the airplane, accomplish the following:

(a) Within the next 25 hours time-in-service (TIS) after the effective date of this AD, and thereafter at intervals not to exceed 150 hours TIS until the modification required by paragraph (b) of this AD is accomplished, inspect the tailplane de-icing system for contamination in accordance with part I of the Accomplishment Instructions section of British Aerospace (BAe), Regional Aircraft Limited, Jetstream Alert Service Bulletin (ASB) 30-A-JA 920444, dated October 30, 1992. Prior to further flight, drain any accumulated water.

(b) Within the next 400 hours TIS after the effective date of this AD, modify the tailplane de-icing system and replace and relocate the tail unit pressure switch in accordance with part 2 or part 3, as applicable, of the Accomplishment Instructions section of BAe, Regional Aircraft Limited, Jetstream ASB 30-A-JA 920444, dated October 30, 1992.

(c) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(d) An alternative method of compliance or adjustment of the initial or repetitive compliance times that provides an equivalent level of safety may be approved by the Manager, Brussels Aircraft Certification Office, FAA, Europe, Africa, and Middle East Office, c/o American Embassy, B-1000 Brussels, Belgium. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Brussels Aircraft Certification Office.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Brussels Aircraft Certification Office.

(e) The inspections, modification, replacement, and relocation required by this AD shall be done in accordance with British Aerospace, Regional Aircraft Limited, Jetstream Alert Service Bulletin 30-A-JA 920444, dated October 30, 1992. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from British Aerospace, Regional Aircraft Limited, Manager Product Support, Commercial Aircraft Airlines Division, Prestwick Airport, Ayrshire, KA9 2RW Scotland; or British Aerospace, Inc., Librarian, Box 17414, Dulles International Airport, Washington, DC, 20041. Copies may be inspected at the FAA, Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

(f) This amendment (39-8455) becomes effective on January 22, 1993.

Issued in Kansas City, Missouri, on December 21, 1992.

Barry D. Clements,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 92-31533 Filed 12-28-92; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 92-NM-233-AD; Amendment 39-8446; AD 92-27-11]

Airworthiness Directives; McDonnell Douglas Model MD-11 and MD-11F Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain McDonnell Douglas Model MD-11 and MD-11F series airplanes. This action requires a functional inspection for proper actuation of the fire bottle switch; a visual inspection of the fire shutoff handle cover assembly to verify whether proper clearance exists between the fire shutoff handles, cover assembly, and rub strips in the flight compartment; and modification of discrepant parts. This amendment is prompted by a report that the engine fire extinguisher switches would not actuate, due to interference between fire shutoff handles and the cover assembly in the flight compartment. The actions specified in this AD are intended to prevent inhibited operation of the engine emergency fire extinguisher system.

DATES: Effective January 13, 1993.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 13, 1993.

Comments for inclusion in the Rules Docket must be received on or before March 1, 1993.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 92-NM-233-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

The service information referenced in this AD may be obtained from McDonnell Douglas Corporation, P.O. Box 1771, Long Beach, California 90846-1771, Attention: Business Unit Manager, Technical Publications-Technical Administrative Support, C1-L5B. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Raymond Vakili, Aerospace Engineer, Propulsion Branch, ANM-140L, FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806-2425; telephone (310) 988-5262; fax (310) 988-5210.

SUPPLEMENTARY INFORMATION: Recently, during a routine maintenance check of the engine emergency fire extinguisher system on a Model MD–11 series airplane, the numbers one and three fire shutoff handles did not rotate far enough to actuate the fire extinguisher switches. This condition has been attributed to either incorrect trimming of the cutouts in the fire shutoff handle cover assembly or incorrect installation of the rub strips between the cover assembly and lightplate assembly, hindering rotation of the fire shutoff handles. This condition, if not corrected, could result in inhibited operation of the engine emergency fire extinguisher system.

The engine emergency fire extinguisher system of Model MD–11F series airplanes is similar to that of Model MD–11 series airplanes. Therefore, the Model MD–11F may be subject to the same potential unsafe condition.

The FAA has reviewed and approved McDonnell Douglas MD–11 Alert Service Bulletin A76–3, dated November 17, 1992, that describes procedures for a functional inspection for proper actuation of the fire bottle switch; a visual inspection of the fire shutoff handle cover assembly to verify whether proper clearance exists between the fire shutoff handles, cover assembly, and rub strips in the flight compartment; and if any fire bottle switch does not actuate and/or any handle clearance is not within the specified limits, trim of the cover assembly handle cutout and rub strips, and a functional reinspection for proper switch actuation. This modification will ensure sufficient rotation of the fire shutoff handles.

Since an unsafe condition has been identified that is likely to exist or develop on other McDonnell Douglas Model MD–11 and MD–11F series airplanes of the same type design, this AD is being issued to prevent inhibited operation of the engine emergency fire extinguisher system. This AD requires a functional inspection for proper actuation of the fire bottle switch; a visual inspection of the fire shutoff handle cover assembly to verify whether proper clearance exists between the fire shutoff handles, cover assembly, and rub strips in the flight compartment; and if any fire bottle switch does not actuate and/or any handle clearance is not within the specified limits, trim of the cover assembly handle cutout and rub strips, and a functional reinspection for proper switch actuation. The actions are required to be accomplished in accordance with the service bulletin described previously.

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

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified under the caption "ADDRESSES." All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 92–NM–233–AD." The postcard will be date stamped and returned to the commenter.

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 determined further 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 Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, 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—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

92–27–11. McDonnell Douglas: Amendment 39–8446. Docket 92–M–223–D.

Applicability: McDonnell Douglas Model MD–11 and MD–11F series airplanes; as listed in McDonnell Douglas MD–11 Alert Service Bulletin A76–3, dated November 17, 1992; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent inhibited operation of the engine emergency fire extinguisher system, accomplish the following:

(a) Within 30 days after the effective date of this AD, perform a functional inspection for proper actuation of the fire bottle switch, and a visual inspection of the fire shutoff handle cover assembly to verify whether a minimum clearance of 0.30 inch (0.76 mm) exists between the fire shutoff handles, cover assembly, and rub strips in the flight compartment, in accordance with the Accomplishment Instructions of McDonnell Douglas MD–11 Alert Service Bulletin A76–3, dated November 17, 1992.

(1) If any fire bottle switch actuates (audible click), and if any handle clearance

is found to be 0.30 inch (0.76 mm) or greater, no further action is necessary; or

(2) If any fire bottle switch does not actuate (click is not audible), and/or any handle clearance is not found to be 0.30 inch (0.76 mm) or greater, prior to further flight, trim the cover assembly handle cutout and rub strips to achieve a clearance of 0.30 inch (0.76 mm) or greater, and repeat the functional inspection requirements for proper switch actuation in accordance with paragraph (a) of this AD.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles ACO.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Manager, Los Angeles ACO.

(c) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(d) The functional inspection and trim shall be done in accordance with McDonnell Douglas MD-11 Alert Service Bulletin A76-3, dated November 17, 1992. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from McDonnell Douglas Corporation, P.O. Box 1771, Long Beach, California 90846-1771, Attention: Business Unit Manager, Technical Publications—Technical Administrative Support, C1-L5B. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on January 13, 1993.

Issued in Renton, Washington, on December 17, 1992.

Bill R. Boxwell,

Acting Manager, Transport Airplane Directorate Aircraft Certification Service.

[FR Doc. 92-31534 Filed 12-28-92; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 92-CE-44-AD; Amendment 39-8456; AD 93-01-03]

Airworthiness Directives; Ayres Corporation S2D and S2R Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to certain Ayres Corporation (Ayres) S2D and S2R series airplanes. This action requires repetitively inspecting the wing front spar for corrosion, and repairing any corroded areas. Investigation of an accident involving one of the affected airplanes revealed extensive corrosion on the upper and lower portions of the front spar. The actions specified by this AD are intended to prevent wing structural damage that, if not detected, could progress to the point of failure.

DATES: Effective February 5, 1993.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 5, 1993.

ADDRESSES: Service information that is applicable to this AD may be obtained from the Ayres Corporation, P.O. Box 3090, Albany, Georgia 31708; Telephone (912) 883-1440. This information may also be examined at the Federal Aviation Administration (FAA), Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ms. Cindy Lorenzen, Aerospace Engineer, Atlanta Aircraft Certification Office, 1669 Phoenix Parkway, Suite 210C, Atlanta, Georgia 30349; Telephone (404) 991-2910; Facsimile (316) 991-3606.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations to include an AD that would apply to certain Ayres S2D and S2R series airplanes was published in the Federal Register on September 9, 1992 (57 FR 41115). The action proposed repetitive inspections of the wing front spar for corrosion, and repair of any corroded areas. The proposed actions would be accomplished in accordance with the ACCOMPLISHMENT INSTRUCTIONS section of Ayres Service Bulletin No. SB-AG-29, dated June 15, 1992.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposed rule or the FAA's determination of the cost to the public.

After careful review, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. The FAA has determined that these minor corrections will not change the meaning of the AD nor add any additional burden upon the public than was already proposed.

The compliance time for this AD is presented in calendar time instead of hours time-in-service (TIS). The FAA has determined that a calendar time for compliance is the most desirable method because the unsafe condition described by the required AD is caused by corrosion. Corrosion can occur on airplanes regardless of whether the airplane is in service. In addition, the utilization rate of the affected airplanes varies throughout the fleet. For example, one operator may utilize the airplane 50 hours TIS in one week, while another operator may not operate the airplane 50 hours TIS in one month. Therefore, to ensure that corrosion is detected and corrected on all airplanes within a reasonable period of time without inadvertently grounding any airplanes, a compliance schedule based upon calendar time instead of hours TIS is utilized.

The FAA estimates that 1,700 airplanes in the U.S. registry will be affected by this AD, that it will take approximately 8 workhours per airplane to accomplish the required action, and that the average labor rate is approximately $55 an hour. Parts cost approximately $180 per airplane. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $1,054,000.

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.

For the reasons discussed above, I certify that this action (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) 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 final evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, 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—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

93-01-03 Ayres Corporation: Amendment 39-8456; Docket No. 92-CE-44-AD.

Applicability: The following model and serial number airplanes, certificated in any category:

Models	Serial numbers
S2D	all serial numbers.
S2R	5000 through 5099, 1380R, and 1416R through 2583R.
S2R-R1340	R1340-001 through R1340-030 (with or without DC suffix).
S2R-R3S	R3S-001 through R3S-011 (with or without DC suffix).
S2R-R1820	R1820-001 through R1820-035 (with or without DC suffix).
S2R-T11	T11-001 through T11-005 (with or without DC suffix).
S2R-T15	T15-001 through T15-029 (with or without DC suffix) and T15-031 (with or without DC suffix); and T27-001 through T27-029 (with or without DC suffix) and T27-031 (with or without DC suffix).
S2R-T34	6000 through 6049, T34-001 through T34-178 (with or without DC suffix) and T34-180 (with or without DC suffix); and T41-001 through T41-178 (with or without DC suffix) and T41-180 (with or without DC suffix).
S2R-T45	T45-001 through T45-003 (with or without DC suffix).
S2R-T65 and S2RHG-T65.	T65-001 through T65-010 (with or without DC suffix).
S2R-G6	G6-101 through G6-107 (with or without DC suffix).

Compliance: Required within the next 3 calendar months after the effective date of this AD, unless already accomplished, and thereafter at intervals not to exceed 12 calendar months.

To prevent wing structural damage that, if not detected, could progress to the point of failure, accomplish the following:

(a) Inspect the wing front spar for corrosion in accordance with the "ACCOMPLISHMENT INSTRUCTIONS: I. Inspection of Front Spar" section of Ayres Service Bulletin (SB) No. SB-AG-29, dated June 15, 1992.

(b) If corrosion is found, prior to further flight, treat and repair the corrosion damage in accordance with the "ACCOMPLISHMENT INSTRUCTIONS: II. Repairs" section of Ayres SB No. SB-AG-29, dated June 15, 1992.

(c) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(d) An alternative method of compliance or adjustment of the initial or repetitive compliance times that provides an equivalent level of safety may be approved by the Manager, Atlanta Aircraft Certification Office, 1669 Phoenix Parkway, suite 210C, Atlanta, Georgia 30349. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Atlanta Aircraft Certification Office.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Atlanta Aircraft Certification Office.

(e) The inspections required by this AD shall be done in accordance with Ayres Service Bulletin No. SB-AG-29, dated June 15, 1992. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the Ayres Corporation, P.O. Box 3090, Albany, Georgia 31708. Copies may be inspected at the FAA, Central Region, Office of the Assistant Chief Counsel, room 1558, 601 E. 12th Street, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(f) This amendment (39-8456) becomes effective on February 5, 1993.

Issued in Kansas City, Missouri, on December 21, 1992.

Barry D. Clements,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 92-31411 Filed 12-28-92; 8:45 am]

BILLING CODE 4910-13-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1214

Space Shuttle

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Interim final rule.

SUMMARY: NASA is amending its regulations by adding new provisions on "Special Policy on Use of Small, Self-Contained Payloads (SSCP's) by Domestic Educational Institutions." In conjunction with NASA regulations on, "Use of Small, Self-Contained Payloads," the goal is to stimulate and encourage the use of space by a wide range of users, particularly those associated with education.

DATES: This rule is effective December 29, 1992. Any comments must be received on or before January 28, 1993.

ADDRESSES: Comments may be mailed to the Education Division, Code FET, NASA Headquarters, Washington, DC 20546, or delivered to room 2K31, 300 E Street, SW., Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Dr. Malcom V. Phelps, (202) 358-1540.

SUPPLEMENTARY INFORMATION: The National Aeronautics and Space Administration has determined that:

1. This rule is not subject to the requirements of the Regulatory Flexibility Act, 51 U.S.C. 601-612, since it will not exert a significant economic impact on a substantial number of small business entities.

2. This rule is not a major rule as defined in Executive Order 12291.

List of Subjects in 14 CFR Part 1214

Government employees, Security measures, Space Shuttle.

PART 1214—SPACE SHUTTLE

For reasons set out in the Preamble, 14 CFR part 1214 is amended as follows:

1. The authority citation for 14 CFR part 1214 is revised to read as follows:

Authority: Sec. 203, Public Law 85-568, 72 Stat. 429, as amended (42 U.S.C. 2473).

2. Subpart 1214.10 is revised to read as follows:

Subpart 1214.10—Special Policy on Small, Self-Contained Payloads (SSCP's) by Domestic Educational Institutions

Sec.
1214.1000 Scope.
1214.1001 Goal.
1214.1002 Pricing.
1214.1003 Qualifications.
1214.1004 Results and data dissemination.

Subpart 1214.10—Special Policy on Small, Self-Contained Payloads (SSCP's) by Domestic Educational Institutions

§ 1214.1000 Scope.

This subpart defines NASA's special policy for the use of Small, Self-Contained Payloads (SSCP's) by domestic educational institutions.

§ 1214.1001 Goal.

The goal of NASA's policy on "Use of Small, Self-Contained Payloads," as stated in subpart 1214.9, is to stimulate

and encourage the use of space by a wide range of users, particularly those associated with education.

§ 1214.1002 Pricing.

As an adjunct to that policy, and in furtherance of NASA's commitment to education, NASA is offering lower prices for standard launch services for SSCP's sponsored by domestic educational institutions that agree to certain provisions and can meet certain criteria. The prices for standard launch services for such payloads will be:

Payload weight/volume	Price
200 lbs/5.0 cf	$10,000
100 lbs/2.5 cf	5,000
60 lbs/2.5 cf	3,000

§ 1214.1003 Qualifications.

For a payload to qualify for flight as a domestic educational institution payload":

(a) The applying institution must be a U.S. public or nonprofit (section 501(c)(3) of the Internal Revenue Code) educational institution, which may include universities, colleges, community colleges, elementary or secondary schools, or university-affiliated education research foundations.

(b) The payload must be certified by an authorized official of the institution to be part of an educational or research project that is principally for the benefit of students, rather than nonstudents, such as faculty or research staff. The certification shall include a brief explanation of the educational aspects of the payload project and how it principally benefits students.

(c) Payload experiments should involve students in all phases of the project, including concept development, initial planning, design, conduct, and analysis of the results of the experiments. Involvement of faculty or other professionals in a supervisory, advisory, or consultative relationship with the students is necessary.

(d) Projects may include; (1) Applied research;

(2) Basic research; and/or

(3) Other activities which have further educational uses beyond the immediate research effort.

§ 1214.1004 Results and data dissemination.

(a) A goal of this special category of payloads is to encourage student participation in various space science and technology experiments. Accordingly, subject to the exceptions listed below, NASA, unless otherwise agreed, will require all scientific or research results or data that are produced or obtained during the flight of a payload of this category to be made publicly available without restriction of disclosure and use no later than 2 years after the Shuttle mission on which the payload is flown. The exceptions are:

(1) Those results comprising an invention for which patent protection has been or will in a reasonable time be applied for.

(2) Data disclosing an invention prior to applying for patent protection thereon.

(b) Payloads of domestic educational institutions will be subject to all other provisions of subpart 1214.9, and each such institution will be required to sign a Launch Services Agreement with NASA.

(c) Domestic educational institutions proposing to fly SSCP experiments under this special policy should contact NASA Headquarters, Office of Space Flight, Code MB, Washington, DC 20546. Such applications must receive the approval of the NASA Education Division, Office of Human Resources and Education.

Dated: November 30, 1992.

Daniel S. Goldin,

Administrator.

[FR Doc. 92-31246 Filed 12-28-92; 8:45 am]

BILLING CODE 7510-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 404

[Regulations No. 4]

RIN 0960—None Assigned

Federal Old-Age, Survivors and Disability Insurance Determining Disability and Blindness; Extension of Expiration Date for Cardiovascular System Listing

AGENCY: Social Security Administration, HHS.

ACTION: Final rule.

SUMMARY: We are extending the date on which part A of the cardiovascular system listings found in appendix 1 of part 404, subpart P, will no longer be effective from January 5, 1993, to July 6, 1993. We have made no revisions in the medical criteria in the cardiovascular system listings; they remain the same as they now appear in the Code of Federal Regulations. We are presently considering comments we received on a Notice of Proposed Rulemaking (NPRM) to update the medical criteria contained in part A and part B of the cardiovascular system listings. When we have completed our review, any revised criteria will be published as final regulations.

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

FOR FURTHER INFORMATION CONTACT: Irving Darrow, Legal Assistant, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (410) 966-0512.

SUPPLEMENTARY INFORMATION: On December 6, 1985, a revised Listing of Impairments in appendix 1 to subpart P of part 404 was published in the **Federal Register** (50 FR 50068). The Listing of Impairments describes, for each of 13 major body systems, impairments that are considered severe enough to preclude a person from engaging in any gainful activity (part A), or in the case of a child under the age of 18, impairments that are considered severe enough to prevent the child from functioning independently, appropriately, and effectively in an age-appropriate manner (part B). The Listing of Impairments is used for evaluating disability and blindness at the third step of the sequential evaluation process for adults and children under the Social Security disability program and the supplemental security income program.

When the revised Listing of Impairments was published in 1985, we indicated that medical advances in disability evaluation and treatment and program experience would require that the listings be periodically reviewed and updated.

Accordingly, we established termination dates ranging from 4 to 8 years for each of the listings for specific body systems. A date of December 6, 1989, was established for the cardiovascular system listings in part A to no longer be effective. A date of December 6, 1993, was established for part B of the cardiovascular system listings to no longer be effective.

The potential program impact of the changes to update the cardiovascular system listings required careful analysis and consideration within the Agency. As our study and analysis continued, it became evident that we would be unable to publish a proposed and then a final regulation containing revised criteria for part A of the cardiovascular system listings by December 6, 1989. We published in the **Federal Register** of December 5, 1989 (54 FR 50233), a final regulation extending the current cardiovascular system listings for a period of 18 months through June 5, 1991. The cardiovascular system listings were again extended an additional 12

months through June 5, 1992, by final regulation published in the **Federal Register** on June 6, 1991 (56 FR 26030), and were extended to January 5, 1993, by final regulation published in the **Federal Register** on June 5, 1992 (57 FR 23945).

On July 9, 1991 we published an NPRM proposing revisions to the medical criteria contained in parts A and B of the cardiovascular system listings (56 FR 31266), with provisions for a 60-day comment period. The complex issues raised by the numerous comments we received have required extensive analysis and careful consideration. Because of the need to consider these complex issues thoroughly so that any revised criteria reflect medical advances in disability evaluation and treatment of cardiovascular impairments, we find that we will not have sufficient time to publish a final regulation in the **Federal Register** by January 5, 1993. We have, therefore, decided to extend the date on which the current cardiovascular system listings in part A will no longer be effective for an additional 6 months and 1 day—from January 5, 1993, to July 6, 1993.

Regulatory Procedures

The Department, even when not required by statute, as a matter of policy, generally follows the Administrative Procedure Act notice of proposed rulemaking and public comment procedures specified in 5 U.S.C. 553 in the development of its regulations. The Administrative Procedure Act provides exceptions to its notice and public comment procedures when an agency finds there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest. We have determined that, under 5 U.S.C. 553(b)(B), good cause exists for waiver of notice of proposed rulemaking and public comment procedures on this rule because it only extends the date on which part A of the cardiovascular system listings will no longer be effective and makes no substantive changes to these listings. The current regulations expressly provide that the listings may be extended by the Secretary, as well as revised and promulgated again. Because we are not making any revisions to the current listings, we have determined that use of public comment procedures is unnecessary under the Administrative Procedure Act.

Executive Order 12291

The Secretary has determined that this is not a major rule under Executive Order 12291 because this regulation does not meet any of the threshold criteria for a major rule. Therefore, a regulatory impact analysis is not required.

Regulatory Flexibility Act

We certify that this regulation will not have a significant economic impact on a substantial number of small entities because it only affects disability claimants under titles II and XVI of the Social Security Act.

Paperwork Reduction Act

This regulation imposes no reporting or recordkeeping requirements necessitating clearance by the Office of Management and Budget.

(Catalog of Federal Domestic Assistance Program No. 93.802, Social Security-Disability Insurance; No. 93.807, Supplemental Security Income)

List of Subjects in 20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-age, Survivors and disability insurance, Reporting and recordkeeping requirements.

Dated: December 3, 1992.

Louis D. Enoff,

Principal Deputy Commissioner of Social Security.

Approved: December 15, 1992.

Louis W. Sullivan,

Secretary of Health and Human Services.

For the reasons set forth in the preamble, part 404, title 20 of the Code of Federal Regulations is amended as set forth below.

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

1. The authority citation for subpart P of part 404 is revised to read as follows:

Authority: Secs. 202, 205 (a), (b), and (d) through (h), 216(i), 221 (a) and (i), 222(c), 223, 225, and 1102 of the Social Security Act; 42 U.S.C. 402, 405 (a), (b), and (d) through (h), 416(i), 421 (a) and (i), 422(c), 423, 425, and 1302; sec. 505(a) of Public Law 96–265, 94 Stat. 473, secs. 2(d) (2), (5), (6) and (15) of Public Law 98–460, 98 Stat. 1797, 1801, 1802, and 1808.

2. Appendix 1 to subpart P is amended by revising the fourth paragraph of the introductory text to read as follows:

Appendix 1 to Subpart P—Listing of Impairments

* * * * *

The cardiovascular system (4.00) will no longer be effective on July 6, 1993.

* * * * *

[FR Doc. 92–31471 Filed 12–28–92; 8:45 am]

BILLING CODE 4190–29–M

Food and Drug Administration

21 CFR Part 510

Animal Drugs, Feeds, and Related Products; Change of Sponsor Name

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor name for a new animal drug application (NADA) from Norwich Eaton Pharmaceuticals, Inc., to Procter & Gamble Pharmaceuticals, Inc.

EFFECTIVE DATE: December 29, 1992.

FOR FUTHER INFORMATION CONTACT: Benjamin A. Puyot, Center for Veterinary Medicine (HFV–130), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–295–8646.

SUPPLEMENTARY INFORMATION: Norwich Eaton Pharmaceuticals, Inc., P.O. Box 191, Norwich, NY 13815, has informed FDA of a change of sponsor name from Norwich Eaton Pharmaceuticals, Inc., to Procter & Gamble Pharmaceuticals, Inc. Accordingly, FDA is amending the regulations in 21 CFR 510.600(c)(1) and (c)(2) to reflect the change of sponsor name.

List of Subjects in 21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 510 is amended as follows:

PART 510—NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 510 continues to read as follows:

Authority: Secs. 201, 301, 501, 502, 503, 512, 701, 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 376).

§ 510.600 [Amended]

2. Section 510.600 *Names, addresses, and drug labeler codes of sponsors of approved applications* is amended in the table in paragraph (c)(1) in the entry for "Norwich Eaton Pharmaceuticals, Inc." and in the table in paragraph (c)(2) in the entry for "000149" by revising the

sponsor name to read "Procter & Gamble Pharmaceuticals, Inc."

Dated: December 18, 1992.

Robert C. Livingston,

Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 92-31530 Filed 12-28-92; 8:45 am]

BILLING CODE 4160-01-F

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[T.D. 8462]

RIN 1545-AH09

Definition of Affiliated Group

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 1504(a) setting forth circumstances under which warrants, options, obligations convertible into stock, and other similar interests are treated as exercised for purposes of determining whether a corporation is a member of an affiliated group. For purposes of these regulations, unless the context otherwise provides, warrants, options, convertible obligations, and similar interests are all referred to as options. This section generally applies to all provisions under the Internal Revenue Code and Income Tax Regulations to which affiliation within the meaning of section 1504 (with or without the exceptions in section 1504(b)) is relevant, and to all provisions that refer to section 1504(a)(2). These regulations ensure that the affiliation rules under section 1504(a) are not circumvented through the use of options.

DATES: These regulations are effective December 28, 1992 and apply to options with a measurement date on or after February 28, 1992. These regulations do not apply to options issued prior to February 28, 1992, which have a measurement date on or after February 28, 1992, if the measurement date for the option occurs solely because of an adjustment in the terms of the option pursuant to the terms of the option as it existed on February 28, 1992. Section 1.1504-4(b)(2)(iv) applies to stock outstanding on or after February 28, 1992.

FOR FURTHER INFORMATION CONTACT: Ken Cohen, (202) 622-7790 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Introduction

On March 2, 1992, the Internal Revenue Service published in the **Federal Register** a Notice of proposed rulemaking (57 FR 7340 [CO-152-84, 1992-12 I.R.B. 37]) proposing to add new regulations §§ 1.1504-0 and 1.1504-4 to 26 CFR part 1. The Notice of proposed rulemaking provided rules regarding circumstances under which options are treated as exercised for purposes of determining whether the 80 percent voting power and value tests for affiliation under section 1504(a) are satisfied. A public hearing was scheduled for April 14, 1992. Comments responding to the Notice of proposed rulemaking were received, but no one requested to present comments at the scheduled public hearing. Accordingly, the hearing was cancelled. After considering the written comments received, the Service adopts the proposed regulations as revised by this Treasury decision.

Overview

The final regulations provide guidance regarding circumstances under which options are treated as exercised for purposes of determining whether the 80 percent voting power and value tests for affiliation under section 1504(a) are satisfied. In general, options are disregarded in determining whether a corporation is a member of an affiliated group. An option, however, is treated as exercised for purposes of determining affiliation when (1) a reasonable certainty exists, on a specified measurement date (generally the issuance, adjustment, or transfer date), that the option will be exercised and (2) the issuance or transfer of the option in lieu of the issuance, redemption, or transfer of the underlying stock would result (but for these regulations) in the elimination of a substantial amount of federal income tax liability. In each case, the determination of whether an option is reasonably certain to be exercised or whether a substantial amount of federal income tax liability would be eliminated is based on all the facts and circumstances. Options that do not have an abuse potential, such as publicly traded options, employee stock options, and options granted in connection with a bona fide loan agreement are generally excepted from these regulations. Safe harbors are provided for other options, which based on their terms, do not evidence an abuse potential.

Amendment and Adoption of §§ 1.1504-0 and 1.1504-4

After full consideration of the comments concerning the proposed regulations, §§ 1.1504-0 and 1.1504-4 are amended and adopted as final regulations. Generally, the final regulations maintain the same approach as the proposed regulations. However, in response to comments, the following modifications have been made.

Scope of Regulations

Comments asked whether the proposed regulations were intended to apply to provisions of the Code and regulations that refer to section 1504(a)(2) or just to provisions that use the term "affiliation." The final regulations clarify that they apply to all provisions which refer to affiliation and to those provisions to which affiliation within the meaning of section 1504(a) is relevant, including those provisions which refer to section 1504(a)(2) without referring to affiliation. For this purpose, a provision is considered to refer to affiliation or section 1504(a)(2) regardless of whether the exceptions provided in section 1504(b) apply. However, a provision is not considered to refer to affiliation or section 1504(a)(2) if the 80 percent voting power and 80 percent value requirements of section 1504(a)(2) are modified. In addition, the regulations do not apply to those provisions specified by the Internal Revenue Service in regulations, a revenue ruling, or revenue procedure.

Several of the exceptions to the scope of the proposed regulations have been modified in the final regulations. Sections 163(j) and 904(i) have been added to the excepted sections and the exception relating to section 864 has been limited to subsection (e) of section 864. The proposed regulations provided that the regulations do not apply to section 382(l)(5). Because section 382(l)(5) modifies the 80 percent voting power and value requirement of section 1504(a)(2), no exception is needed to prevent the regulations from applying to section 382(l)(5). Accordingly, the exception for section 382(l)(5) is unnecessary and has been removed from the final regulations.

Option Not Treated as Exercised for Voting Power Purposes

Under the proposed regulations, an option that was treated as exercised was always treated as exercised for purposes of determining the value of the stock of the issuing corporation owned, but was treated as exercised for voting power purposes only in limited circumstances.

Comments requested that the regulations be clarified as to those circumstances. The regulations have been revised to provide that, for purposes of these regulations, an option is never treated as exercised for voting power purposes. Instead, the determination of the voting power owned is made under other applicable principles of law.

Cash Settlement Options, Phantom Stock, Stock Appreciation Rights, or Similar Interests

Comments requested that the regulations clarify the treatment of cash settlement options, phantom stock, stock appreciation rights, or similar interests. The final regulations provide that such options are treated as reasonably certain to be exercised if it is reasonably certain that the option will have value at some time during the period in which the option may be exercised. If such an option is treated as exercised, the option is treated as having been converted into stock of the issuing corporation. If the amount to be received upon the exercise of such an option is determined by reference to a multiple of the increase in the value of a share of the issuing corporation's stock on the exercise date over the value of a share of the stock on the date the option is issued, the option is treated as converted into a corresponding number of shares of such stock. For example, assume P owns all 100 shares of the stock of S. S issues to X, an unrelated corporation, a stock appreciation right that allows X to receive 40 times the increase in the value of a share of S stock at the time the stock appreciation right is exercised over the current value of a share of S stock. If the stock appreciation right is treated as exercised under these regulations, X is treated, for value purposes only, as the owner of 40 shares of S stock. Appropriate adjustments must be made in any situation in which the amount to be received upon exercise of the option is determined in another manner.

Measurement Dates

Comments requested that the number of measurement dates be limited. After consideration of the comments, several changes have been made.

Under the proposed regulations, a measurement date included the date on which an option was issued, transferred, or on which the terms of an existing option or the underlying stock were modified. The proposed regulations provided an exception for certain issuances, transfers, and modifications "unless used as a device to avoid the application of section 1504 and these regulations." Comments suggested that this exception was too vague. After consideration of these comments, the device test has been deleted.

Comments asserted that the exception from a measurement date for sales between parties none of which are related to a member of the issuing corporation's group was too narrow. The Service and Treasury have determined that the purposes of this provision can be satisfied by broadening the exception to cover sales between parties none of which is a member of the issuing corporation's affiliated group. However, the exception does not apply if the person is related to, or acting in concert with, the issuing corporation or a member of its affiliated group, and the issuance or transfer of the option is pursuant to a plan a principal purpose of which is to avoid the application of section 1504 and these regulations.

Comments also asserted that the definition of related persons in the proposed regulations was too broad. The proposed regulations defined related persons by reference to section 267(b), which incorporates sections 267(c) and 1563(e)(1). The incorporation of section 1563(e)(1) had the unintended result of treating a corporation having an option to acquire over 10 percent of the stock of an issuing corporation as related to the issuing corporation, regardless of whether it actually owned stock of the issuing corporation. Under the proposed regulations, the transfer of such an option by a corporation would have caused a measurement date. Accordingly, the regulations have been amended to provide that section 1563(e)(1) does not apply in determining whether persons are related. Furthermore, the Service and Treasury have determined that the incorporation of the constructive ownership rules under section 267(c) is also unnecessary to carry out the purposes of the regulations. Accordingly, the regulations have been amended to provide that section 267(c) does not apply in determining whether persons are related.

Instruments Treated as Options

Several comments concerned instruments treated as options under the proposed regulations. Comments asked whether an agreement under which one shareholder could require the issuing corporation to redeem the stock of another shareholder constituted an option under the proposed regulations. The regulations have been modified to clarify that redemption agreements constitute options because they provide for the ability to transfer or require the transfer of stock.

In addition, comments suggested that the provision in the proposed regulations treating any instrument or right (except for stock itself) pursuant to which the holder may share in corporate growth as an option was too broad. For example, comments suggested that this rule treated instruments such as royalty interests and purchase price "earn-outs" as options. Because these instruments generally are associated with non-abusive transactions, the proposed regulations were not intended to cover these types of instruments. Accordingly, the regulations have been modified to limit the application of the regulations to instruments with greater abuse potential and thus the language defining an option as any "instrument or right (except for stock itself) pursuant to which the holder may share in the growth of the issuing corporation" has been eliminated.

Comments requested that the treatment of tracking stock be clarified in the regulations. However, the final regulations do not address the treatment of tracking stock. The Service and Treasury continue to study the questions raised by tracking stock and may issue guidance in the future.

Instruments Not Treated as Options

The proposed regulations stated that, "provided they are not used as a device to avoid the application of section 1504 or these regulations," specified instruments are not treated as options. Several comments asserted that the device test causes uncertainty. Comments recommended eliminating the general device test and addressing concerns about abuse by narrowing the enumerated exceptions. After consideration of these comments, the general device test has been eliminated. Concerns about abuse are addressed by more specific requirements for instruments not treated as options. For example, under the final regulations, the exception for publicly traded options applies unless an option is issued, transferred, or listed with a principal purpose of avoiding the application of section 1504 and these regulations. The final regulations include examples of when a publicly traded option may have such a principal purpose.

In addition, the final regulations provide that options created pursuant to a title 11 or similar case and certain convertible preferred stock are not treated as options. Most convertible preferred stock should satisfy this exception and should not be treated as an option. If, however, the convertible preferred stock does not satisfy this exception, it may be treated as stock

and/or an option, depending on the circumstances.

Comments asked whether an option that is publicly traded on one measurement date but not on a subsequent measurement date is treated as an option on the subsequent measurement date. The regulations have been clarified to provide that the publicly traded exception no longer applies if the option is no longer publicly traded.

Reasonable Anticipation of Elimination of Tax Liability

Comments asked whether the requirement that there be a reasonable anticipation that the issuance or transfer of an option, in lieu of the underlying stock, result in the elimination of tax liability requires only some possibility of elimination, or similar to the reasonable certainty of exercise test, a strong probability. The intention of the regulations is that the sale of an option is treated as if it would result in the elimination of tax liability only if the parties expect, or should reasonably have expected, that there would be an elimination of tax liability. The mere possibility of such savings is not sufficient to satisfy this requirement.

Comments also suggested that an aggregation rule should be provided when testing whether the issuance or transfer of an option in lieu of the underlying stock would, if not for the regulations, result in the elimination of federal income tax liability. In response to these comments, the regulations have been changed to provide that in the case of options issued pursuant to a plan, a measurement date for any of the options constitutes a measurement date for all options issued pursuant to the plan that are outstanding on the measurement date. In addition, the regulations have been modified to provide that all options with the same measurement date are aggregated in determining whether the sale of the option, in lieu of the underlying stock, would result in the elimination of a substantial amount of federal income tax liability.

Other comments asked whether the triggering of an excess loss account or the restoration of deferred intercompany accounts because of the disaffiliation of the issuing corporation from its affiliated group are taken into account in determining whether there would be an elimination of tax liability under the regulations. The regulations intend that any benefit related to the affiliation of the issuing corporation and its affiliated group constitutes an elimination of federal income tax liability within the meaning of the regulations. When a corporation is disaffiliated from its group, the entire excess loss account or deferred intercompany account, and not just the amount associated with any stock that is sold, is restored to income. Therefore, these amounts must be taken into consideration in determining whether there would be an elimination of federal income tax liability. This should be contrasted with the deferral of gain with respect to stock subject to the option that would be recognized if such stock, rather than the option, were sold on a measurement date. This latter deferral of gain is not related to the affiliation of the issuing corporation and its affiliated group but only to the stock that would otherwise have been sold. Therefore, the regulations provide that such deferral does not constitute an elimination of federal income tax liability.

Another comment asked whether the description of items that constitute an elimination of tax liability under the proposed regulations was all inclusive, or whether other items could also satisfy this provision. The list was not intended to address all items that could constitute the elimination of tax liability. For example, a deferral of a loss under § 1.1502–13 from the current year to a later year to allow an otherwise expiring net operating loss to be used in the current year constitutes an elimination of tax liability for purposes of this provision.

Elimination of a Substantial Amount of Federal Income Tax Liability

Comments requested that the regulations add a safe harbor for the determination of a substantial amount of federal income tax liability. Careful consideration was given to this issue. Based on all of the different factors involved, however, including size of groups, gross income of groups, net income of groups, amount of savings, and timing of savings, the Service and Treasury determined that the final regulations would not provide a safe harbor. Accordingly, the determination of whether an elimination of tax liability is substantial is made on a facts and circumstances basis.

Reasonable Certainty of Exercise

Other comments asked about the treatment of an option whose exercise price varies over time. Generally, all the facts and circumstances are considered in determining whether an option is reasonably certain to be exercised. The fact that an option cannot, or may not, be exercised for a period of time after its issuance is not determinative as to whether the option is treated as exercised as of a measurement date. Therefore, if the possible exercise prices of an option are set forth in the option agreement, the lowest exercise price (or in the case of an option to sell stock, the highest exercise price) is used in determining whether an option is reasonably certain to be exercised. If the exercise price varies according to an index or some other standard outside the option agreement, all the facts and circumstances must be taken into consideration. In addition, the regulations have been amended to clarify that the date on which the exercise price of the option changes constitutes a measurement date, because the change is an adjustment pursuant to the terms of the option.

One of the factors considered in determining whether an option is reasonably certain to be exercised is the existence of stockholder rights (i.e., managerial or economic rights in the issuing corporation that ordinarily are possessed by owners of stock). Several comments asked whether an option holder (or a person whose stock ownership would increase on the exercise of an option) who is also a stockholder is considered to possess such stockholder rights if these rights are possessed solely because of actual stock ownership. In response to these comments, the regulations have been modified to provide that managerial or economic rights possessed because of actual stock ownership in the issuing corporation are not taken into account.

In addition, another comment noted that the proposed regulations treat the existence of stockholder rights as a factor to be taken into account in determining whether an option is reasonably certain to be exercised, even though the existence of such rights actually may reduce the likelihood of exercise. For example, if an option holder already possesses dividend and/or voting rights pursuant to an option agreement, the exercise of the option may be less likely than if the option did not provide such rights, because the option holder benefits less from the exercise of the option. However, because an option that provides stockholder rights tends to appear more similar to actual stock of the issuing corporation, the existence of such rights is considered a factor making an option more likely to be exercised, rather than less likely.

Treatment of Options Previously Treated as Exercised

Several comments concerned the treatment of options that were treated as exercised on one measurement date and that subsequently either lapsed or were forfeited. The lapse or forfeiture of an option does not constitute a

measurement date. However, because the option is no longer in existence as of the date of lapse or forfeiture, the option is not taken into account in determining affiliation on or after such date. Accordingly, if the option had the effect of breaking affiliation as of a prior measurement date, the lapse or forfeiture of the option may reaffiliate the issuing corporation with its affiliated group as of the date of lapse or forfeiture.

Several comments requested that an option that lapses or is forfeited be treated as if it never existed, so that the issuing corporation would be treated as not having disaffiliated. The final regulations do not adopt such a rule. These regulations only apply to options that are reasonably certain to be exercised and the sale, issuance, or transfer of which, if not for these regulations, would provide a substantial elimination of tax liability, i.e., abusive situations. In effect, the regulations treat the sale, issuance, or transfer of such an option as if the underlying stock were sold. Accordingly, the issuing corporation should properly be disaffiliated as of the date of the sale, issuance, or transfer of the option. Further, all of the consequences of the disaffiliation and reaffiliation, including section 1504(a)(3), apply.

Comments also asked whether options that were previously treated as exercised are to be retested on subsequent measurement dates or are permanently treated as exercised. Under the regulations, an option, whether previously treated as exercised or as not exercised, is retested on a subsequent measurement date for the option. Thus, an option that was previously treated as exercised will no longer be treated as exercised on a subsequent measurement date if the option no longer satisfies both the reasonable certainty of exercise test and the substantial elimination of tax liability test. If the retesting of the option causes the reaffiliation of the issuing corporation to its affiliated group, all of the consequences of disaffiliation and reaffiliation apply.

Substance Over Form

The preamble to the proposed regulations stated that no inference was intended that options with no measurement date on or after February 28, 1992, are to be disregarded for purposes of determining affiliation and that the Service may apply substance over form principles in determining whether options are treated as stock or as exercised in appropriate circumstances. Comments asked whether the same substance over form principles would be applied for options with measurement dates on or after February 28, 1992. It is intended that substance over form principles apply to options with measurement dates on or after February 28, 1992. Accordingly, the fact that an instrument is treated as an option under these regulations does not prevent the instrument from being treated as stock under general principles of law.

Effective Date

Several comments asked for clarification of the effective date of the provision concerning valuation of stock. This provision does not require the existence of an option and thus, the effective date of this provision is unclear. Accordingly, the regulations have been modified to provide that the valuation provision applies to stock outstanding on or after February 28, 1992, the date the proposed regulations were filed with the Federal Register.

Special Analyses

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis and a final Regulatory Flexibility Analysis (under the Regulatory Flexibility Act (5 U.S.C. chapter 6)) are not required. Pursuant to section 7805(f) of the Internal Revenue Code, the Notice of Proposed Rulemaking for the regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Ken Cohen of the Office of Assistant Chief Counsel (Corporate), Internal Revenue Service. However, other personnel from the Service and the Treasury Department participated in their development.

List of Subjects in 26 CFR 1.1501–1 Through 1.1504–5

Consolidated returns, Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority citation for part 1 is amended by adding the following citation:

Authority: 26 U.S.C. 7805 * * * Section 1.1504–4 also issued under 26 U.S.C. 1504(a)(5). * * *

Par. 2. Section 1.1504–0 is added to read as follows:

§ 1.1504–0 Outline of provisions.

In order to facilitate the use of §§ 1.1504–1 through 1.1504–4, this section lists the captions contained in §§ 1.1504–1 through 1.1504–4.

§ 1.1504–1 Definitions.

§ 1.1504–2 [Reserved].

§ 1.1504–3 [Reserved].

§ 1.1504–4 Treatment of warrants, options, convertible obligations, and other similar interests.

(a) Introduction.
(1) General rule.
(2) Exceptions.
(b) Options not treated as stock or as exercised.
(1) General rule.
(2) Options treated as exercised.
(i) In general.
(ii) Aggregation of options.
(iii) Effect of treating option as exercised.
(A) In general.
(B) Cash settlement options, phantom stock, stock appreciation rights, or similar interests.
(iv) Valuation.
(3) Example.
(c) Definitions.
(1) Issuing corporation.
(2) Related or sequential option.
(3) Related persons.
(4) Measurement date.
(i) General rule.
(ii) Issuances, transfers, or adjustments not treated as measurement dates.
(iii) Transactions increasing likelihood of exercise.
(iv) Measurement date for options issued pursuant to a plan.
(v) Measurement date for related or sequential options.
(vi) Example.
(5) In-the-money.
(d) Options.
(1) Instruments treated as options.
(2) Instruments generally not treated as options.
(i) Options on section 1504(a)(4) stock.
(ii) Certain publicly traded options.
(A) General rule.
(B) Exception.
(iii) Stock purchase agreements.
(iv) Escrow, pledge, or other security agreements.
(v) Compensatory options.
(A) General rule.
(B) Exceptions.
(vi) Options granted in connection with a loan.
(vii) Options created pursuant to a title 11 or similar case.
(viii) Convertible preferred stock.
(ix) Other enumerated instruments.
(e) Elimination of federal income tax liability.
(f) Substantial amount of federal income tax liability.

(g) Reasonable certainty of exercise.
(1) Generally.
(i) Purchase price.
(ii) In-the-money option.
(iii) Not in-the-money option.
(iv) Exercise price.
(v) Time of exercise.
(vi) Related or sequential options.
(vii) Stockholder rights.
(viii) Restrictive covenants.
(ix) Intention to alter value.
(x) Contingencies.
(2) Cash settlement options, phantom stock, stock appreciation rights, or similar interests.
(3) Safe harbors.
(i) Options to acquire stock.
(ii) Options to sell stock.
(iii) Options exercisable at fair market value.
(iv) Exceptions.
(v) Failure to satisfy safe harbor.
(h) Examples.
(i) Effective date.

Par. 3. Sections 1.1504–2 and 1.1504–3 are added and reserved and § 1.1504–4 is added to read as follows.

§ 1.1504–2 [Reserved]

§ 1.1504–3 [Reserved]

§ 1.1504.4 Treatment of warrants, options, convertible obligations, and other similar interests

(a) *Introduction*—(1) *General rule.* This section provides regulations under section 1504(a)(5) (A) and (B) regarding the circumstances in which warrants, options, obligations convertible into stock, and other similar interests are treated as exercised for purposes of determining whether a corporation is a member of an affiliated group. The fact that an instrument may be treated as an option under these regulations does not prevent such instrument from being treated as stock under general principles of law. Except as provided in paragraph (a)(2) of this section, this section applies to all provisions under the Internal Revenue Code and the regulations to which affiliation within the meaning of section 1504(a) (with or without the exceptions in section 1504(b)) is relevant, including those provisions that refer to section 1504(a)(2) (with or without the exceptions in section 1504(b)) without referring to affiliation, provided that the 80 percent voting power and 80 percent value requirements of section 1504(a)(2) are not modified therein.

(2) *Exceptions.* This section does not apply to sections 163(j), 864(e), or 904(i) or to the regulations thereunder. This section also does not apply to any other provision specified by the Internal Revenue Service in regulations, a revenue ruling, or revenue procedure. See § 601.601(d)(2)(ii)(*b*) of this chapter.

(b) *Options not treated as stock or as excerised*—(1) *General rule.* Except as provided in paragraph (b)(2) of this section, an option is not considered either as stock or as exercised. Thus, options are disregarded in determining whether a corporation is a member of an affiliated group unless they are described in paragraph (b)(2) of this section.

(2) *Options treated as exercised*—(i) *In general.* Solely for purposes of determining whether a corporation is a member of an affiliated group, an option is treated as exercised if, on a measurement date with respect to such option—

(A) It could reasonably be anticipated that, if not for this section, the issuance or transfer of the option in lieu of the issuance, redemption, or transfer of the underlying stock would result in the elimination of a substantial amount of federal income tax liability (as described in paragraphs (e) and (f) of this section); and

(B) It is reasonably certain that the option will be exercised (as described in paragraph (g) of this section).

(ii) *Aggregation of options.* All options with the same measurement date are aggregated in determining whether the issuance or transfer of an option in lieu of the issuance, redemption, or transfer of the underlying stock would result in the elimination of a substantial amount of federal income tax liability.

(iii) *Effect of treating option as exercised*—(A) *In general.* An option that is treated as exercised is treated as exercised for purposes of determining the percentage of the value of stock owned by the holder and other parties, but is not treated as exercised for purposes of determining the percentage of the voting power of stock owned by the holder and other parties.

(B) *Cash settlement options, phantom stock, stock appreciation rights, or similar interests.* If a cash settlement option, phantom stock, stock appreciation right, or similar interest is treated as exercised, the option is treated as having been converted into stock of the issuing corporation. If the amount to be received upon the exercise of such an option is determined by reference to a multiple of the increase in the value of a share of the issuing corporation's stock on the exercise date over the value of a share of the stock on the date the option is issued, the option is treated as converted into a corresponding number of shares of such stock. Appropriate adjustments must be made in any situation in which the amount to be received upon exercise of the option is determined in another manner.

(iv) *Valuation.* For purposes of section 1504(a)(2)(B) and this section, all shares of stock within a single class are considered to have the same value. Thus, control premiums and minority and blockage discounts within a single class are not taken into account.

(3) *Example.* The provisions of paragraph (b)(2) of this section may be illustrated by the following example:

Example. (i) Corporation P owns all 100 shares of the common stock of Corporation S, the only class of S stock outstanding. Each share of S stock has a fair market value of $10 and has one vote. On June 30, 1992, P issues to Corporation X and option to acquire 80 shares of the S stock from P.

(ii) If, under the provisions of this section, the option is treated as exercised, then, solely for purposes of determining affiliation, P is treated as owning only 20 percent of the value of the outstanding S stock and X is treated as owing the remaining 80 percent of the value of the S stock. P is still treated as owning all of the voting power of S. Accordingly, because P is treated as owning less than 80 percent of the value of the outstanding S stock, P and S are no longer affiliated. However, because X is not treated as owning any of the voting power of S, X and S are also not affiliated.

(c) *Definitions.* For purposes of this section—

(1) *Issuing corporation.* "Issuing corporation" means the corporation whose stock is subject to an option.

(2) *Related or sequential option.* "Related or sequential option" means an option that is one of a series of options issued to the same or related persons. For purposes of this section, any options issued to the same person or related persons within a two-year period are presumed to be part of a series of options. This presumption may be rebutted if the facts and circumstances clearly establish that the options are not part of a series of options. Any options issued to the same person or related persons more than two years apart are presumed not to be part of a series of options. This presumption may be rebutted if the facts and circumstances clearly establish that the options are part of a series of options.

(3) *Related persons.* Persons are related if they are related within the meaning of section 267(b) (without the application of sections 267(c) and 1563(e)(1)) or 707(b)(1), substituting "10 percent" for "50 percent" wherever it appears.

(4) *Measurement date*—(i) *General rule.* "Measurement date" means a date on which an option is issued or transferred or on which the terms of an existing option or the underlying stock are adjusted (including an adjustment

pursuant to the terms of the option or the underlying stock).

(ii) *Issuances, transfers, or adjustments not treated as measurement dates.* A measurement date does not include a date on which—

(A) An option is issued or transferred by gift, at death, or between spouses or former spouses under section 1041;

(B) An option is issued or transferred—

(*1*) Between members of an affiliated group (determined with the exceptions in section 1504(b) and without the application of this section); or

(*2*) Between persons none of which is a member of the affiliated group (determined without the exceptions in section 1504(b) and without the application of this section), if any, of which the issuing corporation is a member, unless—

(*i*) Any such person is related to (or acting in concert with) the issuing corporation or any member of its affiliated group; and

(*ii*) The issuance or transfer is pursuant to a plan a principal purpose of which is to avoid the application of section 1504 and this section;

(C) An adjustment occurs in the terms or pursuant to the terms of an option or the underlying stock that does not materially increase the likelihood that the option will be exercised; or

(D) A change occurs in the exercise price of an option or in the number of shares that may be issued or transferred pursuant to the option as determined by a bona fide, reasonable, adjustment formula that has the effect of preventing dilution of the interests of the holders of the options.

(iii) *Transactions increasing likelihood of exercise.* If a change or alteration referred to in this paragraph (c)(4)(iii) is made for a principal purpose of increasing the likelihood that an option will be exercised, a measurement date also includes any date on which—

(A) The capital structure of the issuing corporation is changed; or

(B) The fair market value of the stock of the issuing corporation is altered through a transfer of assets to or from the issuing corporation (other than regular, ordinary dividends) or by any other means.

(iv) *Measurement date for options issued pursuant to a plan.* In the case of options issued pursuant to a plan, a measurement date for any of the options constitutes a measurement date for all options issued pursuant to the plan that are outstanding on the measurement date.

(v) *Measurement date for related or sequential options.* In the case of related or sequential options, a measurement date for any of the options constitutes a measurement date for all related or sequential options that are outstanding on the measurement date.

(vi) *Example.* The provisions of paragraph (c)(4)(v) of this section may be illustrated by the following example.

Example. (i) Corporation P owns all 80 shares of the common stock of Corporation S, the only class of S stock outstanding. On January 1, 1992, S issues a warrant, exercisable within 3 years, to U, an unrelated corporation, to acquire 10 newly issued shares of S common stock. On July 1, 1992, S issues a second warrant to U to acquire 10 additional newly issued shares of S common stock. On January 1, 1993, S issues a third warrant to T, a wholly owned subsidiary of U, to acquire 10 newly issued shares of S common stock. Assume that the facts and circumstances do not clearly establish that the options are not part of a series of options.

(ii) January 1, 1992, July 1, 1992, and January 1, 1993, constitute measurement dates for the first warrant, the second warrant, and the third warrant, respectively, because the warrants were issued on those dates.

(iii) Because the first and second warrants were issued within two years of each other, and both warrants were issued to U, the warrants constitute related or sequential options. Accordingly, July 1, 1992, constitutes a measurement date for the first warrant as well as for the second warrant.

(iv) Because the first, second, and third warrants were all issued within two years of each other, and were all issued to the same or related persons, the warrants constitute related or sequential options. Accordingly, January 1, 1993, constitutes a measurement date for the first and second warrants, as well as for the third warrant.

(5) *In-the-money.* "In-the-money" means the exercise price of the option is less than (or in the case of an option to sell stock, greater than) the fair market value of the underlying stock.

(d) *Options*—(1) *Instruments treated as options.* For purposes of this section, except to the extent otherwise provided in this paragraph (d), the following are treated as options:

(i) A call option, warrant, convertible obligation, put option, redemption agreement (including a right to cause the redemption of stock), or any other instrument that provides for the right to issue, redeem, or transfer stock (including an option on an option); and

(ii) A cash settlement option, phantom stock, stock appreciation right, or any other similar interest (except for stock).

(2) *Instruments generally not treated as options.* For purposes of this section, the following will not be treated as options:

(i) *Options on section 1504(a)(4) stock.* Options on stock described in section 1504(a)(4);

(ii) *Certain publicly traded options*—(A) *General rule.* Options which on the measurement date are traded on (or subject to the rules of) a qualified board or exchange as defined in section 1256(g)(7), or on any other exchange, board of trade, or market specified by the Internal Revenue Service in regulations, a revenue ruling, or revenue procedure. See § 601.601(d)(2)(ii)(*b*) of this chapter;

(B) *Exception.* Paragraph (d)(2)(ii)(A) of this section does not apply to options issued, transferred, or listed with a principal purpose of avoiding the application of section 1504 and this section. For example, a principal purpose of avoiding the application of section 1504 and this section may exist if warrants, convertible or exchangeable debt instruments, or other similar instruments have an exercise price (or, in the case of convertible or exchangeable instruments, a conversion or exchange premium) that is materially less than, or a term that is materially longer than, those that are customary for publicly traded instruments of their type. A principal purpose may also exist if a large percentage of an issuance of an instrument is placed with one investor (or group of investors) and a very small percentage of the issuance is traded on a qualified board or exchange;

(iii) *Stock purchase agreements.* Stock purchase agreements or similar arrangements whose terms are commercially reasonable and in which the parties' obligations to complete the transaction are subject only to reasonable closing conditions;

(iv) *Escrow, pledge, or other security agreements.* Agreements for holding stock in escrow or under a pledge or other security agreement that are part of a typical commercial transaction and that are subject to customary commercial conditions;

(v) *Compensatory options*—(A) *General rule.* Stock appreciation rights, warrants, stock options, phantom stock, or other similar instruments provided to employees, directors, or independent contractors in connection with the performance of services for the corporation or a related corporation (and that is not excessive by reference to the services performed) and which—

(*1*) Are nontransferable within the meaning of § 1.83–3(d); and

(*2*) Do not have a readily ascertainable fair market value as defined in § 1.83–7(b) on the measurement date;

(B) *Exceptions.* (*1*) Paragraph (d)(2)(v)(A) of this section does not apply to options issued or transferred with a principal purpose of avoiding the application of section 1504 and this section; and

(2) Paragraph (d)(2)(v)(A) of this section ceases to apply to options that become transferable;

(vi) *Options granted in connection with a loan.* Options granted in connection with a loan if the lender is actively and regularly engaged in the business of lending and the options are issued in connection with a loan to the issuing corporation that is commercially reasonable. This paragraph (d)(2)(vi) continues to apply if the option is transferred with the loan (or if a portion of the option is transferred with a corresponding portion of the loan). However, if the option is transferred without a corresponding portion of the loan, this paragraph (d)(2)(vi) ceases to apply;

(vii) *Options created pursuant to a title 11 or similar case.* Options created by the solicitation or receipt of acceptances to a plan of reorganization in a title 11 or similar case (within the meaning of section 368(a)(3)(A)), the option created by the confirmation of the plan, and any option created under the plan prior to the time the plan becomes effective;

(viii) *Convertible preferred stock.* Convertible preferred stock, provided the terms of the conversion feature do not permit or require the tender of any consideration other than the stock being converted; and

(ix) *Other enumerated instruments.* Any other instruments specified by the Internal Revenue Service in regulations, a revenue ruling, or revenue procedure. See § 601.601(d)(2)(ii)(*b*) of this chapter.

(e) *Elimination of federal income tax liability.* For purposes of this section, the elimination of federal income tax liability includes the elimination or deferral of federal income tax liability. In determining whether there is an elimination of federal income tax liability, the tax consequences to all involved parties are considered. Examples of elimination of federal income tax liability include the use of a loss or deduction that would not otherwise be utilized, the acceleration of a loss or deduction to a year earlier than the year in which the loss or deduction would otherwise be utilized, the deferral of gain or income to a year later than the year in which the gain or income would otherwise be reported, and the acceleration of gain or income to a year earlier than the year in which the gain or income would otherwise be reported, if such gain or income is offset by a net operating loss or net capital loss that would otherwise expire unused. The elimination of federal income tax liability does not include the deferral of gain with respect to the stock subject to the option that would be recognized if such stock were sold on a measurement date.

(f) *Substantial amount of federal income tax liability.* The determination of what constitutes a substantial amount of federal income tax liability is based on all the facts and circumstances, including the absolute amount of the elimination, the amount of the elimination relative to overall tax liability, and the timing of items of income and deductions, taking into account present value concepts.

(g) *Reasonable certainty of exercise*—(1) *Generally.* The determination of whether, as of a measurement date, an option is reasonably certain to be exercised is based on all the facts and circumstances, including:

(i) *Purchase price.* The purchase price of the option in absolute terms and in relation to the fair market value of the stock or the exercise price of the option;

(ii) *In-the-money option.* Whether and to what extent the option is in-the-money on the measurement date;

(iii) *Not in-the-money option.* If the option is not in-the-money on the measurement date, the amount or percentage by which the exercise price of the option is greater than (or in the case of an option to sell stock, is less than) the fair market value of the underlying stock;

(iv) *Exercise price.* Whether the exercise price of the option is fixed or fluctuates depending on the earnings, value, or other indication of economic performance of the issuing corporation;

(v) *Time of exercise.* The time at which, or the period of time during which, the option can be exercised;

(vi) *Related or sequential options.* Whether the option is one in a series of related or sequential options;

(vii) *Stockholder rights.* The existence of an arrangement (either within the option agreement or in a related agreement) that, directly or indirectly, affords managerial or economic rights in the issuing corporation that ordinarily would be afforded to owners of the issuing corporation's stock (e.g., voting rights, dividend rights, or rights to proceeds on liquidation) to the person who would acquire the stock upon exercise of the option or a person related to such person. For this purpose, managerial or economic rights in the issuing corporation possessed because of actual stock ownership in the issuing corporation are not taken into account;

(viii) *Restrictive covenants.* The existence of restrictive covenants or similar arrangements (either within the option agreement or in a related agreement) that, directly or indirectly, prevent or limit the ability of the issuing corporation to undertake certain activities while the option is outstanding (e.g., covenants limiting the payment of dividends or borrowing of funds);

(ix) *Intention to alter value.* Whether it was intended that through a change in the capital structure of the issuing corporation or a transfer of assets to or from the issuing corporation (other than regular, ordinary dividends) or by any other means, the fair market value of the stock of the issuing corporation would be altered for a principal purpose of increasing the likelihood that the option would be exercised; and

(x) *Contingencies.* Any contingency (other than the mere passage of time) to which the exercise of the option is subject (e.g., a public offering of the issuing corporation's stock or reaching a certain level of earnings).

(2) *Cash settlement options, phantom stock, stock appreciation rights, or similar interests.* A cash settlement option, phantom stock, stock appreciation right, or similar interest is treated as reasonably certain to be exercised if it is reasonably certain that the option will have value at some time during the period in which the option may be exercised.

(3) *Safe harbors*—(i) *Options to acquire stock.* Except as provided in paragraph (g)(3)(iv) of this section, an option to acquire stock is not considered reasonably certain, as of a measurement date, to be exercised if—

(A) The option may be exercised no more than 24 months after the measurement date and the exercise price is equal to or greater than 90 percent of the fair market value of the underlying stock on the measurement date; or

(B) The terms of the option provide that the exercise price of the option is equal to or greater than the fair market value of the underlying stock on the exercise date.

(ii) *Options to sell stock.* Except as provided in paragraph (g)(3)(iv) of this section, an option to sell stock is not considered reasonably certain, as of a measurement date, to be exercised if—

(A) The option may be exercised no more than 24 months after the measurement date and the exercise price is equal to or less than 110 percent of the fair market value of the underlying stock on the measurement date; or

(B) The terms of the option provide that the exercise price of the option is equal to or less than the fair market value of the underlying stock on the exercise date.

(iii) *Options exercisable at fair market value.* For purposes of paragraphs (g)(3)(i)(B) and (g)(3)(ii)(B) of this

section, an option whose exercise price is determined by a formula is considered to have an exercise price equal to the fair market value of the underlying stock on the exercise date if the formula is agreed upon by the parties when the option is issued in a bona fide attempt to arrive at fair market value on the exercise date and is to be applied based upon the facts in existence on the exercise date.

(iv) *Exceptions.* The safe harbors of this paragraph (g)(3) do not apply if—

(A) An arrangement exists that provides the holder or a related party with stockholder rights described in paragraph (g)(1)(vii) of this section (except for rights arising upon a default under the option or a related agreement);

(B) It is intended that through a change in the capital structure of the issuing corporation or a transfer of assets to or from the issuing corporation (other than regular, ordinary dividends) or by any other means, the fair market value of the stock of the issuing corporation will be altered for a principal purpose of increasing the likelihood that the option will be exercised; or

(C) The option is one in a series of related or sequential options, unless all such options satisfy paragraph (g)(3) (i) or (ii) of this section.

(v) *Failure to satisfy safe harbor.* Failure of an option to satisfy one of the safe harbors of this paragraph (g)(3) does not affect the determination of whether an option is treated as reasonably certain to be exercised.

(h) *Examples.* The provisions of this section may be illustrated by the following examples. These examples assume that the measurement dates set forth in the examples are the only measurement dates that have taken place or will take place.

Example 1. (i) P is the common parent of a consolidated group, consisting of P, S, and T. P owns all 100 shares of S's only class of stock, which is voting common stock. P also owns all the stock of T. On June 30, 1992, when the fair market value of the S stock is $40 per share, P sells to U, an unrelated corporation, an option to acquire 40 shares of the S stock that P owns at an exercise price of $30 per share, exercisable at any time within 3 years after the granting of the option. P and T have had substantial losses for 5 consecutive years while S has had substantial income during the same period. Because P, S, and T have been filing consolidated returns, P and T have been able to use all of their losses to offset S's income. It is anticipated that P, S, and T will continue their earnings histories for several more years. On July 31, 1992, S declares and pays a dividend of $1 per share to P.

(ii) If P, S, and T continue to file consolidated returns after June 30, 1992, it could reasonably be anticipated that P, S, and T would eliminate a substantial amount of federal income tax liability by using P's and T's future losses to offset S's income in consolidated returns. Furthermore, based on the difference between the exercise price of the option and the fair market value of the S stock, it is reasonably certain, on June 30, 1992, a measurement date, that the option will be exercised. Therefore, the option held by U is treated as exercised. As a result, for purposes of determining whether P and S are affiliated, P is treated as owning only 60 percent of the value of outstanding shares of S stock and U is treated as owning the remaining 40 percent. P is still treated as owning 100 percent of the voting power. Because members of the P group are no longer treated as owning stock possessing 80 percent of the total value of the S stock as of June 30, 1992, S is no longer a member of the P group. Additionally, P is not entitled to a 100 percent dividends received deduction under section 243(a)(3) because P and S are also treated as not affiliated for purposes of section 243. P is only entitled to an 80 percent dividends received deduction under section 243(c).

Example 2. (i) The facts are the same as in *Example 1* except that rather than P issuing an option to acquire 40 shares of S stock to U on June 30, 1992, P, pursuant to a plan, issues an option to U1 on July 1, 1992, to acquire 20 shares of S stock, and issues an option to U2 on July 2, 1992, to acquire 20 shares of S stock.

(ii) Because the options issued to U1 and U2 were issued pursuant to a plan, July 2, 1992, constitutes a measurement data for both options. Therefore, both options are aggregated in determining whether the issuance of the options, rather than the sale of the S stock, would result in the elimination of a substantial amount of federal income tax liability. Accordingly, as in *Example 1*, because the continued affiliation of P, S, and T could reasonably be anticipated to result in the elimination of a substantial amount of federal income tax liability and the options are reasonably certain to be exercised, the options are treated as exercised for purposes of determining whether P and S are affiliated, and P and S are no longer affiliated as of July 2, 1992.

Example 3. (i) The facts are the same as in *Example 1* except that the option gives U the right to acquire all 100 shares of the S stock, and U is the common parent of a consolidated group. The U group has had substantial losses for 5 consecutive years and it is anticipated that the U group will continue its earnings history for several more years.

(ii) If P sold the S stock, in lieu of the option, to U, S would become a member of the U group. Because the U group files consolidated returns, if P sold the S stock to U, U would be able to use its future losses to offset future income of S. When viewing the transaction from the effect on all parties, the sale of the option, in lieu of the underlying S stock, does not result in the elimination of federal income tax liability because S's income would be offset by the losses of members of either the P or U group. Accordingly, the option is disregarded and S remains a member of the P group.

Example 4. (i) P is the common parent of a consolidated group, consisting of P and S. P owns 90 of the 100 outstanding shares of S's only class of stock, which is voting common stock, and U, an unrelated corporation, owns the remaining 10 shares. On August 31, 1992, when the fair market value of the S stock is $100 per share, P sells a call option to U that entitles U to purchase 20 shares of S stock from P, at any time before August 31, 1993, at an exercise price of $115 per share. The call option does not provide U with any voting rights, dividend rights, or any other managerial or economic rights ordinarily afforded to owners of the S stock. There is no intention on August 31, 1992, to alter the value of S to increase the likelihood of the exercise of the call option.

(ii) Because the exercise price of the call option is equal to or greater than 90 percent of the fair market value of the S stock on August 31, 1992, a measurement date, the option may be exercised no more than 24 months after the measurement date, and none of the items described in paragraph (g)(3)(iv) of this section that preclude application of the safe harbor are present, the safe harbor of paragraph (g)(3)(i) of this section applies and the call option is treated as if it is not reasonably certain to be exercised. Therefore, regardless of whether the continued affiliation of P and S would result in the elimination of a substantial amount of federal income tax liability, the call option is disregarded in determining whether S remains a member of the P group.

Example 5. (i) The facts are the same as in *Example 4* except that the call option gives U the right to vote similar to that of a shareholder.

(ii) Under paragraph (g)(3)(iv) of this section, the safe harbor of paragraph (g)(3)(i) of this section does not apply because the call option entitles U to voting rights equivalent to that of a shareholder. Accordingly, all of the facts and circumstances surrounding the sale of the call option must be taken into consideration in determining whether it is reasonably certain that the call option will be exercised.

Example 6. (i) In 1992, two unrelated corporations, X and Y, decide to engage jointly in a new business venture. To accomplish this purpose, X organizes a new corporation, S, on September 30, 1992. X acquires 100 shares of the voting common stock of S, which are the only shares of S stock outstanding. Y acquires a debenture of S which is convertible, on September 30, 1995, into 100 shares of S common stock. If the conversion right is not exercised, X will have the right, on September 30, 1995, to put 50 shares of its S stock to Y in exchange for 50 percent of the debenture held by Y. The likelihood of the success of the venture is uncertain. It is anticipated that S will generate substantial losses in its early years of operation. X expects to have substantial taxable income during the three years following the organization of S.

(ii) Under the terms of this arrangement, it is reasonably certain on September 30, 1992, a measurement date, that on September 30, 1995, either through Y's exercise of its

conversion right or X's right to put S stock to Y, that Y will own 50 percent of the S stock. Additionally, it could reasonably be anticipated, on September 30, 1992, a measurement date, that the affiliation of X and S would result in the elimination of a substantial amount of federal income tax liability. Accordingly, for purposes of determining whether X and S are affiliated, X is treated as owning only 50 percent of the value of the S stock as of September 30, 1992, a measurement date, and S is not a member of the X affiliated group.

Example 7. (i) The facts are the same as in *Example 6* except that rather than acquiring 100 percent of the S stock and the right to put S stock to Y, X acquires only 80 percent of the S stock, while S, rather than acquiring a convertible debenture, acquires 20 percent of the S stock, and an option to acquire an additional 30 percent of the S stock. The terms of the option are such that the option will only be exercised if the new business venture succeeds.

(ii) In contrast to *Example 6*, because of the true business risks involved in the start-up of S and whether the business venture will ultimately succeed, along with the fact that X does not have an option to put S stock to Y, it is not reasonably certain on September 30, 1992, a measurement date, that the option will be exercised and that X will only own 50 percent of the S stock on September 30, 1995. Accordingly, the option is disregarded in determining whether S is a member of the X group.

(i) *Effective date.* This section applies, generally, to options with a measurement date on or after February 28, 1992. This section does not apply to options issued prior to February 28, 1992, which have a measurement date on or after February 28, 1992, if the measurement date for the option occurs solely because of an adjustment in the terms of the option pursuant to the terms of the option as it existed on February 28, 1992. Paragraph (b)(2)(iv) of this section applies to stock outstanding on or after February 28, 1992.

Shirley D. Peterson,

Commissioner of Internal Revenue.

Approved: November 13, 1992.

Fred T. Goldberg, Jr.,

Assistant Secretary of the Treasury.

[FR Doc. 92-31058 Filed 12-28-92; 8:45 am]

BILLING CODE 4830-01-M

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26 CFR Part 1

[T. D. 8460]

RIN 1545-AP28

Income From Discharge of Indebtedness—Acquisition of Indebtedness by Person Related to the Debtor

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final income tax regulations under section 108(e)(4) of the Internal Revenue Code of 1986. These regulations provide rules concerning the acquisition of outstanding indebtedness by a person related to the debtor from a person who is not related to the debtor. These regulations provide that the acquisition of outstanding indebtedness by a person related to the debtor from a person who is not related to the debtor results in the realization by the debtor of income from discharge of indebtedness (to the extent required by section 61(a)(12) and section 108). This rule also applies to transactions in which a holder of outstanding indebtedness becomes related to the debtor, if the holder acquired the indebtedness in anticipation of becoming related to the debtor.

DATES: The regulations are effective on December 28, 1992 and apply to direct or indirect acquisitions of indebtedness occurring on or after March 21, 1991.

FOR FURTHER INFORMATION CONTACT: Victor L. Penico at (202) 622-7750 or Sharon L. Hall at (202) 622-4930 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

On March 22, 1991, the Internal Revenue Service published a notice of proposed rulemaking in the **Federal Register** (56 FR 12135) regarding the tax treatment of the acquisition of indebtedness by a person related to the debtor under section 108(e)(4). The preamble to that notice contains an explanation of the proposed rules. A public hearing was held on June 3, 1991. After consideration of the public comments regarding the proposed regulations, the regulations are adopted as revised by this Treasury decision.

Explanation of Statutory Provisions

Under section 61(a)(12) of the Internal Revenue Code (Code), gross income includes income from discharge of indebtedness. Section 108(e)(4)(A) provides that for purposes of determining income from discharge of indebtedness, to the extent provided in regulations prescribed by the Secretary, the acquisition of outstanding indebtedness by a person bearing a relationship to the debtor specified in section 267(b) or 707(b)(1) from a person who does not bear such a relationship to the debtor is treated as the acquisition of such indebtedness by the debtor. Thus, to the extent required by section 61(a)(12) and section 108, the debtor realizes discharge of indebtedness income upon the acquisition of its debt at a discount by a related party from an unrelated party.

Section 108(e)(4) was enacted by section 2(a) of the Bankruptcy Tax Act of 1980 (Pub. L. No. 96-589, 94 Stat. 3389, 3392) to prevent taxpayers from avoiding discharge of indebtedness through acquisitions of outstanding indebtedness by related parties. The legislative history notes that, under prior law, "a related party (such as the parent corporation of a debtor) can acquire the taxpayer's debt at a discount and effectively eliminate it as a real liability to outside interests, but the debtor thereby avoids the tax treatment which would apply if the debtor had directly retired the debt by repurchasing it." H. Rep. No. 96-833, 96th Cong., 2d Sess. 9 (1980); S. Rep. No. 96-1035, 96th Cong., 2d Sess. 10 (1980) (the Senate Report).

Public Comments

A significant number of comments were received from the public on the scope and content of the proposed regulations. The following discussion summarizes the principal comments made, as well as the changes made in the final regulations in response to those comments.

Direct and Indirect Acquisitions

Under the proposed regulations, section 108(e)(4) applies if indebtedness is acquired in a direct acquisition or an indirect acquisition. A direct acquisition occurs where a person related to the debtor acquires the indebtedness from a person unrelated to the debtor. An indirect acquisition is a transaction in which a holder of outstanding indebtedness becomes related to the debtor, if the holder acquired the indebtedness in anticipation of becoming related to the debtor.

The final regulations provide that the Service may exclude certain transactions from the definition of a direct acquisition through the issuance of subsequent published guidance. In response to comments received, the Service intends to study the extent, if any, to which a direct acquisition should not occur if the indebtedness and an ownership interest in the debtor are acquired together from the same person, and that person was related to the debtor immediately prior to the transaction.

Some commentators argued that the Secretary does not have the regulatory authority to apply section 108(e)(4) to indirect acquisitions, particularly where the holder acquires the debtor (because the holder then retains the power to

require payment of the debt). However, the Service and Treasury continue to believe that section 108(e)(4) applies to indirect acquisitions of the type covered by these regulations.

Under the proposed regulations, a holder is treated as having acquired indebtedness in anticipation of becoming related to the debtor, (1) if the holder acquired the indebtedness less than 6 months before the date the holder becomes related to the debtor or, (2), if, on the date the holder becomes related to the debtor, indebtedness of the debtor represents more than 25 percent of the fair market value of the total gross assets of the holder or of the holder group (the 25 percent test). Under the proposed regulations, a holder is presumed to have acquired indebtedness in anticipation of becoming related to the debtor if the holder acquired the indebtedness 6 months or more before the date the holder becomes related to the debtor but less than 24 months before that date (the 6 to 24 month test). This presumption is rebutted if the holder establishes that the acquisition was not made in anticipation of becoming related to the debtor.

A number of comments were received with respect to these rules. Several commentators criticized the proposed regulations for not permitting the debtor to establish that the acquisition was not made in anticipation of becoming related to the debtor under the 25 percent test. Others suggested that certain transactions should be excepted from the test. In response to these comments, the final regulations eliminate the presumptions relating to the 25 percent test and 6 to 24 month test. In those cases, the determination as to whether the acquisition was in anticipation of becoming related to the debtor will be based on the facts and circumstances of the particular case. However, if either the 25 percent test or the 6 to 24 month test is met and the debtor does not treat the transaction as an indirect acquisition, the final regulations require the debtor to disclose the circumstances of the acquisition on its income tax return (or on a qualified amended return within the meaning of § 1.6664–2(c)(3)) for the taxable year in which the debtor becomes related to the holder. This disclosure is in addition to any applicable disclosure required under section 6662, 6664 or 6694. If the debtor fails to make this disclosure in a timely manner, the holder will be presumed to have acquired the indebtedness in anticipation of becoming related to the debtor.

The final regulations also make technical changes in the mechanics of the 25 percent test and with respect to the tacking of holding periods for measuring the time elapsed from the date of the acquisition of the indebtedness until the date the holder becomes related to the debtor.

Measure of Discharge of Indebtedness Income

The proposed regulations provide that in a direct or indirect acquisition, discharge of indebtedness income is measured by reference to the fair market value of the indebtedness. Several commentators urged that the amount of discharge of indebtedness should be measured by reference to the related holder's cost of acquiring the indebtedness.

In most cases (for example, where an affiliate of the debtor buys the indebtedness for cash), the holder's cost should equal, or at least approximate, the fair market value of the indebtedness. However, disparities could potentially arise in three significant cases. One is where the related party acquires the indebtedness in exchange for its own indebtedness (a debt swap) and the issue price of the related party's indebtedness is not determined by reference to the fair market value of either instrument. Another is in an indirect acquisition, where the value of the indebtedness can change between the time the holder acquires the indebtedness and the time the holder becomes related to the debtor. The third is where the indebtedness is acquired in a nonrecognition transaction, in which case the holder's basis generally reflects the transferor's earlier cost rather than the current economic cost to the debtor group of acquiring the indebtedness.

The proponents of a cost standard argued that the treatment of an indebtedness acquired by a related person under section 108(e)(4) should mirror the treatment of an acquisition of indebtedness by the debtor itself. In the latter case, under § 1.61–12 and section 108(e)(11), the amount of income from discharge of indebtedness is generally determined by reference to the debtor's cost of acquiring the indebtedness.

As noted above, in most cases subject to section 108(e)(4), the cost and fair market value standards should produce similar results. The Service and Treasury believe that, where the two standards would differ, the correct economic measure of the cost of acquiring the debt (and, thus, of discharge of indebtedness income) is by reference to fair market value. However, the Service and Treasury have concluded that, in most circumstances, the related holder's cost of acquiring the indebtedness is a reasonable measure for determining the amount of discharge of indebtedness income. For example, because discharge of indebtedness income in debt swaps by the debtor is measured by reference to the debtor's cost rather than always measured by reference to fair market value, the Service and Treasury are persuaded that the cost standard should generally apply in debt swaps by debtor affiliates. Moreover, the use of cost is significantly less burdensome because it eliminates the need to value the indebtedness.

Consequently, the final regulations adopt a cost standard in computing discharge of indebtedness income for most transactions subject to section 108(e)(4). Except in certain special cases, this rule applies as long as the related holder (or a holder that becomes related to the debtor) acquires the debt "by purchase" on or less than six months before the acquisition date. For this purpose, a purchase occurs if the indebtedness in the hands of the holder is not substituted basis property within the meaning of section 7701(a)(42) (*e.g.*, if the holder has a cost basis under section 1012 or a fair market value basis under section 301(d)).

Where the holder's basis is not established by purchase within the six month period, the final regulations retain the fair market value measuring standard. In that case, the holder's cost of acquiring the indebtedness provides a less reliable measure of the debtor's discharge of indebtedness, *i.e.*, that cost would be less likely to bear a reasonable relationship to the fair market value of the debt and, thus, to the economic cost to the debtor group of reacquiring its debt. It is expected that this rule will apply infrequently because of the limited scope of the indirect acquisition rules.

The final regulations reserve on the treatment of an acquisition of indebtedness in a nonrecognition transaction, such as a merger of the creditor into a subsidiary of the debtor in a reorganization under section 368(a)(1)(A). As stated in the preamble to the proposed regulations, the Treasury Department intends to issue regulations clarifying the measurement and treatment of income from discharge of indebtedness in certain nonrecognition transactions in which the debtor acquires its own indebtedness, or the creditor assumes a debtor's obligation to the creditor. It is anticipated that those regulations will also provide guidance on the amount of discharge of indebtedness income in a nonrecognition transition that constitutes a direct or indirect

acquisition of debt under section 108(e)(4).

The final regulations also provide that discharge of indebtedness income is measured by the fair market value of the indebtedness if a principal purpose of the acquisition is the avoidance of federal income tax. Such an avoidance purpose may be inferred, for example, in a transaction that shifts the discharge of indebtedness income of a domestic corporation to a foreign affiliate.

Deemed Issuance

In general, the proposed regulations treat indebtedness acquired in a direct or indirect acquisition as new indebtedness of the debtor for all purposes of the Code with an issue price equal to its fair market value. This deemed issuance creates original issue discount (OID) that is generally deductible by the debtor and includible in income by the related holder. To correlate with the revised measure of discharge of indebtedness income in a section 108(e)(4) transaction, the final regulations provide that the issue price of the new indebtedness is equal to the amount used to compute the debtor's discharge of indebtedness. As discussed above, this amount is generally the related holder's cost of acquiring the indebtedness but, in certain cases, may be the fair market value of the indebtedness.

As noted above, under the proposed regulations, the deemed issuance applies for all purposes of the Code. In the preamble to the proposed regulations, the Service invited comments on whether the deemed issuance should not apply for purposes of specific provisions of the Code. Several commentators argued that the deemed issuance should not apply for purposes of the applicable high yield discount obligation (AHYDO) rules of section 163(e)(5) and the earnings stripping rules of section 163(j).

The final regulations provide that the Commissioner may provide by Revenue Procedure or other published guidance that the indebtedness is not treated as newly issued indebtedness for purposes of designated provisions of the income tax laws. The Service and Treasury are currently of the view that providing an exception from section 163(j) (or its effective date provisions) would permit taxpayers to convert non-earnings stripping debt into earnings stripping debt, and do not contemplate providing relief for that case. The Service is studying the possibility of publishing guidance with respect to other contexts (including AHYDO) and invites comments as to where the deemed issuance results in inappropriate consequences.

Treatment of the Holder in an Indirect Acquisition

The proposed regulations treat the holder of indebtedness in an indirect acquisition as if it sold the indebtedness to an unrelated party on the day before the acquisition date for an amount of money equal to the fair market value of the indebtedness on the acquisition date (deemed sale rule).

Comments were received to the effect that the holder should not be treated as selling the indebtedness, and that the holder's basis in the indebtedness should be treated as acquisition premium that offsets the OID to be earned by the holder as a result of the deemed issuance.

By adopting cost as the measuring standard for discharge of indebtedness income for most transactions under section 108(e)(4), the final regulations have substantially diminished the underlying basis for the deemed sale rule. Even where the final regulations measure discharge of indebtedness income by reference to the fair market value of the indebtedness, the Service and Treasury have concluded, in response to the comments received, that it is appropriate not to cause the holder to recognize gain or loss, and instead to treat the holder's basis as acquisition premium that offsets the OID otherwise includible as a result of the deemed issuance.

Accordingly, the final regulations have eliminated the deemed sale rule. In addition, the final regulations provide that the related holder does not recognize any gain or loss on the deemed issuance and its adjusted basis in the indebtedness is equal to its adjusted basis immediately before the deemed issuance. The deemed issuance is treated as a purchase of the indebtedness by the related holder for purposes of sections 1272(a)(7) and 1276, enabling the holder to use any basis in excess of the new issue price as an offset against the OID of the reissued indebtedness.

Subsequent Dispositions

Under the proposed regulations, the deemed issuance rule continues to apply after the related holder disposes of the indebtedness to an unrelated holder or ceases to be related to the debtor. Under this rule, the debtor continues to deduct and the unrelated holder must include in income the OID attributable to the deemed issuance. The preamble to the proposed regulations requested comments whether a different rule should apply, *e.g.*, a rule that suspends the debtor's deduction of OID (and does not require holder inclusion) attributable to the deemed issuance until maturity.

Although one commentator partially endorsed the alternative proposal, the final regulations retain the rule of the proposed regulations. The Service and Treasury believe that a subsequent disposition of the indebtedness by a related party would not be a common business transaction. Thus, the complexity involved in the alternative proposal was not considered justified.

Under the final regulations, a special anti-abuse rule applies to certain subsequent dispositions of indebtedness by the related holder if the related holder acquired the indebtedness in exchange for its own indebtedness and the issue price of the related holder's indebtedness is not determined by reference to fair market value.

As noted above, the final regulations generally measure discharge of indebtedness income under section 108(e)(4) by reference to the holder's cost. This rule was adopted, in part, to provide parity with the treatment that would apply if the debtor acquired its own indebtedness in exchange for new indebtedness. However, in the situation outlined above, absent this special rule, the debtor group might be able to obtain better treatment than would be available if the debtor acquired its own debt in exchange for its indebtedness and then resold its acquired obligation (which, for income tax purposes, would be treated as the issuance of a new obligation). In that case, the timing of the debtor's deductions with respect to the newly issued indebtedness (stated interest or OID) would match that of the holders' income inclusion. By contrast, in the transaction outlined above, the debtor group would have the benefit of a current deduction (the related holder's loss on the disposition of the indebtedness) while the unrelated holder would generally defer its corresponding market discount income until the debt is satisfied.

Accordingly, under the anti-abuse rule, the related holder's loss is deferred until the date the debtor retires the indebtedness. Comparable treatment is also provided for less direct forms of disposition (*e.g.*, where the holder contributes the indebtedness to a subsidiary and either the subsidiary sells the debt or the former holder sells the subsidiary) that would otherwise result in a tax benefit similar to the loss.

Miscellaneous Comments

Additional comments were received from the public. The Service and Treasury were requested, among other

things, to provide a *de minimis* dollar exception to the application of section 108(e)(4), to clarify the applicability of the stock-for-debt exception to cancellation of indebtedness income, and to clarify the treatment of the acquisition by an affiliate of portions of stripped bonds. The Service and Treasury concluded that a *de minimis* exception would not be appropriate and would add undue complexity (including aggregation rules and similar provisions).

The regulations (both proposed and final) require the realization of income "to the extent required by section 61(a)(12) and section 108." They do not address the extent to which the stock-for-debt exception might apply when a person related to the debtor issues its stock in exchange for the indebtedness. The Service is currently working on guidance regarding triangular stock-for-debt exchanges within a consolidated return context.

The question regarding coupon stripping transactions should be addressed with respect to acquisitions by the debtor as well as by its affiliates. Accordingly, it is believed that such guidance should await future guidance under section 1286 generally.

Additional comments were received prior to the publication of the proposed regulations as to the scope of the relationship rules. However, the Service and Treasury believe it would be inappropriate to address the scope of section 267(b) or 707(b) solely in the context of section 108(e)(4) and, thus, those issues are not addressed in the final regulations.

Effective Dates

The proposed regulations state that the regulations are proposed to apply to direct or indirect acquisitions on or after March 21, 1991. In addition, the proposed regulations state that section 108(e)(4) is effective for any transaction after December 31, 1980, subject to the rules of section 7 of the Bankruptcy Tax Act of 1980 (Pub. L. No. 96–589, 94 Stat. 3389, 3411). Several commentators argued that the statute should not be considered effective before the effective date of regulations because the statutory language of section 108(e)(4) states that the section applies to the extent provided in regulations.

It remains the position of the Service and Treasury that section 108(e)(4) is effective from the date of its enactment. The statutory language of section 108(e)(4) is reasonably clear in its primary application. However, the final regulations clarify that taxpayers may use any reasonable method of determining the amount of discharge of indebtedness income and the treatment of correlative adjustments for acquisitions of indebtedness before March 21, 1991, if such method is applied consistently by both the debtor and related holder. In addition, pursuant to a notice being published separately in the Internal Revenue Bulletin, the Service will permit taxpayers to apply the proposed regulations to acquisitions occurring on or after March 21, 1991 and before December 28, 1992.

Special Analyses

These rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedures Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to any part of these regulations other than § 1.108–2(g). Furthermore, the rules of § 1.108–2(g) generally apply only to extraordinary transactions, primarily by larger issuers of indebtedness and their affiliates. Thus, they will generally not have a significant impact on a substantial number of small entities, nor will they significantly alter the reporting or recordkeeping duties of small entities. Therefore, although this Treasury decision was preceded by a notice of proposed rulemaking that solicited public comments, a final Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f)(1) of the Internal Revenue Code, the notice of proposed rulemaking for the regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small businesses.

Drafting Information

The principal authors of these regulations are Victor L. Penico of the Office of Assistant Chief Counsel (Corporate), Internal Revenue Service, and Sharon L. Hall of the Office of Assistant Chief Counsel (Income Tax and Accounting), Internal Revenue Service. Other personnel from the Internal Revenue Service and the Treasury Department participated in their development.

List of Subjects in 26 CFR 1.101–1 Through 1.133–1T

Income taxes, Reporting and recordkeeping requirements.

Adoption of Final Regulations

Accordingly 26 CFR part 1 is amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority citation for part 1 is amended by adding the following citation:

Authority: 26 U.S.C. 7805 * * * Section 1.108–2 also issued under 26 U.S.C. 108. * * *

Par. 2. Section 1.108–2 is added to read as follows:

§ 1.108–2 Acquisition of indebtedness by a person related to the debtor.

(a) *General rules.* The acquisition of outstanding indebtedness by a person related to the debtor from a person who is not related to the debtor results in the realization by the debtor of income from discharge of indebtedness (to the extent required by section 61(a)(12) and section 108) in an amount determined under paragraph (f) of this section. Income realized pursuant to the preceding sentence is excludible from gross income to the extent provided in section 108(a). The rules of this paragraph apply if indebtedness is acquired directly by a person related to the debtor in a direct acquisition (as defined in paragraph (b) of this section) or if a holder of indebtedness becomes related to the debtor in an indirect acquisition (as defined in paragraph (c) of this section).

(b) *Direct acquisition.* An acquisition of outstanding indebtedness is a direct acquisition under this section if a person related to the debtor (or a person who becomes related to the debtor on the date the indebtedness is acquired) acquires the indebtedness from a person who is not related to the debtor. Notwithstanding the foregoing, the Commissioner may provide by Revenue Procedure or other published guidance that certain acquisitions of indebtedness described in the preceding sentence are not direct acquisitions for purposes of this section.

(c) *Indirect acquisition*—(1) *In general.* An indirect acquisition is a transaction in which a holder of outstanding indebtedness becomes related to the debtor, if the holder acquired the indebtedness in anticipation of becoming related to the debtor.

(2) *Proof of anticipation of relationship.* In determining whether indebtedness was acquired by a holder in anticipation of becoming related to the debtor, all relevant facts and circumstances will be considered. Such facts and circumstances include, but are not limited to, the intent of the parties at the time of the acquisition, the nature of any contacts between the parties (or

their respective affiliates) before the acquisition, the period of time for which the holder held the indebtedness, and the significance of the indebtedness in proportion to the total assets of the holder group (as defined in paragraph (c)(5) of this section). For example, if a holder acquired the indebtedness in the ordinary course of its portfolio investment activities and the holder's acquisition of the indebtedness preceded any discussions concerning the acquisition of the holder by the debtor (or by a person related to the debtor) or the acquisition of the debtor by the holder (or by a person related to the holder), as the case may be, these facts, taken together, would ordinarily establish that the holder did not acquire the indebtedness in anticipation of becoming related to the debtor. The absence of discussions between the debtor and the holder (or their respective affiliates), however, does not by itself establish that the holder did not acquire the indebtedness in anticipation of becoming related to the debtor (if, for example, the facts and circumstances show that the holder was considering a potential acquisition of or by the debtor, or the relationship is created within a relatively short period of time of the acquisition, or the indebtedness constitutes a disproportionate portion of the holder group's assets).

(3) *Indebtedness acquired within 6 months of becoming related.* Notwithstanding any other provision of this paragraph (c), a holder of indebtedness is treated as having acquired the indebtedness in anticipation of becoming related to the debtor if the holder acquired the indebtedness less than 6 months before the date the holder becomes related to the debtor.

(4) *Disclosure of potential indirect acquisition*—(i) *In general.* If a holder of outstanding indebtedness becomes related to the debtor under the circumstances described in paragraph (c)(4)(ii) or (iii) of this section, the debtor is required to attach the statement described in paragraph (c)(4)(iv) of this section to its tax return (or to a qualified amended return within the meaning of § 1.6664–2(c)(3)) for the taxable year in which the debtor becomes related to the holder, unless the debtor reports its income on the basis that the holder acquired the indebtedness in anticipation of becoming related to the debtor. Disclosure under this paragraph (c)(4) is in addition to, and is not in substitution for, any disclosure required to be made under section 6662, 6664 or 6694.

(ii) *Indebtedness represents more than 25 percent of holder group's assets*—(A) *In general.* Disclosure under this paragraph (c)(4) is required if, on the date the holder becomes related to the debtor, indebtedness of the debtor represents more than 25 percent of the fair market value of the total gross assets of the holder group (as defined in paragraph (c)(5) of this section).

(B) *Determination of total gross assets.* In determining the total gross assets of the holder group, total gross assets do not include any cash, cash item, marketable stock or security, short-term indebtedness, option, futures contract, notional principal contract, or similar item (other than indebtedness of the debtor), nor do total gross assets include any asset in which the holder has substantially reduced its risk of loss. In addition, total gross assets do not include any ownership interest in or indebtedness of a member of the holder group.

(iii) *Indebtedness acquired within 6 to 24 months of becoming related.* Disclosure under this paragraph (c)(4) is required if the holder acquired the indebtedness 6 months or more before the date the holder becomes related to the debtor, but less than 24 months before that date.

(iv) *Contents of statement.* A statement under this paragraph (c)(4) must include the following—

(A) A caption identifying the statement as disclosure under § 1.108–2(c);

(B) An identification of the indebtedness with respect to which disclosure is made;

(C) The amount of such indebtedness and the amount of income from discharge of indebtedness is section 108(e)(4) were to apply;

(D) Whether paragraph (c)(4)(ii) or (iii) of this section applies to the transaction; and

(E) A statement describing the facts and circumstances supporting the debtor's position that the holder did not acquire the indebtedness in anticipation of becoming related to the debtor.

(v) *Failure to disclose.* In addition to any other penalties that may apply, if a debtor fails to provide a statement required by this paragraph (c)(4), the holder is presumed to have acquired the indebtedness in anticipation of becoming related to the debtor unless the facts and circumstances clearly established that the holder did not acquire the indebtedness in anticipation of becoming related to the debtor.

(5) *Holder group.* For purposes of this paragraph (c), the holder group consists of the holder of the indebtedness and all persons who are both—

(i) Related to the holder before the holder becomes related to the debtor; and

(ii) Related to the debtor after the holder becomes related to the debtor.

(6) *Holding period*—(i) *Suspensions.* The running of the holding periods set forth in paragraphs (c)(3) and (c)(4)(iii) of this section is suspended during any period in which the holder or any person related to the holder is protected (directly or indirectly) against risk of loss by an option, a short sale, or any other device or transaction.

(ii) *Tacking.* For purposes of paragraphs (c)(3) and (c)(4)(iii) of this section, the period for which a holder held the debtor's indebtedness includes—

(A) The period for which the indebtedness was held by a corporation to whose attributes the holder succeeded pursuant to section 381; and

(B) The period (ending on the date on which the holder becomes related to the debtor) for which the indebtedness was held continuously by members of the holder group (as defined in paragraph (c)(5) of this section).

(d) *Definitions*—(1) *Acquisition date.* For purposes of this section, the acquisition date is the date on which a direct acquisition of indebtedness or an indirect acquisition of indebtedness occurs.

(2) *Relationship.* For purposes of this section, persons are considered related if they are related within the meaning of sections 267(b) or 707(b)(1). However—

(i) Sections 267(b) and 707(b)(1) are applied as if section 267(c)(4) provided that the family of an individual consists of the individual's spouse, the individual's children, grandchildren, and parents, and any spouse of the individual's children or grandchildren; and

(ii) Two entities that are treated as a single employer under subsection (b) or (c) of section 414 are treated as having a relationship to each other that is described in section 267(b).

(e) *Exceptions*—(1) *Indebtedness retired within one year.* This section does not apply to a direct or indirect acquisition of indebtedness with a stated maturity date on or before the date that is one year after the acquisition date, if the indebtedness is, in fact, retired on or before its stated maturity date.

(2) *Acquisitions by securities dealers.* (i) This section does not apply to a direct acquisition or an indirect acquisition of indebtedness by a dealer that acquires and disposes of such indebtedness in the ordinary course of its business of dealing in securities if—

(A) The dealer accounts for the indebtedness as a security held primarily for sale to customers in the ordinary course of business;

(B) The dealer disposes of the indebtedness (or it matures while held by the dealer) within a period consistent with the holding of the indebtedness for sale to customers in the ordinary course of business, taking into account the terms of the indebtedness and the conditions and practices prevailing in the markets for similar indebtedness during the period in which it is held; and

(C) The dealer does not sell or otherwise transfer the indebtedness to a person related to the debtor (other than in a sale to a dealer that in turn meets the requirements of this paragraph (e)(2)).

(ii) A dealer will continue to satisfy the conditions of this paragraph (e)(2) with respect to indebtedness that is exchanged for successor indebtedness in a transaction in which unrelated holders also exchange indebtedness of the same issue, provided that the conditions of this paragraph (e)(2) are met with respect to the successor indebtedness.

(iii) For purposes of this paragraph (e)(2), if the period consistent with the holding of indebtedness for sale to customers in the ordinary course of business is 30 days or less, the dealer is considered to dispose of indebtedness within that period if the aggregate principal amount of indebtedness of that issue sold by the dealer to customers in the ordinary course of business (or that mature and are paid while held by the dealer) in the calendar month following the month in which the indebtedness is acquired equals or exceeds the aggregate principal amount of indebtedness of that issue held in the dealer's inventory at the close of the month in which the indebtedness is acquired. If the period consistent with the holding of indebtedness for sale to customers in the ordinary course of business is greater than 30 days, the dealer is considered to dispose of the indebtedness within that period if the aggregate principal amount of indebtedness of that issue sold by the dealer to customers in the ordinary course of business (or that mature and are paid while held by the dealer) within that period equals or exceeds the aggregate principal amount of indebtedness of that issue held in inventory at the close of the day on which the indebtedness was acquired.

(f) *Amount of discharge of indebtedness income realized*—(1) *Holder acquired the indebtedness by purchase on or less than six months before the acquisition date.* Except as otherwise provided in this paragraph (f), the amount of discharge of indebtedness income realized under paragraph (a) of this section is measured by reference to the adjusted basis of the related holder (or of the holder that becomes related to the debtor) in the indebtedness on the acquisition date if the holder acquired the indebtedness by purchase on or less than six months before the acquisition date. For purposes of this paragraph (f), indebtedness is acquired "by purchase" if the indebtedness in the hands of the holder is not substituted basis property within the meaning of section 7701(a)(42). However, indebtedness is also considered acquired by purchase within six months before the acquisition date if the holder acquired the indebtedness as transferred basis property (within the meaning of section 7701(a)(43)) from a person who acquired the indebtedness by purchase on or less than six months before the acquisition date.

(2) *Holder did not acquire the indebtedness by purchase on or less than six months before the acquisition date.* Except as otherwise provided in this paragraph (f), the amount of discharge of indebtedness income realized under paragraph (a) of this section is measured by reference to the fair market value of the indebtedness on the acquisition date if the holder (or the transferor to the holder in a transferred basis transaction) did not acquire the indebtedness by purchase on or less than six months before the acquisition date.

(3) *Acquisitions of indebtedness in nonrecognition transactions.* [Reserved]

(4) *Avoidance transactions.* The amount of discharge of indebtedness income realized by the debtor under paragraph (a) of this section is measured by reference to the fair market value of the indebtedness on the acquisition date if the indebtedness is acquired in a direct or an indirect acquisition in which a principal purpose for the acquisition is the avoidance of federal income tax.

(g) *Correlative adjustments*—(1) *Deemed issuance.* For income tax purposes, if a debtor realizes income from discharge of its indebtedness in a direct or an indirect acquisition under this section (whether or not the income is excludible under section 108(a)), the debtor's indebtedness is treated as new indebtedness issued by the debtor to the related holder on the acquisition date (the deemed issuance). The new indebtedness is deemed issued with an issue price equal to the amount used under paragraph (f) of this section to compute the amount realized by the debtor under paragraph (a) of this section (*i.e.*, either the holder's adjusted basis or the fair market value of the indebtedness, as the case may be). Under section 1273(a)(1), the excess of the stated redemption price at maturity (as defined in section 1273(a)(2)) of the indebtedness over its issue price is original issue discount (OID) which, to the extent provided in sections 163 and 1272, is deductible by the debtor and includible in the gross income of the related holder. Notwithstanding the foregoing, the Commissioner may provide by Revenue Procedure or other published guidance that the indebtedness is not treated as newly issued indebtedness for purposes of designated provisions of the income tax laws.

(2) *Treatment of related holder.* The related holder does not recognize any gain or loss on the deemed issuance described in paragraph (g)(1) of this section. The related holder's adjusted basis in the indebtedness remains the same as it was immediately before the deemed issuance. The deemed issuance is treated as a purchase of the indebtedness by the related holder for purposes of section 1272(a)(7) (pertaining to reduction of original issue discount where a subsequent holder pays acquisition premium) and section 1276 (pertaining to acquisitions of debt at a market discount).

(3) *Loss deferral on disposition of indebtedness acquired in certain exchanges.* (i) Any loss otherwise allowable to a related holder on the disposition at any time of indebtedness acquired in a direct or indirect acquisition (whether or not any discharge of indebtedness income was realized under paragraph (a) of this section) is deferred until the date the debtor retires the indebtedness if—

(A) The related holder acquired the debtor's indebtedness in exchange for its own indebtedness; and

(B) The issue price of the related holder's indebtedness was not determined by reference to its fair market value (*e.g.*, the issue price was determined under section 1273(b)(4) or 1274(a) or any other provision of applicable law).

(ii) Any comparable tax benefit that would otherwise be available to the holder, debtor, or any person related to either, in any other transaction that directly or indirectly results in the disposition of the indebtedness is also deferred until the date the debtor retires the indebtedness.

(4) *Examples.* The following examples illustrate the application of this paragraph (g). In each example, all taxpayers are calendar-year taxpayers, no taxpayer is insolvent or under the

jurisdiction of a court in a title 11 case and no indebtedness is qualified farm indebtedness described in section 108(g).

Example 1. (i) P, a domestic corporation, owns 70 percent of the single class of stock of S, a domestic corporation. S has outstanding indebtedness that has an issue price of $10,000,000 and provides for monthly interest payments of $80,000 payable at the end of each month and a payment at maturity of $10,000,000. The indebtedness has a stated maturity date of December 31, 1994. On January 1, 1992, P purchases S's indebtedness from I, an individual not related to S within the meaning of paragraph (d)(2) of this section, for cash in the amount of $9,000,000. S repays the indebtedness in full at maturity.

(ii) Under section 61(a)(12), section 108(e)(4), and paragraphs (a) and (f) of this section, S realizes $1,000,000 of income from discharge of indebtedness on January 1, 1992.

(iii) Under paragraph (g)(1) of this section, the indebtedness is treated as issued to P on January 1, 1992, with an issue price of $9,000,000. Under section 1273(a), the $1,000,000 excess of the stated redemption price at maturity of the indebtedness ($10,000,000) over its issue price ($9,000,000) is original issue discount, which is includible in gross income by P and deductible by S over the remaining term of the indebtedness under sections 163(e) and 1272(a).

(iv) Accordingly, S deducts and P includes in income original issue discount, in addition to stated interest, as follows: in 1992, $289,144.88; in 1993, $331,286.06; and in 1994, $379,569.06.

Example 2. The facts are the same as in *Example 1*, except that on January 1, 1992, P sells S's indebtedness to J, who is not related to S within the meaning of paragraph (d)(2) of this section, for $9,400,000 in cash. J holds S's indebtedness to maturity. On January 1, 1993, P's adjusted basis in S's indebtedness is $9,289,144.88. Accordingly, P realizes gain in the amount of $110,855.12 upon the disposition. S and J continue to deduct and include the original issue discount on the indebtedness in accordance with *Example 1*. The amount of original issue discount includible by J is reduced by the $110,855.12 acquisition premium as provided in section 1272(a)(7).

Example 3. The facts are the same as in *Example 1*, except that on February 1, 1992 (one month after P purchased S's indebtedness), S retires the indebtedness for an amount of cash equal to the fair market value of the indebtedness. Assume that the fair market value of the indebtedness is $9,022,621.41, which in this case equals the issue price of indebtedness determined under paragraph (g)(1) of this section ($9,000,000) plus the accrued original issue discount through February 1 ($22,621.41). Section 1.61–12(c)(3) provides that if indebtedness is repurchased for a price that is exceeded by the issue price of the indebtedness plus the amount of discount already deducted, the excess is income from discharge of indebtedness. Therefore, S does not realize income from discharge of indebtedness. The result would be the same if P had contributed the indebtedness to the capital of S. Under section 108(e)(6), S would be treated as having satisfied the indebtedness with an amount of money equal to P's adjusted basis and, under section 1272(d)(2), P's adjusted basis is equal to $9,022,621.41.

Example 4. (i) P, a domestic corporation, owns 70 percent of the single class of stock of S, a domestic corporation. On January 1, 1986, P issued indebtedness that has an issue price of $5,000,000 and provides for no stated interest payments and a payment at maturity of $10,000,000. The indebtedness has a stated maturity date of December 31, 1995. On January 1, 1992, S purchases P's indebtedness from K, a partnership not related to P within the meaning of paragraph (d)(2) of this section, for cash in the amount of $6,000,000. The sum of the debt's issue price and previously deducted original issue discount is $7,578,582.83. P repays the indebtedness in full at maturity.

(ii) Under section 61(a)(12), section 108(e)(4), and paragraphs (a) and (f) of this section, P realizes $1,578,582.83 in income from discharge of indebtedness ($7,578,582.83 minus $6,000,000) on January 1, 1992.

(iii) Under paragraph (g)(1) of this section, the indebtedness is treated as issued to S on January 1, 1992, with an issue price of $6,000,000. Under section 1273(a), the $4,000,000 excess of the stated redemption price at maturity of the indebtedness ($10,000,000) over its issue price ($6,000,000) is orignial issue discount, which is includible in gross income by S and deductible by P over the remaining term of the indebtedness under sections 163(e) and 1272(a).

(iv) Accordingly, P deducts and S includes in income original issue discount as follows: in 1992, $817,316.20; in 1993, $928,650.49; in 1994, $1,055,150.67; and in 1995, $1,198,882.64.

(h) *Effective date.* This section applies to any transaction described in paragraph (a) and in either paragraph (b) or (c) of this section with an acquisition date on or after March 21, 1991. Although this section does not apply to direct or indirect acquisitions occurring before March 21, 1991, section 108(e)(4) is effective for any transaction after December 31, 1980, subject to the rules of section 7 of the Bankruptcy Tax Act of 1980 (Pub. L. 96–589, 94 Stat. 3389, 3411). Taxpayers may use any reasonable method of determining the amount of discharge of indebtedness income realized and the treatment of correlative adjustments under section 108(e)(4) for acquisitions of indebtedness before March 21, 1991, if such method is applied consistently by both the debtor and related holder.

Michael P. Dolan,
Acting Commissioner of Internal Revenue

Approved: November 16, 1992.

Fred T. Goldberg, Jr.,
Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 92–31065 Filed 12–28–92; 8:45 am]
BILLING CODE 4830–01–M

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26 CFR Part 1

[T.D. 8463]
RIN 1545–AQ03

Treatment of Certain Stripped Bonds and Stripped Coupons

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final income tax regulations that apply to taxpayers holding stripped bonds and stripped coupons under section 1286 of the Internal Revenue Code. The regulations are needed to provide guidance on the treatment of original issue discount (OID) that arises under section 1286(a) of the Internal Revenue Code. This guidance is intended to simplify and clarify the tax treatment of certain stripped bonds and stripped coupons.

EFFECTIVE DATE: These regulations are effective August 8, 1991.

FOR FURTHER INFORMATION CONTACT: Mark S. Smith, telephone (202) 622–3920 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Temporary regulations (T.D. 8358) on the tax treatment of certain stripped bonds and stripped coupons were published in the **Federal Register** on August 13, 1991 (56 FR 38339). The text of these temporary regulations also served as the comment document for a notice of proposed rulemaking (the proposed regulations) (56 FR 38398). No public hearing on these regulations was requested or held, and no written comments were received. Accordingly, the temporary regulations are adopted as revised by this Treasury decision.

Explanation of Provisions

Section 1286(a) of the Internal Revenue Code (Code) provides that a stripped bond or stripped coupon is treated by the purchaser as a bond originally issued on the purchase date and having OID equal to the excess of (1) the stated redemption price at

maturity (or, in the case of a coupon, the amount payable on the due date of the coupon), over (2) the bond's or coupon's ratable share of the purchase price. Section 1273(a)(3) of the Code provides that if a debt instrument has only a *de minimis* amount of OID, then the OID shall be treated as zero. Section 1.1286–1(a) of the final regulations provides that the *de minimis* rule applies to stripped bonds and stripped coupons.

Section 1.1286–1(b) of the final regulations, which adopts the provisions of § 1.1286–1T(b) without change, authorizes the Internal Revenue Service to publish guidance in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of the Statement of Procedural Rules) treating certain stripped bonds as market discount bonds under section 1278, provided that certain criteria are met. This authority was exercised in Rev. Proc. 91–49, 1991–2 C.B. 777, which provides simplified tax treatment for certain mortgages that are stripped bonds.

The extent to which this Treasury decision revises § 1.1286–1T(a) is discussed below.

Weighted Average Maturity Rule

Section 1.1286–1(a) of the final regulations treats as *de minimis* any OID determined under Code section 1286(a) with respect to the purchase of a stripped bond or stripped coupon, if the OID "is less than the amount computed under subparagraphs (A) and (B) of section 1273(a)(3) and the regulations thereunder." Code section 1273(a)(3) provides that this amount is ¼ of 1 percent of the stated redemption price at maturity, multiplied by the number of complete years to maturity. However, in the case of an installment obligation, the multiplier is the debt instrument's weighted average maturity. A special safe harbor rule also is available for certain installment obligations.

Section 1.1286–1T(a) provided that for purposes of the computation under section 1273(a)(3), the number of complete years to maturity is the number of full years from the date the stripped bond or stripped coupon is purchased to final maturity. This provision was intended not to override the reference in § 1.1286–1T(a) to "section 1273(a)(3) and the regulations thereunder," but, simply, to provide that the number of complete years to maturity is measured from the date the stripped bond or stripped coupon is purchased. This provision has been clarified to remove any arguable ambiguity as to the required use of a weighted average maturity in testing for *de minimis* OID.

Treatment of OID on Tax-Exempt Obligations

The final regulations also contain a provision that prevents the *de minimis* rule from causing any tax-exempt portion of OID to become taxable. Under section 1288, the holder of a tax-exempt obligation generally increases its basis in the obligation in a manner designed to prevent tax on accrued OID. Section 1.1286–1(a) of the final regulations prevents the *de minimis* rule from negating the section 1288 basis adjustment for any tax-exempt portion of OID on stripped bonds and stripped coupons. Without this provision, the tax-exempt portion of *de minimis* OID would become taxable. Since the provision applies only to any tax-exempt portion of OID, it does not prevent any taxable portion of OID from being treated as zero if the total OID (including any tax-exempt portion thereof) on a tax-exempt obligation is *de minimis*.

Aggregation of Stripped Bonds and Stripped Coupons

The final regulations are premised on the assumption that an aggregation approach such as that applicable under Code section 1275 is appropriate in determining whether OID on a stripped bond or stripped coupon is *de minimis*. The final regulations are premised also on the assumption that stripped coupons may be treated as stated interest with respect to the bonds from which they are stripped and, therefore, may be excluded from stated redemption price at maturity in appropriate circumstances. Without these assumptions, each stripped bond and stripped coupon would be treated as a separate (zero coupon) bond, and the OID with respect to each separate bond or coupon virtually never would be *de minimis*.

Section 1.1286–1T(a) contained a provision concerning the stated redemption price at maturity of a stripped bond or stripped coupon. That provision was omitted from the final regulations to avoid any arguable inconsistency with the assumptions described above. Future regulations under section 1286 will provide specific guidance relating to these assumptions. In anticipation of these regulations, comments are requested on the appropriate rules for aggregating stripped bonds and stripped coupons under section 1286.

Special Analyses

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

Drafting Information

The principal author of these regulations is Mark S. Smith, Office of the Assistant Chief Counsel (Financial Institutions and Products), Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in their development.

List of Subjects in 26 CFR 1.1231–1 through 1.1297–3T

Income taxes.

Amendment to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority citation for part 1 is amended by removing the citation for "Section 1.1286–1T" and adding the following citation:

Authority: 26 U.S.C. 7805 * * * Section 1.1286–1 also issued under 26 U.S.C. 1275(D) and 1286(f).

Par. 2. Section 1.1286–1T is removed.

Par. 3. Section 1.1286–1 is added to read as follows:

§ 1.1286–1 Tax treatment of certain stripped bonds and stripped coupons.

(a) *De minimis OID.* If the original issue discount determined under section 1286(a) with respect to the purchase of a stripped bond or stripped coupon is less than the amount computed under subparagraphs (A) and (B) of section 1273(a)(3) and the regulations thereunder, then the amount of original issue discount with respect to that purchase (other than any tax-exempt portion thereof, determined under section 1286(d)(2)) shall be considered to be zero. For purposes of this computation, the number of complete years to maturity is measured from the date the stripped bond or stripped coupon is purchased.

(b) *Treatment of certain stripped bonds as market discount bonds*—(1) *In general.* By publication in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of the Statement of Procedural Rules), the Internal Revenue Service may (subject to the limitation of paragraph (b)(2) of this section) provide that certain mortgage loans that are stripped bonds are to be treated as market discount bonds under section 1278. Thus, any purchaser of such a bond is to account for any discount on the bond as market discount rather than original issue discount.

(2) *Limitation.* This treatment may be provided for a stripped bond only if, immediately after the most recent disposition referred to in section 1286(b)—

(i) The amount of original issue discount with respect to the stripped bond is determined under paragraph (a) of this section (concerning *de minimis* OID); or

(ii) The annual stated rate of interest payable on the stripped bond is no more than 100 basis points lower than the annual stated rate of interest payable on the original bond from which it and any other stripped bond or bonds and any stripped coupon or coupons were stripped.

(c) *Effective date.* This section is effective on and after August 8, 1991.

Shirley D. Peterson,

Commissioner of Internal Revenue.

Approved: December 9, 1992.

Alan J. Wilensky,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 92-31059 Filed 12-28-92; 8:45 am]

BILLING CODE 4830-01-M

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26 CFR Parts 1 and 602

[T.D. 8456]

RIN 1545-AQ14

Capitalization of Certain Policy Acquisition Expenses

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the requirement that insurance companies capitalize specified policy acquisition expenses for tax purposes. Changes to the applicable law were made by the Revenue Reconciliation Act of 1990. The regulations are necessary to provide guidance to insurance companies that must comply with the capitalization requirement.

EFFECTIVE DATE: September 30, 1990.

FOR FURTHER INFORMATION CONTACT: Gary Geisler, 202-622-3970 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information requirement contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)) under control number 1545-1287. The estimated annual burden per respondent varies from 15 minutes to 20 hours, depending on individual circumstances, with an estimated average of 1 hour.

These estimates are an approximation of the average time expected to be necessary to collect information. They are based on such information as is available to the Internal Revenue Service. Individual respondents may require greater or less time, depending on their particular circumstances.

Comments concerning the accuracy of these burdens estimates and suggestions for reducing this burden should be directed to the Internal Revenue Service, Attention: IRS Reports Clearance Officer, T:FP, Washington, DC 20224, and to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Background

This document contains final income tax regulations under section 848 of the Internal Revenue Code (Code), relating to the capitalization of certain policy acquisition expenses of insurance companies. Section 848 was added to the Code by section 11301(a) of the Revenue Reconciliation Act of 1990, Pub. L. No. 101-508. Proposed regulations under section 848 were published in the Federal Register on November 15, 1991 (56 FR 58003). Written comments were received from the public and a public hearing was held on January 31, 1992. After consideration of all written and oral comments regarding the proposed regulations, those regulations are adopted as revised by this Treasury decision.

Explanation of Provisions

Section 848 provides that insurance companies must capitalize "specified policy acquisition expenses." in lieu of identifying the categories of expenses that must be capitalized, section 848 requires that a company capitalize an amount of otherwise deductible expenses equal to specified percentages of net premiums with respect to certain types of insurance contracts. These capitalized amounts are called "specified policy acquisition expenses." The maximum amount of specified policy acquisition expenses required to be capitalized in any taxable year is generally limited to the insurance company's "general deductions" for that year.

Categories of Specified Insurance Contracts

Under sections 848 (c) and (e), the amounts treated as specified policy acquisition expenses depend on whether a particular contract is classified as an annuity contract, a group life insurance contract, or "other specified insurance contract."

The proposed regulations contain definitions of the types of contracts to which the provisions of section 848 apply. They also define a "combination contract" (that is, a contract providing more than one type of insurance or annuity coverage) and provide rules for applying the capitalization requirement to premiums under a combination contract.

Combination Contracts

In response to comments, the final regulations modify the treatment of premiums under a combination contract. The final regulations define a combination contract as a contract that provides two or more types of coverage, one of which if provided separately would be a life insurance contract, an annuity, or a noncancellable or guaranteed renewable accident and health insurance contract. The regulations generally provide that if the premiums relating to each type of insurance coverage provided by a combination contract are separately stated on the insurance company's annual statement, the separately stated premiums are treated in the same manner as premiums under separate contracts. If premiums allocable to any type of coverage provided under a combination contract are not separately stated, the premium for the entire contract is subject to the highest capitalization percentage applicable to any of the coverages provided by the contract.

Special rules apply in the case of de minimis premiums. De minimis premiums are not required to be separately stated. If the separate statement rule is otherwise satisfied but for de minimis premiums, the de minimis premiums are required to be treated consistently with the characterization of these premiums on the insurance company's annual

statement. Furthermore, in determining the highest capitalization percentage applicable to any of the coverages provided by the contract, the coverage to which a de minimis premium is allocable is disregarded. For purposes of these provisions, premiums allocable to a type of coverage considered de minimis if the premiums are 2 percent or less of the entire premium for the contract.

Definition of Group Life Insurance

Under section 848(c), a lower capitalization percentage is applied to premiums received on a group life insurance contract than to premiums received with respect to an individual life insurance contract. Section 848(e)(2) defines a group life insurance contract as one which satisfies three requirements. The first requirement is an affiliation requirement; that is, the contract must cover "a group of individuals defined by reference to employment relationship, membership in an organization, or similar factor."

The proposed regulations specify five categories of eligible groups as satisfying the affiliation requirement: an employee group, a debtor group, a labor union group, a credit union group, and an association group satisfying certain conditions. The proposed regulations also allow multiple groups consisting of combinations of groups from the same category.

The categories of eligible groups in the proposed regulations include the specific group categories referred to in the Group Life Insurance Definition and Group Life Insurance Standard Provisions Model Act approved by the National Association of Insurance Commissioners. Unlike the Model Act, the proposed regulations make no provision for a discretionary group that satisfies the requirements of the applicable state law to be treated as an eligible group. The preamble to the proposed regulations requested public comment concerning the desirability of expanding the group life insurance definition to include discretionary groups.

In response to comments, the final regulations list a number of discretionary groups that will also be treated as satisfying the affiliation requirement of section 848(e)(2)(A). The final regulations also authorize the Commissioner to specify other discretionary groups as satisfying the group affiliation requirement in subsequent guidance published in the Internal Revenue Bulletin.

Comments stated that a contract covering members from different categories of eligible groups should be treated as a group contract. In general, these comments were not adopted because the Model Act does not specifically authorize these contracts. The final regulations, however, allow employees to be included as members of a group sponsored by an association, a labor union, or a credit union. The regulations also allow members of a credit union to be covered under a single contract whether in their capacity as members or as borrowers of the credit union.

Comments were received asking that the prohibition of determining a group (or class within a group) on the basis of individual health characteristics be clarified such that a pre-retirement age requirement or active work requirement would be allowed. Comments also requested clarification of the application of the identical premium requirement in the context of the separate employer units covered by a single contract issued to a multi-employer trust. The final regulations adopt these comments.

The second requirement for qualification as a group life insurance contract is that the premiums for a group life insurance contract must be determined on a group basis. The proposed regulations set forth a two-part test to determine whether premiums for a contract are determined on a group basis: an identical premium requirement and an eligibility requirement.

Under the identical premium requirement, the only permissible differences in premiums charged with respect to any member of the group are those reflecting the member's actual age (in years), the member's gender, or the member's smoking habits. Under the eligibility requirement, all members of the group generally must be eligible for the coverage provided under the contract without regard to evidence of insurability.

The proposed regulations provide two exceptions with respect to the eligibility requirement. First, in the case of group term life insurance coverage, the proposed regulations allow the insurance company to deny or limit coverage based on a member's responses to a medical questionnaire (but not on any other basis, such as a medical examination). Secondly, a denial or limitation of coverage to any member is allowed on the basis of medical information obtained with respect to that member prior to January 1, 1993.

Public comments generally endorsed the use of an identical premium requirement as a means for determining whether premiums for the contract are determined on a group basis. The comments suggested a number of changes to the identical premium requirement to clarify the application of this test. The final regulations adopt most of these comments. For example, the regulations provide that the identical premium requirement is satisfied if the premium rates charged by the insurance company for the corresponding units of coverage (for example, per $1,000 of face amount of insurance) provided to each member of the group are the same, except for differences attributable to the age, gender, or smoking habits of the member.

A large number of comments objected to the proposed regulations' requirement that all members of the group generally must be eligible for coverage without regard to evidence of insurability. It was stressed that under state law, an insurance company may deny or limit coverage to any member of the group in the absence of satisfactory evidence of individual insurability, and that the accepted group underwriting practice is to require evidence of individual insurability beyond a medical questionnaire in cases when there is a high likelihood of anti-selection against the insurer. The comments stated that other rules in the proposed regulations, such as the group affiliation requirement and the identical premium requirement, clearly differentiate the coverage under a group life insurance contract from that of individual life insurance.

In response to these comments, the final regulations do not contain the eligibility requirement. Future regulations may address company underwriting practices for group life insurance contracts if, for example, changes in business practice or a shift in premiums from the individual to the group category indicate the need for further guidance. If additional guidance addressing the eligibility requirement is contemplated, the guidance would be first published in a notice of proposed rulemaking and, if adopted, would be applied prospectively.

A third requirement for qualification as a group life insurance contract is that the proceeds of the contract are payable to (or for the benefit of) persons other than the employer of the insured, an organization to which the insured belongs, or other similar person. In response to comments, the final regulations clarify the usage of the term "organization" in this context to include only the organization that is either the sponsor of the contract or the group policyholder. It is intended that other life insurance in which the proceeds are used similarly to credit life insurance (for example, pre-need burial insurance) will not be treated as violating the

restriction on the payment of proceeds to the sponsoring organization or group policyholder.

The final regulations also adopt new rules to address the situation in which the requirements of the regulations are not satisfied with respect to a small number of individuals covered by a group contract. Under the proposed regulations, if the group life insurance requirements are not met with respect to all members of the group, the premiums for the entire contract are treated as received under an individual life insurance contract. Comments indicated that an ineligible individual or individuals may temporarily obtain coverage under a group contract (through inadvertence of the group policyholder or otherwise), and that one individual or a small number of individuals should not disqualify the entire premium for the contract. In response to these comments, the final regulations provide that if the premiums allocable to an ineligible member (or members) are no more than 5 percent of the total premiums charged by the insurance company for the group as a whole, then only the premiums allocable to ineligible member (or members) will be treated as individual life insurance premiums.

General Deductions

The final regulations clarify that the determination of general deductions under section 848(c)(2) is made without regard to any amount capitalized under section 848(a) in any taxable year. This clarification eliminates any circularity with respect to the determination of general deductions under section 848(c)(2) and the capitalization of specified policy acquisition expenses for the taxable year.

Definition of Net Premiums

Section 848(d)(1) provides that, with respect to each category of specified insurance contracts, net premiums equal the excess, if any, of the gross amount of premiums and other consideration for the contracts, over the sum of return premiums and premiums incurred for the reinsurance of the contracts. Pursuant to section 848(d)(3), the gross amount of premiums and other consideration does not include certain policyholder dividends and similar amounts that, under section 808(e), are treated as paid to the policyholder and returned to the insurance company as a premium.

Policy Exchanges

The proposed regulations provide that if an insurance or annuity contract is exchanged (within the meaning of section 1001) for a specified insurance contract, the insurance company must include the fair market value of the contract issued in the exchange in its gross amount of premiums and other consideration for the issuance of a new specified insurance contract. The preamble to the proposed regulations requested comments whether this treatment of exchanges of insurance contracts (initiated by either a policyholder or the company) would require an insurance company to capitalize excessive amounts.

Many comments questioned whether under the proposed regulations many routine policy changes, such as the addition or deletion of a rider, might result in the capitalization of existing contract values. The comments generally urged that only external exchanges (that is, exchanges involving a different insurance company) should give rise to net premiums under section 848.

In response to comments, the treatment of exchanges of insurance or annuity contracts is modified in the final regulations. Except as otherwise provided by the regulations, an exchange (including a change in the terms of a specified insurance contract) will not give rise to net premiums under section 848. The regulations identify specific types of exchanges that will cause net premiums to be subject to section 848. These situations are (1) external exchanges (that is, exchanges involving a different insurance company), and (2) internal exchanges which result in the issuance of fundamentally different contracts.

Under the final regulations, an internal exchange is considered to result in the issuance of a fundamentally different contract if the contract issued in the exchange (1) belongs to a different category of specified insurance contract (or is issued in exchange for a nonspecified insurance contract), (2) changes the identity of the individual insured, or (3) changes the mortality, morbidity, interest, or expense guarantees with respect to nonforfeiture benefits provided in the exchanged contract.

The final regulations identify certain modifications that will not be treated as changing the mortality, morbidity, interest, or expense guarantees and authorize the Commissioner to identify other modifications in subsequent guidance published in the Internal Revenue Bulletin. The regulations also provide an exception for contracts that are restructured pursuant to a rehabilitation, conservatorship, insolvency, or similar state proceeding. A finding of insolvency is not necessary to qualify for this exception.

The final regulations also clarify the amount that is taken into account as the value of the new contract issued in an exchange that generates net premiums under section 848. The value of the new contract is generally determined by the most recent sale by the insurance company of a comparable contract, or if this value is not readily ascertainable, by reference to the interpolated terminal reserve of the original contract. The final regulations permit a lesser value to be used for an exchange of contracts made pursuant to a policy enhancement or update transaction. The regulations also provide that in the case of any exchange involving a group term life insurance contract without cash value, the value of the new contract is deemed to be zero.

Dividend Accumulations

The proposed regulations provide that an amount deposited with an insurance company is not treated as a premium until it is applied to, or irrevocably committed to, the payment of premiums on a specified insurance contract. Amounts left on deposit with an insurance company in a dividend accumulation account are not treated as irrevocably committed to the payment of premiums.

Numerous comments asked that dividend accumulations used to pay premiums on a specified insurance contract be treated like "other similar amounts" under section 848(d)(3). This comment was not adopted because amounts credited to a dividend accumulation account are treated as taxable deposits held on behalf of the policyholder and are not committed to the payment of premiums on a specified insurance contract.

Reinsurance

The capitalization requirements of section 848 apply to premiums and other consideration for reinsurance agreements. Under section 848(d)(1), the ceding company reduces its gross amount of premiums and other consideration by the amount that it incurs as premiums for reinsurance. Correspondingly, the reinsurer includes the reinsurance premiums in its gross amount of premiums and other consideration.

Section 848(d)(4)(B) authorizes the Treasury Department to prescribe regulations to ensure that "premiums and other consideration with respect to reinsurance" are treated consistently by the parties of a reinsurance agreement in applying the provisions of section 848.

Pursuant to this regulatory authority, the proposed regulations set forth rules identifying the amounts that are to be taken into account in determining the parties' premiums and other consideration for reinsurance under section 848(d)(1). Under the proposed regulations, all items of consideration transferred between a ceding company and a reinsurer pursuant to a reinsurance agreement are netted. The net negative consideration determined by one party to a reinsurance agreement reduces its net premiums under section 848(d)(1)(B). The net positive consideration determined by the other party increases its net premiums under section 848(d)(1)(A). The determination of net consideration for the reinsurance agreement ensures consistency between the parties. This consistency extends to the amount and timing, as well as the character, of items. The net consideration rules of the proposed regulations apply to all amounts incurred under a reinsurance agreement for taxable years beginning after December 31, 1991.

The proposed regulations also address a second problem that may arise in reinsurance transactions. The capitalization requirements of section 848 could be avoided if, for example, a primary insurer reinsures its business with a reinsurer whose general deductions are disproportionately small. To prevent this avoidance, the proposed regulations limit a party's use of the net negative consideration on a reinsurance agreement to reduce its net premiums if the other party did not capitalize the net positive consideration due to that party's general deductions limitation. Under the proposed regulations, this potential reduction applies to all amounts arising under any reinsurance agreement executed on or after November 15, 1991, and to all amounts arising under any reinsurance agreement for taxable years beginning after December 31, 1991, without regard to when the reinsurance agreement was entered into.

Net Consideration Rules

Several comments addressed the determination of net consideration for reinsurance agreements. One set of comments urged that claims and benefit reimbursements be excluded from the determination of net consideration for reinsurance. Other comments urged the retention of all items of consideration (including claims and benefit reimbursements) in determining net consideration for reinsurance. Finally, a third set of comments urged the adoption of separate rules for determining premiums and other consideration for reinsurance depending on the type of reinsurance agreement involved.

The final regulations generally retain the rules relating to the determination of net consideration for reinsurance agreements that were entered into after November 14, 1991, for taxable years beginning after December 31, 1991. In response to comments, the regulations postpone the effective date of the net consideration rules for other reinsurance agreements. The regulations provide that for reinsurance agreements entered into prior to November 15, 1991, the net consideration rules apply only to amounts arising for taxable years beginning after December 31, 1994. For taxable years beginning before January 1, 1995, the parties must account for premiums and other consideration for the agreement using the interim rules of the proposed regulations.

The final regulations also contain a special rule that applies to a funds-withheld reinsurance agreement that was entered into after November 14, 1991, but before the first day of the first taxable year beginning after December 31, 1991, and was terminated before January 1, 1995. Under this rule, the parties' net consideration for the year of termination must include the amount of the original reserve for any reinsured specified insurance contract that, in applying the provisions of subchapter L, is treated as premiums and other consideration for reinsurance in the taxable year for which the agreement becomes effective.

Reduction in the Amount of Net Negative Consideration To Ensure Consistency of Capitalization for Reinsurance Agreements

The comments generally supported the rule in the proposed regulations that provided for a reduction in the amount of net negative consideration that a party to reinsurance agreement could take into account to reduce its net premiums if the other party did not capitalize the net positive consideration because of the other party's general deductions limitation. Some comments requested that the regulations specify the manner of demonstrating consistency of capitalization between the parties of a reinsurance agreement (such as an affidavit from the party with net positive consideration). Although the regulations do not adopt this comment, the Internal Revenue Service is considering whether to provide an administrative means of demonstrating consistency of capitalization in subsequent guidance published in the Internal Revenue Bulletin.

Reinsurance Agreements With Parties Not Subject to United States Taxation

Section 848(d)(4)(A) provides that premiums and other consideration incurred for reinsurance may be taken into account as a reduction of net premiums only to the extent that the premiums are includible in the gross income of an insurance company which is taxable under subchapter L, or whose shareholders are subject to United States taxation on the reinsurance premiums by reason of subpart F of part III of subchapter N. The proposed regulations provide that a party to a reinsurance agreement may not reduce its net premiums by the net negative consideration on a reinsurance agreement if the other party is neither an insurance company subject to tax under subchapter L nor a controlled foreign corporation. The proposed regulations do not address the treatment of net positive consideration on reinsurance agreements with parties not subject to United States taxation.

Several comments urged that the regulations exclude from net premiums any net positive consideration from reinsurance agreements with parties that are not subject to United States taxation. The comments expressed concern that unless these net positive consideration amounts are eliminated, the rules in the proposed regulations could result in a double counting of a party's net premiums.

In response to the comments, the final regulations provide an election to separately determine the amounts required to be capitalized for reinsurance agreements with parties not subject to United States taxation with respect to the premiums and other consideration under the agreements. If the election is made, a capitalization amount (either positive or negative) is determined for each category of specified insurance contracts based on the net premiums for each category. The capitalization amounts for all the categories of contracts are then aggregated to arrive at a "net foreign reinsurance capitalization amount" (either positive or negative) for the taxable year on all reinsurance agreements with parties that are not subject to United States taxation.

If the net foreign capitalization amount for any taxable year is negative, the negative amount is applied to reduce (but not below zero) the unamortized balances of amounts previously capitalized (beginning with the most recent taxable year) to the extent attributable to prior years' net positive foreign capitalization amounts. The reduction of the previously

capitalized amounts is allowed as a deduction for the taxable year. The net negative foreign capitalization amount. The remaining portion of a net negative foreign capitalization amount, if any, remaining after this reduction is carried over and used to offset a future year's net positive foreign capitalization amount. The remaining portion of a net negative foreign capitalization amount may not reduce the amounts otherwise required to be capitalized for the taxable year with respect to directly written business or reinsurance agreements with parties that are subject to United States taxation.

A net positive foreign capitalization amount (after reduction by any carryover amount from preceding years) is added to the specified policy acquisition expenses required to be capitalized for the taxable year (determined without regard to amounts taken into account under the election). Thus, a net positive foreign capitalization amount is capitalized independently of the general deductions limitation.

The rules in the final regulations with respect to the determination of net foreign capitalization amounts generally apply to taxable years beginning after November 14, 1991. Under the regulations, however, an insurance company may make an election to apply the rules with respect to the determination of net foreign capitalization amounts for earlier taxable years by filing an amended federal income tax return.

Carryover of Excess Negative Capitalization Amount

Section 848(f)(1) authorizes an insurance company to reduce the amount of the current year's capitalization of specified policy acquisition expenses and the unamortized balances of specified policy acquisition expenses from preceding years if there is a "negative capitalization amount" for a category of specified insurance contracts. The negative capitalization amount is determined by multiplying the negative net premiums for a category of specified insurance contracts by the applicable percentage set forth in section 848(c)(1) from that category of specified contracts. As a practical matter, a negative capitalization amount for a category of specified insurance contracts will generally only arise as a result of reinsurance agreements.

In response to comments, the final regulations add rules that permit an insurance company to carry over to future years the portion of any negative capitalization amount remaining after the reductions specified in section 848(f)(1). This provision of the regulations is effective for taxable years ending on or after September 30, 1990.

Reinsurance Agreements Involving Insolvent Insurance Companies

The proposed regulations authorize the Commissioner to grant a waiver excluding from the capitalization requirement any reinsurance consideration relating to agreements approved by a state court supervising the rehabilitation or liquidation of an insolvent company. The proposed regulations do not specify the conditions that would allow an insurance company undergoing a rehabilitation, conservatorship, liquidation, or similar state proceeding to be treated as "insolvent."

In response to comments, the final regulations adopt specific rules for the treatment of reinsurance agreements involving insolvent insurance companies. The rules operate in conjunction with the provisions allowing the carryover of an excess negative capitalization amount under section 848(f). Under the final regulations, an insolvent insurance company with an excess negative capitalization amount as a result of a reinsurance agreement and the party with net positive consideration under that agreement may make a joint election. The joint election requires the insolvent company to forego the carryover of the portion of the excess negative capitalization amount attributable to the agreement and allows the party with net positive consideration to reduce its specified policy acquisition expenses for the taxable year by an amount equal to the portion of the insolvent company's excess negative capitalization amount that is not carried over. The final regulations also specify certain conditions occurring as part of a state supervised proceeding that will cause the insurance company that is the subject of this proceeding to be presumed to be insolvent.

The provisions of the final regulations relating to reinsurance agreements involving insolvent companies are effective for taxable years ending on or after September 30, 1990. The joint election of an insolvent insurance company and a reinsurer may be made on an amended return.

Application of the Capitalization Requirements in the Context of Corporate Adjustment

The preamble to the proposed regulations requested comments concerning the applicability of section 848 to reinsurance agreements undertaken in the context of corporate adjustments, such as different non-recognition transactions under subchapter C. Several comments were received on this issue. The comments requested that the regulations also provide guidance regarding the application of section 848 to stock acquisitions that are treated as asset acquisitions under section 338.

Due to the complexity of this area of the tax law, these regulations do not adopt rules relating to the application of section 848 to reinsurance agreements affected as part of non-recognition transactions and other corporate adjustments. The application of section 848 in the context of different subchapter C transactions will be the subject of forthcoming proposed regulations. The Treasury Department and the Internal Revenue Service continue to invite comments on the application of section 848 to these transactions.

Coordination With Subchapter N

The final regulations do not address the treatment of amounts required to be capitalized under section 848 for purposes of subchapter N (including rules concerning source of income, allocation and apportionment of expenses, and computation of the foreign tax credit). The Treasury Department and the Internal Revenue Service request comments on any issues relating to the coordination of section 848 and subchapter N that should be addressed in these forthcoming proposed regulations.

Special Analyses

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

Drafting Information

The principal author of these regulations is Gary Geisler of the Office of the Assistance Chief Counsel (Financial Institutions and Products), Internal Revenue Service. However,

personnel from other offices of the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR 1.801–1 Through 1.860–5

Income taxes, Insurance companies, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

For the reasons set forth in the preamble, 26 CFR parts 1 and 602 are amended as follows:

PART 1—[AMENDED]

Paragraph 1. The authority citation for part 1 is amended by adding the following citations:

Authority: 26 U.S.C. 7805 * * * Section 1.848–2 also issued under 26 U.S.C. 845(b) and 26 U.S.C. 848(d)(4)(B). Section 1.848–3 also issued under 26 U.S.C. 848(d)(4)(B).

Par. 2. Sections 1.848–0, 1.848–1, 1.848–2, and 1.848–3 are added to read as follows:

§ 1.848–0 Outline of regulations under section 848.

This section lists the paragraphs in §§ 1.848–1 through 1.848–3.

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(2) Exceptions.
(i) In general.
(ii) Reinsurance of qualified foreign contracts.
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(g) Combination contract.
(1) Definition.
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(v) Association group.
(vi) Credit union group.
(vii) Multiple group.
(viii) Certain discretionary groups.
(ix) Employees treated as members.
(x) Class or classes of a group determined without regard to individual health characteristics.
(A) In general.
(B) Limitation of coverage based on certain work and age requirements permissible.
(3) Premiums determined on a group basis.
(i) In general.
(ii) Exception for substandard premium rates for certain high risk insureds.
(iii) Flexible premium contracts.
(iv) Determination of actual age.
(4) Underwriting practices used by company. [Reserved]
(5) Disqualification of group.
(i) In general.
(ii) Exception for de minimis failures.
(6) Supplemental life insurance coverage.
(7) Special rules relating to the payment of proceeds.
(i) Contracts issued to a welfare benefit fund.
(ii) Credit life insurance contracts.
(iii) "Organization or association" limited to the sponsor of the contract or the group policyholder.
(i) General deductions.

§ 1.848–2 Determination of net premiums.

(a) Net premiums.
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(2) Separate determination of net premiums for certain reinsurance agreements.
(b) Gross amount of premiums and other consideration.
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(2) Items included.
(3) Treatment of premium deposits.
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(ii) Amounts irrevocably committed to the payment of premiums.
(iii) Retired lives reserves.
(4) Deferred and uncollected premiums.
(c) Policy exchanges.
(1) General rule.
(2) External exchanges.
(3) Internal exchanges resulting in fundamentally different contracts.
(i) In general.
(ii) Certain modifications treated as not changing the mortality, morbidity, interest, or expense guarantees.
(iii) Exception for contracts restructured by a court supervised rehabilitation or similar proceeding.
(4) Value of the contract.
(i) In general.
(ii) Special rule for group term life insurance contracts.
(iii) Special rule for certain policy enhancement and update programs.
(A) In general.
(B) Policy enhancement or update program defined.
(5) Example.
(d) Amounts excluded from the gross amount of premiums and other consideration.
(1) In general.
(2) Amounts received or accrued from a guaranty association.
(3) Exclusion not to apply to dividend accumulations.
(e) Return premiums.
(f) Net consideration for a reinsurance agreement.
(1) In general.
(2) Net consideration determined by a ceding company.
(i) In general.
(ii) Net negative and net positive consideration.
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(4) Timing consistency required.
(5) Modified coinsurance and funds-withheld reinsurance agreements.
(i) In general.
(ii) Special rule for certain funds-withheld reinsurance agreements.
(6) Treatment of retrocessions.
(7) Mixed reinsurance agreements.
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(9) Examples.
(g) Reduction in the amount of net negative consideration to ensure consistency of capitalization for reinsurance agreements.
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(8) Election to determine specified policy acquisition expenses for an agreement without regard to general deductions limitation.
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(ii) Manner of making election.
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(h) Treatment of reinsurance agreements with parties not subject to U.S. taxation.
(1) In general.
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(3) Election to separately determine the amounts required to be capitalized for reinsurance agreements with parties not subject to U.S. taxation.
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(4) Special rule for the treatment of an excess negative capitalization amount of an insolvent company.
(i) When applicable.
(ii) Election to forego carryover of excess negative capitalization amount.
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(v) Presumptions relating to the insolvency of an insurance company undergoing a court supervised rehabilitation or similar state proceeding.
(vi) Example.
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(3) Net consideration rules.
(4) Determination of the date on which a reinsurance agreement is entered into.
(5) Special rule for certain reinsurance agreements with parties not subject to U.S. taxation.
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§ 1.848–3 Interim rules for certain reinsurance agreements.

(a) Scope and effective dates.
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(c) Adjustments and special rules.
(1) Assumption reinsurance.
(2) Reimbursable dividends.
(3) Ceding commissions.
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(d) Examples.

§ 1.848–1 Definitions and special provisions.

(a) *Scope and effective date.* The definitions and special provisions in this section apply solely for purposes of determining specified policy acquisition expenses under section 848 of the Internal Revenue Code, this section, and §§ 1.848–2 and 1.848–3. Unless otherwise specified, the rules of this section are effective for the taxable years of an insurance company beginning after November 14, 1991.

(b) *Specified insurance contract*—(1) *In general.* A "specified insurance contract" is any life insurance contract, annuity contract, noncancellable or guaranteed renewable accident and health insurance contract, or combination contract. A reinsurance agreement that reinsures the risks under a specified insurance contract is treated in the same manner as the reinsured contract.

(2) *Exceptions*—(i) *In general.* A "specified insurance contract" does not include any pension plan contract (as defined in section 818(a)), flight insurance or similar contract, or qualified foreign contract (as defined in section 807(e)(4)).

(ii) *Reinsurance of qualified foreign contracts.* The exception for qualified foreign contracts does not apply to reinsurance agreements that reinsure qualified foreign contracts.

(c) *Life insurance contract.* A "life insurance contract" is any contract—

(1) Issued after December 31, 1984, that qualifies as a life insurance contract under section 7702(a) (including an endowment contract as defined in 7702(h)); or

(2) Issued prior to January 1, 1985, if the premiums on the contract are reported as life insurance premiums on the insurance company's annual statement (or could be reported as life insurance premiums if the company were required to file the annual statement for life and accident and health companies).

(d) *Annuity contract.* An "annuity contract" is any contract (other than a life insurance contract as defined in paragraph (c) of this section) if amounts received under the contract are subject to the rules in section 72(b) or section 72(e) (determined without regard to section 72(u)). The term "annuity contract" also includes a contract that is a qualified funding asset under section 130(d).

(e) *Noncancellable accident and health insurance contract.* The term "noncancellable accident and health insurance contract" has the same meaning for purposes of section 848 as the term has for purposes of section 816(b).

(f) *Guaranteed renewable accident and health insurance contract.* The term "guaranteed renewable accident and health insurance contract" has the same meaning for purposes of section 848 as the term has for purposes of section 816(e).

(g) *Combination contract*—(1) *Definition.* A "combination contract" is a contract (other than a contract described in section 848(e)(3)) that provides two or more types of insurance coverage, at least one of which if offered separately would be a life insurance contract, an annuity contract, or a noncancellable or guaranteed renewable accident and health insurance contract.

(2) *Treatment of premiums on a combination contract*—(i) *In general.* If the premium allocable to each type of insurance coverage is separately stated on the insurance company's annual statement (or could be separately stated if the insurance company were required to file the annual statement for life and accident and health companies), the premium allocable to each type of insurance coverage in a combination contract is subject to the capitalization rate, if any, that would apply if that coverage was provided in a separate contract. If the premium allocable to each type of insurance coverage in a combination contract is not separately stated, the entire premium is subject to the highest capitalization percentage applicable to any of the coverages provided.

(ii) *De minimis premiums.* For purposes of this paragraph (g)(2)—

(A) A de minimis premium is not required to be separately stated;

(B) In determining the highest capitalization percentage applicable to a combination contract, the coverage to which a de minimis premium is allocable is disregarded;

(C) If the separate statement requirement of this paragraph (g)(2) is satisfied, a de minimis premium is treated in accordance with its characterization on the insurance company's annual statement; and

(D) Whether a premium for an insurance coverage is de minimis is determined by comparing that premium with the aggregate of the premiums for the combination contract. A premium that is not more than 2 percent of the premium for the entire contract is considered de minimis. Whether a premium that is more than 2 percent is de minimis is determined based on all the facts and circumstances.

(3) *Example.* The principles of this paragraph (g) are illustrated by the following example.

Example. A life insurance company (L1) issues a contract to an employer (X) which provides cancellable accident and health insurance coverage and group term life insurance coverage to X's employees. L1 charges a premium of $1,000 for the contract, $950 of which is attributable to the cancellable accident and health insurance coverage and $50 of which is attributable to the group term life insurance coverage. On its annual statement, L1 reports the premiums attributable to the accident and health insurance coverage separately from the premiums attributable to the group term life insurance coverage. The contract issued by

L1 is a combination contract as defined in paragraph (g)(1) of this section. Pursuant to paragraph (g)(2)(i) of this section, only the premiums attributable to the group term life insurance coverage ($50) are subject to the provisions of section 848. The premiums attributable to the cancellable accident and health insurance coverage ($950) are not subject to the provisions of section 848.

(h) *Group life insurance contract*—(1) *In general.* A life insurance contract (as defined in paragraph (c) of this section) is group life insurance contract if—

(i) The contract is a group life insurance contract under the applicable law;

(ii) The coverage is provided under a master contract issued to the group policyholder, which may be a trust, trustee, or agent;

(iii) The premiums on the contract are reported either as group life insurance premiums or credit life insurance premiums on the insurance company's annual statement (or could be reported as group life insurance premiums or credit life insurance premiums if the company were required to file the annual statement for life and accident and health companies);

(iv) The group affiliation requirement of paragraph (h)(2) of this section is satisfied;

(v) The premiums on the contract are determined on a group basis within the meaning of paragraph (h)(3) of this section; and

(vi) The proceeds of the contract are not payable to or for the benefit of the insured's employer, an organization or association to which the insured belongs, or other similar person. (See paragraph (h)(7) of this section for special rules that apply in determining if this requirement is satisfied.)

(2) *Group affiliation requirement*—(i) *In general.* The group affiliation requirement of section 848(e)(2)(A) and this paragraph (h)(2) is satisfied only if all of the individuals eligible for coverage under the contract constitute a group described in paragraphs (h)(2) (ii) through (viii) of this section.

(ii) *Employee group.* An employee group consists of all of the employees (including statutory employees within the meaning of section 3121(d)(3) and individuals who are treated as employed by a single employer under section 414 (b), (c), or (m)), or any class or classes thereof within the meaning of paragraph (h)(2)(x) of this section, of an employer. For this purpose, the term "employee" includes—

(A) A retired or former employee;

(B) The sole proprietor, if the employer is a sole proprietorship;

(C) A partner of the partnership, if the employer is a partnership;

(D) A director of the corporation, if the employer is a corporation; and

(E) An elected or appointed official of the public body, if the employer is a public body.

(iii) *Debtor group.* A debtor group consists of all of the debtors, or any class or classes thereof within the meaning of paragraph (h)(2)(x) of this section, of a creditor. For this purpose, the term "debtor" includes a borrower of money or purchaser or lessee of goods, services, or property for which payment is arranged through a credit transaction.

(iv) *Labor union group.* A labor union group consists of all of the members, or any class or classes thereof within the meaning of paragraph (h)(2)(x) of this section, of a labor union or similar employee organization.

(v) *Association group.* An association group consists of all of the members, or any class or classes thereof within the meaning of paragraph (h)(2)(x) of this section, of an association that, at the time the master contract is issued—

(A) Is organized and maintained for purposes other than obtaining insurance;

(B) Has been in active existence for at least two years (including, in the case of a merged or successor association, the years of active existence of any predecessor association); and

(C) Has at least 100 members.

(vi) *Credit union group.* A credit union group consists of all of the members of borrowers, or any class or classes thereof within the meaning of paragraph (h)(2)(x) of this section, of a credit union.

(vii) *Multiple group.* A multiple group consists of two or more groups from any single category described in paragraphs (h)(2) (ii) through (vi) of this section. A multiple group may not include two or more groups from different categories described in paragraph (h)(2) (ii) through (vi) of this section.

(viii) *Certain discretionary groups.* Provided that the contract otherwise satisfies the requirements of paragraph (h)(1) of this section, a contract issued to one of the following discretionary groups is treated as satisfying the group affiliation requirement of this paragraph (h)(2)—

(A) A contract issued to a group consisting of students of one or more universities or other educational institutions;

(B) A contract issued to a group consisting of members or former members of the U.S. Armed Forces;

(C) A contract issued to a group of individuas for the payment of future funeral expenses; and

(D) A contract issued to any other discretionary group as specified by the Commissioner in subsequent guidance published in the Internal Revenue Bulletin. (See § 601.601(d)(2)(ii)(*b*) of this chapter.)

(ix) *Employees treated as members.* In determining whether the group affiliation requirement of paragraph (h)(2) of this section is satisfied, the employees of a labor union, credit union, or association may be treated as members of a labor union group, a credit union group, or an association group, respectively.

(x) *Class or classes of a group determined without regard to individual health characteristics*—(A) *In general.* A class or classes of a group described in paragraphs (h)(2) (ii) through (viii) of this section may be determined using any reasonable characteristics (for example, amount of insurance, location, or occupation) other than individual health characteristics. The employees of a single employer covered under a policy issued to a multi-employer trust are considered a class of a group described in paragraph (h)(2)(ii) of this section.

(B) *Limitation of coverage based on certain work and age requirements permissible.* A limitation of coverage under a group contract to persons who are actively at work or of a pre-retirement age (for example, age 65 or younger) is not treated as based on individual health characteristics.

(3) *Premiums determined on a group basis*—(1) *In general.* Premiums for a contract are determined on a group basis for purposes of section 848(e)(2)(B) and this paragraph (h) only if the premium charged by the insurance company for each member of the group (or any class thereof) is determined on the basis of the same rates for the corresponding amount of coverage (for example, per $1,000 of insurance) or on the basis of rates which differ only because of the gender, smoking habits, or age of the member.

(ii) *Exception for substandard premium rates for certain high risk insureds.* Any difference in premium rates is disregarded for purposes of this paragraph (h)(3) if the difference is charged for an individual who was accepted for coverage at a substandard rate prior to January 1, 1993.

(iii) *Flexible premium contracts.* In the case of a group universal life insurance contract, the identical premium requirement is satisfied if the premium rates used by the insurance company in determining the periodic mortality charges applied to the policy account value of any member insured by the contract differ from those of other

members (within the same class) only because of the gender, smoking habits, or age of the member.

(iv) *Determination of actual age.* For purposes of this paragraph (h)(3), determinations of actual age may be made using any reasonable method, provided that this method is applied consistently for all members of the group.

(4) *Underwriting practices used by company.* [Reserved]

(5) *Disqualification of group*—(i) *In general.* Except as otherwise provided in this paragraph (h)(5), if the requirements of paragraphs (h)(1), (2), and (3) of this section are not satisfied with respect to one or more members of the group, or of a class within a group (within the meaning of paragraph (h)(2)(x) of this section), the premiums for the entire group (or class) are treated as individual life insurance premiums.

(ii) *Exception for de minimis failures.* If the requirements of paragraphs (h) (1), (2), or (3) of this section are not satisfied with respect to one or more members of the group (or class), but the sum of the premiums charged by the insurance company for those individuals is no more than 5 percent of the aggregate premiums for the group (or class), only the premiums charged for those individuals are treated as premiums for an individual life insurance contract.

(6) *Supplemental life insurance coverage.* For purposes of determining whether the requirement in paragraph (h)(3)(i) of this section is satisfied, any supplemental life insurance coverage (including optional coverage for members of the group, their spouses, or their dependent children) is (or is treated as) a separate contract. In determining whether the group affiliation requirement of paragraph (h)(2) of this section is satisfied for the supplemental coverage, a member's spouse and dependent children are treated as members of the group if they are eligible for coverage.

(7) *Special rules relating to the payment of proceeds.* The following rules apply for purposes of section 848(e)(2) and paragraph (h)(1)(vi) of this section.

(i) *Contracts issued to a welfare benefit fund.* If a contract issued to a welfare benefit fund (as defined in section 419) provides for payment of proceeds to the welfare benefit fund, the proceeds of the contract are not considered payable to or for the benefit of the insured's employer, an organization or association to which the insured belongs, or other similar person, provided the proceeds are paid as benefits to the employee or the employee's beneficiary.

(ii) *Credit life insurance contracts.* If a credit life insurance contract provides for payment of proceeds to the insured's creditor, the proceeds of the contract are not treated as payable to or for the benefit of the insured's employer, an organization or association to which the insured belongs, or other similar person, provided the proceeds are applied against an outstanding indebtedness of the insured.

(iii) *"Organization or association" limited to the sponsor of the contract or the group policyholder.* The term "organization or association" means the organization or association that is either the sponsor of the contract or the group policyholder.

(i) *General deductions.* The term "general deductions" is defined in section 848(c)(2). An insurance company determines its general deductions for the taxable year without regard to amounts capitalized or amortized under section 848(a). The amount of a company's general deductions is also determined without regard to the rules of § 1.848–2(f), which apply only for purposes of determining net consideration for reinsurance agreements.

§ 1.848–2 Determination of net premiums.

(a) *Net premiums*—(1) *In general.* An insurance company must use the accrual method of accounting (as prescribed by section 811(a)(1)) to determine the net premiums with respect to each category of specified insurance contracts. With respect to any category of contracts, net premiums means—

(i) The gross amount of premiums and other consideration (see paragraph (b) of this section); reduced by

(ii) The sum of—

(A) The return premiums (see paragraph (e) of this section); and

(B) The net negative consideration for a reinsurance agreement (other than an agreement described in paragraph (h)(2) of this section). See paragraphs (f) and (g) of this section for rules relating to the determination of net negative consideration.

(2) *Separate determination of net premiums for certain reinsurance agreements.* Net premiums with respect to reinsurance agreements for which an election under paragraph (h)(3) of this section has been made (certain reinsurance agreements with parties not subject to United States taxation) are treated separately and are subject to the rules of paragraph (h) of this section.

(b) *Gross amount of premiums and other consideration*—(1) *General rule.* The term "gross amount of premiums and other consideration" means the sum of—

(i) All premiums and other consideration (other than amounts on reinsurance agreements); and

(ii) The net positive consideration for any reinsurance agreement (other than an agreement for which an election under paragraph (h)(3) of this section has been made).

(2) *Items included.* The gross amount of premiums and other consideration includes—

(i) Advance premiums;

(ii) Amounts in a premium deposit fund or similar account, to the extent provided in paragraph (b)(3) of this section;

(iii) Fees;

(iv) Assessments;

(v) Amounts that the insurance company charges itself representing premiums with respect to benefits for its employees (including full-time life insurance salesmen treated as employees under section 7701(a)(20)); and

(vi) The value of a new contract issued in an exchange described in paragraph (c)(2) or (c)(3) of this section.

(3) *Treatment of premium deposits*—(i) *In general.* An amount in a premium deposit fund or similar account is taken into account in determining the gross amount of premiums and other consideration at the earlier of the time that the amount is applied to, or irrevocably committed to, the payment of a premium on a specified insurance contract. If an amount is irrevocably committed to the payment of a premium on a specified insurance contract, then neither that amount nor any earnings allocable to that amount are included in the gross amount of premiums and other consideration when applied to the payment of a premium on the same contract.

(ii) *Amounts irrevocably committed to the payment of premiums.* Except as provided in paragraph (b)(3)(iii) of this section, an amount in a premium deposit fund or similar account is irrevocably committed to the payment of premiums on a contract only if neither the amount nor any earnings allocable to that amount may be—

(A) Returned to the policyholder or any other person (other than on surrender of the contract); or

(B) Used by the policyholder to fund another contract.

(iii) *Retired lives reserves.* Premiums received by an insurance company under a retired lives reserve arrangement are treated as irrevocably committed to the payment of premiums on a specified insurance contract.

(4) *Deferred and uncollected premiums.* The gross amount of premiums and other consideration does not include deferred and uncollected premiums.

(c) *Policy exchanges*—(1) *General rule.* Except as otherwise provided in this paragraph (c), an exchange of insurance contracts (including a change in the terms of a specified insurance contract) does not result in any amount being included in the gross amount of premiums and other consideration.

(2) *External exchanges.* If a contract is exchanged for a specified insurance contract issued by another insurance company, the company that issues the new contract must include the value of the new contract in the gross amount of premiums and other consideration.

(3) *Internal exchanges resulting in fundamentally different contracts*—(i) *In general.* If a contract is exchanged for a specified insurance contract issued by the same insurance company that issued the original contract, the company must include the value of the new contract in the gross amount of premiums and other consideration if the new contract—

(A) Relates to a different category of specified insurance contract than the original contract;

(B) Does not cover the same insured as the original contract; or

(C) Changes the interest, mortality, morbidity, or expense guarantees with respect to the nonforfeiture benefits provided in the original contract.

(ii) *Certain modifications treated as not changing the mortality, morbidity, interest, or expense guarantees.* For purposes of paragraph (c)(3)(i)(C) of this section, the following items are not treated as changing the interest, mortality, morbidity, or expense guarantees with respect to the nonforfeiture benefits provided in the contract—

(A) A change in a temporary guarantee with respect to the amounts to be credited as interest to the policyholder's account, or charged as mortality, morbidity, or expense charges, if the new guarantee applies for a period of ten years or less;

(B) The determination of benefits on annuitization using rates which are more favorable to the policyholder than the permanently guaranteed rates; and

(C) Other items as specified by the Commissioner in subsequent guidance published in the Internal Revenue Bulletin.

(iii) *Exception for contracts restructured by a court supervised rehabilitation or similar proceeding.* No amount is included in the gross amount of premiums and other consideration with respect to any change made to the interest, mortality, morbidity, or expense guarantees with respect to the nonforfeiture benefits of contracts of an insurance company that is the subject of a rehabilitation, conservatorship, insolvency, or similar state proceeding. This treatment applies only if the change—

(A) Occurs as part of the rehabilitation, conservatorship, insolvency, or similar state proceeding; and

(B) Is approved by the state court, the state insurance department, or other state official with authority to act in the rehabilitation, conservatorship, insolvency, or similar state proceeding.

(4) *Value of the contract*—(i) *In general.* For purposes of paragraph (c)(2) or (c)(3) of this section, the value of the new contract is established through the most recent sale by the company of a comparable contract. If the value of the new contract is not readily ascertainable, the value may be approximated by using the interpolated terminal reserve of the original contract as of the date of the exchange.

(ii) *Special rule for group term life insurance contracts.* In the case of any exchange involving a group term life insurance contract without cash value, the value of the new contract is deemed to be zero.

(iii) *Special rule for certain policy enhancement and update programs*—(A) *In general.* If the interest, mortality, morbidity, or expense guarantees with respect to the nonforfeiture benefits of a specified insurance contract are changed pursuant to a policy enhancement or update program, the value of the contract included in the gross amount of premiums and other consideration equals 30 percent of the value determined under paragraph (c)(4) of this section.

(B) *Policy enhancement or update program defined.* For purposes of paragraph (c)(4)(iii)(A) of this section, a policy enhancement or update program means any offer or commitment by the insurance company to all of the policyholders holding a particular policy form to change the interest, mortality, morbidity, or expense guarantees used to determine the contract's nonforfeiture benefits.

(5) *Example.* The principles of this paragraph (c) are illustrated by the following example.

Example. (i) An individual (A) owns a life insurance policy issued by a life insurance company (L1). On January 1, 1993, A purchases additional term insurance for $250, which is added as a rider to A's life insurance policy. The purchase of the additional term insurance does not change the interest mortality, morbidity, or expense guarantees with respect to the nonforfeiture benefits provided by A's life insurance policy.

(ii) A's purchase of the term insurance rider is not considered to result in a fundamentally different contract under paragraph (c)(3) of this section because the addition of the rider did not change the interest, mortality, morbidity, or expense guarantees with respect to the nonforfeiture values of A's original life insurance policy. Therefore, L1 includes only the $250 received from A in the gross amount of premiums and other consideration.

(d) *Amounts excluded from the gross amount of premiums and other consideration*—(1) *In general.* The following items are not included in the gross amount of premiums and other consideration—

(i) Items treated by section 808(e) as policyholder dividends that are paid to the policyholder and immediately returned to the insurance company as a premium on the same contract that generated the dividends, including—

(A) A policyholder dividend applied to pay a premium under the contract that generated the dividend;

(B) Excess interest accumulated within the contract;

(C) A policyholder dividend applied for additional coverage (for example, a paid-up addition, extension of the period for which insurance protection is provided, or reduction of the period for which premiums are paid) on the contract that generated the dividend;

(D) A policyholder dividend applied to reduce premiums otherwise payable on the contract that generated the dividend;

(E) An experience-rated refund applied to pay a premium on the group contract that generated the refund; and

(F) An experience-rated refund applied to a premium stabilization reserve held with respect to the group contract that generated the refund;

(ii) Premiums waived as a result of the disability of an insured or the disability or death of a premium payor;

(iii) Premiums considered to be paid on a contract as the result of a partial surrender or withdrawal from the contract, or as a result of the surrender or withdrawal of a paid-up addition previously issued with respect to the same contract; and

(iv) Amounts treated as premiums upon the selection by a policyholder or by a beneficiary of a settlement option provided in a life insurance contract.

(2) *Amounts received or accrued from a guaranty association.* Amounts received or accrued from a guaranty association relating to an insurance company that is subject to an insolvency, delinquency, conservatorship, rehabilitation, or

similar proceeding are not included in the gross amount of premiums and other consideration.

(3) *Exclusion not to apply to dividend accumulations.* For purposes of section 848(d)(3) and paragraph (d)(1) of this section, amounts applied from a dividend accumulation account to pay premiums on a specified insurance contract are not amounts treated as paid to, and immediately returned by, the policyholder.

(e) *Return premiums.* For purposes of section 848(d)(1)(B) and this section, return premiums do not include policyholder dividends (as defined in section 808), claims or benefits payments, or amounts returned to another insurance company under a reinsurance agreement. For the treatment of amounts returned to another insurance company under a reinsurance agreement, see paragraph (f) of this section.

(f) *Net consideration for a reinsurance agreement*—(1) *In general.* For purposes of section 848, the ceding company and the reinsurer must treat amounts arising from the reinsurance of a specified insurance contract consistently in determining their net premiums. See paragraph (g) of this section for restrictions on the amount of the net negative consideration for any reinsurance agreement that may be taken into account. See paragraph (h) of this section for special rules applicable to reinsurance agreements with parties not subject to United States taxation.

(2) *Net consideration determined by a ceding company*—(i) *In general.* The net consideration determined by a ceding company for a reinsurance agreement equals—

(A) The gross amount incurred by the reinsurer with respect to the reinsurance agreement, including any ceding commissions, annual allowances, reimbursements of claims and benefits, modified coinsurance reserve adjustments under paragraph (f)(5) of this section, experience-rated adjustments, and termination payments; less

(B) The gross amount of premiums and other consideration incurred by the ceding company with respect to the reinsurance agreement.

(ii) *Net negative and net positive consideration.* If the net consideration is less than zero, the ceding company has net negative consideration for the reinsurance agreement. If the net consideration is greater than zero, the ceding company has net positive consideration for the reinsurance agreement.

(3) *Net consideration determined by the reinsurer*—(i) *In general.* The net consideration determined by a reinsurer for a reinsurance agreement equals—

(A) The amount described in paragraph (f)(2)(i)(B) of this section; less

(B) The amount described in paragraph (f)(2)(i)(A) of this section.

(ii) *Net negative and net positive consideration.* If the net consideration is less than zero, the reinsurer has net negative consideration for the reinsurance agreement. If the net consideration is greater than zero, the reinsurer has net positive consideration for the reinsurance agreement.

(4) *Timing consistency required.* For purposes of determining the net consideration of a party for a reinsurance agreement, an income or expense item is taken into account for the first taxable year for which the item is required to be taken into account by either party. Thus, the ceding company and the reinsurer must take the item into account for the same taxable year (or for the same period if the parties have different taxable years).

(5) *Modified coinsurance and funds-withheld reinsurance agreements*—(i) *In general.* In the case of a modified coinsurance or funds-withheld reinsurance agreement, the net consideration for the agreement includes the amount of any payments or reserve adjustments, as well as any related loan transactions between the ceding company and the reinsurer. The amount of any investment income transferred between the parties as the result of a reserve adjustment or loan transaction is treated as an item of consideration under the reinsurance agreement.

(ii) *Special rule for certain funds-withheld reinsurance agreements.* In the case of a funds-withheld reinsurance agreement that is entered into after November 14, 1991, but before the first day of the first taxable year beginning after December 31, 1991, and is terminated before January 1, 1995, the parties' net consideration in the year of termination must include the amount of the original reserve for any reinsured specified insurance contract that, in applying the provisions of subchapter L, was treated as premiums and other consideration incurred for reinsurance for the taxable year in which the agreement became effective.

(6) *Treatment of retrocessions.* For purposes of this paragraph (f), a retrocession agreement is treated as a separate reinsurance agreement. The party that is relieved of liability under a retrocession agreement is treated as the ceding company.

(7) *Mixed reinsurance agreement.* If a reinsurance agreement includes more than one category of specified insurance contracts (or specified insurance contracts and contracts that are not specified insurance contracts), the portion of the agreement relating to each category of reinsured specified insurance contracts is treated as a separate agreement. The portion of the agreement relating to reinsured contracts that are not specified insurance contracts is similarly treated as a separate agreement.

(8) *Treatment of policyholder loans.* For purposes of determining the net consideration under a reinsurance agreement, the transfer of a policyholder loan receivable is treated as an item of consideration under the agreement. The interest credited with respect to a policyholder loan receivable is treated as investment income earned directly by the party holding the receivable. The amounts taken into account as claims and benefit reimbursements under the agreement must be determined without reduction for the policyholder loan.

(9) *Examples.* The principles of this paragraph (f) are illustrated by the following examples.

Example 1. On July 1, 1992, a life insurance company (L1) transfers a block of individual life insurance contracts to an unrelated life insurance company (L2) under an agreement whereby L2 becomes solely liable to the policyholders under the contracts reinsured. L1 and L2 are calendar year taxpayers. Under the assumption reinsurance agreement, L1 agrees to pay L2 $100,000 for assuming the life insurance contracts, and L2 agrees to pay L1 a $17,000 ceding commission. Under paragraph (f)(2) of this section, L1 has net negative consideration of ($83,000) ($17,000 ceding commission incurred by L2—$100,000 incurred by L1 for reinsurance). Under paragraph (f)(3) of this section, L2 has net positive consideration of $83,000. Under paragraph (b)(1)(ii) of this section, L2 includes the net positive consideration in its gross amount of premiums and other consideration.

Example 2. (i) On July 1, 1992, a life insurance company (L1) transfers a block of individual life insurance contracts to an unrelated life insurance company (L2) under an agreement whereby L1 remains liable to the policyholders under the reinsured contracts. L1 and L2 are calendar year taxpayers. Under the indemnity reinsurance agreement, L1 agrees to pay L2 $100,000 for reinsuring the life insurance contracts, and L2 agrees to pay L1 a $17,000 ceding commission. L1 agrees to pay L2 an amount equal to the future premiums on the reinsured contracts. L2 agrees to indemnify L1 for claims and benefits and administrative expenses incurred by L1 while the reinsurance agreement is in effect.

(ii) For the period beginning July 1, 1992, and ending December 31, 1992, the following income and expense items are determined with respect to the reinsured contracts:

Item	Income	Expense
Premiums	$25,000	
Death benefits		$10,000
Surrender benefits		8,000
Premium taxes and other expenses		2,000
Total		20,000

(iii) Under paragraph (f)(2) of this section, L1's net negative consideration equals ($88,000), which is determined by subtracting the $125,000 ($100,000 + $25,000) incurred by L1 from the $37,000 incurred by L2 under the reinsurance agreement ($17,000 + $10,000 + $8,000 + $2,000). L2's net positive consideration is $88,000. Under paragraph (b)(1)(ii) of this section, L2 includes the $88,000 net positive consideration in its gross amount of premiums and other consideration.

Example 3. (i) Assume that the reinsurance agreement referred to in *Example 2* is terminated on December 31, 1993. During the period from January 1, 1993 through December 31, 1993, the following income and expense items are determined with respect to the reinsured contracts:

Item	Income	Expense
Premiums	$45,000	
Death benefits		$18,000
Surrender benefits		6,000
Premium taxes and other expenses		8,000
Total		32,000

(ii) On the termination of the reinsurance agreement, L1 receives a payment of $70,000 from L2 as consideration for releasing L2 from liability with respect to the reinsured contracts.

(iii) L1's net positive consideration equals $57,000, which is the excess of the $102,000 incurred by L2 for the year ($18,000 + $6,000 + $8,000 + $70,000) over the $45,000 incurred by L1. L2's net negative consideration is ($57,000). L1 includes the net positive consideration in its gross amount of premiums and other consideration.

Example 4. (i) On January 1, 1993, an insurance company (L1) enters into a modified coinsurance agreement with another insurance company (L2), covering a block of individual life insurance contracts. Both L1 and L2 are calendar year taxpayers. Under the agreement, L2 is credited with an initial reinsurance premium equal to L1's reserves on the reinsured contracts at the inception of the agreement, any new premiums received with respect to the reinsured contracts, any decrease in L1's reserves on the reinsured contracts, and an amount of investment income determined by reference to L1's reserves on the reinsured contracts. L2 is charged for all claims and expenses incurred with respect to the reinsured contracts plus an amount reflecting any increase in L1's reserves. The agreement further provides that cash settlements between the parties are made at the inception and termination of the agreement, as well as at the end of each calendar year while the agreement is in effect. The cash settlement is determined by netting the sum of the amounts credited to L2 against the sum of the amounts charged to L2 with respect to the reinsured policies. L1's reserves on the reinsured policies at the inception of the reinsurance agreement are $375,000.

(ii) Under the cash settlement formula, L2 is credited with an initial reinsurance premium equal to L1's reserves on the reinsured policies ($375,000), but is charged an amount reflecting L1's policy reserve requirements ($375,000).

(iii) For the period ending December 31, 1993, L2 is also credited and charged the following amounts with respect to the reinsured contracts.

Item	Income	Expense
Premiums	$100,000	
Investment income	39,000	
Death benefits		$65,000
Increase in reserves		75,000

(iv) Under paragraph (f)(5) of this section, L2's net negative consideration for the 1993 taxable year equals ($1,000) which is determined by subtracting the sum of the amounts charged to L2 ($375,000 + $65,000 + $75,000 = $515,000) from the sum of the amounts credited to L2 ($375,000 + $100,000 + $39,000 = $514,000). L1's net positive consideration for calendar year 1993 equals $1,000. Under paragraph (b)(1)(ii) of this section, L1 includes the $1,000 net positive consideration in its gross amount of premiums and other consideration.

Example 5. (i) On January 1, 1993, an insurance company (L1) enters into a coinsurance agreement with another insurance company (L2) covering a block of individual life insurance contracts. Both L1 and L2 are calendar year taxpayers. Under the agreement, L2 is credited with an initial reinsurance premium equal to L1's reserves on the effective date of the agreement, any new premiums received on the reinsured contracts, but must indemnify L1 of all claims and expenses incurred with respect to the contracts. As part of the agreement, L2 makes a loan to L1 equal to the amount of the reserves on the reinsured contracts. L1's reserves on the reinsured contracts on the effective date of the agreement are $375,000. Thus, on the inception date of the reinsurance agreement, L1 transfers to L2 its note for $375,000 as consideration for reinsurance.

(ii) The reinsurance agreement between L1 and L2 is a funds-withheld reinsurance agreement. Under paragraph (f)(5) of this section, the amount of any loan transaction is taken into account in determining the parties' net consideration. At the inception of the reinsurance agreement, L2 is credited with a reinsurance premium equal to L1's reserves on the reinsured contracts ($375,000). L2's $375,000 loan to L1 is treated as an amount returned to L1 under the agreement.

(iii) For the period ending December 31, 1993, L2 is credited and charged the following amounts with respect to the reinsured contracts and the loan transaction with L1.

Item	Income	Expense
Premiums	$100,000	
Accrued interest	39,000	
Death benefits		$65,000
Increase in loan to L1		75,000

(iv) Under paragraph (f)(5) of this section, L2's net negative consideration for the 1993 taxable year equals ($1,000), which is determined by subtracting the sum of amounts incurred by L2 with respect to death benefits and the loan transaction ($375,000 + $65,000 + $75,000 = $515,000) from the sum of the amounts credited to L2 as reinsurance premiums and interest on the loan transaction ($375,000 + $100,000 + 39,000 = $514,000). L1's net positive consideration for calendar year 1993 equals $1,000. Under paragraph (b)(1)(ii) of this section, L1 includes the $1,000 net positive consideration in its gross amount of premiums and other consideration.

Example 6. (i) On December 31, 1993, an insurance company (L1) enters into a reinsurance agreement with another insurance company (L2) covering a block of individual life insurance contracts. Both L1 and L2 are calendar year taxpayers. Under the agreement, L2 is credited with L1's reserves on the reinsured contracts on the effective date of the agreement, plus any new premiums received on the reinsured contracts, but must indemnify L1 for all claims and expenses incurred with respect to the contracts. Under the agreement, L1 transfers cash of $325,000 to L2 plus rights to its policyholder loan receivables on the reinsured contracts ($50,000). L2 reports the reinsurance agreement by including the transferred policyholder loan receivables as an asset on its books.

(ii) For the period beginning January 1, 1994 and ending December 31, 1994, the following income and expense items are incurred with respect to the reinsured contracts.

Item	Income	Expense
Premiums	$100,000	
Death benefits		$25,000
Surrender benefits		5,000
Premium taxes and other expenses		8,000
Total		38,000

(iii) These amounts are net of the outstanding policyholder loans held by L2 of $20,000 with respect to death benefits and $15,000 with respect to surrender benefits.

(iv) Under paragraph (f)(8) of this section, the transferred policyholder loan receivables are treated as an item of consideration under the reinsurance agreement. In determining the parties' net consideration for the agreement, the transferred policyholder loan receivables ($50,000) are treated as an item of consideration incurred by L1 under paragraph (f)(2)(i)(B) of this section. Therefore, for the 1993 taxable year, L1 has net negative consideration of ($375,000). L2 has net positive consideration of $375,000. Under paragraph (b)(1)(ii) of this section, L2 includes the $375,000 net positive consideration in its gross amount of premiums and other consideration.

(v) For the 1994 taxable year, L2 has net positive consideration for the reinsurance

agreement of $62,000 before adjustment for the transferred policyholder loans. Under paragraph (f)(8) of this section, the amounts taken into account as claim and benefit payments must be adjusted by the amount of any transferred policyholder loan receivables which are netted against the reinsurer's claim and benefit reimbursements. Therefore, L2 takes into account $45,000 ($25,000+$20,000=$45,000) as reimbursements for death benefits, and $20,000 ($5,000+$15,000=$20,000) as reimbursements for surrender benefits. After adjustment for these items, L2 has net positive consideration of $27,000, which is determined by subtracting the sum of the amounts charged to L2 ($45,000+$20,000+$8,000=$73,000) from the sum of the amounts credited to L2 ($100,000). L1 has net negative consideration of ($27,000) under the agreement. Under paragraph (b)(1)(ii) of this section, L2 includes the $27,000 net positive consideration in its gross amount of premiums and other consideration. The amount of any interest earned on the policyholder loan receivables after their transfer to L2 is treated as investment income earned directly by L2, and is not taken into account as an item of consideration under the agreement.

(g) *Reduction in the amount of net negative consideration to ensure consistency of capitalization for reinsurance agreements*—(1) *In general.* Paragraph (g)(3) of this section provides for a reduction in the amount of net negative consideration that a party to a reinsurance agreement (other than a reinsurance agreement described in paragraph (h)(2) of this section) may take into account in determining net premiums under paragraph (a)(2)(ii) of this section if the party with net positive consideration has a capitalization shortfall (as defined in paragraph (g)(4) of this section). Unless the party with net negative consideration demonstrates that the party with net positive consideration does not have a capitalization shortfall or demonstrates the amount of the other party's capitalization shortfall which is allocable to the reinsurance agreement, the net negative consideration that may be taken into account under paragraph (a)(2)(ii) of this section is zero. However, the reduction of paragraph (g)(3) of this section does not apply to a reinsurance agreement if the parties make a joint election under paragraph (g)(8) of this section. Under the election, the party with net positive consideration capitalizes specified policy acquisition expenses with respect to the agreement without regard to the general deductions limitation of section 848(c)(1).

(2) *Application to reinsurance agreements subject to the interim rules.* In applying this paragraph (g) to a reinsurance agreement that is subject to the interim rules of § 1.848–3, the term "premiums and other consideration incurred for reinsurance under section 848(d)(1)(B)" is substituted for "net negative consideration," and the term "gross amount of premiums and other consideration under section 848(d)(1)(A)" is substituted for "net positive consideration." If an insurance company has "premiums and other consideration incurred for reinsurance under section 848(d)(1)(B)" and a "gross amount of premiums and other consideration under section 848(d)(1)(A)" for the same agreement, the net of these amounts is taken into account for purposes of this paragraph (g).

(3) *Amount of reduction.* The reduction required by this paragraph (g)(3) equals the amount obtained by dividing—

(i) The portion of the capitalization shortfall (as defined in paragraph (g)(4) of this section) allocated to the reinsurance agreement under paragraph (g)(7) of this section; by

(ii) The applicable percentage set forth in section 848(c)(1) for the category of specified insurance contracts reinsured by the agreement.

(4) *Capitalization shortfall.* A "capitalization shortfall" equals the excess of—

(i) The sum of the required capitalization amounts (as defined in paragraph (g)(5) of this section) for all reinsurance agreements (other than reinsurance agreements for which an election has been made under paragraph (h)(3) of this section); over

(ii) The general deductions allocated to those reinsurance agreements, as determined under paragraph (g)(6) of this section.

(5) *Required capitalization amount*—(i) *In general.* The "required capitalization amount" for a reinsurance agreement (other than a reinsurance agreement for which an election has been made under paragraph (h)(3) of this section) equals the amount (either positive or negative) obtained by multiplying—

(A) The net positive or negative consideration for an agreement not described in paragraph (h)(2) of this section, and the net positive consideration for an agreement described in paragraph (h)(2) of this section, but for which an election under paragraph (h)(3) of this section has not been made; by

(B) The applicable percentage set forth in section 848(c)(1) for that category of specified insurance contracts.

(ii) *Special rule with respect to net negative consideration.* Solely for purposes of computing a party's required capitalization amount under this paragraph (g)(5)—

(A) If either party to the reinsurance agreement is the direct issuer of the reinsured contracts, the party computing its required capitalization amount takes into account the full amount of any net negative consideration without regard to any potential reduction under paragraph (g)(3) of this section; and

(B) If neither party to the reinsurance agreement is the direct issuer of the reinsured contracts, any net negative consideration is deemed to equal zero in computing a party's required capitalization amount except to the extent that the party with the net negative consideration establishes that the other party to that reinsurance agreement capitalizes the appropriate amount.

(6) *General deductions allocable to reinsurance agreements.* An insurance company's general deductions allocable to its reinsurance agreements equals the excess, if any, of—

(i) The company's general deductions (excluding additional amounts treated as general deductions under paragraph (g)(8) of this section); over

(ii) The amount determined under section 848(c)(1) on specified insurance contracts that the insurance company has issued directly (determined without regard to any reinsurance agreements).

(7) *Allocation of capitalization shortfall among reinsurance agreements.* The capitalization shortfall is allocated to each reinsurance agreement for which the required capitalization amount (as determined in paragraph (g)(5) of this section) is a positive amount. The portion of the capitalization shortfall allocable to each agreement equals the amount which bears the same ratio to the capitalization shortfall as the required capitalization amount for the reinsurance agreement bears to the sum of the positive required capitalization amounts.

(8) *Election to determine specified policy acquisition expenses for an agreement without regard to general deductions limitation*—(i) *In general.* The reduction specified by paragraph (g)(3) of this section does not apply if the parties to a reinsurance agreement make an election under this paragraph (g)(8). The election requires the party with net positive consideration to capitalize specified policy acquisition expenses with respect to the reinsurance agreement without regard to the general deductions limitation of section 848(c)(1). That party must reduce its deductions under section 805 or section 832(c) by the amount, if any, of the

party's capitalization shortfall allocable to the reinsurance agreement. The additional capitalized amounts are treated as specified policy acquisition expenses attributable to premiums and other consideration on the reinsurance agreement, and are deductible in accordance with section 848(a)(2).

(ii) *Manner of making election.* To make an election under paragraph (g)(8) of this section, the ceding company and the reinsurer must include an election statement in the reinsurance agreement, either as part of the original terms of the agreement or by an addendum to the agreement. The parties must each attach a schedule to their federal income tax returns which identifies the reinsurance agreement for which the joint election under this paragraph (g)(8) has been made. The schedule must be attached to each of the parties' federal income tax returns filed for the later of—

(A) The first taxable year ending after the election becomes effective; or

(B) The first taxable year ending on or after December 29, 1992.

(iii) *Election statement.* The election statement in the reinsurance agreement must—

(A) Provide that the party with net positive consideration for the reinsurance agreement for each taxable year will capitalize specified policy acquisition expenses with respect to the reinsurance agreement without regard to the general deductions limitation of section 848(a)(1);

(B) Set forth the agreement of the parties to exchange information pertaining to the amount of net consideration under the reinsurance agreement each year to ensure consistency;

(C) Specify the first taxable year for which the election is effective; and

(D) Be signed by both parties.

(iv) *Effect of election.* An election under this paragraph (g)(8) is effective for the first taxable year specified in the election statement and for all subsequent taxable years for which the reinsurance agreement remains in effect. The election may not be revoked without the consent of the Commissioner.

(9) *Example.* The principles of this paragraph (g) are illustrated by the following examples.

Example 1. (i) On December 31, 1992, a life insurance company (L1) transfers a block of individual life insurance contracts to an unrelated life insurance company (L2) under an agreement in which L2 becomes solely liable to the policyholders on the reinsured contracts. L1 transfers $105,000 to L2 as consideration for the reinsurance of the contracts.

(ii) L1 and L2 do not make an election under paragraph (g)(8) of this section to capitalize specified policy acquisition expenses with respect to the reinsurance agreement without regard to the general deductions limitation. L2 has no other insurance business, and its general deductions for the taxable year are $3,500.

(iii) Under paragraph (f)(2) of this section, L1's net negative consideration is ($105,000). Under paragraph (f)(3) of this section, L2's net positive consideration is $105,000. Pursuant to paragraph (b)(1)(ii) of this section, L2 includes the net positive consideration in its gross amount of premiums and other consideration.

(iv) The required capitalization amount under paragraph (g)(5) of this section for the reinsurance agreement is $8,085 ($105,000 × .077). L2's general deductions, all of which are allocable to the reinsurance agreement with L1, are $3,500. The $4,585 difference between the required capitalization amount ($8,085) and the general deductions allocable to the reinsurance agreement ($3,500) represents L2's capitalization shortfall under paragraph (g)(4) of this section.

(v) Since L2 has a capitalization shortfall allocable to the agreement, the rules of paragraph (g)(1) of this section apply for purposes of determining the amount by which L1 may reduce its net premiums. Under paragraph (g)(3) of this section, L1 must reduce the amount of net negative consideration that it takes into account under paragraph (a)(2)(ii) of this section by $59,545 ($4,585/.077). Thus, of the $105,000 net negative consideration under the reinsurance agreement, L1 may take into account only $45,455 as a reduction of its net premiums.

Example 2. The facts are the same as *Example 1*, except that L1 and L2 make the election under paragraph (g)(8) of this section to capitalize specified policy acquisition expenses with respect to the reinsurance agreement without regard to the general deductions limitation. Pursuant to this election, L2 must capitalize as specified policy acquisition expenses an amount equal to $8,085 ($105,000 × .077). L1 may reduce its net premiums by the $105,000 of net negative consideration.

Example 3. (i) A life insurance company (L1) is both a direct issuer and a reinsurer of life insurance and annuity contracts. For 1993, L1's net premiums under section 848 (d)(1) for directly issued individual life insurance and annuity contracts are as follows:

Category	Net premiums
Life insurance contracts	$17,000,000
Annuity contracts	8,000,000

(ii) L1's general deductions for 1993 are $1,500,000.

(iii) For 1993, L1 is a reinsurer under four separate indemnity reinsurance agreements with unrelated insurance companies (L2, L3, L4, and L5). The agreements with L2, L3, and L4 cover life insurance contracts issued by those companies. The agreement with L5 covers annuity contracts issued by L5. The parties to the reinsurance agreements have not made the election under paragraph (g)(8) of this section to capitalize specified policy acquisition expenses with respect to these agreements without regard to the general deductions limitation.

(iv) L1's net consideration for 1993 with respect to its reinsurance agreements is as follows:

Agreement	Net consideration
L2	$1,200,000
L3	(350,000)
L4	300,000
L5	600,000

(v) To determine whether a reduction under paragraph (g)(3) of this section applies with respect to these reinsurance agreements, L1 must determine the required capitalization amounts for its reinsurance agreements and the amount of its general deductions allocable to these agreements.

(vi) Pursuant to paragraph (g)(5) of this section, the required capitalization amount for each reinsurance agreement is determined as follows:

L2.....$1,200,000×.077=$92,400
L3.....($350,000)×.077=($26,950)
L4.....$300,000×.077=$23,100
L5.....$600,000×.0175=$10,500

(vii) Thus, the sum of L1's required capitalization amounts on its reinsurance agreements equals $99,050.

(viii) Pursuant to paragraph (g)(6) of this section, L1 determines its general deductions allocable to its reinsurance agreements. The amount determined under section 848(c)(1) on its directly issued contracts is:

Category:		
Annuity contracts	$8,000,000×.0175 =	$140,000
Life insurance contracts	$17,000,000×.077 =	1,309,000
		$1,449,000

(ix) L1's general deductions allocable to its reinsurance agreements are $51,000 ($1,500,000–$1,449,000).

(x) Pursuant to paragraph (g)(4) of this section, L1's capitalization shortfall equals $48,050, reflecting the excess of L1's required capitalization amounts for its reinsurance agreements ($99,050) over the general deductions allocable to its reinsurance agreements ($51,000).

(xi) Pursuant to paragraph (g)(7) of this section, the capitalization shortfall of $48,050 must be allocated between each of L1's reinsurance agreements with net positive consideration in proportion to their respective required capitalization amounts. The allocation of the shortfall between L1's reinsurance agreements is determined as follows:

L2=$35,237 ($48,050×92,400/126,000)
L4=$8,809 ($48,050×23,100/126,000)
L5=$4,004 ($48,050×10,500/126,000)

(xii) Accordingly, the reduction under paragraph (g)(3) of this section that applies to the amount of net negative consideration that may be taken into account by L2, L4, and L5

under paragraph (a)(1)(ii)(B) of this section is determined as follows:

L2=$457,623 ($35,237/.077)
L4=$114,403 ($8,809/.077)
L5=$228,800 ($4,004/.0175)

Example 4. The facts are the same as *Example 3*, except that L1 and L4 make a joint election under paragraph (g)(8) of this section to capitalize specified policy acquisition expenses with respect to the reinsurance agreement without regard to the general deductions limitation. Pursuant to this election, L1 must reduce its deductions under section 805 by an amount equal to the capitalization shortfall allocable to the reinsurance agreement with L4 ($8,809). L1 treats the additional capitalized amounts as specified policy acquisition expenses allocable to premiums and other consideration under the agreement. L4 may reduce its net premiums by the $300,000 net negative consideration. The election by L1 and L4 does not change the amount of the capitalization shortfall allocable under paragraph (g)(7) of this section to the reinsurance agreements with L2 and L5. Thus, the reduction required by paragraph (g)(3) of this section with respect to the amount of the net negative consideration that L2 and L5 may recognize under paragraph (a)(2)(ii) of this section is $457,623 and $228,800, respectively.

(h) *Treatment of reinsurance agreements with parties not subject to U.S. taxation*—(1) *In general.* Unless an election under paragraph (h)(3) of this section is made, an insurance company may not reduce its net premiums by the net negative consideration for the taxable year (or, with respect to a reinsurance agreement that is subject to the interim rules of § 1.848–3, by the premiums and other consideration incurred for reinsurance) under a reinsurance agreement to which this paragraph (h) applies.

(2) *Agreements to which this paragraph (h) applies*—(i) *In general.* This paragraph (h) applies to a reinsurance agreement if, with respect to the premiums and other consideration under the agreement, one party to that agreement is subject to United States taxation and the other party is not.

(ii) *Parties subject to U.S. taxation*—(A) *In general.* A party is subject to United States taxation for this purpose if the party is subject to United States taxation either directly under the provisions of subchapter L of chapter 1 of the Internal Revenue Code (subchapter L), or indirectly under the provisions of subpart F of part III of subchapter N of chapter 1 of the Internal Revenue Code (subpart F).

(B) *Effect of a closing agreement.* If a reinsurer agrees in a closing agreement with the Internal Revenue Service to be subject to tax under rules equivalent to the provisions of subchapter L on its premiums and other consideration from reinsurance agreements with parties subject to United States taxation, the reinsurer is treated as an insurance company subject to tax under subchapter L.

(3) *Election to separately determine the amounts required to be capitalized for reinsurance agreements with parties not subject to U.S. taxation*—(i) *In general.* This paragraph (h)(3) authorizes an insurance company to make an election to separately determine the amounts required to be capitalized for the taxable year with respect to reinsurance agreements with parties that are not subject to United States taxation. If this election is made, an insurance company separately determines a net foreign capitalization amount for the taxable year for all reinsurance agreements to which this paragraph (h) applies.

(ii) *Manner of making the election.* An insurance company makes the election authorized by this paragraph (h)(3) by attaching an election statement to the federal income tax return (including an amended return) for the taxable year for which the election becomes effective. The election applies to that taxable year and all subsequent taxable years unless permission to revoke the election is obtained from the Commissioner.

(4) *Amount taken into account for purposes of determining specified policy acquisition expenses.* If for a taxable year an insurance company has a net positive foreign capitalization amount (as defined in paragraph (h)(5)(i) of this section), any portion of that amount remaining after the reduction described in paragraph (h)(7) of this section is treated as additional specified policy acquisition expenses for the taxable year (determined without regard to amounts taken into account under this paragraph (h)). A net positive capitalization amount is treated as an amount otherwise required to be capitalized for the taxable year for purposes of the reduction under section 848(f)(1)(A).

(5) *Net foreign capitalization amount*—(i) *In general.* An insurance company's net foreign capitalization amount equals the sum of the foreign capitalization amounts (netting positive and negative amounts) determined under paragraph (h)(5)(ii) of this section for each category of specified insurance contracts reinsured by agreements described in paragraph (h)(2) of this section. If the amount is less than zero, the company has a net negative foreign capitalization amount. If the amount is greater than zero, the company has a net positive foreign capitalization amount.

(ii) *Foreign capitalization amounts by category.* The foreign capitalization amount for a category of specified insurance contracts is determined by—

(A) Combining the net positive consideration and the net negative consideration for the taxable year (or, with respect to a reinsurance agreement that is subject to the interim rules of § 1.848–3, by combining the gross amount of premiums and other consideration and the premiums and other consideration incurred for reinsurance) for all agreements described in paragraph (h)(2) of this section which reinsure specified insurance contracts in that category; and

(B) Multiplying the result (either positive or negative) by the percentage for that category specified in section 848(c)(1).

(6) *Treatment of net negative foreign capitalization amount*—(i) *Applied as a reduction to previously capitalized amounts.* If for a taxable year an insurance company has a net negative foreign capitalization amount, the negative amount reduces (but not below zero) the unamortized balances of the amounts previously capitalized (beginning with the amount capitalized for the most recent taxable year) to the extent attributable to prior years' net positive foreign capitalization amounts. The amount by which previously capitalized amounts is reduced is allowed as a deduction for the taxable year.

(ii) *Carryover of remaining net negative foreign capitalization amount.* The net negative foreign capitalization amount, if any, remaining after the reduction described in paragraph (h)(6)(i) of this section is carried over to reduce a future net positive capitalization amount. The remaining net negative foreign capitalization amount may only offset a net positive foreign capitalization amount in a future year, and may not be used to reduce the amounts otherwise required to be capitalized under section 848(a) for the taxable year, or to reduce the unamortized balances of specified policy acquisition expenses from preceding taxable years, with respect to directly written business or reinsurance agreements other than agreements for which the election under paragraph (h)(3) of this section has been made.

(7) *Reduction of net positive foreign capitalization amount by carryover amounts allowed.* If for a taxable year an insurance company has a net positive foreign capitalization amount, that amount is reduced (but not below zero) by any carryover of net negative foreign capitalization amounts from preceding taxable years. Any remaining net positive foreign capitalization amount is

taken into account as provided in paragraph (h)(4) of this section.

(8) *Examples.* The principles of this paragraph (h) are illustrated by the following examples.

Example 1. (i) On January 1, 1993, a life insurance company (L1) enters into a reinsurance agreement with a foreign corporation (X) covering a block of annuity contracts issued to residents of the United States. X is not subject to taxation either directly under subchapter L or indirectly under subpart F on the premiums for the reinsurance agreement with L1. L1 makes the election under paragraph (h)(3) of this section to separately determine the amounts required to be capitalized for the taxable year with respect to parties not subject to United States taxation.

(ii) For the taxable year ended December 31, 1993, L1 has net negative consideration of ($25,000) under its reinsurance agreement with X. L1 has no other reinsurance agreements with parties not subject to United States taxation.

(iii) Under paragraph (h)(5) of this section, L1's net negative foreign capitalization amount for the 1993 taxable year equals ($437.50), which is determined by multiplying L1's net negative consideration on the agreement with X ($25,000) by the percentage in section 848(c)(1) for the reinsured specified insurance contracts (1.75%). Under paragraph (h)(6)(ii) of this section, L1 carries over the net negative foreign capitalization amount of $437.50) to future taxable years. The net negative foreign capitalization amount may not be used to reduce the amounts which L1 is required to capitalize on directly written business or reinsurance agreements other than those agreements described in paragraph (h)(2) of this section.

Example 2. (i) The facts are the same as *Example 1* except that L1 terminates its reinsurance agreement with X and receives $35,000 on December 31, 1994. For the 1994 taxable year, L1 has net positive consideration of $35,000 under its agreement with X. L1 has no other reinsurance agreements with parties not subject to United States taxation.

(ii) Under paragraph (h)(5) of this section, L1's net positive net foreign capitalization amount for the 1984 taxable year equals $612.50, which is determined by multiplying the net positive consideration on the agreement with X ($35,000) by the percentage in section 848(c)(1) for the reinsured specified insurance contracts (1.75%). Under paragraph (h)(4) of this section, L1 reduces the net positive foreign capitalization amount for the taxable year by the net negative foreign capitalization amount carried over from preceding taxable years ($437.50). After this reduction, L1 includes $175 ($612.50–$437.50) as specified policy acquisition expenses for the 1994 taxable year.

(i) *Carryover of excess negative capitalization amount*—(1) *In general.* This paragraph (i) authorizes a carryover of an excess negative capitalization amount (as defined in paragraph (i)(2) of this section) to reduce amounts otherwise required to be capitalized under section 848. Paragraph (i)(4) provides special rules for the treatment of excess negative capitalization amounts of insolvent insurance companies.

(2) *Excess negative capitalization amount.* The excess negative capitalization amount with respect to a category of specified insurance contracts for a taxable year is equal to the excess of—

(A) The negative capitalization amount with respect to that category; over

(B) The amount that can be utilized under section 848(f)(1).

(3) *Treatment of excess negative capitalization amount.* The excess negative capitalization amount for a taxable year reduces the amounts that are otherwise required to be capitalized by an insurance company under section 848(c)(1) for future years.

(4) *Special rule for the treatment of an excess negative capitalization amount of an insolvent company*—(i) *When applicable.* This paragraph (i)(4) applies only for the taxable year in which an insolvent insurance company has an excess negative capitalization amount and has net negative consideration under a reinsurance agreement. See paragraph (i)(4)(v) of this section for the definition of "insolvent."

(ii) *Election to forego carryover of excess negative capitalization amount.* At the joint election of the insolvent insurance company and the other party to the reinsurance agreement—

(A) The insolvent insurance company reduces the excess negative capitalization amount which would otherwise be carried over under paragraph (i)(1) of this section by the amount determined under paragraph (i)(4)(iii) of this section; and

(B) The other party reduces the amount of its specified policy acquisition expenses for the taxable year by the amount determined under paragraph (i)(4)(iii) of this section.

(iii) *Amount of reduction to the excess negative capitalization amount and specified policy acquisition expenses.* To determine the reduction to the carryover of an insolvent insurance company's excess negative capitalization amount and the specified policy acquisition expenses of the other party with respect to a reinsurance agreement—

(A) Multiply the net negative consideration for each reinsurance agreement of the insolvent insurer for which there is net negative consideration for the taxable year by the appropriate percentage specified in section 848(c)(1) for the category of specified insurance contracts reinsured by the agreement;

(B) Sum the results for each agreement;

(C) Calculate the ratio between the results in paragraphs (i)(4)(ii) (A) and (B) of this section for each agreement; and

(D) Multiply that result by the increase in the excess negative capitalization amount of the insolvent insurer for the taxable year.

(iv) *Manner of making election.* To make an election under paragraph (i)(4) of this section, each party to the reinsurance agreement must attach an election statement to its federal income tax return (including an amended return) for the taxable year for which the election is effective. The election statement must identify the reinsurance agreement for which the joint election under this paragraph (i)(4) has been made, state the amount of the reduction to the insolvent insurance company's excess negative capitalization amount that is attributable to the agreement, and be signed by both parties. An election under this paragraph (i)(4) is effective for the taxable year specified in the election statement, and may not be revoked without the consent of the Commissioner.

(v) *Presumptions relating to the insolvency of an insurance company undergoing a court supervised rehabilitation or similar state proceeding.* For purposes of this paragraph (i)(4), an insurance company which is undergoing a rehabilitation, conservatorship, or similar state proceeding shall be presumed to be insolvent if the state proceeding results in—

(A) An order of the state court finding that the fair market value of the insurance company's assets is less than its liabilities;

(B) The use of funds, guarantees, or reinsurance from a guaranty association;

(C) A reduction of the policyholders' available account balances; or

(D) A substantial limitation on access to funds (for example, a partial or total moratorium on policyholder withdrawals or surrenders that applies for a period of 5 years).

(vi) *Example.* The principles of this paragraph (i)(4) are illustrated by the following example.

Example. (i) An insurance company (L1) is the subject of a rehabilitation proceeding under the supervision of a state court. The state court has made a finding that the fair market value of L1's assets is less than its liabilities. On December 31, 1993, L1 transfers a block of individual life insurance contracts to an unrelated insurance company (L2) under an assumption reinsurance

agreement whereby L2 becomes solely liable to the policyholders under the contracts reinsured. Under the agreement, L1 agrees to pay L2 $2,000,000 for assuming the life insurance contracts. This negative net consideration causes L1 to incur an excess negative capitalization amount of $138,600 for the 1993 taxable year. L1 has no other reinsurance agreements for the taxable year.

(ii) As part of the reinsurance agreement, L1 and L2 agree to make an election under paragraph (i)(4) of this section. Under the election, L1 agrees to forgo the carryover of the $138,600 excess negative capitalization amount for future taxable years. L2 must include the $2,000,000 net positive consideration for the reinsurance agreement in its gross amount of premiums and other consideration. L2 reduces its specified policy acquisition expenses for the 1993 taxable year by $138,600.

(j) *Ceding commissions with respect to reinsurance of contracts other than specified insurance contracts.* A ceding commission incurred with respect to the reinsurance of an insurance contract that is not a specified insurance contract is not subject to the provisions of section 848(g).

(k) *Effective dates*—(1) *In general.* Unless otherwise specified in this paragraph, the rules of this section are effective for the taxable years of an insurance company beginning after November 14, 1991.

(2) *Reduction in the amount of net negative consideration to ensure consistency of capitalization for reinsurance agreements.* Section 1.848–2(g) (which provides for an adjustment to ensure consistency) is effective for—

(i) All amounts arising under any reinsurance agreement entered into after November 14, 1991; and

(ii) All amounts arising under any reinsurance agreement for taxable years beginning after December 31, 1991, without regard to the date on the reinsurance agreement was entered into.

(3) *Net consideration rules.* Section 1.848–2(f) (which provides rules for determining the net consideration for a reinsurance agreement) applies to—

(i) Amounts arising in taxable years beginning after December 31, 1991, under a reinsurance agreement entered into after November 14, 1991; and

(ii) Amounts arising in taxable years beginning after December 31, 1994, under a reinsurance agreement entered into before November 15, 1991.

(4) *Determination of the date on which a reinsurance agreement is entered into.* A reinsurance agreement is considered entered into at the earlier of—

(i) The date of the reinsurance agreement; or

(ii) The date of a binding written agreement to enter into a reinsurance transaction if the written agreement evidences the parties' agreement on substantially all material items relating to the reinsurance transaction.

(5) *Special rule for certain reinsurance agreements with parties not subject to U.S. taxation.* The election and special rules in paragraph (h) of this section relating to the determination of amounts required to be capitalized on reinsurance agreements with parties not subject to United States taxation apply to taxable years ending on or after September 30, 1990.

(6) *Carryover of excess negative capitalization amount.* The provisions of paragraph (i) of this section, including the special rule for the treatment of excess negative capitalization amounts of insolvent insurance companies, are affected with respect to amounts arising in taxable years ending on or after September 30, 1990.

§ 1.848–3. Interim rules for certain reinsurance agreements.

(a) *Scope and effective dates.* The rules of this section apply in determining net premiums for a reinsurance agreement with respect to—

(1) Amounts arising in taxable years beginning before January 1, 1992, under a reinsurance agreement entered into after November 14, 1991; and

(2) Amounts arising in taxable years beginning before January 1, 1995, under a reinsurance agreement entered into before November 15, 1991.

(b) *Interim rules.* In determining a company's gross amount of premiums and other consideration under section 848(d)(1)(A) and premiums and other consideration incurred for reinsurance under section 848(d)(1)(B), the general rules of subchapter L of the Internal Revenue Code apply with the adjustments and special rules set forth in paragraph (c) of this section. Except as provided in paragraph (c)(5) of this section (which applies to modified coinsurance transactions), the gross amount of premiums and other consideration is determined without any reduction for ceding commissions, annual allowances, reimbursements of claims and benefits, or other amounts incurred by a reinsurer with respect to reinsured contracts.

(c) *Adjustment and special rules.* This paragraph sets forth certain adjustments and special rules that apply for reinsurance agreements in determining the gross amount of premiums and other consideration under section 848(d)(1)(A) and premiums and other considerations incurred for reinsurance under section 848(d)(1)(B).

(1) *Assumption reinsurance.* The ceding company must treat the gross amount of consideration incurred with respect to an assumption reinsurance agreement as premiums and other consideration incurred for reinsurance under section 848(d)(1)(B). The reinsurance must include the same amount in the gross amount of premiums and other consideration under section 848(d)(1)(A). For rules relating to the determination and treatment of ceding commissions, see paragraph (c)(3) of this section.

(2) *Reimbursable dividends.* The reinsurer must treat the amount of policyholder dividends reimbursable to the ceding company (other than under a modified coinsurance agreement covered by paragraph (c)(5) of this section) as a return premium under section 848(d)(1)(B). The ceding company must include the same amount in the gross amount of premiums and other consideration under section 848(d)(1)(A). The amount of any experience-related refund due the ceding company is treated as a policyholder dividend reimbursable to the ceding company.

(3) *Ceding commissions*—(i) *In general.* The reinsurer must treat ceding commissions as a general deduction. The ceding company must treat ceding commissions as non-premium related income under section 803(a)(3). The ceding company may not reduce its general deductions by the amount of the ceding commission.

(ii) *Amount of ceding commission.* For purposes of this section, the amount of a ceding commission equals the excess, if any, of—

(A) The increase in the reinsurer's tax reserves resulting from the reinsurance agreement (computed in accordance with section 807(d)); over

(B) The gross consideration incurred by the ceding company for the reinsurance agreement, less any amount incurred by the reinsurer as part of the reinsurance agreement.

(4) *Termination payments.* The reinsurer must treat the gross amount of premiums and other consideration payable as a termination payment to the ceding company (including the tax reserves on the reinsured contracts) as premiums and other consideration incurred for reinsurance under section 848(d)(1)(B). The ceding company must include the same amount in the gross amount of premiums and other consideration under section 848(d)(1)(A). This paragraph does not apply to modified coinsurance agreements.

(5) *Modified coinsurance agreements.* In the case of a modified coinsurance

agreement, the parties must determine their net premiums on a net consideration basis as described in § 1.848–2(f)(5).

(D) *Examples.* The principles of this section are illustrated by the following examples.

Example 1. On July 1, 1991, an insurance company (L1) transfers a block of individual life insurance contracts to an unrelated insurance company (L2) under an arrangement whereby L2 becomes solely liable to the policy holder under the contracts reinsured. The tax reserves on the reinsured contracts are $100,000. Under the assumption reinsurance agreement, L1 pays L2 $83,000 for assuming the life insurance contracts. Under paragraph (c)(3) of this section, since the increase in L2's tax reserves ($100,000) exceeds the net consideration transferred by L1 ($83,000), the reinsurance agreement provides for a ceding commission. The ceding commission equals $17,000 ($100,000-$83,000). Under paragraph (c)(3) of this section, L1 reduces its gross amount of premiums and other consideration for the 1991 taxable year under section 848(d)(1)(B) by the $100,000 premium incurred for reinsurance, and L2 includes the $100,000 premium for reinsurance in its gross amount of premiums and other consideration under section 848(d)(1)(A). L1 treats the $17,000 ceding commission as non-premium related income and section 803 (a)(3).

Example 2. On July 1, 1991, a life insurance company (L1) transfers a block of individual life insurance contracts to an unrelated insurance company (L2) under an arrangement whereby L2 becomes solely liable to the policyholder under the contracts reinsured. The tax reserves on the reinsured contracts are $100,000. Under the assumption reinsurance agreement, L1 pays L2 $100,000 for assuming the contracts, and L2 pays L1 a $17,000 ceding commission. Under paragraph (c)(1) of this section, L1 reduces its gross amount of premiums and other consideration under section 848(d)(1)(B) by $100,000. L2 includes $100,000 in its gross amount of premiums and other consideration under section 848(d)(1)(A). Under paragraph (c)(3) of this section, since the increase in L2's tax reserves ($100,000) exceeds the net consideration transferred by L1, the reinsurance agreement provides for a ceding commission. The ceding commission equals $17,000 ($100,000 increase in L2's tax reserves less $83,000 net consideration transferred by L1). L1 treats the $17,000 ceding commission as non-premium related income under section 803(a)(3).

Example 3. On July 1, 1991, a life insurance company (L1) transfers a block of individual life insurance contracts to an unrelated insurance company (L2) under an arrangement whereby L2 becomes solely liable to the policyholder under the contracts reinsured. Under the assumption reinsurance agreement, L1 transfers assets of $105,000 to L2. The tax reserves on the reinsured contracts are $100,000. Under paragraph (c)(1) of this section, L1 reduces its gross amount of premiums and other consideration under section 848(d)(1)(B) by $105,000, and L2 increases its gross amount of premiums and other consideration under section 848(d)(1)(A) by $105,000. Since the net consideration transferred by L1 exceeds the increase in L2's tax reserves, there is no ceding commission under paragraph (c)(3) of this section.

Example 4. (i) On June 30, 1991, a life insurance company (L1) reinsures 40% of certain individual life insurance contracts to be issued after that date with an unrelated insurance company (L2) under an agreement whereby L1 remains directly liable to the policyholders with respect to the contracts reinsured. The agreement provides that L2 is credited with 40% of any premiums received with respect to the reinsured contracts, but must indemnify L1 for 40% of any claims, expenses, and policyholder dividends. During the period from July 1 through December 31, 1991, L1 has the following income and expense items with respect to the reinsured policies:

Item	Income	Expense
Premiums	$8,000	
Benefits paid		$1,000
Commissions		6,000
Policyholder dividends		500
Total		7,500

(ii) Under paragraphs (b) and (c)(2) of this section, L1 includes $8,200 in its gross amount of premiums and other consideration under section 848(d)(1)(A) ($8,000 gross premiums on the reinsured contracts plus $200 of policyholder dividends reimbursed by L2 ($500 × 40%). L1 reduces its gross amount of premiums and other consideration by $3,200 (40% × $8,000) as premiums and other consideration incurred for reinsurance under section 848(d)(1)(B). The benefits and commissions incurred by L1 with respect to the reinsured contracts do not reduce L1's gross amount of premiums and other consideration under section 848(d)(1)(B). L2 includes $3,200 in its gross amount of premiums and other consideration (40% × $8,000) and is treated as having paid return premiums of $200 (the amount of reimbursable dividends paid to L1). L2 is also treated as having incurred the following expenses with respect to the reinsured contracts: $400 as benefits paid (40% × $1,000) and $2,400 as commissions expense (40% × $6,000). Under paragraph (b) of this section, these expenses do not reduce L2's gross amount of premiums and other consideration under section 848(d)(1)(A).

Example 5. On December 31, 1991, an insurance company (L1) terminates a reinsurance agreement with an unrelated insurance company (L2). The termination applies to a reinsurance agreement under which L1 had ceded 40% of its liability on a block of individual life insurance contracts to L2. Upon termination of the reinsurance agreement, L2 makes a final payment of $116,000 to L1 for assuming full liability under the contracts. The tax reserves attributable to L2's portion of the reinsured contracts are $120,000. Under paragraph (c)(4) of this section, L2 reduces its gross amount of premiums and other consideration under section 848(d)(1)(B) by $120,000. L1 includes $120,000 in its gross amount of premiums and other consideration under section 848(d)(1)(A).

Example 6. (i) On June 30, 1991, an insurance company (L1) reinsures 40% of its existing life insurance contracts with an unrelated life insurance company (L2) under a modified coinsurance agreement. For the period July 1, 1991 through December 31, 1991, L1 reports the following income and expense items with respect to L2's 40% share of the reinsured contracts:

Item	Income	Expense
Premiums	$10,000	
Benefits paid		$4,000
Policyholder dividends		500
Reserve adjustment		1,500
Total		6,000

(ii) Pursuant to paragraph (c)(5) of this section, L1 reduces its gross amount of premiums and other consideration under section 848(d)(1)(B) by the $4,000 net consideration for the modified coinsurance agreement ($10,000–$6,000). L2 includes the $4,000 net consideration in its gross amount of premiums and other consideration under section 848(d)(1)(A).

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 38. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 39. Section 602.101 (c) is amended by adding the following entries in the table to read as follows:

§ 602.101 OMB Control Numbers.

* * * * *

(c) * * *

CFR part or section where identified and described	Current OMB control number
1.848–2(g)(8)	1545–1287
1.848–2(h)(3)	1545–1287
1.848–2(j)(4)	1545–1287

* * * * *

Michael P. Dolan,

Acting Commissioner of Internal Revenue.

Approved: November 16, 1992.

Fred T. Goldberg, Jr.,

Assistant Secretary of the Treasury.

[FR Doc. 92–30943 Filed 12–28–92; 8:45am]

BILLING CODE 4830–01–m

DEPARTMENT OF THE INTERIOR

Bureau of Mines

30 CFR Part 609

RIN 1032-AA02

Payments Required for Owners of Private Lands Upon Which the Bureau of Mines Performs Exploration or Development Work To Investigate Known Coal Deposits

AGENCY: Bureau of Mines, Interior.

ACTION: Final rule; rescission.

SUMMARY: This document rescinds the Federal Government's regulations that stipulate that a "reasonable percentage" of the value of coals produced by a private owner be paid to the Federal Government as compensation for the exploration and development efforts of the Bureau of Mines. This regulation is no longer applicable to Bureau programs.

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: John D. Ford, U.S. Department of the Interior, U.S. Bureau of Mines, Branch of Management Analysis, 810 7th Street NW., Washington, DC 20241, Tel: 202-501-9253.

SUPPLEMENTARY INFORMATION: The current 30 CFR part 609, Payments Required from Owners of Private Lands Upon Which the Bureau of Mines Performs Exploration or Development Work to Investigate Known Coal Deposits is a result of a directive established in fiscal year 1947 by the Interior Department Appropriation Act. At that time, the Bureau investigated known coal deposits on Federal, State, and private lands. When on private lands, the Federal Government required a "reasonable percentage" of the value of coals produced by the private owner as compensation for the exploration and development efforts. This regulation, as described above, no longer has application to Bureau programs. Under the authority of the President's memorandum of January 28, 1992, regarding reducing the burden of Government regulations, this regulation is rescinded.

The Department of the Interior has determined this document is not a major rule under Executive Order 12291 and certifies this document does not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Bureau of Mines certifies that this final rule does not have a significant economic effect on a substantial number of small entities.

This final rule to rescind 30 CFR part 609 is determined not to have federalism effects under Executive Order 12612 as it has no direct causal effect on the relative roles of Federal and State Governments.

This final rule does not contain collections of information that require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

The Department of the Interior has determined that this final rule does not constitute a major Federal action significantly affecting the quality of the human environment under The National Environmental Policy Act of 1969.

Author: Michael L. Kaas, Chief, Division of Resource Evaluation, U.S. Bureau of Mines.

The policy of the Department of the Interior is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. A proposed rule was published in the **Federal Register**, Vol. 57, No. 183, Monday, September 21, 1992, on pages 43411-43412. Accordingly, interested persons were asked to submit written comments, suggestions, or objections regarding its content. No comments were received during the 30-day comment period.

The Department has certified to the Office of Management and Budget that this final rule meets the applicable standards provided in sections 2(a) and 2(b) of Executive Order 12778.

List of Subjects in 30 CFR Part 609

Coal, Mines.

Accordingly, in exercise of authority delegated (5 U.S.C. 302) by the Secretary of the Interior to the Assistant Secretary, 30 CFR chapter VI is amended by removing part 609.

Dated: November 5, 1992.

John M. Sayre,

Assistant Secretary—Water and Science.

[FR Doc. 92-31370 Filed 12-28-92; 8:45 am]

BILLING CODE 4310-53-M

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30 CFR Part 651

RIN 1032-AA03

Administration of Grants

AGENCY: Bureau of Mines, Interior.

ACTION: Final rule, rescission.

SUMMARY: 30 CFR part 651 requires innovation in the submission of research and development proposals to further Bureau programs as authorized by statute. These requirements are also contained in 48 CFR chapter 15, part 1515, subpart 1515.5. Since there is no need these requirements be contained in both locations, this part is rescinded.

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: John D. Ford, U.S. Department of the Interior, U.S. Bureau of Mines, Branch of Management Analysis, 810 7th Street NW., Washington, DC 20241, Tel: 202-501-9253.

SUPPLEMENTARY INFORMATION: Under the authority of the President's memorandum of January 28, 1992, regarding reducing the burden of Government regulation, this regulation is rescinded.

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and certifies this document does not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*.).

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Bureau of Mines certifies that this final rule does not have a significant economic effect on a substantial number of small entities.

This final rule to rescind 30 CFR part 651 is determined not to have federalism effects under Executive Order 12612 as it has no direct causal effect on the relative roles of Federal and State Governments.

This final rule does not contain collections of information that require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

The Department of the Interior has determined that this final rule does not constitute a major Federal action significantly affecting the quality of the human environment under The National Environmental Policy Act of 1969.

Author: Doyne W. Teets, Chief, Division of Procurement, U.S. Bureau of Mines.

The policy of the Department of the Interior is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. A proposed rule was published in the **Federal Register**, Vol. 57, No. 183, Monday, September 21, 1992, on page 43412. Accordingly, interested persons were asked to submit written comments, suggestions, or objections regarding its content. No comments were received during the 30-day comment period.

The Department has certified to the Office of Management and Budget that this final rule meets the applicable standards provided in sections 2(a) and 2(b) of Executive Order 12778.

List of Subjects in 30 CFR Part 651

Grant programs-environmental protection, Grant programs-health, Mine safety and health, Reporting and recordkeeping requirements, Waste treatment and disposal.

Accordingly, in exercise of authority delegated (5 U.S.C. 302) by the Secretary of the Interior to the Assistant Secretary, 30 CFR chapter VI is amended by removing part 651.

Dated: November 5, 1992.

John M. Sayre,

Assistant Secretary—Water and Science.

[FR Doc. 92-31371 Filed 12-28-92; 8:45 am]

BILLING CODE 4310-53-M

LIBRARY OF CONGRESS

37 CFR Part 201

[Docket No. RM 92-7]

Cable and Satellite Carrier Royalty Interest Regulations (Amendments)

AGENCY: Copyright Office; Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Office amends §§ 201.11(h)(2) and 201.17(i)(2)(i) of its regulations to adopt the Department of the Treasury's published interest rates for late and underpaid royalties made pursuant to section 111 and section 119 of the Copyright Act. The Office also makes technical amendments to §§ 201.11(h)(3) and 201.17(i)(2)(ii).

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, DC 20540. Telephone: (202) 707-8380.

SUPPLEMENTARY INFORMATION:

1. Background

On April 10, 1989, the Copyright Office announced that it would be assessing interest against late and underpaid royalties made pursuant to the cable compulsory license. See 54 FR 14217 (1989). The Office made a similar announcement on July 3, 1989 for late payments and underpayments made pursuant to the satellite carrier compulsory license. See 54 FR 27873 (1989). The regulations provide, *inter alia*, the means for determining the beginning and end of the accrual period, the minimum charge assessable, and the method for determining the applicable interest rate.

With regards to determination of an interest rate, the Office provided:

> The Copyright Office does not wish to penalize cable systems for late and amended filings, but rather wishes to compensate copyright owners for the present value loss of royalties which should have been deposited on a timely basis. Therefore, to achieve this equitable result, the Office chose a rate which would most closely approximate the interest earned on royalty payments made within the accounting period filing dates.
>
> As part of its standard practice, the Copyright Office makes a deposit of royalty funds recently received with the U.S. Treasury on the first business day after the close of an accounting filing period. The interest rate paid on that deposit is readily obtainable from the U.S. Treasury within a day or so of the deposit. The Office feels that making the Treasury rate applicable to all underpayments which resulted from cable carriage during that accounting period, most closely equals the amount of interest the underpaid royalties would have earned had they been paid in accordance with the accounting period filing deadlines. The one drawback of adopting such an interest rate is that it is not a fixed predetermined rate.

54 FR at 14220. See also 54 FR at 27874-75. The Office subsequently adopted a regulation which set the interest rate for an accounting period as the rate paid by the Treasury on the first investment of royalties made after the close of the filing period for that accounting period. See § 201.17(i)(2)(i). See also, § 201.11(h)(2).

The Copyright Office also adopted a regulation for the cable and satellite carrier license setting the minimum amount of interest that would be assessed. The regulation provides:

> Interest is not required to be paid on any royalty underpayment from a particular accounting period if the sum of that underpayment is less than or equal to five dollars ($5.00).

§ 201.17(i)(2)(ii). See also § 201.11(h)(3).

2. Policy Decision of the Copyright Office

The Copyright Office has found the procedure for setting the interest rate for late payments and underpayments from particular accounting periods to present several problems. First, the Office has noticed a significant disparity between the interest rate appearing on Treasury securities purchased after the close of an accounting filing period and the actual yield those securities produce. This has resulted in the setting of an interest rate pursuant to §§ 201.11(h)(2) and 201.17(i)(2)(i) which is often higher than the interest yield the royalties would have produced had they been deposited with the Office on time. Second, the Office has faced the administrative problem, particularly with section 119 royalties, of not having sufficient funds to make an investment immediately following the close of the accounting filing period. This has caused problems with the setting of the interest rate. Furthermore, the Copyright Office is often forced to purchase short-term Treasury bills, as opposed to Treasury notes, which contain a discount rate rather than an interest rate, further complicating the setting of an appropriate interest rate.

As the Copyright Office noted in the preamble to the interest regulation for the cable compulsory license, the Office "does not wish to penalize cable systems for late and amended filings, but rather wishes to compensate copyright owners for the present value loss of royalties which should have been deposited on a timely basis." 54 FR at 14220. In order to further this goal, the Office chose a system for establishing a rate of interest to be assessed against late payments and underpayments that it felt would most closely match the amount of interest copyright owners would have earned had all royalties been submitted on time for each individual accounting period. The Office therefore concluded that the "interest rate applicable under the interest regulation adopted herein shall be the interest rate paid by the Treasury on the cable royalty funds deposited by the Copyright Office on the first business day after the close of the filing deadline for the accounting period with respect to which the underpayment occurs." *Id.* at 14220. See also 54 FR at 27875.

The current system for establishing the applicable interest rate has proved administratively difficult for several reasons. First, as noted above, the interest rate obtained from the Treasury on securities purchased the first business day after the close of the filing period has often differed greatly from the effective yield of those securities. For example, when the Office purchases a Treasury note on the day following the close of the filing period, the note may state on its face that it will pay a 9.125% interest rate over the two year term of the note. However, as is often the case, the Copyright Office is forced to purchase notes which have been issued well prior to the purchase date by the Office, and have actually been held by others. The notes are typically held for up to six months or less, at which time the funds are available to the Copyright Royalty Tribunal for distribution. The notes are therefore held for a far shorter period of time than the term of the note. In the above example, a two year note paying 9.125% over that period which is only held for a six month period will yield an amount that is far less than 9.125%. A cable system which makes a late payment therefore must, under th

current regulations, pay a 9.125% interest assessment when, if it had submitted its royalties on time, copyright owners would have received a lesser yield. This result frustrates the Office's stated goal of not penalizing cable systems and satellite carriers for late payments, but rather providing copyright owners the funds they would have received had the royalties been paid on time.

Second, the Copyright Office has encountered the administrative difficulty, particular with satellite carrier royalties, in making deposits of royalties with the Treasury the day after the close of the filing period. It is often the case that the majority of royalties arrive well in advance of the final day of the filing period, necessitating earlier deposits. The Copyright Office does not wish to hold funds from deposit for any period of time, since copyright owners will lose the interest on those funds, nor will it deposit relatively insignificant amounts on a daily basis. The problem therefore arises of having a sufficiently large, recently received royalty pool to be deposited on the day after the close of the filing period so that the appropriate interest rate may be established.

Third, the Copyright Office is faced with the problem of not always being able to purchase Treasury securities which carry an interest rate. It is often the case that the Office is forced to purchase Treasury bills, rather than notes, which are sold at a discount rate, rather than an interest rate. This situation arises when the royalty funds are to be turned over to the Copyright Royalty Tribunal at a time period of less than six months from the date of investment. Since the bills do not carry an interest rate, the question becomes how to calculate the appropriate interest rate for regulation purposes.

Finally, due to such circumstances as the necessity of purchasing Treasury bills as opposed to notes, it is often difficult for the Copyright Office to quickly provide cable and satellite operators with the applicable interest rate for the most recent accounting period. This delay, while perhaps only for a period of several days, has serious implications for Form 3 systems submitting large royalty payments a day or two late.

To correct the above-stated problems, the Copyright Office has decided to amend its regulations to adopt the Department of the Treasury's method for determining the percentage rate charge for late payments. Section 8025.40 of the Treasury Financial Manual states:

> The minimum annual rate of interest to be charged will be calculated by Treasury as an average of current value of funds to Treasury and will be published in the **Federal Register** each year by October 31, to become effective January 1.

Described as the Current Value of Funds Rate, this Treasury Department rate is subject to quarterly revisions if the annual average changes by 2 percent, and such revisions are published in the **Federal Register**. The applicable interest rate for an accounting period shall be the Current Value of Funds Rate in effect on the first business day after the close of an accounting filing period.

The Copyright Office finds the Current Value of Funds Rate to be the superior means of calculating the appropriate cable and satellite interest rate for several reasons. First, the rate more accurately reflects what the market is currently paying on investment funds than the current system, thereby producing a rate which approximates yield on investment. This eliminates disparities currently experienced between interest rate assessed and yield on funds received by copyright owners. Second, the Current Value of Funds Rate solves the problem of lack of deposits on the day after the close of a filing period, and the problem faced by the purchase of Treasury bills carrying only a discount rate. Finally, the rate is easily determinable well in advance of the close of an accounting filing period and is available to all through the **Federal Register**. The Office therefore amends its regulations to adopt the Treasury's method of calculating interest to be effective beginning with the current 1992/2 accounting period and for all accounting periods thereafter.

The Copyright Office also amends §§ 201.11(h)(3) and 201.17(10)(2)(ii) by adding "or late payment" after the word "underpayment" and by removing the second "underpayment" and replacing it with the words "interest charge." Both sections should read:

> Interest is not required to be paid on any royalty underpayment or late payment from a particular accounting period if the interest charge is less than or equal to five dollars ($5.00).

Since this regulation makes technical adjustments to the method used in calculating interest on late and underpaid royalties and since the amendments make it easier to establish the applicable interest rate, the regulation is issued in final form and takes effect for late payments and underpayments related to royalties due for the 1992/2 accounting period and for all accounting periods thereafter. The Copyright Office has already set the interest rates for accounting periods earlier than 1992/2 under the superseded regulation, and those established rates are unaffected by this amendment of the regulation. That is, the interest rates already set under the superseded regulation will apply to any late payments or underpayments related to royalties due for any accounting period before 1992/2.

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position that this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress, which is part of the legislative branch. Neither the Library of Congress nor the Copyright Office is an "agency" within the meaning of the Administrative Procedure Act of June 11, 1946, as amended (title 5, of U.S. Code, subchapter II and chapter 7). The Regulatory Flexibility Act consequently does not apply to the Copyright Office since that Act affects only those entities of the Federal Government that are agencies as defined in the Administrative Procedure Act.[1]

Alternatively, if it is later determined by a court of competent jurisdiction that the Copyright Office is an "agency" subject to the Regulatory Flexibility Act, the Register of Copyrights has determined and hereby certifies that this regulation will have no significant impact on small businesses.

List of Subjects in 37 CFR Part 201

Cable television; Cable compulsory license.

Final Regulation

In consideration of the foregoing, the Copyright Office is amending part 201 of 37 CFR, chapter II, as set forth below.

PART 201—[AMENDED]

1. The authority section for part 201 continues to read as follows:

Authority: Sec. 702, 90 Stat. 2541, 17 U.S.C. 702; § 201.7 is also issued under 17 U.S.C. 408, 409, and 410; § 201.16 is also issued under 17 U.S.C. 116; § 201.24 is also issued under Public Law 101–650, 104 Stat. 5089, 5134; § 201.6 is also issued under 17 U.S.C. 708; § 201.17 is also issued under 17

[1] The Copyright Office was not subject to the Administrative Procedure Act before 1978, and it is now subject to it only in areas specified by section 701(d) of the Copyright Act (i.e., "all actions taken by the Register of Copyrights under this title (17)," except with respect to the making of copies of copyright deposits (17 U.S.C. 708(b)). The Copyright Act does not make the Office an "agency" as defined in the Administrative Procedure Act. For example, personnel actions taken by the Office are not subject to APA–FOIA requirements.

U.S.C. 111; § 201.19 is also issued under 17 U.S.C. 115.

PART 201.11—[AMENDED]

2. Sections 201.11(h) (2) and (3) are revised to read as follows:

§ 201.11 Satellite carrier statements of account covering statutory licenses for secondary transmissions for private home viewing.

* * * * *

(h)(1) * * *

(2)(i) The interest rate applicable to a specific accounting period beginning with the 1992/2 period shall be the Current Value of Funds Rate, as established by section 8025.40 of the Treasury Financial Manual and published in the **Federal Register**, in effect on the first business day after the close of the filing deadline for that accounting period. Cable operators wishing to obtain the interest rate for a specific accounting period may do so by consulting the **Federal Register** for the applicable Current Value of Funds Rate, or by contacting the Licensing Division of the Copyright Office.

(ii) The interest rate applicable to a specific accounting period earlier than the 1992/2 period shall be the rate fixed by the Licensing Division of the Copyright Office pursuant to 37 CFR 201.11(h) in effect on June 30, 1992.

* * * * *

(3) Interest is not required to be paid on any royalty underpayment or late payment from a particular accounting period if the interest charge is less than or equal to five dollars ($5.00).

§ 201.17 [Amended]

3. Sections 201.17(i)(2) (i) and (ii) are revised and (i)(2)(iii) is added to read as follows:

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

* * * * *

(i)(1) * * *

(2) * * *

(i) The interest rate applicable to a specific accounting period beginning with the 1992/2 period shall be the Current Value of Funds Rate, as established by section 8025.40 of the Treasury Financial Manual and published in the **Federal Register**, in effect on the first business day after the close of the filing deadline for that accounting period. Cable operators wishing to obtain the interest rate for a specific accounting period may do so by consulting the **Federal Register** for the applicable Current Value of Funds Rate, or by contacting the Licensing Division of the Copyright Office.

(ii) The interest rate applicable to a specific accounting period earlier than the 1992/2 period shall be the rate fixed by the Licensing Division of the Copyright Office pursuant to 37 CFR 201.17(i) in effect on June 30, 1992.

(iii) Interest is not required to be paid on any royalty underpayment or late payment from a particular accounting period if the interest charge is less than or equal to five dollars ($5.00).

* * * * *

Dated: December 3, 1992.

Ralph Oman,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

[FR Doc. 92-31286 Filed 12-28-92; 8:45 am]

BILLING CODE 1410-06-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[IL 16-1-5140; FRL 4545-5]

Approval and Promulgation of Implementation Plans; Illinois

AGENCY: U.S. Environmental Protection Agency (USEPA).

ACTION: Final rule.

SUMMARY: USEPA is approving three revisions to the Illinois State Implementation Plan (SIP) addressing the control of emissions of total suspended particulates (TSP) from fuel combustion sources. These revisions pertain to the incorporation of new TSP rules to replace those remanded by the courts, as well as procedures for granting adjusted opacity standards. USEPA's action is based upon a request incorporating all three revisions, which was submitted by the State to satisfy the requirements of Part D of the Clean Air Act (Act).

DATES: This action will be effective March 1, 1993 unless notice is received within 30 days that someone wishes to submit adverse or critical comments. If the effective date is delayed, timely notice will be published in the **Federal Register**.

ADDRESSES: Copies of the SIP revision request and USEPA's analysis are available for inspection at the following address: (It is recommended that you telephone Randolph O. Cano at (312) 886-6036, before visiting the Region 5 office.) U.S. Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Written comments should be sent to: J. Elmer Bortzer, Chief, Regulation Development Section, Regulation Development Branch (AR-18J) U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

A copy of today's revision to the Illinois SIP is available for inspection at: U.S. Environmental Protection Agency, Public Information Reference Unit, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Randolph O. Cano, Regulation Development Branch, Regulation Development Section (AR-18J), U.S. Environmental Protection Agency, Region 5, Chicago, Illinois 60604 (312) 886-6036.

SUPPLEMENTARY INFORMATION: USEPA revised the National Ambient Air Quality Standard (NAAQS) for particulate matter on July 1, 1987, (52 FR 24634), and replaced the TSP ambient air quality standard. The revised standard is expressed in terms of particulate matter with a nominal diameter of 10 micrometers or less (PM_{10}). However, at the State's option, USEPA continues to process TSP SIP revisions which were in process at the time the new (PM_{10}) standard was promulgated. In a policy document published on July 1, 1987, (52 FR at 24679, column 2), USEPA stated that it would regard its approval of existing TSP rules as necessary interim particulate matter plans during the period preceding the approval of State plans specifically aimed at PM_{10}. Section 110(1) of the 1990 Clean Air Act Amendments (CAAA), 42 U.S.C. 7410, prohibits USEPA from approving SIP revisions that result in the relaxation of control requirements in effect in nonattainment areas before November 15, 1990, if such revisions "would interfere with any applicable requirement concerning attainment or reasonable further progress (as defined in section 171), or any other applicable requirement of this Act." If the SIP revision is judged to include more stringent provisions than are in the existing plan, USEPA's general policy is to approve it. Regulations in the TSP SIP cannot be relaxed, however, without a demonstration that the revision will not interfere with attainment and maintenance of the PM_{10} NAAQS. It is USEPA's judgement that the revisions in this action would increase the stringency of the plan and are, therefore, not likely to interfere with the attainment and maintenance of the PM_{10} standard as well. Thus, USEPA is approving this SIP revision.

On May 31, 1972 (37 FR 10862), USEPA approved the incorporation of Illinois Pollution Control Board (IPCB) rule 203(g)(1) and rule 202(b) into the Illinois SIP. These rules were vacated and remanded by the Illinois Appellate Court on September 22, 1978 and, therefore, are no longer federally enforceable as part of the Illinois SIP. Rule 203(g)(1) addressed particulate emission from fuel combustion emission sources. Rule 202(b) addresses visual emission standards for existing sources.

Because these regulations were vacated, USEPA issued a notice of deficiency regarding the Illinois SIP (on July 12, 1979, (44 FR 40723)). Today's rulemaking concerns regulations adopted to replace the TSP fuel combustion regulations remanded by the Court.

On March 13, 1986, the Illinois Environmental Protection Agency (IEPA) submitted certain proposed regulations to USEPA then being considered by the IPCB to replace the regulations vacated and remanded by the Illinois Appellate Court. In submitting these proposed regulations, the State requested USEPA to initiate proposed rulemaking on these regulations using parallel processing. USEPA did not take action on the March 13, 1986, submittals. On July 2, 1986, the IPCB adopted final regulations to replace rule 203(g)(1), those being rules 212.201 through 212.204, and 212.209. The final adopted regulations were submitted to USEPA on July 30, 1986, with a request to incorporate them into the SIP. On June 30, 1988, the IPCB finally adopted regulations to replace rule 202(b), those being rules 212.113, and 212.121 through 212.126. These regulations were submitted to USEPA on July 22, 1988, with a request to incorporate them into the SIP. Also submitted July 22, 1988, were procedural rules, those being rules 106.501 through 106.507, adopted by the IPCB, intended to establish procedures for considering source requests for an adjusted opacity standard pursuant to § 212.126.

It should be noted that subsequent to the invalidation of rule 203(g)(1) and 202(b) by the Illinois Appellate Court, the State of Illinois recodified all of its environmental regulations into title 35 of the Illinois Administrative Code (IAC). The regulations being considered to replace rule 203(g)(1) and rule 202(b) are, respectively, §§ 212.201 through 212.204 and 212.209 and 212.113, 212.121 through 212.126 of 35 IAC Subtitle B; Air Pollution, Chapter I: Pollution Control Board USEPA's description and evaluation of these regulations will utilize the revised numbering scheme.

Description and Evaluation of Rules

Boilers Rules

Section 212.201 Existing Sources Using Solid Fuel Exclusively Located in the Chicago Area

This section provides an emission limit of 0.10 lbs/million British Thermal Units (Btu). This is the same limit that was approved in 1972. USEPA considers this rule to represent Reasonably Available Control Technology (RACT) for TSP sources in Illinois.

Section 212.202 Existing Sources Using Solid Fuel Exclusively Located Outside the Chicago Area

This section provides the following emission limits:

Actual heat input of sources in million Btu/hr (H)	Emission limit in pounds per million Btu
Less than or equal to 10	1.0
Greater than 10 but less than 20	5.18H–0.175
Greater than or equal to 250	0.1

These are the same limits that were approved in 1972. USEPA believes that these rules represent RACT. They would apply both in attainment and nonattainment areas.

Section 212.203 Existing Controlled Sources Using Solid Fuel Exclusively

This section allows for degradation of control at sources subject to section 212.201 and 212.202. Emissions from these sources would in no case exceed 0.20 lbs per million Btu. The rule approved in 1972 would allow a source to degrade up to 0.05 lbs per million Btu from original design or acceptance performance test conditions. Section 212.203 would additionally allow a source to degrade up to 0.05 lbs per million Btu from the most recent stack test submitted prior to April 1, 1985. This rule would apply in attainment and nonattainment areas alike. USEPA considers these Illinois rules, even with this relaxation, to represent RACT. Granting a relaxed emission limit would redefine RACT for a particular facility.

This rule, in effect, sets up a generic procedure for the State agency to provide an alternate emission limit for sources subject to § 212.201 or 212.202. As a general practice USEPA is reluctant to approve SIP provisions which grant the state "director discretion" to allow sources to modify their emission limits without first obtaining Federal approval through the SIP rulemaking process. USEPA's concern is that if source emission limits can be relaxed without Federal SIP approval it is possible that the SIP could be modified so that the attainment and maintenance of the National Ambient Air Quality Standards the SIP was intended to protect is jeopardized. USEPA would not be given an opportunity to rulemake on all such modifications. Several factors lessen USEPA's concerns. First, in all instances the degregations cannot exceed .05 lbs/MMBtu. The relaxed emission limits cannot exceed .20/lbs per MMBtu. USEPA believes that even these relaxed emission limits are reflective of RACT for in the process of granting a relaxed emission limit the State redefines RACT as it pertains to the subject facility. Further, all such relaxations should be incorporated in an operating permit. On December 17, 1992, (57 FR 59928) USEPA approved the Illinois Operating Permit program for the purpose of issuing federally enforceable operating permits. Prior to issuing an operating permit, the State must give USEPA the opportunity to review the permit to ensure that the respective permit is federally enforceable. USEPA will therefore be able to use its review of State operating permits to further ensure that the NAAQS are protected.

Section 212.204 New Sources Using Solid Fuel Exclusively

This section would provide an emission limit of 0.10 lbs per million Btu in any one hour period for new solid fuel sources. This is the same limit that was approved as representing RACT in 1972 and is still approvable as RACT. Under the Clean Air Act's regulatory scheme new sources would also be subject to any applicable emission limits required by Part D, or section 112. These include lowest achievable emission rate (LAER), new source performance standards (NSPS) and, national emission standards for hazardous air pollutants (NESHAPS).

Section 212.209 Village of Winnetka Generating Station

This section would provide as a variance a temporary emission limit of 0.25 lbs per million Btu for the Village of Winnetka Generating Stations if the Village files a petition to establish site-specific particulate standards within 60 days of the effective date of this rule. This variance would be effective until January 1, 1988, or until a final determination is made by the Illinois Pollution Control Board on the site-specific rulemaking, whichever occurs sooner. (The provisions of § 212.209 are moot since the variance period ended on January 1, 1988.)

USEPA believes that §§ 212.201, 212.202, 212.203 and 212.204 are

approvable because they represent RACT. As § 212.209 is moot by its own terms, no determination is made as to its approvability.

Opacity Rules

Section 212.113 Incorporations by Reference

This section was revised to incorporate all of part 60 of title 40 of the Code of Federal Regulations (1987) (which was the most current version available at the time the State modified this Section). In addition, language was added to clarify that no future additions were being incorporated by reference at this time. This additional qualification is consistent with the legal requirements for incorporation by reference at both the State and Federal level. It is simply impossible to incorporate by reference something that is not yet in existence.

Section 212.121 Opacity Standards

This section provides that, for the purpose of subpart B: Visible Emissions of part 212: Visible and Particulate Matter Emissions, all visible emission opacity standards shall be considered equivalent to corresponding Ringleman Chart readings as described under the definition of opacity in § 211.122. An additional change to this Section is that the term "visible" replaces the term "visual". USEPA approves the incorporation of this section into the SIP because the change to the rule in non substantive.

Section 212.122 Limitation for Certain New Sources

This Section, which provides emission limits for new sources with actual heat input greater than 250 MMBtu/hr, was approved for incorporation into the Illinois SIP on May 31, 1972 (37 FR 10862) as PCB rule 202(a)(1). Today USEPA is incorporating the recordified rule number, 35 IAC 212.122 into the SIP.

Section 212.123 Limitation for All Other Sources

This Section has been revised to clarify that no person shall cause or allow emission of smoke, or other particulate matter, with an opacity greater than 30 percent, into the atmosphere from any emission source other than those sources subject to § 212.122. This Section also contains an exception for smoke or other particulate matter from any such emission source, which allows opacity greater than 30 percent but not greater than 60 percent for a period or periods aggregating 8 minutes in any 60 minute period. The more opaque emissions shall occur from only one such emission source, located within 305 meters or 1,000 feet radius from the center point from any other such emission source, owned or operated by the same person. It is further provided that the periods of more opaque emissions are limited to three times in a 24 hour period. USEPA is granting approval of the incorporation of this section into the SIP.

Section 212.124 Exceptions

This section provides for exceptions during startup, malfunction, and breakdown, as provided in an operating permit issued in accordance with 35 IAC 201. Part 201 contains the permit and general provisions. Section 212.124 also provides that sources which have obtained an adjusted opacity standard pursuant to § 212.126 are subject to that standard rather than the limitations of § 212.122 or 212.123. Finally § 212.124 clearly defines the criteria for a source's use of compliance with the particulate regulations as a defense to a violation of the applicable opacity standards. USEPA approves the incorporation of this section into the SIP.

Section 212.125 Determination of Violations

This Section provides three methods for determining violations: visual observation, use of an approved calibrated smoke evaluation device or, use of an approved smoke monitor, which were approved by IPCB for incorporation into the Illinois SIP on May 31, 1972 (37 FR 10862) as PCB rule 202(c). Today USEPA is incorporating the recodified rule number 35 IAC 212.125 into the SIP.

Section 212.126 Adjusted Opacity Standards Procedures

This Section provides detailed procedures a source can follow to obtain an adjusted opacity standard, including a detailed testing methodology. Four limits on alternate opacity limitations are also set forth; they must be contained in an operating permit; must substitute for the otherwise applicable limit; must not allow an opacity greater than 60 percent; and, must allow opacity for one, six minute averaging period in any sixty minute period, to exceed the adjusted opacity standard. USEPA approves the incorporation of this Section in the SIP.

The Illinois opacity rules as discussed above incorporate guidance provided by USEPA in its September 23, 1986, comments to IEPA. The regulations are clear and enforceable. The procedures in § 212.126 Adjusted Opacity Standards Procedures allows the IPCB to modify the pertinent SIP emission requirements without USEPA rulemaking. It should be noted here that opacity is used as an indirect measure of compliance with particulate emission limits by a point source. Even without an opacity limit, compliance with the particulate limit is required. Further, such compliance can be more accurately measured through the use of a stack test. USEPA normally objects to this practice because the State could modify the SIP in such a way as to interfere with attainment and maintenance of the NAAQS. However, because USEPA has approved the Illinois operating permit program for the purpose of issuing federally enforceable operating permits, and operating permits will be the vehicle for issuing Adjusted Opacity Standards, such concerns are minimized. USEPA intends to use its overview of the Illinois operating permit program to review operating permits prior to their issuance; and, through its authority under section 105 of the Act grant process, to ensure attainment and maintenance of the NAAQS. For the above cited reasons, USEPA approves the incorporation of these opacity rules into the SIP.

Air Adjusted Standards Procedures

As part of its June 30, 1988, submittal the State submitted Adjusted Standard Procedures which are part of IPCB's procedural results. These procedures are contained in 35 IAC Subtitle A: General Provisions; Chapter I: Pollution Control Board; part 106: Hearings Pursuant to Specific Rules; subpart E: Air Adjusted Standard Procedures; § 106.501 through 106.507.

Section 106.501 Scope and Applicability

This Section clarifies that subpart E only applies whenever an adjusted standard is requested pursuant to 35 IAC 212.126 Adjusted Opacity Standard Procedures.

Section 106.502 Joint Single Petitions

This Section provides that any person may initiate an adjusted standard proceeding by filing a petition jointly with the IEPA, or on its own.

Section 106.503 Request to Agency to Join as Co-Petitioner

This Section allows IEPA to act in any adjusted standard proceeding as a petitioner. Any person may request IEPA assistance in initiating a petition for an adjusted standard. IEPA may require the requestor to submit relevant information. IEPA must promptly notify the requestor of its decision whether or not to become a co-petitioner. The basis for not becoming a co-petitioner must be given to the requestor. IEPA's decision

is discretionary and not appealable to the IPCB.

Section 106.504 Contents of Petition

This Section specifies what information must be included in a petition.

Section 106.505 Response and Reply

This Section requires IEPA to file a response within 45 days of a petition being filed in which IEPA is not a co-petitioner. This response must include IEPA's recommendations concerning IPCB's proposed action on the petition. The petitioner is allowed 15 days to file a reply to the IEPA response.

Section 106.506 Notice and Conduct of Hearing

This Section requires the IPCB to hold at least one public hearing prior to granting an adjusted standard. The public notification process must conform to the pertinent Federal requirements.

Section 106.507 Opinions and Orders

This Section requires the IPCB to issue an Opinion and Order stating the relevant facts and rationale for the final IPCB determination. The IPCB may issue other orders as it deems appropriate. This Section also requires the Clerk of the IPCB to maintain a record of all Opinions and Orders for public inspection. This Section also provides that decisions of the IPCB are appealable pursuant to section 41 of the Illinois Environmental Protection Act, which provides for judicial review of IPCB decisions in the Appellate Court for the District in which the cause of action arose.

USEPA believes that these Air Adjusted Standards Procedures are well defined and provide for adequate review of petitions for an adjusted standard in that both the public and IEPA are afforded an opportunity to comment on all petitions. These comments must also be addressed in the IPCB Opinion and Order. For these reasons, USEPA approves the incorporation of these procedural rules into the SIP.

USEPA has reviewed IEPA's submittals of July 30, 1986, and July 22, 1988, for conformance with the provisions of the 1990 CAAA enacted on November 15, 1990. USEPA has determined that these actions conform with those requirements irrespective of the fact that the submittal preceded the date of enactment.

Because USEPA considers today's actions noncontroversial and routine, we are approving them today without prior proposal. The action will become effective on March 1, 1993. However, if we receive notice by January 28, 1993 that someone wishes to submit adverse comments, then USEPA will publish: (1) A notice that withdraws the action, and (2) a notice that begins a new rulemaking by proposing the action and establishing a comment period.

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

This action has been classified as a Table 2 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 (OMB) waived Table Two and Three SIP revisions (54 FR 2222) from the requirements of Section 3 of Executive Order 12291 for a period of 2 years. USEPA has submitted a request for a permanent waiver for Table 2 and Table 3 SIP revisions. The OMB has agreed to continue the temporary waiver until such time as it rules on USEPA's request.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 et seq., USEPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, USEPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D of the CAA do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP-approval does not impose any new requirements, it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of State actions. The CAA forbids USEPA to base it actions concerning SIPs on such grounds. *Union Electric Co* v. *U.S., E.P.A.*, 427 U.S. 246, 256–66 (S.Ct. 1976); 42 U.S.C. 7410 (a)(2).

Under section 307(b)(1) of the 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 March 1, 1993. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall be not postpone the effectiveness of such rule or action. 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, Incorporation by reference, Intergovernmental relations, Particulate matter.

Dated: December 2, 1992.

David Kee,

Acting Regional Administrator.

For the reasons set out in the preamble title 40, Chapter I of the Code of Federal Regulations is amended as follows.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

Subpart O—Illinois

Authority: 42 U.S.C. 7401, 7671(q)

2. Section 52.720 is amended by adding paragraph (c)(94) to read as follows:

§ 52.720 Identification of plan.

* * * * *

(c) * * *

(94) On July 30, 1986, the State submitted particulate boiler rules intended to replace rule 203(g)(1) which was vacated by the Courts. No action is taken on § 212.209 because the variance which it authorized has expired. On July 22, 1988, the State submitted opacity rules intended to replace rule 202(b) which had been vacated by the Courts. Also on July 22, 1988, the State submitted Illinois Pollution Control Board procedural rules for considering Air Adjusted Standard Procedures.

(i) Incorporation by reference.

(A) Title 35: Environmental Protection, Illinois Administrative Code, Subtitle B: Air Pollution; Chapter 1: Pollution Control Board; part 212 Visible and Particulate Matter Emissions; subpart E: Particulate Matter Emission from Fuel Combustion Emission Sources; §§ 212.201, 212.202, 212.203 and 212.204. Amended or added at 10 Ill Reg. 12637, effective July 9, 1986.

(B) Title 35: Environmental Protection, Illinois Administrative Code,

Subtitle B: Air Pollution; Chapter 1: Pollution Control Board; part 212 Visible and Particulate Matter Emissions; subpart B: Visible Emissions. Amended or added at 12 Ill. Reg 12492, effective July 13, 1988.

(C) Title 35: Environmental Protection, Illinois Administrative Code; Subtitle A: General Provisions; Chapter 1: Pollution Control Board; part 106: Hearings Pursuant to Specific Rules; subpart E: Air Adjusted Standards Procedures. Added at 12 Ill. Reg 12484, effective July 13, 1988.

[FR Doc. 92-31265 Filed 12-28-92; 8:45 am]

BILLING CODE 6560-50-M

Proposed Rules

Federal Register
Vol. 57, No. 250
Tuesday, December 29, 1992

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1106

[DA-92-39]

Milk in the Southwest Plains Marketing Area; Proposed Suspension of Certain Provisions of the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed suspension of rule.

SUMMARY: The proposed action would suspend from the Southwest Plains order for the months of December 1992 through August 1993 the shipping standards for supply plants that were pooled during the preceding September, and for an indefinite period the limits on the percentage of a supply plant's shipping standard that may be met by considering milk to be qualifying shipments from the supply plant. The action is requested by Kraft General Foods, Inc. Kraft operates a supply plant at Bentonville, Arkansas.

DATES: Comments are due no later than January 4, 1993.

ADDRESSES: Comments (two copies) should be filed with the USDA/AMS/Dairy Division, Order Formulation Branch, room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456.

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

SUPPLEMENTARY INFORMATION: 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 proposed action would not have a significant economic impact on a substantial number of small entities. Such action would lessen the regulatory impact of the order on certain milk handlers and would tend to ensure that dairy farmers would continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

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

The proposed rule has been reviewed under Executive Order 12778, Civil Justice Reform. This action would not be intended to have retroactive effect. This action would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law and requesting a modification of an order or to be exempted from the order. A handler is afforded the opportunity for a hearing on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after date of the entry of the ruling.

The Department of Agriculture is committed to carrying out its statutory and regulatory mandates in a manner that best serves the public interest. Therefore, where legal discretion permits, the Department actively seeks to promulgate regulations that promote economic growth, create jobs, are minimally burdensome and are easy for the public to understand, use or comply with. In short, the Department is committed to issuing regulations that maximize net benefits to society and minimize costs imposed by those regulations. This principle is articulated in President Bush's January 28, 1992, memorandum to agency heads, and in Executive Orders 12291 and 12498. The Department applies this principle to the full extent possible, consistent with law.

In this regard, the Department believes that public input from all interested persons can be invaluable to ensuring that the final regulatory product is minimally burdensome and maximally efficient. Therefore, the Department specifically seeks comments and suggestions from the public regarding any less burdensome or more efficient alternative that would accomplish the purposes described in this notice of proposed suspension.

Notice is hereby given that, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), the suspension of the following provisions of the order regulating the handling of milk in the Southwest Plains marketing area is being considered: A. For an indefinite period: In § 1106.7(b)(2), the following sentence: "Diversions in excess of three-fifths of the shipping requirements shall not be included as qualifying shipments."; and B. For the period of December 1, 1992, through August 31, 1993, the following:

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

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

All persons who want to send written data, views or arguments about the proposed suspension should send two copies of them to the USDA/AMS/Dairy Division, Order Formulation Branch, room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456, by the 7th day after publication of this notice in the **Federal Register**. The period for filing comments is limited to 7 days because a longer period would not provide the time needed to complete the required procedures and include

December 1992 in the suspension period.

The comments that are sent will be made available for public inspection in the Dairy Division during normal business hours (7 CFR 1.27(b)).

Statement of Consideration

The proposed action for December 1992 through August 1993 would suspend the shipping standards for supply plants that were previously associated with the market. The order defines a supply plant as a plant from which fluid milk products are transferred or diverted to distributing plants during the month. It also provides that in order to be pooled under the order during the months of September through January, 50 percent of a supply plant's receipts must be shipped to distributing plants each month. A supply plant that was pooled during each month of the immediately preceding months of September through January shall continue to be pooled during the following months of February through August if 20 percent of its receipts are shipped to distributing plants. Part of the requested suspension action would remove during the months of December 1992 through August 1993 the shipping standard for supply plants that were pooled under the order during the immediately preceding month of September.

The order also provides that the operator of a supply plant may meet up to 60 percent of its shipping requirement with milk that was diverted from the supply plant. The second part of the proposed suspension would remove the requirement that some milk must actually move from the supply plant to a distributing plant each month. The proposed suspension also would allow a supply plant to meet its pooling standard with diverted milk; i.e., milk that moves directly from the procedures farm(s) to the plant after the suspension of shipping standards ends. This proposed action would be for an indefinite period.

Under the proposed suspension, a supply plant that had met the shipping requirement for September 1992 could be a pool plant during December 1992 through August 1993 without making any actual deliveries of milk to distributing plants. Moreover, the shipping requirements for supply plants could be met entirely with diverted milk as long as the indefinite suspension remained in effect.

These suspension actions were requested by Kraft, USA, which operates a supply plant at Bentonville, Arkansas. Kraft maintains that it is capable of meeting the supply plant shipping standards entirely with diverted milk. Since the order now allows only three-fifths of the shipments to be made by diversions, Kraft must receive, unload and reload two-fifths of the required shipments. Kraft maintains that this uneconomic unloading/reloading is done solely to meet the pooling requirements and serves no other function.

Kraft further maintains that other provisions of the order, such as the "touch-base" provision, will protect the integrity of the order. Meanwhile, the suspension action would allow supply plants to meet their performance standards with the most efficient method of shipping milk. Kraft indicates a belief that the rationale that the Department of Agriculture relied on in reducing cooperative performance standards for pooling balancing plants is appropriate to justify this proposed action.

Before deciding whether to grant the proposed suspension, the Department of Agriculture is inviting comments from other interested parties. Comments also are sought regarding whether the portion of the request that would be suspended indefinitely should instead be suspended for a limited period, such as two years.

List of Subjects in 7 CFR Part 1106

Milk marketing orders.

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

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

Dated: December 21, 1992.

Daniel Haley,

Administrator.

[FR Doc. 92–31348 Filed 12–28–92; 8:45 am]

BILLING CODE 3410–02–M

[4910–13]

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 91–CE–37–AD]

Airworthiness Directives; Fairchild Aircraft (Formerly Swearingen Aviation Corporation) SA226 and SA227 series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to supersede Airworthiness Directive (AD) 81–22–04, which currently requires repetitively inspecting the elevator return spring on certain Fairchild Aircraft SA226 and SA227 series airplanes, and replacing any damaged part. The Federal Aviation Administration's policy on aging commuter-class aircraft is to eliminate or, in certain instances, reduce the number of certain repetitive short-interval inspections when improved parts or modifications are available. The proposed action would require relocating the elevator return spring as terminating action for the repetitive inspections that are currently required by AD 81–22–04. The actions specified in the proposed AD are intended to prevent a jammed elevator control caused by elevator return spring failure.

DATES: Comments must be received on or before March 5, 1993.

ADDRESSES: Submit comments on the proposal in triplicate to the Federal Aviation Administration (FAA), Central Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 91–CE–37–AD, room 1558, 601 E. 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

Service information that is discussed in the proposed AD may be obtained from Fairchild Aircraft, P.O. Box 790490, San Antonio, Texas 78279–0490; Telephone (512) 824–9421. This information also may be examined at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Mr. Bob D. May, Aerospace Engineer, Airplane Certification Office, FAA, Southwest Region, 4400 Blue Mound Road, Fort Worth, Texas 76193–0150; Telephone (817) 624–5156.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments

submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice, must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 91-CE-37-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Central Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 91-CE-37-AD, room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Discussion: The FAA has determined that reliance on critical repetitive inspections on aging commuter-class airplanes carries an unnecessary safety risk when a design change exists that could eliminate or, in certain instances, reduce the number of those critical inspections. In determining what inspections are critical, the FAA considers: (1) The safety consequences of the airplane if the known problem is not detected by the inspection; (2) the reliability of the inspection such as the probability of not detecting the known problem; (3) whether the inspection area is difficult to access; and (4) the possibility of an adjacent structure being damaged as a result of the problem.

These factors have led the FAA to establish an aging commuter-class aircraft policy that requires the incorporation of a known design change when it could replace a critical repetitive inspection. With this policy in mind, the FAA recently conducted a review of existing ADs that apply to Fairchild Aircraft SA226 and SA227 series airplanes. Assisting the FAA in this review were (1) Fairchild Aircraft; (2) the Regional Airlines Association (RAA); and (3) several operators of the affected airplanes.

From this review, the FAA has identified AD 81-22-04, Amendment 39-4238, as one that should be superseded with a new AD that would eliminate short-interval and critical repetitive inspections. AD 81-22-04 currently requires repetitively inspecting the elevator return spring on certain Fairchild Aircraft SA226 and SA227 series airplanes, and replacing any damaged part.

Fairchild Aircraft has issued Service Bulletin (SB) No. 226-27-032, Issued: September 14, 1981, revised: January 19, 1983; and SB No. 227-27-002, Issued: September 14, 1981, revised: October 25, 1985. These service bulletins specify procedures for relocating the elevator return spring on certain Fairchild Aircraft SA226 and SA227 series airplanes.

Based on its aging commuter-class aircraft policy and after reviewing all available information, the FAA has determined that (1) The procedures specified in the referenced service information incorporate an improved design change that could replace the repetitive inspections currently required by AD 81-22-04; and (2) AD action should be taken to eliminate these repetitive short-interval inspections and prevent failure of the elevator return spring.

Since the condition described is likely to exist or develop in other SA226 and SA227 series airplanes of the same type design, the proposed AD would supersede AD 81-22-04 with a new AD that would (1) initially retain the inspections of the elevator return spring with replacement and relocation of any damaged elevator return spring; and (2) eventually require the relocation of the elevator return spring as terminating action for the repetitive inspections required by AD 81-22-04. The proposed relocation would be accomplished in accordance with Fairchild SB No. 226-27-032, Issued: September 14, 1981, revised: January 19, 1983; or Fairchild SB No. 227-27-002, Issued: September 14, 1981, revised: October 25, 1985, as applicable.

The FAA estimates that 322 airplanes in the U.S. registry would be affected by the proposed AD, that it would take approximately 20 workhours per airplane to accomplish the proposed action, and that the average labor rate is approximately $55 an hour. Parts would be provided by the manufacturer at no cost to the operator. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $354,200.

The intent of the FAA's aging commuter airplane program is to ensure safe operation of commuter-class airplanes that are in commercial service without adversely impacting private operators. Of the approximately 322 airplanes in the U.S. registry that would be affected by the proposed AD, the FAA has determined that approximately 30 percent are operated in scheduled passenger service by 19 different operators. A significant number of the remaining 70 percent are operated in other forms of air transportation such as air cargo and air taxi.

The proposed AD allows 2,200 hours time-in-service (TIS) before mandatory accomplishment of the design modification. The average utilization of the fleet for those airplanes in commercial commuter service is approximately 25 to 50 hours TIS per week. Based on these figures, operators of commuter-class airplanes involved in commercial operation would have to accomplish the proposed modification within 5 to 11 calendar months after the proposed AD would become effective. For private owners, who typically operate between 100 to 200 hours TIS per year, this would allow 11 to 22 calendar years before the proposed modification would be mandatory.

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

For the reasons discussed above, I certify that this action: (1) Is not a "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 regulatory evaluation prepared for this action has been placed in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing AD 81-22-04, Amendment 39-4238, and adding the following new AD:

Fairchild Aircraft: Docket No. 91-CE-37-AD. Supersedes AD 81-22-04, Amendment 39-4238.

Applicability: The following model and serial number airplanes, certificated in any category:

Model	Serial No.
SA226-AT	All serial numbers.
SA226-TC	All serial numbers.
SA227-AC	406, 415, 416, and 420 through 473.
SA227-AT	423 through 469.

Compliance: Required as indicated after the effective date of this AD, unless already accomplished.

To prevent a jammed elevator control caused by elevator return spring failure, accomplish the following:

(a) Within the next 25 hours time-in-service (TIS), unless already accomplished within the last 275 hours TIS, and thereafter at intervals not to exceed 300 hours TIS until the modification specified in paragraph (c) of this AD is accomplished, visually inspect the elevator return spring, the attachment bolts, the spacers, and the clevis for damage such as deterioration, wear, or breakage.

(b) If any damaged part is found, prior to further flight, replace with a new part and relocate the elevator return spring in accordance with the ACCOMPLISHMENT INSTRUCTIONS section of Fairchild Service Bulletin (SB) No. 226-27-032, Issued: September 14, 1981, revised: January 19, 1983; or Fairchild SB No. 227-27-002, Issued: September 14, 1981, revised: October 25, 1985, as applicable.

(c) Within the next 2,200 hours TIS, unless already accomplished as required by paragraph (b) of this AD, relocate the elevator return spring in accordance with the ACCOMPLISHMENT INSTRUCTIONS section of Fairchild Service Bulletin (SB) No. 226-27-032, Issued: September 14, 1981, revised: January 19, 1983; or Fairchild SB No. 227-27-002, Issued: September 14, 1981, revised: October 25, 1985, as applicable.

(d) The accomplishment of the modification required by paragraph (c) of this AD is considered terminating action for the repetitive inspection requirement of this AD.

(e) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(f) An alternative method of compliance or adjustment of the initial or repetitive compliance times that provides an equivalent level of safety may be approved by the Manager, Airplane Certification Office, FAA, Fort Worth, Texas 76193-0150. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Fort Worth Airplane Aircraft Certification Office.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Fort Worth Airplane Certification Office.

(g) All persons affected by this directive may obtain copies of the document referred to herein upon request to Fairchild Aircraft, P.O. Box 790490, San Antonio, Texas 78279-0490; or may examine this document at the FAA, Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

(h) This amendment supersedes AD 81-22-04, Amendment 39-4238.

Issued in Kansas City, Missouri, on December 18, 1992.

Barry D. Clements,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 92-31380 Filed 12-28-92; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 92-NM-209-AD]

Airworthiness Directives; Boeing Model 747-400, 757, and 767 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 747-400, 757, and 767 series airplanes. This proposal would require a one-time inspection of the discharge cartridges and electrical connectors on the fire extinguisher bottles, and replacement of damaged cartridges and connectors. This proposal is prompted by reports of bent pins found in the discharge cartridges and damaged electrical connectors on some fire extinguisher bottles. The actions specified by the proposed AD are intended to ensure the proper discharge of the fire extinguisher bottle in the event of a fire.

DATES: Comments must be received by February 23, 1993.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 92-NM-209-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplane Company, P.O. Box 3707, Seattle Washington 98124-2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Ms. Barbara Mudrovich, Aerospace Engineer, Seattle Aircraft Certification Office, Systems & Equipment Branch, ANM-130S, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (206) 227-2670; fax (206) 227-1181.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 92-NM-209-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 92-NM-209-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion: Two operators of Boeing series airplanes have reported finding bent pins in the discharge cartridges on fire extinguisher bottles installed at various locations on the airplane. During regular maintenance, whenever the electrical connector is disconnected from the discharge cartridge, a shunt

plug is installed on the discharge cartridge. The removal and installation of this shunt plug can inadvertently bend the pins in the discharge cartridge. (The use of shunt plugs has been discontinued; the use of protective covers during these maintenance procedures is now recommended.) If an electrical connector is connected to a discharge cartridge that has a bent pin, the connector can be damaged. A damaged discharge cartridge pin or a damaged electrical connector, if not detected and corrected, can cause an unsatisfactory electrical connection, which could prevent the proper discharge of the fire extinguisher bottle in the event of a fire.

The subject discharge cartridges are installed on fire extinguisher bottles located in the auxiliary power unit (APU), lower cargo compartment, and engine fire extinguishing systems on certain Boeing Model 747–400, 757, and 767 series airplanes.

The FAA has reviewed and approved the following Boeing Alert Service Bulletins:

Alert service bulletin No.	Issue date	Affected airplane model
747–26A2210	Oct. 29, 1992	747–400
757–26A0032	Oct. 22, 1992	757
767–26A0089	Oct. 22, 1992	767

These service bulletins describe procedures for inspecting the fire extinguishing discharge cartridges (squibs) and electrical connectors on the fire extinguisher bottles to detect damage, and replacement of damaged cartridges or connectors. Also included in these service bulletins are procedures for conducting an operational test of the bottle discharge cartridge circuit whenever a damaged cartridge or connector is replaced.

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require a one-time inspection of the discharge cartridges and electrical connectors on the fire extinguisher bottles; replacement of damaged cartridges and connectors; and an operational test of the bottle discharge cartridge circuit after replacement of any damaged item. The actions would be required to be accomplished in accordance with the service bulletins described previously.

There are approximately 1,059 airplanes of the affected design in the worldwide fleet; of this number, 149 are Model 747–400 series airplanes, 489 are Model 757 series airplanes, and 421 are Model 767 series airplanes. The FAA estimates that 495 airplanes of U.S. registry would be affected by this proposed AD; of this number, 22 are Model 747–400 series airplanes, 311 are Model 757 series airplanes, and 163 are Model 767 series airplanes.

The FAA estimates that it would take approximately 5 work hours per airplane (.25 work hour per cartridge) to accomplish the proposed actions, and that the average labor rate is $55 per work hour. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $136,125, or $275 per airplane. This total cost figure assumes that no operator has yet accomplished the proposed requirements of this AD action.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket 92–NM–209–AD.

Applicability: Model 747–400 series airplanes, passenger and combi configurations, line position 696 through 906, inclusive; Model 757 series airplanes, line numbers 1 through 488, inclusive; and Model 767 series airplanes, line numbers 1 through 421, inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent the improper discharge of fire extinguishant due to a damaged discharge cartridge or electrical connector on the fire extinguisher bottle, accomplish the following:

(a) Within 120 days after the effective date of this AD, conduct a detailed visual inspection to detect damage to the discharge cartridges and the electrical connectors on each fire extinguisher bottle installed in auxiliary power unit (APU), cargo compartment, and engine fire extinguishing systems, in accordance with Boeing Alert Service Bulletin 747–26A2210, dated October 29, 1992 (for Model 747–400 series airplanes); Boeing Alert Service Bulletin 757–26A0032, dated October 22, 1992 (for Model 757 series airplanes); or Boeing Alert Service Bulletin 767–26A0089, dated October 22, 1992 (for Model 767 series airplanes); as applicable. Since an operational test of the fire extinguishing system can be successfully completed even if there is a damaged pin or connector, this inspection must be performed by visually examining the discharge cartridge and the electrical connector.

(b) If any damage is detected during the inspection required by paragraph (a) of this AD, prior to further flight, replace the damaged item with a serviceable part and perform an operational test of the bottle discharge cartridge circuit in accordance with the applicable service bulletin. Any discrepancies detected as a result of the operational test must be corrected prior to further flight.

(c) As of the effective date of this AD, no person shall install a fire extinguisher bottle on any airplane unless the discharge cartridge and electrical connector has been inspected in accordance with this AD.

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

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

(e) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on December 21, 1992.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 92-31461 Filed 12-28-92; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 91-NM-258-AD]

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Proposed rule; withdrawal.

SUMMARY: This action withdraws a notice of proposed rulemaking (NPRM) that proposed a new airworthiness directive (AD), applicable to certain Boeing Model 747 series airplanes. That action would have required inspection of the flexible conduit, wiring, and support brackets between the fuselage and the forward and aft cargo door, and replacement or repair, if necessary. Since the issuance of the NPRM, the Federal Aviation Administration (FAA) has reconsidered its position on this safety issue and has concluded that the proposed inspection is unnecessary to provide an acceptable level of safety, and that the procedures currently required by a separate existing AD will preclude the uncommanded opening of the forward and aft cargo door. Accordingly, the proposed rule is withdrawn.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Huber, Aerospace Engineer, Seattle Aircraft Certification Office, Systems and Equipment Branch, ANM-130S, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (206) 227-2791; fax (206) 227-1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations to add a new airworthiness directive (AD), applicable to certain Boeing Model 747 series airplanes, was published in the **Federal Register** on March 2, 1992 (57 FR 7335). The proposed rule would have required inspection of the flexible conduit, wiring, and support brackets between the fuselage and the forward and aft cargo door, and replacement or repair, if necessary. The proposed actions were intended to prevent the inadvertent actuation of the respective cargo door power drive units that open and close the doors, and possible injury to maintenance or cargo handling personnel.

That action originally was prompted by an incident of an uncommanded electrical opening of an aft cargo door that occurred during maintenance procedures conducted on a Model 747-200 series airplane. The apparent cause of the inadvertent cargo door opening was traced to shorted wires contained in the flexible metallic conduit. Wires related to the cargo door control and power are contained in this conduit.

Investigation of this incident indicated that the shorted wires had occurred as a result of wire insulation breaches caused by chafing on the metallic extrusions of the flexible conduit. Apparently, the inherent design of the metallic conduit and the improper installation of the conduit led to the development of circumferential cracks on the inside of the conduit. These cracks produced jagged edges that chafed the wires in the conduit.

In its further review of the circumstances surrounding this door opening incident, however, the FAA has confirmed that an inadvertent opening of the cargo door cannot be caused solely by wire chafing. In addition to chafing, at least four independent failures must also occur in order to drive the door latches to the open position. These four failures are:

1. Failure of the lock sectors;
2. Wire chafing that causes two specific wires to short together;
3. Failure of the associated circuit breakers; and
4. A failure that provides power to the Ground Handling Bus.

To illustrate the consequences of these failures, the FAA offers the following explanation:

As the door closes, two hooks pull the door in and compress the door seal. This allows the eight sill latches to rotate by means of a latching power drive unit. The door is then locked by operation of the master latch-lock mechanism. Overcenter travel of the master latch-lock handle causes the reinforced lock sectors to lock the latches in the closed position. All latches must be latched for the lock sectors to engage.

When the master latch-lock handle is stowed, 28V DC control power is removed by means of a limit switch located on a lock sector. A door warning switch located on the pressure vent door indicates when all the lock sectors are engaged. AD 90-09-06 [Amendment 39-6581, (55 FR 15217, April 23, 1990)] mandated the installation of this door warning switch, as well as a reinforcement of the lock sectors to ensure that the latches remain locked against backdriving of the latches by the latch power drive unit. Failure of lock sectors that are reinforced in accordance with AD 90-09-06 has been shown to be unlikely and, even in the event of such a failure, an indication by means of the door warning switch will warn the flight crew of the problem.

In addition to the failure of the lock sectors, two specific wires must short together as a result of the chafing problem, and power must be available on the Ground Handling Bus, in order for an uncommanded operation of the latch power drive unit to occur. Furthermore, the wires must short together without grounding out the metallic conduit, which would cause the circuit breaker to open and remove power for the cargo door control circuitry.

Power is available on the Ground Handling Busses as long as (1) the weight-on-wheels switch is in the ground position, and (2) either the APU is running or external power is applied. A failure of the Ground Handling Bus relay must occur before power is available to the cargo door control circuitry during flight. The APU is not certified for in-flight operation on any Model 747 series airplane.

If the unlikely condition were to occur where power was available on the Ground Handling Bus and, concurrently, the shorting condition occurred, the latches would be backdriven against the reinforced lock sectors, thus preventing latching. If this were to happen, the "door latched" switch would be relaxed, which would immediately indicate to the crew that a door problem exists that requires maintenance action. Standard operational and/or maintenance practices would then be put into action to correct the problem.

In addition to its own investigation and reconsideration of the addressed safety issue, the FAA also has considered information provided by the public in comments submitted to the proposed rule.

One commenter, Boeing Commercial Airplane Group, provides data concerning failure consequences that are very similar to the discussion above. Boeing also states that its tests of the aft cargo door wire bundle have revealed that the correct installation and rigging of the wire bundle and conduit will preclude any damage to the wire bundle. These tests demonstrated that, after 50,000 opening and closing cycles of the door, no damage occurred to the wire bundle.

Additionally, Boeing contends that in-service experience does not support the unsafe condition addressed in the proposal as "possible injury to maintenance or cargo handling

personnel." The incident involving the uncommanded electrical operation of a cargo door due to a short in the wire bundle conduit occurred on the ground. Further, the slow rate of cargo door travel from the lower sill to the fully open position provides an additional safety margin in the event of an uncommanded cargo door operation occurring on the ground.

After further review of its previous position on this subject and of the data presented by the commenter, the FAA has concluded that the modifications, tests, and inspections currently required by AD 90-09-06 provide an acceptable level of safety to preclude inadvertent actuation of the cargo-door power drive unit and possible injury to maintenance or cargo handling personnel. Accordingly, the proposed rule is considered unnecessary and is hereby withdrawn.

Although other comments were received in response to the notice, those comments are not addressed in this document. However, this information may be examined at the FAA, Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington.

Withdrawal of this notice of proposed rulemaking constitutes only such action, and does not preclude the agency from issuing another notice in the future, nor does it commit the agency to any course of action in the future.

Since this action only withdraws a notice of proposed rulemaking, it is neither a proposed nor a final rule and therefore, is not covered under Executive Order 12291, the Regulatory Flexibility Act, or DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979).

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Withdrawal

Accordingly, the notice of proposed rulemaking, Docket 91-NM-258-AD, published in the **Federal Register** on March 2, 1992 (57 FR 7335), is withdrawn.

Issued in Renton, Washington, on December 21, 1992.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 92-31462 Filed 12-28-92; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 39

[Docket No. 92-NM-198-AD]

Airworthiness Directives; de Havilland, Inc. Model DHC-8-100 and -300 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain de Havilland Model DHC-8-100 and -300 series airplanes. This proposal would require inspection of the upper drag strut trunnion fittings of the nose landing gear to detect cracks, inspection of the fitting attachment bolts to verify tightness, and replacement of the fittings or fasteners, if necessary. This proposal is prompted by reports of cracked trunnion fittings. The actions specified by the proposed AD are intended to prevent failure of the upper drag strut trunnion fittings of the nose landing gear, which could lead to collapse of the nose landing gear.

DATES: Comments must be received by February 23, 1993.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 92-NM-198-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from de Havilland, Inc., Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Engine and Propeller Directorate, New York Aircraft Certification Office, 181 South Franklin Avenue, Room 202, Valley Stream, New York.

FOR FURTHER INFORMATION CONTACT: Mr. Jon Hjelm, Aerospace Engineer, Airframe Branch, ANE-172, FAA, Engine and Propeller Directorate, 181 South Franklin Avenue, Room 202, Valley Stream, New York 11581; telephone (516) 791-6220; fax (516) 791-9024.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 92-NM-198-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 92-NM-198-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion: Transport Canada Aviation, which is the airworthiness authority for Canada, recently notified the FAA that an unsafe condition may exist on certain de Havilland Model DHC-8-100 and -300 series airplanes. Transport Canada Aviation advises that cracks have been found in the two trunnion fittings that retain and support the nose landing gear upper drag strut. Historically, these fittings have a low fatigue life. Initial investigations have revealed that fatigue and subsequent cracking is attributed to ground handling of the airplane, in particular towing, which imposes higher loads on the airplane than initially predicted. In addition, this condition may be aggravated by loose fasteners. This condition, if not corrected, could cause failure of the upper drag strut trunnion fittings of the nose landing gear, which could lead to collapse of the nose landing gear.

De Havilland has issued DHC-8 Alert Service Bulletin S.B. A8-53-40, Revision 'A', dated June 12, 1992, which describes procedures for inspecting the

upper drag strut trunnion fittings of the nose landing gear to detect cracks, and inspecting the fitting attachment bolts to verify tightness. The service bulletin also describes procedures for replacing the fittings or fasteners. If either fitting is cracked, both fittings are to be replaced with confirmed crack-free fittings. Transport Canada Aviation classified this service bulletin as mandatory and issued Canadian Airworthiness Directive CF-92-18, dated August 18, 1992, in order to assure the continued airworthiness of these airplanes in Canada.

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

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require repetitive inspections of the upper drag strut trunnion fittings of the nose landing gear to detect cracks, inspections of fitting attachment bolts to verify tightness, and replacement of the fittings or fasteners, if necessary. The actions would be required to be accomplished in accordance with the service bulletin described previously.

The FAA estimates that 125 de Havilland Model DHC-8-100 and -300 series airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 1 work hour per airplane to accomplish the proposed actions, and that the average labor rate is $55 per work hour. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $6,875, or $55 per airplane. This total cost figure assumes that no operator has yet accomplished the proposed requirements of this AD action.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

De Havilland, Inc.: Docket 92-NM-198-AD.

Applicability: Model DHC-8-102, -103, -301, -311, and -314 series airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the upper drag strut trunnion fittings of the nose landing gear, which could lead to collapse of the nose landing gear, accomplish the following:

(a) Within 500 landings after the effective date of this AD, unless accomplished within the last 500 landings, conduct a visual inspection of both upper drag strut trunnion fittings of the nose landing gear to detect cracks; and inspect the fitting attachment bolts to verify tightness; in accordance with de Havilland DHC-8 Alert Service Bulletin S.B. A8-53-40, Revision 'A', dated June 12, 1992.

(1) If no crack is detected in the upper drag strut trunnion fittings of the nose landing gear, and no looseness is detected in the fitting attachment bolts, repeat the inspections at intervals not to exceed 1,000 landings.

(2) If a crack is detected on either fitting, prior to further flight, replace both fittings with confirmed crack-free fittings in accordance with the service bulletin. After such replacement, the inspections required by this paragraph much continue at intervals not to exceed 1,000 landings.

(3) If the fitting attachment bolts are found to be loose during the initial inspection, prior to further flight, replace the fasteners securing the fittings (nuts, washers, and bolts) in accordance with the service bulletin. After such replacement, the inspections required by this paragraph must continue at intervals not to exceed 1,000 landings.

(4) If any fastener, replaced in accordance with this AD, is found to be loose during any repetitive inspection, prior to further flight, tighten the bolt to the value specified in the service bulletin.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, New York Aircraft Certification Office (ACO), ANE-170, FAA, Engine and Propeller Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, New York ACO.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the New York ACO.

(c) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on December 21, 1992.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 92-31463 Filed 12-28-92; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 92-NM-193-AD]

Airworthiness Directives; Fokker Model F-27 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Fokker Model F-27 series airplanes. This proposal would require a one-time visual inspection to determine whether bolts and screws of proper length have been installed in the outboard wing attachment fittings of the fuselage main frame and replacement of discrepant parts. This proposal is prompted by reports that loose or sheared bolts and screws were found in

the outboard wing attachment fittings. The actions specified by the proposed AD are intended to prevent reduced structural integrity of the wings.

DATES: Comments must be received by February 23, 1993.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 92-NM-193-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

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

FOR FURTHER INFORMATION CONTACT: Mark Quam, Aerospace Engineer, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (206) 227-2145; fax (206) 227-1320.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 92-NM-193-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 92-NM-193-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion: In June 1988, the FAA sponsored a conference on aging airplanes. It had become obvious that, because of the tremendous increase in air travel, the relatively slow pace of new airplane production, and the apparent economic feasibility of operating older technology airplanes, older airplanes will continue to be operated rather than be retired. Based on information exchanged during this conference, it was generally agreed that increased attention needed to be focused on the aging airplane fleet and maintaining its continued operational safety.

An Airworthiness Assurance Task Force (AATF), with representatives from the aircraft operators, manufacturers, regulatory authorities, and other aviation representatives from around the world, was established in August 1988. The objective of the AATF was to sponsor "Working Groups" to (1) select service bulletins, applicable to each airplane model in the commuter fleet, to be recommended for mandatory modification of aging airplanes, (2) develop corrosion-directed inspections and prevention programs, (3) review the adequacy of each operator's structural maintenance program, (4) review and update the Supplemental Structural Inspection Documents (SSID), and (5) assess repair quality.

As part of its actions to address Item (1), above, the Working Group assigned to review the Fokker Model F-27 series airplanes made a recommendation that the procedures specified in Fokker Service Bulletin F27/53-115, dated May 21, 1991, be mandated. That service bulletin describes procedures for a one-time visual inspection to determine whether wing attachment fitting bolts and screws have been properly installed in the fuselage main frame at stations 7961 and 9439.5, and replacement of discrepant parts. It was issued in response to reports indicating that, on one Model F-27 series airplane, loose or sheared bolts and screws were found in the outboard wing attachment fittings. This condition, if not corrected, could result in reduced structural integrity of the wings.

The Rijksluchtvaartdienst (RLD) classified the service bulletin as mandatory and issued Netherlands Airworthiness Directive BLA 91-067, dated July 15, 1991, in order to assure the continued airworthiness of these airplanes in The Netherlands.

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

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require a one-time visual inspection to determine whether bolts and screws of proper length have been installed in the outboard wing attachment fittings of the fuselage main frame at stations 7961 and 9439.5, and replacement of discrepant parts. The actions would be required to be accomplished in accordance with the service bulletin described previously.

Airplanes with serial numbers 10260 and subsequent were modified, prior to delivery, to preclude the addressed unsafe condition and, therefore, are not subject to the requirements of this proposed AD. The FAA estimates that 31 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 7 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $55 per work hour. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $11,935, or $385 per airplane. This total cost figure assumes that no operator has yet accomplished the proposed requirements of this AD action.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13—[Amended]

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

Fokker: Docket 92–NM–193–AD.

Applicability: Model F–27 series airplanes, serial numbers 10102 through 10259, inclusive; on which the inspection described in Service Bulletin F27/53–60 (B–156) Part II has not been accomplished; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent reduced structural integrity of the wings, accomplish the following:

(a) Prior to the accumulation of 2,700 hours time-in-service after the effective date of this AD or within 12 months after the effective date of this AD, whichever occurs earlier, perform a one-time visual inspection to determine whether bolts and screws of proper length have been installed in the outboard wing attachment fittings of the fuselage main frame at stations 7961 and 9439.5, in accordance with Fokker Service Bulletin F27/53–115, dated May 21, 1991.

(1) If any measured bolt or screw is found that protrudes more than 4.5 mm (0.177 inch) through the nut, prior to further flight, replace it with a shorter one, in accordance with the service bulletin.

(2) If no measured bolt or screw is found that protrudes more than 4.5 mm (0.177 inch) through the nut, no further action is necessary.

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

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

(c) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on December 21, 1992.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 92–31464 Filed 12–28–92; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 71

[Airspace Docket No. 92–ANM–24]

Proposed Alteration of Transition Areas

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to change the names of three VHF Omnidirectional Range/Tactical Air Navigation (VORTAC) aids and one VHF Omnidirectional Range/Distance Measuring Equipment (VOR/DME) aid, within the airspace designations of certain transition areas located in Oregon and Idaho. A navigational aid (NAVAID) with the same name as the airport should be located on the airport. This action proposes to reflect the name changes, where necessary, of the NAVAID's that are not located on the airport with which they are associated.

DATES: Comments must be received on or before February 10, 1993.

ADDRESSES: Send comments on the proposal to: Manager, System Management Branch, ANM–530, Federal Aviation Administration, Docket No. 92–ANM–24, 1601 Lind Avenue SW., Renton, Washington, 98055–4056.

The official docket may be examined at the same address.

An informal docket may also be examined during normal business hours at the address listed above.

FOR FURTHER INFORMATION CONTACT: Robert Brown, ANM–535, Federal Aviation Administration, Docket No. 92–ANM–24, 1601 Lind Avenue SW., Renton, Washington 98055–4056, Telephone (206) 227–2535.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 92–ANM–24." The postcard will be date/time stamped and returned to the commenter. All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination at the address listed above both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, System Management Branch, ANM–530, 1601 Lind Avenue SW., Renton, Washington 98055–4056. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11–2A which describes the application procedure.

The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to reflect the change of the names of four VORTAC's within the airspace designations for certain transition areas located in Oregon and Idaho. FAA

Handbook 7400.2C states that a NAVAID with the same name as the associated airport should be located on the airport; therefore, the names of the NAVAID's associated with that airport that are not located on the airport surface or are not the primary NAVAID's located off the airport surface for that airport are proposed to be changed accordingly. The coordinates for this airspace docket are based on North American Datum 83. Transition areas are published in § 71.181 of FAA Order 7400.7A, dated November 2, 1992, and effective November 27, 1992, which is incorporated by reference in 14 CFR 71.1. The transition areas listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(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) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation Safety, Incorporated by reference, Transition areas.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71 [AMENDED]

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., P. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.7A, Compilation of Regulations, dated November 2, 1992, and effective November 27, 1992, is amended as follows:

Section 71.181 Designation of transition areas

* * * * *

ANM OR TA Bend, OR [Revised]
Bend Municipal Airport, OR
(lat. 44°05'37"N, long. 121°11'59"W)
Deschutes VORTAC (lat. 44°15'10"N, long. 121°18'13"W)

That airspace extending upward from 700 feet above the surface within a 4.3-mile radius of the Bend Municipal Airport, and within 1.8 miles each side of the Deschutes VORTAC 334° and 154° radials extending from the 4.3-mile radius to .9 mile northwest of the VORTAC; that airspace extending upward from 1,200 feet above the surface within 4.3 miles southwest and 7 miles northeast of the Deschutes VORTAC 334° radial extending from the VORTAC to 10.5 miles northwest of the VORTAC.

* * * * *

ANM OR TA Medford, OR [Revised]
Medford-Jackson County Airport, OR
(lat. 42°22'20"N, long. 122°52'22"W)
Rouge Valley VORTAC (lat. 42°28'47"N, long. 122°54'47"W)
Pumie LOM (lat. 42°27'03"N, long. 122°54'49"W)
Klamath Falls VORTAC (lat. 42°09'11"N, long. 121°43'39"W)
Fort Jones VORTAC (lat. 41°26'59"N, long. 122°48'23"W)

That airspace extending upward from 700 feet above the surface within 6.1 miles northeast and 4.3 miles southwest of the Medford ILS localizer northwest course extending from 2.7 miles northwest of the Pumie LOM to 20.9 miles northwest of the LOM, and within 3 miles each side of the Rogue Valley VORTAC 352° radial extending from the Rogue Valley VORTAC to 7.4 miles north of the VORTAC, and within 3.1 miles each side of the Medford ILS localizer southeast course extending from the LOM to 20.9 miles southeast of the LOM; that airspace extending upward from 1,200 feet above the surface bounded on the east by V–452, on the southeast by the 34.8-mile radius of the Klamath Falls VORTAC, on the south by V–122, on the west by V–23, and that airspace southeast of Medford bounded on the north by the south edge of V–122, on the east by the 34.8-mile radius of the Klamath Falls VORTAC, on the southeast by a line 4.3 miles southeast and parallel to the Fort Jones VORTAC 041° radial, on the west by the east edge of V–23, and that airspace west of the Rogue Valley VORTAC bounded on the north by the south edge of V–287, on the west by the east edge of V–27, on the south by the north edge of V–122.

* * * * *

ANM OR TA Redmond, OR [Revised]
Redmond, Roberts Field, OR
(lat. 44°15'14"N, long. 121°09'00"W)
Deschutes VORTAC (lat. 44°15'10"N, long. 121°18'13"W)

That airspace extending upward from 700 feet above the surface within 1.8 miles north and 11.8 miles south of the Deschutes VORTAC 059° radial to 28.8 miles east of the VORTAC, and within 1.8 miles each side of the 230° bearing from the Roberts Field Airport extending 8.7 miles southwest of the airport, and within the 1.8 miles each side of the Deschutes VORTAC 162° radial extending from the VORTAC to 4.3 miles south of the VORTAC, and within 1.8 miles each side of the Deschutes VORTAC 281° radial extending from the VORTAC to 4.3 miles west of the VORTAC and within 3.5 miles each side of the Deschutes VORTAC 014° radial extending from 13.1 miles north of the VORTAC to 30.5 miles north; that airspace extending upward from 1,200 feet above the surface within a 32.2-mile radius of the VORTAC between the 006° and 048° radials, within a 27-mile radius of the VORTAC between the 048° radial and a line 5.3 miles west of and parallel to the 189° radial; that airspace extending upward from 1,700 feet above the surface within a line beginning at Deschutes VORTAC extending north on V–25 to V–112, east on V–112 to V–4, southeast on V–4 to V–357, southwest on V–357 to V–122, west on V–122 to V–452, northwest on V–452 to V–269, east on V–269 to the Deschutes VORTAC; excluding that airspace within Federal Airways; the Lakeview, OR, Additional Control Area; the Baker Municipal Airport, OR; the Klamath Falls International Airport, OR; Pendleton Municipal Airport, OR; the Dallas Municipal Airport, OR, and the Burns Municipal Airport, OR, transition area.

* * * * *

ANM OR TA Sunriver, OR [Revised]
Sunriver Airport, OR
(lat. 43°52'35"N, long. 121°27'10"W)
Deschutes VORTAC (lat. 44°15'10"N, long. 121°18'13"W)

That airspace extending upward from 700 feet above the surface within a 6.1 mile radius of the Sunriver Airport and within 3.5 miles each side of the Deschutes VORTAC 197° radial extending from the 6.1-mile radius to 8.7 miles north of the airport.

* * * * *

ANM OR TA The Dalles, OR [Revised]
The Dalles Municipal Airport, OR
(lat. 45°37'07"N, long. 121°10'02"W)
Klickitat VORTAC (lat. 45°42'49"N, long. 121°06'03"W)

That airspace extending upward from 700 feet above the surface within a 4.3-mile radius of the Dalles Municipal Airport, and that airspace within 4.4 miles each side of Klickitat VORTAC 184° radial extending from Klickitat VORTAC to 15.2 miles south of the VORTAC, and that airspace between Klickitat VORTAC 206° radial clockwise to the 222° radial extending from the 4.3-mile radius of the airport to the 10.1-mile radius of the airport, and that airspace 4.3 miles either side of the 15.1 mile radius of the VORTAC between the 121° radial clockwise to the 206° radial; that airspace extending upward from 1,200 feet above the surface within 7 miles north and 5.3 miles south of Klickitat VORTAC 281° radial and 101° radial extending from 6.1 miles west to 12.2 miles east of the VORTAC, and within 4.3 miles north of the VORTAC 101° radial extending from 12.2 miles east to 20.1 miles east of the VORTAC, and that airspace within a 20.1-mile radius of the VORTAC extending clockwise from the 101° radial to the 272°

radial, excluding the airspace within the Portland, OR, Transition Area.

* * * * *

ANM ID TA Lewiston, ID [Revised]
Lewiston-Nez Perce County Airport, ID (lat. 46°22'28"N, long. 117°00'55"W)
Nez Perce VOR/DME (lat. 46°22'53"N, long. 116°52'10"W)
Walla Walla VOR/DME (lat. 46°05'13"N, long. 118°17'33"W)

That airspace extending upward from 700 feet above the surface within an area bounded by a line beginning at lat. 46°29'25"N., long. 117°34'09"W.; east to lat. 46°30'45"N., long. 117°00'49"W.; north to lat. 46°34'25"N., long. 117°04'44"W.; then via the arc of a 14.4 nautical mile radius centered on the Nez Perce VOR/DME to lat. 46°27'00"N., long. 116°32'09"W.; east to lat. 46°25'30"N., long. 116°26'03"W.; south to lat. 46°13'20"N., long. 116°30'04"W.; west to lat. 46°14'33"N., long. 116°35'15"W.; then via the arc of a 14.4 nautical mile radius centered on the Nez Perce VOR/DME; to lat. 46°09'00"N., long. 116°46'54"W.; north to lat. 46°17'00"N., long. 116°49'14"W.; west to lat. 46°18'05"N., long. 117°00'15"W.; west to lat. 46°17'42"N., long. 117°22'04"W.; south to lat. 46°10'30"N., long. 117°26'24"W.; west to lat. 46°12'00"N., long. 117°35'44"W.; north to point of beginning; that airspace extending upward from 1,200 feet above the surface, within an area bounded by a line beginning at lat. 46°00'00"N., long. 116°00'04"W., to lat. 46°00'00"N., long. 116°23'04"W., to lat. 45°39'00"N., long. 116°10'03"W., to lat. 45°30'00"N., long. 116°14'03"W., to lat. 45°23'00"N., long. 116°21'03"W., to lat. 45°25'00"N., long. 116°34'04"W., to lat. 45°30'00"N., long. 116°46'04"W., to lat. 46°00'00"N., long. 116°56'04"W.; thence west along lat. 46°00'00"N, to the Walla Walla VOR/DME 16.6 nautical mile radius, thence north along the 16.6 nautical mile radius until intercepting V-536, thence east along V-536 to long. 116°00'00"W.; thence south along long. 116°00'00"W., to lat. 46°00'00"N., to beginning.

* * * * *

Issued in Seattle, Washington on December 8, 1992.

Temple H. Johnson Jr.,

Manager, Air Traffic Division.

[FR Doc. 92-31425 Filed 12-28-92; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 11

[Docket No. RM93-5-000]

Revision of the Billing Procedures for Annual Charges for Administering Part I of the Federal Power Act; Notice of Proposed Rulemaking

December 17, 1992.

AGENCY: Federal Energy Regulatory Commission (Commission).

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Energy Regulatory Commission is proposing to revise the billing procedures for assessing annual charges for administering Part I of the Federal Power Act, 16 U.S.C. 792-833b. Under the revised procedures, the assessment of annual charges would be based on an estimate of the costs that will be incurred by the Commission during the fiscal year in which the annual charges are assessed. After the end of the fiscal year, the assessment would be recalculated based on the costs that were actually incurred during that fiscal year; the actual costs would be compared to the estimated costs; and the difference between the actual and estimated costs would be carried over as an adjustment to the assessment for the subsequent fiscal year. The allocation of costs among the licensees would continue to be based on the data supplied by the licensees with respect to the preceding fiscal year.

The Commission is also proposing to adopt a comparable procedure of current-year billing of the annual charges for the use of tribal land on Indian reservations.

DATES: Comments are due on or before January 28, 1993.

ADDRESSES: An original and 14 copies of written comments must be filed. All filings should refer to Docket No. RM93-5-000 and should be addressed to: Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Barry Smoler, Office of the General Counsel, Federal Energy Regulatory Commission; 825 N. Capitol Street, NE., Washington, DC 20426 (202) 208-1269.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during business hours in Room 3104, 941 North Capitol Street, NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208-1397. To access CIPS, set your communications software to use 300, 1200, or 2400 baud, full duplex, no parity, 9 data bits, and 1 stop bit. The full text of this document will be available to CIPS for 30 days from the date of issuance. The complete text on diskette in Wordperfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, located in Room 3106, 941 North Capitol Street, NE., Washington, DC 20426.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is proposing to revise the billing procedures for assessing annual charges for administering part I of the Federal Power Act (FPA).[1] Under the revised procedures, the assessment of annual charges would be based on an estimate of the costs that will be incurred by the Commission during the fiscal year in which the annual charges are assessed. After the end of the fiscal year, the assessment would be recalculated based on the costs that were actually incurred during that fiscal year; the actual costs would be compared to the estimated costs; and the difference between the actual and estimated costs would be carried over as an adjustment to the assessment for the subsequent fiscal year. The allocation of costs among the licensees would continue to be based on the data supplied by the licensees with respect to the preceding fiscal year.

The Commission is also proposing to adopt a comparable procedure of current-year billing of the annual charges for the use of tribal land on Indian reservations.

The Commission is inviting comments on these proposed amendments to its regulations.

II. Background and Discussion

The Commission is required by section 10(e) of the FPA[2] to collect, among other things, annual charges for the cost of administering part I of the FPA. Part II of the Commission's regulations[3] provides the manner in which licensees are charged for such costs.[4] The reimbursable costs are determined on a fiscal year basis.

The Commission's current regulations do not specify how the reimbursable costs are to be determined, and neither

[1] 16 U.S.C. 792-823b.

[2] 16 U.S.C. 803(e).

[3] 18 CFR part II.

[4] Prior to the adoption of the current regulations in 1958 and 1963, administrative charges were in the nature of set fees that were billed for a calendar year. The present system of basing the annual charges on actual costs was adopted in Order No. 205, 19 F.P.C. 907 (1958) (with respect to municipal licensees only) and in Order No. 272, 30 F.P.C. 1333 (1963) (all other licensees); *see also* Order No. 272A, 31 F.P.C. 1555 (1964).

does the FPA. The Commission's past practice has been to determine the annual charges billed to the licensees in the current fiscal year based on the costs actually incurred by the Commission during the preceding fiscal year. The total costs are then allocated among the licensees based on the amount of each licensee's authorized horsepower, or horsepower and generation, during the preceding fiscal year. The allocation is based on the ratio of each licensee's horsepower (or horsepower and generation) to the total of all of the licensees' horsepower (or horsepower and generation).[5]

There is, however, a substantial lag between the time the costs are incurred and the time they are recovered. In addition, there is a variation from year to year in the costs incurred by the Commission in administering part I of the FPA. The purpose of the proposed rule, therefore, is to revise the Commission's billing practices in such a manner as to enable it to fully recover its costs during the fiscal year in which those costs are incurred.

The proposed rule would achieve this objective by adding to § 11.1 of the current regulations a new paragraph (g). This provision would retain the use of prior-year actual data from licensees to determine the allocation of the costs among the licensees, but would adopt a practice of basing the assessments on an estimate of the costs that will be incurred by the Commission in the current fiscal year (rather than basing the assessments on the costs actually incurred in the preceding fiscal year). The estimate would be based on the Commission's budget for the current fiscal year.

Proposed new paragraph (g) also provides for an adjustment in the subsequent fiscal year. After the end of the fiscal year, the estimated costs would be compared to the actual costs; the assessments would be recalculated based on the costs actually incurred; and the difference between estimated and actual costs would be carried over as an adjustment to the assessment for the subsequent fiscal year.

There is ample precedent for adopting these billing procedures. These are, in fact, the billing procedures that the Commission currently utilizes to recover the costs it incurs in administering the Natural Gas Act (NGA), the Natural Gas Policy Act (NGPA), the Interstate Commerce Act (ICA), and Parts II and III of the FPA itself. Those costs are recovered through the assessment of annual charges against gas and oil pipelines and public utilities pursuant to the mandate of section 3401 of the Omnibus Budget Reconciliation Act of 1986 (OBRA),[6] which requires the Commission to recover all of its costs for the fiscal year through annual charges and fees.[7] The annual charges assessed pursuant to OBRA are based on an estimate of the Commission's current-fiscal-year costs, with subsequent adjustments based on actual costs.[8] The proposed rule would conform the billing procedures for the annual charges to recover the costs of administering Part I of the FPA to the billing procedures that the Commission currently uses for the annual charges to recover (pursuant to OBRA) the costs of administering Parts II and III of the FPA, as well as the NGA, the NGPA, and the ICA.[9] These procedures have worked well, and we perceive no reason why they should not also pertain to the collection of the annual charges that arise under Part I of the FPA.

Under the proposed rule, the bills issued by the Commission in fiscal year 1993 would assess annual charges for the costs incurred by the Commission (in administering Part I of the FPA) in fiscal year 1993, the then-current year. The Commission also incurred costs in fiscal year 1992, which it will not be able to recover unless it also assesses charges for fiscal year 1992. The Commission recognizes that billing for the costs of both fiscal years 1992 and 1993 during one year could cause hardship for the hydropower industry. Therefore, the Commission invites comments as to whether the billing of the costs for both fiscal years 1992 and 1993 in one year would cause hardship for the hydropower industry, and if so, invites suggestions as to how to mitigate that hardship, consistent with law.[10]

One method under consideration is to bill fiscal year 1992 costs in three annual installments, starting in either fiscal year 1993 or 1994. This method would be consistent with the method used for phasing in U.S. lands charges in Order No. 469, issued May 8, 1987.[11]

In this regard, the Commission notes that in 1986 it began including in its assessments of annual charges to licensees, the costs incurred by other federal agencies in the performance of their own responsibilities to administer Part I of the FPA.[12] The Commission also notes that Congress recently enacted section 1701(a) of the Energy Policy Act of 1992,[13] which provides for the recovery through annual charges of "any reasonable costs incurred by fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under" Part I of the FPA. The Commission intends to address the implementation of section 1701(a) in a separate rulemaking. The Commission recognizes that the matter of recovery of costs incurred by other agencies is related to the issues addressed herein, but those issues are beyond the scope of this rulemaking and will be addressed in the follow-up rulemaking alluded to above.

Finally, the Commission proposes to add a new paragraph (c) to § 11.4, to indicate that the annual charges for the use of tribal land within an Indian reservation will be billed during the year in which the land is used. The Commission's past practice has been to issue bills for the preceding year's use of such land. The Commission believes that the reasoning applicable to current-year billing for administrative charges, as discussed above, is equally applicable to current-year billing for the use of tribal land. The Commission proposes to bill in fiscal year 1993 the charges for both the fiscal year 1992 and the fiscal year 1993 use of tribal land. Inasmuch as the charges for use of tribal

[5] The allocations are performed separately for municipal and non-municipal licensees. For municipal licensees, the allocation is based solely on the project's authorized horsepower. For non-municipal licensees, the allocation is based on a combination of the project's authorized horsepower and the power actually generated. *See* 18 CFR 11.1.

[6] Pub. L. No. 99–509, Title III, Subtitle E, section 3401 (1986) (codified as amended at 42 U.S.C. 7178). OBRA is implemented in Part 382 of the Commission's Regulations, 18 CFR Part 382.

[7] *See* Joint Explanatory Statement of the Committee of Conference to Accompany H.R. 5300 (Conference Report), H.R. Rep. No. 1012, 99th Cong., 2d Sess. 238, *reprinted in* 1986 U.S.C.C.A.N. 3607, 3883.

[8] The procedures for estimating the costs and later adjusting the assessments are described in Order No. 472, 52 FR 18201 (May 14, 1987), FERC Stats. & Regs. (Regulations Preambles 1986–1990) ¶30,746 at pp. 30,612 and 30,616–17 (1987).

[9] The annual charges billed pursuant to OBRA, even though they are based on the Commission's current-year costs, use prior-year company data to determine the current-year allocation of charges to the pipelines and utilities. The proposed rule would continue this practice for hydropower licensees as well.

[10] The following information may be of assistance to the industry in commenting on the above issues: From data available at this time, it appears that the Commission's FPA Part I administration costs increased about 25 percent between fiscal years 1991 and 1992, and are expected to increase about 6 to 10 percent between 1992 and 1993.

[11] FERC Stats. & Regs. (Regulations Preambles 1986–1990) ¶30,741 at p. 30,591.

[12] The background is described in the preamble to the above-referenced 1987 final rule on annual charges to recover hydroelectric administration costs and land use fees, FERC Stats. & Regs. ¶30,741 at pp. 30,591–92.

[13] P.L. 102–486, October 24, 1992.

land are comparatively small, the Commission perceives no need to bill the 1992 charges over a period of more than one year.

III. Regulatory Flexibility Certification

The Regulatory Flexibility Act of 1980 (RFA)[14] generally requires a description and analysis of proposed regulations that will have a significant economic impact on a substantial number of small entities.[15] Pursuant to section 605(b) of the RFA, the Commission hereby certifies that the regulations proposed herein will not have a significant economic impact on a substantial number of small entities.

IV. Environmental Statement

Issuance of this notice of proposed rulemaking does not constitute a major federal action having a significant adverse impact on the quality of the human environment under the Commission's regulations implementing the National Environmental Policy Act.[16] The regulations proposed herein are procedural in nature and therefore fall within the categorical exemptions provided in the Commission's regulations. Consequently, neither an environmental impact statement nor an environmental assessment is required.[17]

Information Collection Statement

The Office of Management and Budget's (OMB) regulations require that OMB approve certain information collection requirements imposed by agency rule.[18] However, the regulations proposed herein contain no information collection requirements and therefore are not subject to OMB approval.

VI. Public Comment Procedures

The Commission invites all interested persons to submit written comments on the matters discussed in this notice of proposed rulemaking. An original and 14 copies of the written comments must be filed with the Commission January 28, 1992. Comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, DC 20426, during regular business hours, and should refer to Docket No. RM93–5–000.

All written comments will be placed in the Commission's public files and will be available for inspection in the Commission's Public Reference Room, Room 3104, 941 North Capitol Street, North East, Washington, DC 20426 during regular business hours.

List of Subjects in 18 CFR Part 11

Electric power, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission proposes to amend part 11 of chapter I, title 18, *Code of Federal Regulations*, as set forth below.

By direction of the Commission.

Lois D. Cashell,

Secretary.

PART 11—ANNUAL CHARGES UNDER PART I OF THE FEDERAL POWER ACT

1. The authority citation for Part 11 is revised to read as follows:

Authority: 16 U.S.C. 791a–825r; 42 U.S.C. 7101–7352.

2. In § 11.1, a new paragraph (g) is added, to read as follows:

§ 11.1 Cost of administration.

* * * * *

(g) With respect to costs incurred by the Commission, the assessment of annual charges will be based on an estimate of the costs of administration of part I of the Federal Power Act that will be incurred during the fiscal year in which the annual charges are assessed. After the end of the fiscal year, the assessment will be recalculated based on the costs of administration that were actually incurred during that fiscal year; the actual costs will be compared to the estimated costs; and the difference between the actual and estimated costs will be carried over as an adjustment to the assessment for the subsequent fiscal year. The issuance of bills based on the administrative costs incurred by the Commission during the year in which the bill is issued will commence in 1993. The annual charge for the administrative costs that were incurred in fiscal year 1992 will be billed in three annual installments, which will be payable in fiscal years 1993, 1994, and 1995.

3. In § 11.4, a new paragraph (c) is added, to read as follows:

§ 11.4 Use of government dams for pumped storage projects, and use of tribal lands.

* * * * *

(c) Commencing in 1993, the annual charges for any project using tribal land within Indian reservations will be billed during the fiscal year in which the land is used, for the use of that land during that year.

[FR Doc. 92–31261 Filed 12–28–92; 8:45 am]

BILLING CODE 6717–01–M

[14] 5 U.S.C. 601–612

[15] Section 601(c) of the RFA defines a "small entity" as a small business, a small not-for-profit enterprise, or a small governmental jurisdiction. A "small business" is defined by reference to section 3 of the Small Business Act as an enterprise which is "independently owned and operated and which is not dominant in its field of operation." 15 U.S.C. 632(a).

[16] *See* Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. (Regulations Preambles 1986–1990) ¶ 30,783 (Dec. 10, 1987) (codified at 18 CFR Part 380).

[17] *See* 18 CFR 380.4(a)(1)

[18] 5 CFR Part 1320.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[PS–19–92]

RIN 1545–AR15

Carryover Allocations and Other Rules Relating to the Low-Income Housing Credit

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations concerning the low-income housing credit of section 42 of the Internal Revenue Code. The proposed regulations provide guidance with respect to: (1) Eligibility for a carryover allocation; (2) procedures for electing an appropriate percentage month; (3) the general public use requirement; (4) utility allowances to be used in determining gross rent; and (5) the inclusion of the cost of certain services in gross rent. The proposed regulations incorporate and expand upon the guidance provided by Notice 89–1, 1989–1 C.B. 620, and Notice 89–6, 1989–1 C.B. 625. This information will assist State and local housing credit agencies and taxpayers in complying with the requirements of section 42. These regulations affect taxpayers that apply for or claim the low-income housing tax credit and State and local housing credit agencies.

DATES: Written comments must be received by January 26, 1993. Requests to appear at a public hearing scheduled for 10 a.m. on February 16, 1993, and outlines of oral comments must also be received by January 26, 1993.

ADDRESSES: Send submissions to: Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, (attn: CC:CORP:T:R (PS–19–92), room 5228), Washington, DC 20044. Alternatively, comments, requests to appear at the public hearing, and outlines may be hand delivered to: CC:CORP:T:R (PS–19–92), Internal Revenue Service, room 5228, 1111 Constitution Ave., NW., Washington, DC 20224. The public hearing will be held in the Internal Revenue Service Auditorium, Seventh Floor, 7400 Corridor, Internal Revenue

Building, 1111 Constitution Ave., NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, contact Christopher J. Wilson (202) 622-3040 (not a toll-free call); concerning the hearing, contact Mike Slaughter, Regulations Unit, (202) 622-7190 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information requirements 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 collection of information requirements should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer T:FP, Washington, DC 20224.

The collection of information requirements in this proposed regulation are contained in § 1.42-6 (c), (d)(2), (d)(4); § 1.42-8 (a)(1), (a)(3), (a)(6), (b)(1), (b)(4); and § 1.42-10(b)(4)(ii)(B).

This information is required by the Internal Revenue Service to ensure that the requirements for a carryover allocation under section 42(h)(1) (E) or (F) of the Internal Revenue Code and the requirements for the appropriate percentage election are met. This information also is required to ensure that the proper utility allowances are being used.

The likely respondents/recordkeepers are individuals, business or other for-profit institutions, nonprofit institutions, and small businesses or organizations.

The following estimates are an approximation of the average time expected to be necessary for the collection of information. They are based on such information as is available to the Internal Revenue Service. Individual respondents/recordkeepers may require greater or less time, depending on their particular circumstances. Estimated total reporting and/or recordkeeping burden: 4,008 hours. The estimated annual burden per State or local government respondent/recordkeeper varies from 18.6 hours to 51.63 hours, with an estimated average of 39.61 hours. The estimated annual burden for all other respondent/recordkeepers varies from 1.90 hours to 6.20 hours, with an estimated average of 4.50 hours. *Estimated number of State or local government respondents/recordkeepers:* 55. *Estimated number of all other respondents/recordkeepers:* 1,000. *Estimated annual frequency of State or local government responses (for reporting requirements only):* 1. *Estimated annual frequency of all other responses (for reporting requirements only):* one time.

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 42 of the Internal Revenue Code of 1986, as amended. These amendments are proposed to provide guidance on several requirements of the low-income housing tax credit. These amendments incorporate and expand upon the guidance provided by Notices 89-1 and 89-6.

Explanation of Provisions

Carryover Allocations

Section 42 provides for a low-income housing credit that may be claimed as part of the general business credit under section 38. In general, the credit is allowable only if the owner of a qualified low-income building receives a housing credit allocation from a state or local housing credit agency (Agency).

Under section 42(h)(1)(E), an allocation (carryover allocation) may be made to a qualified building that has not yet been placed in service, provided the building is placed in service not later than the close of this second calendar year following the calendar year of the allocation. Section 42(h)(1)(E)(ii) defines a qualified building as any building that is part of a project if the taxpayer's basis in the project (as of the close of the calendar year of the allocation) is more than 10 percent of the taxpayer's reasonably expected basis in the project (as of the close of the second calendar year following the calendar year of the allocation). The legislative history to section 42 provides that the taxpayer's basis in the project is "land and depreciable basis." See 2 H.R. Conf. Rep. No. 1104, 100th Cong., 2d Sess. II-82 (1988), 1988-3 C.B. 82.

The proposed regulations provide guidance on the requirements that must be met for a carryover allocation, including guidance on ownership and which costs are includable in "carryover-allocation basis." Carryover-allocation basis is the basis used in determining whether the taxpayer has incurred more than 10 percent of its reasonably expected basis in the project for purposes of receiving an allocation of credit under section 42(h)(1)(E) (relating to carryover allocations for buildings) or (F) (relating to carryover allocations for multiple-building projects).

Generally, both the direct and indirect costs of acquiring, constructing, and rehabilitating property may be included in carryover-allocation basis, including certain costs incurred in acquiring a leasehold interest in property. On the date of the allocation a taxpayer's carryover-allocation basis need not be more than 10 percent of the reasonably expected basis in the project. However, the carryover allocation is not valid unless, as of the close of the calendar year of the allocation, the taxpayer has a carryover-allocation basis (land and depreciable basis) as of more than 10 percent of the reasonably expected basis in the project (land and depreciable basis) as of the close of the second following calendar year. Also, by the close of the calendar year of the allocation, the taxpayer must own land or depreciable real property that is expected to be part of the project.

The proposed regulations provide verification procedures an Agency must follow in ensuring that these requirements are met. The proposed regulations also provide rules for determining which costs are includable in carryover-allocation basis and the proper treatment of fees.

Election of Appropriate Percentage Month

Section 42(b)(2)(A) describes the amount of the low-income housing credit for any taxable year in the 10-year credit period. This amount is the applicable percentage of the qualified basis of each qualified low-income building. The applicable percentage for buildings placed in service after 1987 is normally the appropriate percentage prescribed by the Secretary for the month the building is placed in service.

Alternatively, the taxpayer may elect to use the appropriate percentage for the month in which the taxpayer and the Agency enter into an agreement for the building which is binding on the Agency, the taxpayer, and all successors in interest as to the housing credit dollar amount to be allocated to the building. In the case of a substantially bond-financed building, the taxpayer may elect to use the appropriate percentage for the month in which the tax-exempt obligations are issued. In either case, the election must be made no later than the 5th day after the close of the elected month.

The proposed regulations provide guidance on making this election. The proposed regulations also clarify that,

depending on the Agency's determination under section 42(m)(2 as to the housing credit dollar amount necessary for the financial feasibility of the building, the Agency may ultimately allocate more or less housing credit dollar amount than the amount specified in the binding agreement. The Agency may also specify an applicable percentage that is less, but not greater than, the appropriate percentage for the month the building is placed in service, or the month elected by the taxpayer.

Use by the general public

The legislative history of section 42 provides that residential rental units must be for use by the general public. The proposed regulations provide guidance on the circumstances when a residential rental unit is considered for use by the general public. Residential rental units are not for use by the general public, for example, if the units are provided only for members of a social organization or provided by an employer for its employees. In addition, the proposed regulations clarify Notice 89–6 by providing that only those residential rental units that are not for use by the general public, and not the entire building, are ineligible for the credit.

Utility allowances

A qualified low-income housing project is defined in section 42(g)(1) as any project for residential rental housing if the project meets one of the following tests elected by the taxpayer: (1) At least 20 percent of the residential units in the project are rent-restricted and occupied by individuals whose income is 50 percent or less of area median gross income; or (2) at least 40 percent of the residential units in the project are rent-restricted and occupied by individuals whose income is 60 percent or less of area median gross income. For a unit to qualify as "rent-restricted" within the meaning of section 42(g)(1), the gross rent for the unit must not exceed 30 percent of the income limitation applicable to the unit. If the cost of any utilities (other than telephone) is paid directly by a tenant, a utility allowance reflecting that cost is considered part of that tenant's gross rent. Utility allowances are prescribed by the Secretary taking into account utility allowance determinations made under section 8 of the United States Housing act of 1937.

The proposed regulations provide guidance on the utility allowances that must be included in gross rent. The regulations incorporate the guidance provided in Notice 89–6 except that the utility allowance for a low-income unit occupied by a HUD-assisted tenant only applies to that unit, and does not affect the utility allowances of low-income units that are not occupied by HUD-assisted tenants.

Provision of services

The cost to tenants of services other than housing may also be included in gross rent. Section 42(g)(2)(B)(iii) provides a specific exception for certain services. Under that section, gross rent does not include any fee for a supportive service which is paid to the owner of the unit (on the basis of the low-income status of the tenant) by any governmental program of assistance (or by certain tax-exempt organizations described in section 501(c)(3)) if the program (or organization) provides rent assistance and the amount of rent assistance is not separable from the amount of assistance provided for supportive services. Costs to tenants of services, other than supportive services excepted by section 42(g)(2)(B)(iii), generally must be included in gross rent.

The proposed regulations provide that if the cost of any services provided to low-income tenants in connection with their occupancy of residential rental units is required to be paid by a tenant as a condition of occupancy, the cost generally must be included in gross rent. This section also incorporates: (1) The exception for fees paid for certain supportive services under section 42(g)(2)(B)(iii) which was enacted subsequent to the publication of Notice 89–6; and

(2) The practical alternative test in Rev. Rul. 91–38, 1991–2 C.B. 3, 12, of a qualified low-income building with a common dining facility.

Proposed Effective Date

These proposed regulations are proposed to be effective 60 days after date of publication of final regulations in the **Federal Register**. However, binding agreements, election statements, and carryover allocation documents made prior to the effective date of these regulations that conform to the requirements of Notice 89–1 need not be changed to conform to these regulations. Notice 89–1 and Notice 89–6 remain in effect for periods prior to the effective date of these regulations.

Special Analyses

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

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments that are submitted timely (preferably an original and eight copies) to the Internal Revenue Service. All comments will be available for public inspection and copying.

A public hearing will be held on Tuesday, February 16, 1993, at 10 a.m. in the Internal Revenue Service Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington DC. The rules of § 601.601(a)(3) of the "Statement of Procedural Rules" (26 CFR part 601) shall apply to the public hearing.

Persons who have submitted written comments by January 26, 1993, and who also desire to present oral comments at the hearing on the proposed regulations, should submit, not later than January 26, 1993, a request to speak and an outline of the oral comments to be presented at the hearing stating the time they wish to devote to each subject.

Each speaker (or group of speakers representing a single entity) will be limited to 10 minutes for an oral presentation exclusive of the time consumed by the questions from the panel for the government and answers thereto.

Because of controlled access restrictions, attendees cannot be admitted beyond the lobby of the Internal Revenue Building before 9:45 a.m.

An agenda showing the scheduling of the speakers will be made after outlines are received from the persons testifying. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

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

List of Subjects in 26 CFR 1.37–1 through 1.44A–4

Credits, Income taxes, Reporting and Recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority citation for part 1 is amended by adding a citation to read as follows:

Authority: 26 U.S.C. 7805 * * * Sections 1.42–6, 1.42–8, 1.42–9, 1.42–10, 1.42–11, and 1.42–12 also issued under 26 U.S.C. 42(n) * * *

Par. 2. Section 1.42–6 is added, § 1.42–7 is added and reserved, and § § 1.42–8 through 1.42–12 are added to read as follows:

§ 1.42–6 Buildings qualifying for carryover allocations.

(a) *Carryover allocations.* A "carryover allocation" is an allocation that meets the requirements of section 42(h)(1)(E). If a carryover allocation does not meet the requirements of section 42(h)(1)(E), for example because it is made with respect to a building that is not a qualified building (as defined in section 42(h)(1)(E)(ii)), it is not valid and is treated as if it had not been made.

(b) *Carryover-allocation basis*—(1) *In General.* Subject to the limitations of paragraph (b)(2) of this section, a taxpayer's basis in a project for purposes of section 42(h)(1)(E)(ii) (carryover-allocation basis) is the taxpayer's adjusted basis in land or depreciable real property that is expected to be part of the project, whether or not these amounts are includable in eligible basis under section 42(d). Thus, for example, if the project is to include property that is not residential rental property, such as commercial space, the basis attributable to the commercial space, although not includable in eligible basis, is includable in carryover-allocation basis. The adjusted basis of land and depreciable real property is determined under sections 1012 and 1016 of the Internal Revenue Code, and generally includes the direct and indirect costs of acquiring, constructing, and rehabilitating the property. Costs otherwise includable in carryover-allocation basis are not excluded by reason of having been incurred prior to the calendar year in which the carryover allocation is made.

(2) *Limitations*—For purposes of determining carryover-allocation basis under paragraph (b)(1) of this section, the following limitations apply.

(i) *Real property ownership.* A taxpayer does not have carryover-allocation basis in a project unless, by the close of the calendar year of allocation, the taxpayer is the owner, for federal income tax purposes, of land or depreciable real property that is expected to be part of the project. Accordingly, the lessee of land or depreciable real property that is expected to be part of a project has carryover-allocation basis in the leased property only if the lessee is treated, for federal income tax purposes, as the owner of the leased property. A taxpayer is not the owner of land or depreciable real property for federal income tax purposes by reason of owning an option to acquire the property, making a nonrefundable down payment with respect to the property, or entering into an agreement to acquire the property.

(ii) *Property not part of project.* Carryover-allocation basis does not include any portion of the adjusted basis of land of depreciable real property that is not reasonably expected to be part of the project for which the carryover allocation is made.

(iii) *High cost areas.* Any increase in eligible basis that may result under section 42(d)(5)(C) from the project's location in a qualified census tract or difficult development area is not taken into account in determining carryover-allocation basis or reasonably expected basis.

(iv) *Amounts not treated as paid or incurred.* An amount is not includable in carryover-allocation basis unless it is treated as paid or incurred under the method of accounting used by the taxpayer. For example, a cash method taxpayer cannot include construction costs in carryover-allocation basis unless the costs have been paid, and an accrual method taxpayer cannot include construction costs in carryover-allocation basis unless they have been properly accrued. See paragraph (b)(2)(vi) of this section for a special rule for fees paid to related persons.

(v) *Credit application and monitoring fees.* Low-income housing credit application or compliance monitoring fees paid by a taxpayer to a state or local housing credit agency (Agency) are not includable in carryover-allocation basis.

(vi) *Other fees.* A fee other than those described in paragraph (b)(2)(v) of this section is includable in carryover-allocation basis only to the extent the requirements of paragraph (b)(2)(iv) of this section are met and—

(A) The fee is reasonable;

(B) The taxpayer is legally obligated to pay the fee;

(C) The fee is capitalized as part of the taxpayer's basis in land or depreciable real property that is expected to be part of the project;

(D) The fee is not paid (or to be paid) by the taxpayer to itself; and

(E) If the fee is paid (or to be paid) by the taxpayer to a related person, and the taxpayer uses the cash method of accounting, the taxpayer could properly accrue the fee under the accrual method of accounting (including the rules of section 461(h)). A person is a related person if the person bears a relationship to the taxpayer specified in sections 267(b) or 707(b)(1), or the person and the taxpayer are engaged in trades or businesses under common control (within the meaning of subsections (a) and (b) of section 52).

(3) *Reasonably expected basis.* Rules similar to the rules of paragraphs (a) and (b) of this section apply in determining the taxpayer's reasonably expected basis in the project (land and depreciable basis) as of the close of the second calendar year following the calendar year of the allocation.

(4) *Examples.* The following examples illustrate the rules of paragraphs (a) and (b) of this section.

Example 1. (i) *Facts.* C, an accrual-method taxpayer, receives a carryover allocation from Agency, the state housing credit agency, in May of 1993. As of that date, C has not begun construction of the low-income housing building C plans to build. However, C has owned the land on which C plans to build the building since 1985. C's basis in the land is $100,000. C reasonably expects that by the end of 1995, C's basis in the project of which the building is to be a part will be $2,000,000. C also expects that because the project is located in a qualified census tract, C will be able to increase its basis in the project to $2,600,000. Before the close of 1993, C incurs $150,000 of costs for architects' fees and site preparation. C properly accrues these costs under its method of accounting and capitalizes the costs.

(ii) *Determination of carryover-allocation basis.* C's $100,000 basis in the land is includable in carryover-allocation basis even though C has owned the land since 1985. The $150,000 of costs C has incurred for architects' fees and site preparation are also includable in carryover-allocation basis. The expected increase in basis due to the project's location in a qualified census tract is not taken into account in determining C's carryover-allocation basis. Accordingly, C's carryover-allocation basis in the project of which the building is a part is $250,000.

(iii) *Determination of whether building is qualified.* C's reasonably expected basis in the project at the close of the second calendar year following the calendar year of allocation is $2,000,000. The expected increase in basis due to the project's location in a qualified

census tract is not taken into account in determining this amount. Because C's carryover-allocation basis is more than 10 percent of C's reasonably expected basis in the project of which the building is a part, the building for which C received the carryover-allocation is a qualified building for purposes of section 42(h)(1)(E) and paragraph (a) of this section.

Example 2. (i) *Facts.* D, an accrual-method taxpayer, receives a carryover allocation from Agency, the state housing credit agency, in May of 1993. As of that date, D has not begun construction of the low-income housing building D plans to build and does not own the land on which D plans to build the building. In 1993, D incurs some costs related to the planned building, including architects' fees. At the close of 1993, D does not own the land on which the project is expected to be constructed or any depreciable real property that is expected to be part of the project.

(ii) *Determination of carryover-allocation basis.* Because D does not own the land on which the project is expected to be constructed or any depreciable real property that is expected to be part of the project, D has no carryover-allocation basis in the project of which the building is a part.

(iii) *Determination of whether building is qualified.* Because D's carryover-allocation basis is not more than 10 percent of D's reasonably expected basis in the project of which the building is a part, the building for which D received a carryover allocation is not a qualified building for purposes of section 42(h)(1)(E) and paragraph (a) of this section. The carryover allocation to D is not valid, and is treated as if it had not been made.

(c) *Verification of ownership and basis by Agency*—(1) *Verification requirement.* An agency that makes a carryover allocation to a taxpayer must verify that, as of the close of the calendar year of allocation, the taxpayer—

(i) Owns land or depreciable real property that is expected to be part of the project; and

(ii) Has incurred more than 10 percent of the reasonably expected basis in the project (land and depreciable basis).

(2) *Manner of verification*—(i) *Property ownership.* An Agency may verify ownership of land or depreciable real property by obtaining a certification from the taxpayer, in writing and under penalty of perjury, that the taxpayer is the owner of the land or depreciable real property. The certification must be accompanied by supporting documentation that the Agency must review. Supporting documentation may include, for example, a copy of the title records of the jurisdiction where the property is situated, a copy of the deed to the property, or a copy of a title insurance policy on the property that names the taxpayer as owner. Alternatively, an Agency may verify ownership by obtaining from the taxpayer the written legal opinion of an attorney, that based upon the attorney's title search or examination or other relevant documents, the taxpayer is, at the time of the search or examination, the owner of the land or depreciable real property.

(ii) *Basis.* An Agency may verify that a taxpayer has incurred more than 10 percent of its reasonably expected basis in a project by obtaining a certification from the taxpayer, in writing and under penalty of perjury, that the taxpayer has incurred by the close of the calendar year of the allocation more than 10 percent of the reasonably expected basis in the project. The certification must be accompanied by supporting documentation that the Agency must review. Supporting documentation may include, for example, copies of checks or other records of payments. Alternatively, an Agency may verify that the taxpayer has incurred adequate basis by obtaining from an attorney or certified public accountant a written certification to the Agency, that the attorney or accountant has examined all eligible costs incurred with respect to the project and that, based upon this examination, it is the attorney or accountant's belief that the taxpayer has incurred more than 10 percent of its reasonably expected basis in the project by the close of the calendar year of the allocation.

(3) *Time of verification.* An Agency may require that ownership and basis certifications be submitted to or received by the Agency prior to the close of the calendar year or within a reasonable time after the close of the calender year. The Agency will need to verify ownership and basis in order to accurately complete the Form 8610, Annual Low-Income Housing Credit Agencies Report, for the calendar year. If certification is not timely made, or supporting documentation is lacking, inadequate, or does not actually support the certification, the Agency should notify the taxpayer and try to get adequate documentation. If the Agency cannot verify that a carryover allocation is valid before the Form 8610 is filed, the allocation is treated as if it had not been made and the carryover allocation document should not be filed with the Form 8610.

(d) *Requirements for making carryover allocations*—(1) *In general.* Generally, an allocation is made when an Agency issues the Form 8609, Low-Income Housing Credit Allocation Certification, for a building. See § 1.42–1T(d)(8)(ii). An Agency does not issue the Form 8609 for a building until the building is placed in service. However, in cases where allocations of credit are made pursuant to section 42(h)(1)(E) (relating to carryover allocations for buildings) or section 42(h)(1)(F) (relating to carryover allocations for multiple-building projects), Form 8609 is not used as the allocating document because the buildings are not yet in service. When an allocation is made pursuant to section 42(h)(1) (E) or (F), the allocating document is the document meeting the requirements of paragraph (d)(2) of this section. In addition, when an allocation is made pursuant to section 42(h)(1)(F), the requirements of paragraph (d)(3) of this section must be met for the allocation to be valid. An allocation pursuant to section 42(h)(1) (E) or (F) reduces the state housing credit ceiling for the year in which the allocation is made, whether or not the Form 8609 is also issued in that year.

(2) *Requirements for allocation.* An allocation pursuant to section 42(h)(1) (E) or (F) is made when an allocation document containing the following information is completed, signed, and dated by an authorized official of the Agency:

(i) The address of each building in the project, or if none exists, a specific description of the location of each building;

(ii) The name, address, and taxpayer identification number of the taxpayer receiving the allocation;

(iii) The name and address of the Agency;

(iv) The taxpayer identification number of the Agency;

(v) The date of the allocation;

(vi) The housing credit dollar amount allocated to the building or project, as applicable;

(vii) The taxpayer's reasonably expected basis in the project (land and depreciable basis) as of the close of the second calendar year following the calendar year in which the allocation is made;

(viii) The taxpayer's basis in the project (land and depreciable basis) as of the close of the calendar year in which the allocation is made and the percentage that basis bears to the reasonably expected basis in the project (land and depreciable basis) as of the close of the second following calendar year;

(ix) The date that each building in the project is expected to be placed in service; and

(x) The Building Identification Number (B.I.N.) to be assigned to each building in the project. The B.I.N. must reflect the year the allocation is made, regardless of the year that the building is placed in service. Rehabilitation

expenditures treated as a separate new building under section 42(e) should not have a separate B.I.N. if the building to which the rehabilitation expenditures are made has a B.I.N. In this case, the B.I.N. used for the rehabilitation expenditures shall be the B.I.N. previously assigned to the building.

(3) *Special rules for project-based allocations*—(i) *In general.* An allocation pursuant to section 42(h)(1)(F) (a project-based allocation) must meet the requirements of this section as well as the requirements of section 42(h)(1)(F).

(ii) *Requirement of section 42(h)(1)(F)(i)(III).* An allocation satisfies the requirement of section 42(h)(1)(F)(i)(III) if the Form 8609 that is issued for each building that is placed in service in the project states the portion of the project-based allocation that is applied to that building.

(4) *Recordkeeping requirements.*—(i) *Taxpayer.* When an allocation is made pursuant to section 42(h)(1) (E) or (F), the taxpayer must retain a copy of the allocation document and file an additional copy with the Form 8609 that is issued to the taxpayer for a building after the building is placed in service. The taxpayer need only file a copy of the allocation document with the Form 8609 for the building for the first year the credit is claimed. However, the Form 8609 must be filed for the first tax year in which the credit is claimed and for each tax year thereafter throughout the compliance period, whether or not a credit is claimed for the tax year.

(ii) *Agency.* The Agency must retain a copy of the allocation document and file the original with the Agency's Form 8610 that accounts for the year the allocation is made. The Agency must also retain a copy of the Form 8609 that is issued to the taxpayer and file the original with the Agency's Form 8610 that reflects the year the form is issued.

(5) *Separate procedure for election of appropriate percentage month.* If a taxpayer receives an allocation under section 42(h)(1) (E) or (F) and wishes to elect under section 42(b)(2)(A)(ii) to use the appropriate percentage for a month other than the month in which a building is placed in service, the requirements specified in § 1.42–8 must be met for the election to be effective.

(e) *Special rules.* The following rules apply for purposes of this section.

(1) *Treatment of partnerships and other flow-through entities.* With respect to taxpayers who own projects through partnerships or other flow-through entities (*e.g.*, S corporations, estates, or trusts), carryover-allocation basis is determined at the entity level using the rules provided by this section. In addition, the entity is responsible for providing to the Agency the certifications and documentation required under the verification provisions of this section.

(2) *Transferees.* If land or depreciable real property that is expected to be part of a project is transferred after a carryover allocation has been made for a building that is expected to be part of the project, but before the close of the calendar year of the allocation, the transferee's carryover-allocation basis is determined under the principles of this section, section 42(d)(7), and Rev. Rul. 91–38, 1991–2 C.B. 3 (see § 601.601(d)(2)(ii)(*b*) of this chapter). In addition, the transferee is treated as the taxpayer for purposes of the verification provisions of this section, and therefore is responsible for providing to the Agency the required certifications and documentation.

§ 1.42–7 Substantially bond-financed buildings. [Reserved]

§ 1.42–8 Election of appropriate percentage month.

(a) *Election under section 42(b)(2)(A)(ii)(I) to use the appropriate percentage for the month of a binding agreement*—(1) *In general.* For purposes of section 42(b)(2)(A)(ii)(I), an agreement between a taxpayer and an Agency as to the housing credit dollar amount to be allocated to a building is considered binding if it—

(i) Is in writing;

(ii) Is binding under state law on the Agency, the taxpayer, and all successors in interest;

(iii) Specifies the type(s) of building(s) to which the housing credit dollar amount applies (*i.e.*, a newly constructed or existing building, or substantial rehabilitation treated as a separate new building under section 42(e));

(iv) Specifies the housing credit dollar amount to be allocated to the building(s); and

(v) Is dated and signed by the taxpayer and the Agency during the month in which requirements of paragraphs (a)(1) (i) through (iv) of this section are met.

(2) *Effect on state housing credit ceiling.* Generally, a binding agreement described in paragraph (a)(1) of this section is an agreement by the Agency to allocate credit to the taxpayer at a future date. The binding agreement may include a reservation of credit or a binding commitment (under section 42(h)(1)(C)) to allocate credit in a future tax year. A reservation or a binding commitment to allocate credit in a future year has no effect on the state housing credit ceiling until the year the Agency actually makes an allocation. However, if the binding agreement is also a carryover allocation under section 42(h)(1) (E) or (F), the state housing credit ceiling is reduced by the amount allocated by the Agency to the taxpayer in the year the carryover allocation is made. For a binding agreement to be a valid carryover allocation, the requirements of paragraph (a)(1) of this section and § 1.42–6 must be met.

(3) *Time and manner of making election.* An election under section 42(b)(2)(A)(ii)(I) may be made either as part of the binding agreement under paragraph (a)(1) of this section to allocate a specific housing credit dollar amount or in a separate document that references the binding agreement. In either case, the election must—

(i) Be in writing;

(ii) Reference section 42(b)(2)(A)(ii)(I);

(III) Be signed by the taxpayer;

(iv) If it is in a separate document, reference the binding agreement that meets the requirements of paragraph (a)(1) of this section; and

(v) Be notarized by the 5th day following the end of the month in which the binding agreement was made.

(4) *Multiple agreements*—(i) *Rescinded agreements.* A taxpayer may not make an election under section 42(b)(2)(A)(ii)(I) for a building if an election has previously been made for the building for a different month. For example, assume a taxpayer entered into a binding agreement for allocation of a specific housing credit dollar amount to a building and made the election under section 42(b)(2)(A)(ii)(I) to apply the appropriate percentage for the month of the binding agreement. If the binding agreement subsequently is rescinded under state law, and the taxpayer enters into a new binding agreement for allocation of a specific housing credit dollar amount to the building, the taxpayer must apply to the building the appropriate percentage for the elected month of the rescinded binding agreement. However, if no prior election was made with respect to the rescinded binding agreement, the taxpayer may elect the appropriate percentage for the month of the binding agreement.

(ii) *Increases in credit.* The election under section 42(b)(2)(A)(ii)(I), once made, applies to any increase in the credit amount allocated for a building, whether the increase occurs in the same or a subsequent year. However, in the case of a binding agreement (or carryover allocation that is treated as a binding agreement) to allocate a credit amount under section 42(e)(1) for substantial rehabilitation treated as a separate new building, a taxpayer may

make the election under section 42(b)(2)(A)(ii)(I) notwithstanding that a prior election under section 42(b)(2)(A)(ii)(I) is in effect for a prior allocation of credit for substantial rehabilitation that was previously placed in service under section 42(e).

(5) *Amount allocated.* The housing credit dollar amount eventually allocated to a building may be more or less than the amount specified in the binding agreement. Depending on the Agency's determination pursuant to section 42(m)(2) as to the financial feasibility of the building (or project), the Agency may allocate a greater housing credit dollar amount to the building (provided that the Agency has additional housing credit dollar amounts available to allocate for the calendar year of the allocation) or the Agency may allocate a lesser housing credit dollar amount. Under section 42(h)(7)(D), in allocating a housing credit dollar amount, the Agency must specify the applicable percentage and maximum qualified basis of the building. The applicable percentage may be less, but not greater than, the appropriate percentage for the month the building is placed in service, or the month elected by the taxpayer under section 42(b)(2)(A)(ii)(I). Whether the appropriate percentage is the appropriate percentage for the 70 percent present value credit or the 30 percent present value credit is determined under section 42(i)(2) when the building is placed in service.

(6) *Procedures*—(i) *Taxpayer.* The taxpayer must give the original notarized election statement to the Agency before the close of the 5th calendar day following the end of the month in which the binding agreement is made. The taxpayer must retain a copy of the binding agreement and the election statement and must file an additional copy of each with the taxpayer's Form 8609, Low-Income Housing Credit Allocation Certification, for the first tax year in which credit is claimed for the building.

(ii) *Agency.* The Agency must file with the Internal Revenue Service the original of the binding agreement and the election statement with the Agency's Form 8610, Annual Low-Income Housing Credit Agencies Report, that accounts for the year the allocation is actually made. The Agency must also retain a copy of the binding agreement and the election statement.

(7) *Examples.* The following examples illustrate the provisions of this section. In each example, X is the taxpayer, Agency is the state housing credit agency, and the carryover allocations meet the requirements of § 1.42–6 and are otherwise valid.

Example 1. (i) In April 1993, X and Agency enter into an agreement that Agency will allocate $100,000 of housing credit dollar amount for the low-income housing building X is constructing. The agreement is binding and meets all the requirements of paragraph (a)(1) of this section. The agreement is a reservation of credit, not an allocation, and therefore has no effect on the state housing credit ceiling. Before May 5, 1993, X signs and has notarized a written election statement that meets the requirements of paragraph (a)(3) of this section. The applicable percentage for the building is the appropriate percentage for the month of April 1993.

(ii) Agency makes a carryover allocation of $100,000 of housing credit dollar amount for the building on October 2, 1993. The carryover allocation reduces Agency's state housing credit ceiling for 1993. Due to unexpectedly high construction costs, when X places the building in service in July 1994, the product of the building's qualified basis and the applicable percentage for the building (the appropriate percentage for the month of April 1993) is $150,000, rather than $100,000. Notwithstanding that only $100,000 of credit was allocated for the building in 1993, Agency may allocate an additional $50,000 of housing credit dollar amount for the building from its state housing credit ceiling for 1994. The appropriate percentage for the month of April 1993 is the applicable percentage for the building for the entire $150,000 of credit allocated for the building, even though separate allocations were made in 1993 and 1994. Because allocations were made for the building in two separate calendar years, Agency must issue two forms 8609 to X. One form 8609 must reflect the $100,000 allocation made in 1993, and the other Form 8609 must reflect the $50,000 allocation made in 1994.

(iii) X gives the original notarized statement to Agency before May 5, 1993, and retains a copy of the binding agreement, election statement, and carryover allocation document. X files a copy of the binding agreement, election statement, and carryover allocation document with X's Form 8609 for the first tax year in which X claims credit for the building.

(iv) Agency files the original of the binding agreement, election statement, and 1993 carryover allocation document with its 1993 Form 8610. Agency retains a copy of the binding agreement, election statement, and carryover allocation document. After the building is placed in service in 1994, Agency issues to X a copy of the Form 8609 reflecting the 1993 carryover allocation of $100,000 and files the original of that form with its 1994 Form 8610. Agency also files the original of the 1994 Form 8609 reflecting the $50,000 allocation with its 1994 Form 8610 and issues X a copy of the 1994 Form 8609. Agency retains copies of the Forms 8609 that are issued to X.

Example 2. (i) In July 1993, X and Agency enter into an agreement that Agency will allocate $70,000 of housing credit dollar amount for rehabilitation expenditures that X is incurring and that X will treat as a new low-income housing building under section 42(e)(1). The agreement is binding and meets all the requirements of paragraph (a)(1) of this section. The agreement is a reservation of credit, not an allocation, and therefore has no effect on Agency's state housing credit ceiling. Before August 5, 1993, X signs and has notarized a written election statement that meets the requirements of paragraph (a)(3) of this section. The applicable percentage for the building is the appropriate percentage for the month of July 1993. Agency makes a carryover allocation of $70,000 of housing credit dollar amount for the building on November 15, 1993. The carryover allocation reduces by $70,000 Agency's state housing credit ceiling for 1993.

(ii) In October 1994, X and Agency enter into another binding agreement meeting the requirements of paragraph (a)(1) of this section. Under the agreement, Agency will allocate $50,000 of housing credit dollar amount for additional rehabilitation expenditures by X that qualify as a second separate new building under section 42(e)(1). Before November 5, 1994, X signs and has notarized a written election statement meeting the requirements of paragraph (a)(3) of this section. On December 1, 1994, X receives a carryover allocation under section 42(h)(1)(E) for $50,000. The carryover allocation reduces by $50,000 Agency's state housing credit ceiling for 1994. The applicable percentage for the rehabilitation expenditures treated as the second separate new building is the appropriate percentage for the month of October 1994, not July 1993. The appropriate percentage for the month of July 1993 still applies to the allocation of $70,000 for the rehabilitation expenditures treated as first separate new building. Because allocations were made for the building in two separate calendar years, Agency must issue two Forms 8609 to X. One Form 8609 must reflect the $70,000 allocation made in 1993, and the other Form must reflect the $50,000 allocation made in 1994.

(iii) X gives the first original notarized statement to Agency before August 5, 1993, and retains a copy of the first binding agreement, election statement, and carryover allocation document issues in 1993. X gives the second original notarized statement to Agency before November 5, 1994, and retains a copy of the second binding agreement, election statement, and carryover allocation document issued in 1994. X files a copy of the binding agreements, election statements, and carryover allocation documents with X's Forms 8609 for the first tax year in which X claims credit for the buildings.

(iv) Agency retains a copy of the binding agreements, election statements, and carryover allocation documents, Agency files the original of the first binding agreement, election statement and 1993 carryover allocation document with its 1993 Form 8610. Agency files the original of the binding agreement, election statement, and 1994 carryover allocation document with its 1994 Form 8610. After X notifies Agency of the date each building is placed in service, the Agency will issue copies of the respective

Forms 8609 to X, and file the originals of those forms with the Agency's Form 8610 that reflects the year each form is issued. The Agency also retains copies of the Forms 8609.

(b) *Election under section 42(b)(2)(A)(ii)(II) to use the appropriate percentage for the month tax-exempt bonds are issued*—(1) *Time and manner of making election.* An election under section 42(b)(2)(A)(ii)(II) to use the appropriate percentage for the month tax-exempt bonds are issued must—

(i) Be in writing;

(ii) Reference section 42(b)(2)(A)(ii)(II);

(iii) Specify the percentage of the aggregate basis of the building and the land on which the building is located that is financed with the proceeds of obligations described in section 42(h)(4)(A) (tax-exempt bonds);

(iv) State the month in which the tax-exempt bonds are issued;

(v) State that the month in which the tax-exempt bonds are issued is the month elected for the appropriate percentage to be used for the building;

(vi) Be signed by the taxpayer; and

(vii) Be notarized by the 5th day following the end of the month in which the bonds are issued.

(2) *Bonds issued in more than one month.* If a building described in section 42(h)(4)(B) (substantially bond-financed building) is financed with tax-exempt bonds issued in more than one month, the taxpayer may elect the appropriate percentage for any month in which the bonds are issued. Once the election is made, the appropriate percentage elected applies for the building regardless if bonds are issued in a different month. The requirements of this paragraph (b), including the time limitation contained in paragraph (b)(1)(vii) of this section, must also be met.

(3) *Limitations on appropriate percentage.* Under section 42(m)(2)(D), the credit allowable for a substantially bond-financed building is limited to the amount necessary to assure the project's feasibility. Accordingly, in making the determination under section 42(m)(2), an Agency may use an applicable percentage that is less, but not greater than, the appropriate percentage for the month the building is placed in service, or the month elected by the taxpayer under section 42(b)(2)(A)(ii)(II).

(4) *Procedures*—(1) *Taxpayer.* The taxpayer must provide the original notarized election statement to the Agency before the close of the 5th calendar day following the end of the month in which the bonds are issued. If an authority other than the Agency issues the tax-exempt bonds, the taxpayer must also give the Agency a signed statement from the issuing authority that certifies the information described in paragraphs (b)(1) (iii) and (iv) of this section. The taxpayer must file a copy of the election statement with the taxpayer's Form 8609 for the first tax year in which credit is claimed for the building. The taxpayer must also retain a copy of the election statement.

(ii) *Agency.* The Agency must file with the Internal Revenue Service the original of the election statement and the corresponding Form 8609 for the building with the Agency's Form 8610 that reflects the year the form is issued. The Agency must also retain a copy of the election statement and the Form 8609.

§ 1.42–9 For use by the general public.

(a) *General rule.* If a residential rental unit in a building is not for use by the general public, the unit is not eligible for a section 42 credit. A residential rental unit is for use by the general public if the unit is rented in a manner consistent with housing policy governing nondiscrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development (HUD). See HUD Handbook 4350.3 (or its successor).

(b) *Limitations.* Notwithstanding paragraph (a) of this section, if a unit is provided only for a member of a social organization or provided by an employer for its employees (except a resident manager unit that is a facility reasonably required by a project), the unit is not for use by the general public and the unit is not eligible for credit under section 42. In addition, any unit that is part of a hospital, nursing home, sanitarium, lifecare facility, trailer park, or intermediate care facility for the mentally and physically handicapped is not for use by the general public and is not eligible for credit under section 42.

(c) *Treatment of units not for use by the general public.* The costs attributable to a unit that is not for use by the general public are not excludable from eligible basis by reason of the unit's ineligibility for the credit under this section. However, in calculating the applicable fraction, the unit is treated as a residential rental unit that is not a low-income unit.

§ 1.42–10 Utility allowances.

(a) *Inclusion of utility allowances in gross rent.* If the cost of any utilities (other than telephone) for a residential rental unit are paid directly by the tenant(s), the gross rent for that unit includes the applicable utility allowance determined under this section. This section only applies for purposes of determining gross rent under section 42(g)(2)(B)(ii) as to rent-restricted units.

(b) *Applicable utility allowances*—(1) *FmHA-assisted buildings.* If a building receives assistance from the Farmers Home Administration (FmHA-assisted building), the applicable utility allowance for all rent-restricted units in the building is the utility allowance determined under the method prescribed by the Farmers Home Administration (FmHA) for the building. For example, if a building receives assistance under FmHA's section 515 program (whether or not the building or tenants also receive other state or federal assistance), the applicable utility allowance for all rent-restricted units in the building is determined using the method of Exhibit A–5 of FmHA Instruction 1944–E (or a successor method of determining utility allowances).

(2) *Buildings with FmHA assisted tenants.* If any tenant in a building receives FmHA rental assistance payments (FmHA tenant assistance), the applicable utility allowance for all rent-restricted units in the building (including any units occupied by tenants receiving HUD rental assistance payments) is the applicable FmHA utility allowance.

(3) *HUD-regulated buildings.* If neither a building nor any tenant in the building receives FmHA housing assistance, and the rents and utility allowances of the building are reviewed by the Department of Housing and Urban Development (HUD) on an annual basis (HUD-regulated building), the applicable utility allowance for all rent-restricted units in the building is the applicable HUD utility allowance.

(4) *Other buildings.* If a building is neither an FmHA-assisted nor a HUD-regulated building, and no tenant in the building receives FmHA tenant assistance, the applicable utility allowance for rent-restricted units in the building is determined under the following methods.

(i) *Tenants receiving HUD rental assistance.* The applicable utility allowance for any rent-restricted units occupied by tenants receiving HUD rental assistance payments (HUD tenant assistance) is the applicable Public Housing Authority (PHA) utility allowance established for the Section 8 Existing Housing Program.

(ii) *Other tenants*—(A) *General rule.* If none of the rules of paragraphs (b) (1), (2), (3), and (4)(i) of this section apply to any rent-restricted units in a building, the appropriate utility allowance for the units is the applicable PHA utility allowance. However, if a local utility company estimate is obtained for any

unit in the building in accordance with paragraph (b)(4)(ii)(B) of this section, that estimate becomes the appropriate utility allowance for all rent-restricted units of similar size and construction in the building. This local utility company estimate procedure is not available for and does not apply to units to which the rules of paragraph (b) (1), (2), (3), or (4)(i) apply.

(B) *Utility company estimate.* Any interested party (including a low-income tenant, a building owner, or an Agency) may obtain a local utility company estimate for a unit. The estimate is obtained when the interested party receives, in writing, information from a local utility company providing the estimated cost of that utility for a unit of similar size and construction for the geographic area in which the building containing the unit is located. The local utility company estimate may be obtained by an interested party at any time during the building's extended use period (see section 42(h)(6)(D)) or, if the building does not have an extended use period, during the building's compliance period (see section 42(i)(1)). Unless the parties agree otherwise, costs incurred in obtaining the estimate are borne by the initiating party. The interested party that obtains the local utility company estimate (the initiating party) must retain the original of the utility company estimate and must furnish a copy of the local utility company estimate to the owner of the building (where the initiating party is not the owner), and the Agency that allocated credit to the building (where the initiating party is not the Agency). The owner of the building must make available copies of the utility company estimate to the tenants in the building.

(c) *Changes in applicable utility allowance.* If at any time during the building's extended use period (or, if the building does not have an extended use period, the building's compliance period), the applicable utility allowance for a unit changes, the new utility allowance must be used to compute gross rents of rent-restricted units due 90 days after the change. For example, if rent must be lowered because a local utility company estimate is obtained that shows a higher utility cost than the otherwise applicable PHA utility allowance, the lower rent must be in effect for rent due more than 90 days after the date of the local utility company estimate.

§ 1.42–11 Provisions of services.

(a) *General rule.* The furnishing to tenants of services other than housing (whether or not the services are significant) does not prevent the units occupied by the tenants from qualifying as residential rental property eligible for credit under section 42. However, any charges to low-income tenants for services that are not optional generally must be included in gross rent for purposes of section 42(g).

(b) *Services that are optional*—(1) *General rule.* A service is optional if payment for the service is not required as a condition of occupancy. For example, for a qualified low-income building with a common dining facility, the cost of meals is not included in gross rent for purposes of section 42(g)(2)(A) if payment for the meals in the facility is not required as a condition of occupancy and a practical alternative exists for tenants to obtain meals other than from the dining facility.

(2) *Continual or frequent services.* If continual or frequent nursing, medical, or psychiatric services are provided, it is presumed that the services are not optional and the building is ineligible for the credit, as is the case with a hospital, nursing home, sanitarium, lifecare facility, or intermediate care facility for the mentally and physically handicapped. See also § 1.42–9(b).

(3) *Required services*—(i) *General rule.* The cost of services that are required as a condition of occupancy must be included in gross rent even if federal or state law requires that the services be offered to tenants by building owners.

(ii) *Exceptions*—(A) *Supportive services.* Section 42(g)(2)(B)(iii) provides an exception for certain fees paid for supportive services. For purposes of section 42(g)(2)(B)(iii), a supportive service is any service provided under a planned program of services designed to enable residents of a residential rental property to remain independent and avoid placement in a hospital, nursing home, or intermediate care facility for the mentally or physically handicapped. For a building described in section 42(i)(3)(B)(iii) (relating to transitional housing for the homeless), a supportive service includes any service provided to assist tenants in locating and retaining permanent housing.

(B) *Specific project exception.* Gross rent does not include the cost of mandatory meals in any federally-assisted project for the elderly and handicapped (in existence on or before January 9, 1989) that are authorized by 24 CFR part 278 to provide a mandatory meals program.

§ 1.42–12 Effective dates and transitional rules.

(a) *Effective date.* The rules set forth in §§ 1.42–6 and 1.42–8 through 1.42–12 are effective 60 days after publication of the final regulations in the Federal Register. However, binding agreements, election statements, and carryover allocation documents entered into before the effective date of these regulations that follow the guidance set forth in Notice 89–1, 1989–1 C.B. 620 (see § 601.601(d)(2)(ii)(*b*) of this chapter) need not be changed to conform to these regulations.

(b) *Prior periods.* Notice 89–1 1989–1C.B. 620 and Notice 89–6, 1989–1 C.B. 625 (see § 601.601(d)(2)(ii)(*b*) of this chapter) remain in effect for periods to the effective date of these regulations.

Shirley D. Peterson,

Commissioner of Internal Revenue.

[FR Doc. 92–30680 Filed 12–28–92; 8:45 am]

BILLING CODE 4830–01–M

Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1926

[Docket No. S–775]

RIN No. 1218–AA65

Safety Standards for Steel and Other Metal and Non-Metal Erection

AGENCY: Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

ACTION: Announcement of Intent To Establish Negotiated Rulemaking Committee; Request for Representation.

SUMMARY: The Occupational Safety and Health Administration is announcing its intent to establish a Steel Erection Negotiated Rulemaking Advisory Committee under the Negotiated Rulemaking Act (NRA) and the Federal Advisory Committee Act (FACA). The Committee will negotiate issues associated with the development of a proposed revision of the existing safety provisions in its construction standards for steel erection (29 CFR part 1926, subpart R). The Committee will include representatives of identified parties who would be significantly affected by the final rule. OSHA solicits interested parties to nominate representatives for membership for representation on the Committee.

DATES: OSHA must receive written comments and requests for membership or representation by March 29, 1993.

ADDRESSES: All written comments should be sent, in quadruplicate, to the following address: Docket Office, Docket S–775, Room N–2625, 200 Constitution Ave., N.W., Washington, D.C., 20210; Telephone (202) 219–7894.

Nominations for membership or representation on the Committee should be sent, in quadruplicate, to the Docket Office, Docket S–775, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

FOR FURTHER INFORMATION CONTACT: Mr. James F. Foster, OSHA, U.S. Department of Labor, Office of Information and Consumer Affairs, Room N–3647, 200 Constitution Avenue, N.W., Washington, D.C. 20210; Telephone: (202) 219–8151.

SUPPLEMENTARY INFORMATION:

I. Background

Existing subpart R of part 1926 (§§1926.750 through 1926.752) contains the safety standards that apply specifically to steel erection activities. The subpart was adopted in 1971 as an OSHA standard under section 6(a) of the OSH Act, which authorized the Agency to adopt established Federal standards issued under other statutes, including the Construction Safety Act (40 U.S.C. 333). Since 1971, the steel erection standard has been amended several times. For example, in 1972, OSHA promulgated miscellaneous amendments and in 1974, the Agency revised the temporary flooring requirement.

Since 1974, OSHA has received several requests for clarification of various provisions of subpart R, especially regarding the fall protection requirements. In 1984, the Agency began drafting a proposed rule to update and clarify subpart R. On several occasions, in meetings with its Advisory Committee on Construction Safety and Health (ACCSH), OSHA presented draft regulatory language revising subpart R and sought the Committee's advice.

On November 25, 1986, OSHA issued a Notice of Proposed Rulemaking (NPRM) for subpart M (Fall Protection) at 51 FR 42718. In that document the Agency announced that it intended the proposed fall protection rule to apply to all walking/working surfaces found in construction, except for certain specific areas where other sections in the construction standards would continue to apply. With regard to steel erection activities, the Agency provided in proposed §1926.500(a)(2)(iv) that: "Requirements relating to fall protection for connectors performing steel erection and requirements for fall protection for workers on derrick and erection floors during steel erection are provided in 29 CFR 1926.750—1926.752 ([s]ubpart R)." Also, in proposed §1926.500(a)(3)(iii) the Agency provided that: "Specific requirements for safety railings used on derrick and erection floors during steel erection are provided in 29 CFR 1926.752 ([s]ubpart R)."

In the preamble to the fall protection rule, OSHA summarized the meaning of these exceptions by stating that "additional requirements to have fall protection for connectors and for workers on derrick and erection floors during steel erection would remain in [s]ubpart R—Steel Erection" (51 FR 42720, Nov. 25, 1986). This statement led to confusion in the steel erection industry. In response, OSHA extended the comment period for submissions on the issue and stated that it "intend(ed) that the proposed fall protection standards published on November 26, 1986, apply to all workers engaged in skeleton steel erection activities, except for connectors...making initial connections..." (52 FR 20616, June 2, 1987). Subsequently, OSHA announced (53 FR 2048, 2053, January 26, 1988) "that the consolidation of the fall protection provisions in subpart M [would] not apply to steel erection and that the current fall protection requirements of part 1926 [would] continue to cover steel erection until [a] steel erection rulemaking is completed."

OSHA continued to work on its subpart M rulemaking and to develop a draft proposed revision to subpart R. As part of that process, the Agency presented several draft proposed revisions of subpart R to the ACCSH and solicited the Committee's input. Overall, OSHA has received many recommendations from the ACCSH and affected employee and employer parties, several of which have requested that OSHA institute negotiated rulemaking to help develop a new subpart R proposal. OSHA initially denied the requests for negotiated rulemaking because it was about to issue a proposed revision of subpart R. However, in an effort to ensure that OSHA's proposal on subpart R would more fully address the concerns of the affected groups, OSHA asked an independent consultant to review the fall protection issues raised by the draft revisions of subpart R, render an independent opinion and to recommend a course of action. The consultant recommended that OSHA address the issue of fall protection as well as other potential revisions of subpart R by using the negotiated rulemaking process.

Based on the consultant's findings and the continued requests for negotiated rulemaking, OSHA has decided to use the negotiated rulemaking process to develop a proposed revision of subpart R that will cover fall protection for erectors as well as technical requirements for the assembly and installation of structures. To facilitate access to pertinent information, all transcripts and documents generated regarding subpart R and all relevant materials from the rulemaking records for the proposed revision to subparts L (S–205), M (S–206), and X (S–207) have been made part of the docket for this proceeding (S–775).

The negotiated rulemaking effort described in this Notice will be conducted in accordance with the Department of Labor's recently approved policy on negotiated rulemaking. For further detail about the Department's negotiated rulemaking policy, please consult the "Notice of Policy on Use of Negotiated Rulemaking Procedures by Agencies of the Department of Labor" being published in the Federal Register concurrently with this Notice.

A. The Concept of Negotiated Rulemaking

Usually, OSHA develops a proposed rule using staff and consultant resources. The concerns of affected parties are identified through various informal contacts, such as the circulation of a draft proposal to known affected parties for their informal comment, advance notices of proposed rulemaking (ANPR) published in the **Federal Register** or through formal consultation with an advisory committee such as the ACCSH. After a notice of proposed rulemaking is published for comment, affected parties, including the Agency, submit arguments and data supporting their positions. All communications from affected parties are directed to the agency and its docket office. In general, there is not much communication during the rulemaking among parties representing different interests, except during cross-examination conducted at a rulemaking hearing.

Many times, effective regulations have resulted from such a process. However, as Congress noted in the Negotiated Rulemaking Act (5 U.S.C. 561), current rulemaking procedures "may discourage the affected parties from meeting and communicating with each other, and may cause parties with different interests to assume conflicting and antagonistic positions..." (Sec. 2 (2)). Congress also stated that "(a)dversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise, and technical

abilities possessed by the affected parties." (Sec. 2 (3)).

Using negotiated rulemaking to actually develop a proposed rule is fundamentally different. Negotiated rulemaking is a process by which a proposed rule is developed by a committee composed of representatives of all the interests that will be significantly affected by the rule. Decisions are made by consensus, which generally requires concurrence among all of the interests represented.

The process is started by the Agency's careful identification of all interests potentially affected by the rulemaking under consideration. To help in this identification process, the Agency publishes a document in the **Federal Register** such as this one, which identifies a preliminary list of interests and requests public comment on that list.

Following receipt of the comments, the Agency establishes an advisory committee representing these various interests to negotiate a consensus on the provisions of a proposed rule. Representation on the committee may be direct, that is, each member represents a specific interest, or may be indirect, through coalitions of parties formed to represent a specific sphere of interest. The Agency is a member of the committee representing the Federal government's own set of interests.

The negotiated rulemaking (reg/neg) advisory committee is chaired by a trained mediator who facilitates the negotiation process. The role of this mediator, also called a facilitator, is to apply proven consensus building techniques to the OSHA advisory committee setting. The many functions that he or she will perform are discussed below.

Once a reg/neg advisory committee reaches consensus on the provisions of a proposed rule, the Agency, consistent with its legal obligations, uses such consensus as the basis for its proposed rule, to be published in the **Federal Register**. This provides the required public notice and allows for a public comment period. Other participants and other interested parties retain their rights to comment, participate in an informal hearing (if requested) and judicial review. OSHA anticipates, however, that the pre-proposal consensus agreed upon by this Committee will effectively narrow the issues in the subsequent rulemaking to only those which truly remain in controversy.

B. Selecting subpart R as a Candidate for Negotiated Rulemaking

The NRA allows the Agency to establish a negotiated rulemaking committee if it is determined that the use of the negotiated rulemaking procedure is in the public interest. As discussed above (in the Background part of this document) OSHA has made such a determination.

OSHA bases this determination, not only on the independent consultant's recommendations as mentioned above, but also on its own prior experience with the negotiated rulemaking process. Even before the NRA was enacted, OSHA conducted negotiated rulemaking for its complex health standards for Methylenedianiline (MDA). This committee met seven times over a 10-month period (24 meeting days) and successfully negotiated standards for both general industry and construction. The final standards were ultimately based on the recommended proposed standards, and no litigation followed the standards' promulgation.

In addition, extensive discussions held between OSHA staff and many interested parties lends further evidence that the elements necessary for a successful negotiated rulemaking on steel erection exist. Moreover, the Agency believes that most of the selection criteria listed in the NRA (5 U.S.C. 563(a)) are met. There is a recognized need to revise subpart R to clarify fall protection requirements for structural erection workers and to update construction specifications and work practices. Interests which will be affected by a revised subpart R are known, are limited in number, and to a significant degree, are already organized in interest-based coalitions. Parties representing significant interests have requested that OSHA begin negotiated rulemaking on a revised subpart R. The Agency believes that reaching consensus on revised work practices and specifications for structural erection is highly promising. In addition, OSHA expects that all persons likely to be significantly affected by such a rule also will negotiate in good faith, on the fall protection provisions of a proposed standard. The need for clarification and revisions of current fall protection provisions is acknowledged by all known interests.

C. Agency Commitment

In initiating this negotiated rulemaking process, OSHA is making a commitment on behalf of the Department of Labor that the agency and all other participants within the Department will provide adequate resources to ensure timely and successful completion of the process. This commitment includes making the process a priority activity for all representatives, components, officials, and personnel of the Department who need to be involved in the rulemaking, from the time of initiation until such time as a final rule is issued or the process expressly terminated. Once the process has been initiated, all representatives, components, officials, and personnel of the Department shall be expected to act in accordance with this commitment.

As provider of administrative support, OSHA will take steps to ensure that the negotiated rulemaking committee has the dedicated resources it requires to complete its work in a timely fashion. These include the provision or procurement of such support services as: properly equipped space adequate for public meetings and caucuses; logistical support and timely payment of participant travel and expenses where necessary as provided for under the NRA; word processing, information dissemination, storage and other information handling services required by the committee; the services of a facilitator; and such additional statistical, economic, health, safety, legal, computing or other technical assistance as may be necessary.

OSHA, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the Committee as the basis for the rule proposed by the Agency for public notice and comment. The Agency believes that by clarifying and updating the existing standards, it can limit or reduce the number of deaths and injuries to employees engaged in structural erection who are exposed to a significant risk of injury and death because of the outdatedness and lack of clarity of certain current provisions in subpart R. The Agency, therefore, is committed to publishing a consensus proposal that is consistent with OSHA's legal mandates.

D. Negotiating Consensus

As discussed above, the negotiated rulemaking process is fundamentally different from the usual development process for OSHA proposed rules. Negotiation allows all the parties to discuss possible approaches to various issues rather than only asking them to respond to details of an OSHA proposal. The negotiation process involves a mutual education of the parties by each other on the practical concerns about the impact of such approaches. Each committee member participates in resolving the interests and concerns of

other members, rather than leaving it up to OSHA to bridge different points of view.

A key principle of negotiated rulemaking is that agreement is by consensus of all the interests. Thus, no one interest or group of interests is able to control or dominate the process. The NRA defines consensus as the unanimous concurrence among interests represented on a negotiated rulemaking committee, unless the committee itself unanimously agrees to use a different definition. In addition, experience has demonstrated that using a trained mediator to facilitate this process will assist all potential parties, including OSHA, to identify their real interests in the rule and so be able to reevaluate previously stated positions on issues involved in this rulemaking effort.

E. Some Key Issues for Negotiation

OSHA expects the key issues to be addressed as part of these negotiations will include:

1. *Scope and application:* Should the scope of subpart R be limited to the erection of steel or should it cover other materials as well? Should it be limited to the construction of single and multi-story buildings or apply as well to other types of structures such as bridges, metal tanks and non-power transmission towers?

2. *Construction specifications and work practices*: Which construction specifications and/or work practices provide adequate protection for employee safety for steel erection? What other specifications and practices should be included to provide protection for employee safety during the erection of non-steel structures? Would it be appropriate to limit the use of one-bolt connections? What rule is necessary regarding column stability? Should tandem ("christmas tree") loading and hoisting of structural members on the same (crane) hook be restricted? If so, how? What requirements should be set for double connections?

3. *Written construction safety erection plan*: Should OSHA require a written safety erection plan including construction specifications and safety provisions before the actual erection of the structures may start? What should be the required component parts of such a plan?

4. *Fall protection*: (a) To what extent should the fall protection provisions of proposed subpart M apply to steel, non-steel metal and non-metal erectors? Are there circumstances under which employees, who perform initial connections of structural components or other erection work, should be exempted from the requirements of subpart M? What are those circumstances? To what extent do alternative safeguards such as training and special designations adequately protect connectors or other erection workers from fall hazards? What are the advantages and disadvantages for employee safety of using fall protection devices and systems such as body belt systems, body harness systems and safety net systems?

(b) What costs are associated with providing fall protection to erectors? To what extent do employers who provide fall protection reduce their costs, such as through lower insurance and workers compensation premiums? How would productivity, for example, measured in terms of the time required to erect a completed structure, differ according to the fall protection strategy chosen?

(c) To what extent do non-steel structural erectors have concerns about the feasibility of compliance with the fall protection provisions of proposed subpart M? What fall protection requirements would provide appropriate protection for employees erecting non-metal structures? Should the same fall protection provisions apply to all structural erectors, including steel and non-metal structure erectors?

II. Proposed Negotiation Procedures

The following proposed procedures and guidelines may be augmented as a result of comments received in response to this document or during the negotiation process

A. Committee Formation

This negotiated rulemaking Committee will be formed and operated in full compliance with the requirements of the Federal Advisory Committee Act (FACA) in a manner consistent with the requirements of the Negotiated Rulemaking Act (NRA)

B. Interests Involved

The Agency intends to conduct negotiated rulemaking proceedings with particular attention to ensuring full and adequate representation of those interests that may be significantly affected by the proposed rule. Section 562 of the NRA defines the term "interest" as follows:

(5) "interest" means, with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner

The following interests have been tentatively identified as "significantly affected" by the matters that may be included in the proposed rule:

--Architectural, design and engineering firms.

--Developers, property owners and general contractors;

--Erection contractors using steel and erection contractors using materials other than steel;

--Fabricators of structural steel and non-steel metal products;

--Insurance organizations and public interest groups;

--Labor organizations representing employees who perform erection work;

--Manufacturers and suppliers of fall protection safety equipment;

--Manufacturers and suppliers of structural members and pre-engineered components; and

--Government entities.

One purpose of this document is to determine whether a standard regulating erection operations associated with steel and/or other metal and non-metal material members would significantly affect interests that are not listed above. OSHA invites comment and suggestions on this list of "significantly affected" interests.

In this regard, the Department of Labor recognizes that the regulatory actions it takes under its programs may at times affect various segments of society in different ways, and that this may in some cases produce unique "interests" in a proposed rule based on income, gender, or other such factors. Particular attention will be given by the Department to ensure that any unique interests which have been identified in this regard, and which it is determined will be significantly affected by the proposed rule, are fully represented.

C Members

The negotiating group should not exceed 25 members, and 15 would be preferable. The Agency believes that more than 15 members would make it difficult to conduct effective negotiations.

OSHA is aware that there are many more potential participants, whether they are listed here or not, than there are membership slots on the Committee. The Agency does not believe, nor does the NRA contemplate, that each potentially affected group must participate directly in the negotiations; nevertheless, each affected interest will hopefully be adequately represented. In order to have a successful negotiation, it is important for interested parties to identify and form coalitions that adequately represent significantly affected interests. These coalitions, in order to provide adequate representation, must agree to support, both financially and technically, a

member to the Committee whom they will choose to represent their "interest."

It is very important to recognize that interested parties who are not selected to membership on the Committee can make valuable contributions to this negotiated rulemaking effort in any of several ways:

* The person could request to be placed on the Committee mailing list, making written comment, as appropriate;

* The person could attend the Committee meetings, which are open to the public, caucus with his or her interest's member on the Committee, or even address the Committee (usually allowed at the end of an issue's discussion or the end of the session, as time permits); and/or

* The person could assist in the work of a workgroup which might be established by the Committee.

Informal workgroups are usually established by an advisory committee to assist the Committee in "staffing" various technical matters e.g., researching or preparing summaries of the technical literature or comments on particular matters such as economic issues before the Committee so as to facilitate Committee deliberations. They might also assist in estimating costs and drafting regulatory text on issues associated with the analysis of the affordability and benefits addressed, and formulating drafts of the various provisions and their justifications previously developed by the committee. Given their staffing function, workgroups usually consist of participants who have expertise or particular interest in the technical matter(s) being studied.

Because it recognizes the importance of this staffing work for the Committee, OSHA will provide appropriate technical expertise for such workgroups.

Requests for appointment to membership on the Committee are solicited. Members can be individuals or organizations. If the effort is to be fruitful, participants should be able to fully and adequately represent the viewpoints of their respective interests. Those who wish to be appointed as members of the Committee should submit a request to OSHA, in accordance with the Public Participation part of this document.

The following list includes those who have been tentatively identified by OSHA as being either a potential member of the Committee, or a potential member of a coalition that would in turn nominate a candidate to represent one of the significantly affected interests listed above:

Architectural, design, and engineering firms.

--Representatives of architects/engineers, civil, mechanical, and structural design engineering firms; including engineering schools and universities;

--American Institute of Architects (AIA);

--American Society of Civil Engineers (ASCE); and

--American Society of Safety Engineers (ASSE).

Developers, property owners, and general contractors:

--Representatives of builders, developer-owners, and general contractors for construction projects of building structures; bridge structures of railroads, highways, rivers and waterways; power and chemical plants; oil companies; and general managers who hire erector contractors and sub-contractors to do structural erection work.

Builders and contractors associations:

--Associated General Contractors (AGC);

--Associated Builders and Contractors (ABC); and

--National Constructors Association (NCA).

Erection contractors using steel and erection contractors using metals other than steel:

--Representatives of erectors of steel and non-steel metal-framed structures; aluminum, stainless steel, and glass curtain-wall cladding contractors; contractor-erectors of railroad, highway, river and waterway bridge structures;

--National Erectors Association (NEA); and

--Representatives of the structural, ornamental, rigging and reinforcing steel industry.

Erection contractors using non-metal erection members:

--Representatives of erectors of precast concrete;

--Representatives of the Precast/Prestressed Concrete Institute (PCI);

--Representatives of erectors of lumber, wood, plastic and other non-metal structures;

--National Association of Home Builders (NAHB).

Tower project owners, general contractors and erectors:

--Edison Electric Institute (EEI); and

--Electronic transmission tower erectors and other tower erector contractors.

Fabricators of structural steel and non-steel metal products:

--Representatives of fabricators of structural steel, non-steel metal products;

--American Iron and Steel Institute (AISI);

--American Institute of Steel Construction (AISC); and

--Southern Association of Steel Fabricators (SASF).

Insurance organizations and public interest groups:

--Representatives of insurance and public interest groups.

Labor organizations representing employees who perform erection work:

--International Association of Bridge, Structural and Ornamental Iron Workers Union;

--United Brotherhood of Carpenters and Joiners of America;

--International Brotherhood of Electrical Workers; and

--Laborers International Union of North America.

Manufacturers and suppliers of safety equipment:

--Representatives of the manufacturers and suppliers of fall protection equipment; and

--Industrial Safety Equipment Association (ISEA).

Manufacturers and suppliers of structural members and pre-engineered assemblies components:

--Representatives of manufacturers and suppliers of structural steel products;

--Representatives of manufacturers and suppliers of aluminum and non-ferrous structural metals;

--Representatives of manufacturers and suppliers of timber and wood structural products, plastic and plastic reinforced structural products; manufacturers of precast concrete structural products; and

--Steel Joist Institute (SJI).

Government entities:

--U.S. Department of Labor (DOL)/Occupational Safety and Health Administration (OSHA);

--Occupational Safety and Health State Plan Association.

--National Institute for Occupational Safety and Health (NIOSH);

--National Aeronautics and Space Administration (NASA);

--Department of the Army, U.S. Army Corps of Engineers;

--Department of Energy (DOE) and Western Area Power Administration (WAPA); and

--Department of Transportation (DOT), including the Federal Railroad Administration (FRA), U.S. Coast Guard (USCG) and the Federal Highway Administration (FHWA).

This list of potential parties is not presented as a complete or exclusive list from which committee members will be selected, nor does inclusion on the list of potential parties mean that a party on the list has agreed or has been elected

to participate as a member of the committee or as a member of a coalition. The list merely indicates parties that OSHA has tentatively identified as representing significantly affected interests in the outcome of the subpart R negotiated rulemaking process, and suggests possible coalitions for interested parties to consider. This document gives notice of this process to other potential participants and affords them an opportunity to request representation in the negotiations. The procedure for requesting such representation is set out under the Public Participation part of this document, below. In addition, comments and suggestions on this tentative list are invited.

D. Good Faith Negotiation

Committee members should be willing to negotiate in good faith and have the authority to do so. The first step is to ensure that each member has good communications with his or her constituencies. An intra-interest network of communication should be established to bring information from the support organization to the member at the table, and to take information from the table back to the support organization. Second, each organization or coalition should, therefore, designate as its representative an official with credibility and authority to insure that needed information is provided and decisions are made in a timely fashion. Negotiated rulemaking efforts can require a very significant contribution of time by the appointed members that must be sustained for up to a year. Other qualities that can be very helpful are negotiating experience and skills, and sufficient technical knowledge to participate in substantive negotiations.

Certain considerations are central to negotiating in good faith. One is the willingness to bring all issues to the table in an attempt to reach a consensus, instead of keeping key issues in reserve. The second is a willingness to keep the issues at the table and not take them to other forums. Finally, good faith includes a willingness to move away from the type of positions usually taken in a more traditional rulemaking process, and instead explore openly with other parties all ideas that may emerge from the discussions of the committee.

E. Facilitator

This individual or organization will not be involved with the substantive development of the standard. Rather, the facilitator's role generally includes:

(1) Chairing the meetings of the committee in an impartial manner;

(2) Impartially assisting the members of the committee in conducting discussions and negotiations;

(3) Performing the duties of the Designated Federal Official under the FACA; and

(4) Acting as disclosure officer for committee records under the Freedom of Information Act (FOIA).

F. OSHA Representative

The OSHA representative will be a full and active participant in the consensus building negotiations. The representative will meet regularly with various senior OSHA officials, briefing them on the negotiations and receiving their suggestions and advice, in order to effectively represent their views regarding the issues before the Committee. OSHA's representative will also ensure that the entire spectrum of governmental interests affected by revisions of subpart R, including the Office of Management and Budget and other Departmental offices, are kept informed of the negotiations and encouraged to make their concerns known in a timely fashion. (OSHA notes that governmental agencies such as the Army Corps of Engineers, which are involved in the construction of steel-framed buildings and structures, have other identifiable interests and expertise that might be represented separately on the Committee.) OSHA's representative will also communicate with the ACCSH on a regular basis, informing it of the status and content of the negotiations.

In addition, the OSHA representative will present the negotiators with the accumulated record evidence gathered on an issue-by-issue basis for their consideration. (The Committee may also consult OSHA's representative with regard to the Agency's regulatory needs, appropriate boundaries of consideration, or technical information. Such information could include the areas of technological feasibility and economic concerns, including direct and indirect costs of compliance.) The OSHA representative, together with the Facilitator, will also be responsible for coordinating the administrative and committee support functions to be performed by OSHA's support team.

G. Committee Notice

After evaluating the comments on this announcement and the requests for representation, OSHA will issue a notice that will announce the establishment of the Committee and its membership, unless after reviewing the comments, it is determined that such an action is inappropriate. The negotiation process will begin once the Committee membership roster is published in the **Federal Register.**

H. Tentative Schedule

Included in the notice establishing the Committee will be a proposed schedule of the meetings. The first meeting will focus largely on procedural matters, including the proposed ground rules. These will also include agreement on dates, times, and locations of future meetings, and identification and determination of how best to address principal issues for resolution.

To prevent delays that might postpone timely issuance of the proposal, after consulting the committee, OSHA intends to terminate the Committee's activities if it does not reach consensus on a proposed rule within 12 months of the first meeting. The process may end earlier if the Facilitator or the committee itself so recommends.

I. Record of Meetings

In accordance with FACA's requirements, the Facilitator will keep minutes and a record of all committee meetings. This record will be placed in the public docket No. S–775 for this rulemaking. Committee meetings will be announced in the **Federal Register** and will generally be open to the public.

J. Agency Action

As noted above, the Agency intends to use the Committee's consensus as the basis for the NPRM. OSHA expects to issue the proposed rule developed by the Committee, unless the consensus is inconsistent with OSHA's statutory authority or is not appropriately justified. In that event, the Agency will explain the reason for its decision.

K. Committee Procedures

Under the general guidance and direction of the Facilitator and subject to any applicable legal requirements, appropriate detailed procedures for committee meetings will be established. Committee members will be presented with proposed ground rules and agendas prior to the first meeting.

III. Public Participation

Since this will be a negotiated rulemaking, there are many opportunities for an individual who is interested in the outcome of the rule to participate. As a first step in response to this notice of intent to negotiate, OSHA recommends that potential participants take a hard look at the two lists contained in this notice: the lists of significantly affected interests and the lists of potential participants. After analyzing for completeness or over or

under-inclusiveness, parties should examine the lists for the purpose of coalition building. Potential parties should try to identify others, whether on the lists or not, who share a similar viewpoint and who would be affected in a similar way by the rule. Communication with these parties of similar interest should follow, and the organization of coalitions to support the interest should begin. It is only after the formation of these coalitions and extensive intra-constituency discussion that decisions should be made as to which individuals should represent the interest and in which capacity. As indicated above, an interested party may participate in a variety of ways such as being a committee member, working within the coalition (promoting communication, providing expert support in a workgroup or otherwise, helping to develop internal ranges of acceptable alternatives, etc.), attending committee meetings in order to caucus with the interest's member or address the Committee at the appropriate times, or submitting written comments or materials.

Persons who will be significantly affected by the revision of subpart R, whether or not listed above in this document, may apply for or nominate another person for membership on the committee to represent such interests. Such requests should be submitted, in quadruplicate, to the Docket Office, Docket S–775, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, N.W., Washington, D.C. 20210, no later than March 29, 1993. OSHA notes that the NRA addresses the concerns of potential members for whom the expenses of participation may not be affordable (See 5 U.S.C. 568(c)). Each application or nomination shall include:

(1) The name of the applicant or nominee and a description of the interest such person shall represent;

(2) Evidence that the applicant or nominee is authorized to represent parties having the shared interest the person proposes to represent; and

(3) A written commitment that the applicant or nominee shall actively participate in good faith in the development of the rule under consideration.

All other written comments, including comments on the appropriateness of using negotiated rulemaking to develop a proposed rule to revise the existing safety provisions in 29 CFR part 1926 subpart R, should be directed to Docket No. S–775, and sent in quadruplicate to the following address: OSHA Docket Office, U.S. Department of Labor, Room N–2625, 200 Constitution Ave., N.W., Washington, D.C. 20210; Telephone (202) 219–7894.

IV. Authority

This document was prepared under the direction of Dorothy L. Strunk, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210, pursuant to section 3 of the Negotiated Rulemaking Act of 1990, 104 Stat. 4969, Title 5 U.S.C. 561 *et seq.*

Signed at Washington, D.C., this 21st day of December, 1992.

Dorothy L. Strunk,

Acting Assistant Secretary of Labor.

[FR Doc. 92–31414 Filed 12–28–92; 8:45 am]

BILLING CODE 4510–26–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Ch. I

[FRL–4549–2]

Notice of Public Meeting of the Hazardous Waste Manifest Rulemaking Committee

AGENCY: Environmental Protection Agency.

ACTION: Public meeting.

SUMMARY: As required by the Federal Advisory Committee Act, we are giving notice of two public meetings of the Hazardous Waste Manifest Rulemaking Committee. The meeting are open to the public without advance registration.

The purpose of the meetings is to continue work on revising the uniform national hazardous waste manifest form and rule.

The following workgroups will meet from 1 p.m.–6 p.m. on January 13: Rejected Loads, Container Residue, Waste Codes and Transfer Facilities. These workgroups will report to the Committee on January 14 in the public session.

DATES: The Committee meeting will be held on January 13, 1993 from 10 p.m. to 12 p.m. and January 14, 1993 from 8:30 a.m. to 4 p.m. The Committee will also meet on February 23 and 24, 1993.

ADDRESSES: Location of both the January and February meetings will be World Wildlife Fund, suite 500, 1250 Twenty-fourth St. NW., Washington, DC 20037.

FOR FURTHER INFORMATION CONTACT: Persons needing further information on the substantive matters of the rule should contact Rick Westlund, Regulatory Management Division, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 260–2745. Persons needing further information on procedural matters should call Deborah Dalton, Consensus and Dispute Resolution Program, Environemntal Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 260–5495, or Committee's facilitator, Suzanne Orenstein, Resolve, 1250 24th Street, NW., suite 500, Washington, DC 20037, (202) 778–9533.

Dated: December 21, 1992.

Deborah Dalton,

Deputy Director, EPA Consensus and Dispute Resolution Program; Office of Regulatory Management and Evaluation.

[FR Doc. 92–31442 Filed 12–28–92; 8:45 am]

BILLING CODE 6560–50–M

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40 CFR Ch. I

[FRL–4549–5]

Open Meetings of the Disinfection By-products Negotiated Rulemaking Advisory Committee

AGENCY: Environmental Protection Agency.

ACTION: Notice of open meetings.

SUMMARY: The Disinfection By-products Negotiated Rulemaking Advisory Committee will meet on January 13–14 and February 9–10 to continue to develop consensus that can be used as the basis of a proposed rule.

DATES: The meetings will take place on January 13–14 and February 9–10. On January 13 and February 9, the meeting will start at 9:30 a.m. and end at 5 p.m. On January 14 and February 10, it will start at 8:30 a.m. and end by 4 p.m.

ADDRESSES: The Committee will meet at "Resolve", 1250 24th Street NW., 5th floor, Washington, DC (202) 293–4800.

FOR FURTHER INFORMATION CONTACT: For further information on substantive aspects of the rule, call Stig Regli of EPA's Water Office at (202) 260–7379. For further information on the meeting, call Gail Bingham, the Committee Co-Chair, at (202) 293–4800.

Dated: December 22, 1992.

Chris Kirtz,

Director, Consensus and Dispute Program.

[FR Doc. 92–31443 Filed 12–28–92; 8:45 am]

BILLING CODE 6560–50–M

40 CFR Parts 85, 86 and 600

[AMS-FRL-4550-5]

Standards for Emissions From Natural Gas-Fueled, and Liquefied Petroleum Gas-Fueled Motor Vehicles and Motor Vehicle Engines, and Certification Procedures for Aftermarket Conversion Hardware

AGENCY: Environmental Protection Agency (EPA).

ACTION: Extension of comment period.

SUMMARY: This notice announces the extension of the comment period for the Notice of Proposed Rulemaking (NPRM) entitled "Standards for Emissions from Natural Gas-Fueled, and Liquefied Petroleum Gas-Fueled Motor Vehicles and Motor Vehicle Engines, and Certification Procedures for Aftermarket Conversion Hardware," which was published on November 5, 1992 (57 FR 52912). In that notice, EPA stated that the public comment period would remain open for 30 days following the December 3, 1992, hearing. However, in light of the scope of that NPRM, as well as the fact that the year end holidays fall at the end of the current comment period, the Agency is extending the comment period.

DATES: Comments on this proposal will be accepted until January 15, 1993.

ADDRESSES: Interested parties may submit written comments (in duplicate, if possible) to Public Docket No. A-92-14 at the following address: U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT:

Mr. John Mueller, EVRB-12, U.S. Environmental Protection Agency, Regulation Development and Support Division, 2565 Plymouth Road, Ann Arbor, MI 48105, Telephone (313) 668-4275.

SUPPLEMENTARY INFORMATION: For further information on this matter, please refer to EPA's November 5, 1992 Notice of Proposed Rulemaking at 57 FR 52912.

Dated: December 21, 1992.

Michael Shapiro,

Acting Assistant Administrator for Air and Radiation.

[FR Doc. 92-31566 Filed 12-28-92; 8:45 am]

BILLING CODE 6560-50-M

40 CFR Part 300

[FRL-4548-9]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Notice of intent to delete the Woodbury Chemical Company site from the National Priorities List; request for comments.

SUMMARY: The Environmental Protection Agency (EPA), Region VIII announces its intent to delete the Woodbury Chemical Company Site (Site) from the National Priorities List (NPL) and requests public comment on this action. EPA and the State of Colorado (State) have determined that all appropriate response actions have been implemented at the Site and that no further cleanup by responsible parties is appropriate. Moreover, EPA and the State have determined that remedial activities conducted at the Site are protective of public health, welfare, and the environment.

DATES: Comments concerning the proposed deletion of the Woodbury Site may be submitted to EPA during the thirty days following publication of this notice in the **Federal Register**.

ADDRESSES: Comments may be mailed to: Ms. Laura Williams (8HWM-SR), Remedial Project Manager, U.S. Environmental Protection Agency, Region VIII, 999 18th Street, suite 500, Denver, Colorado 80202-2466.

Comprehensive information on this Site is available through the EPA, Region VIII public docket, which is located at EPA's Region VIII Administrative Records Center and is available for viewing from 8 a.m. to 4:30 p.m., Monday through Friday, excluding holidays. Requests for documents should be directed to the EPA, Region VIII Records Center.

The address for the Regional Records Center is: Administrative Records Center, U.S. Environmental Protection Agency, Region VIII, 999 18th Street, 5th Floor, Denver, Colorado 80202-2466, (303) 293-1807.

Background information from the Regional public docket is also available for viewing at two Woodbury Site information respositories located at the:

Colorado Department of Health, Hazardous Materials and Waste, Management Division, 4300 Cherry Creek Drive South, Denver, Colorado 80222 (303) 692-3300, Hours: 8 a.m. to 5 p.m., Monday through Friday, and

Adams County Public Library, Commerce City Branch, 7185 Monaco Street, Commerce City, Colorado 80022 (303) 287-0063, Hours: 1 p.m. to 8 p.m., Monday and Thursday; 10 a.m. to 5 p.m. Tuesday, Wednesday, Friday, and Saturday.

FOR FURTHER INFORMATION CONTACT:

Ms. Laura Williams (8HWM-SR), U.S. EPA, Region VIII, 999 18th Street, suite 500, Denver, Colorado 80202-2466, (303) 293-1531.

or

Mr. Barry Levene (8HWM-SR), Chief, ND/CO Section, U.S. EPA, Region VIII, 999 18th Street, suite 500, Denver, Colorado 80202-2466, (303) 293-1843.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. NPL Deletion Criteria
III. Deletion Procedures
IV. Basis for Intended Site Deletion

I. Introduction

The Environmental Protection Agency (EPA), Region VIII announces its intent to delete the Woodbury Chemical Company Site (Site) located in Commerce City, Colorado from the National Priorities List (NPL) and requests comments on this deletion. The NPL constitutes appendix B of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), title 40 of the Code of Federal Regulations (40 CFR), as amended. EPA identifies sites that appear to present a significant risk to public health, welfare, or the environment and maintains the NPL as a list of those sites. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substance Superfund Response Trust Fund (Fund) Pursuant to § 300.425(e)(3) of the NCP, any site deleted from the NPL remains eligible for Fund-financed remedial actions in the unlikely event that future conditions at the site warrant such action.

It is EPA's intent to delete the Woodbury Chemical Company Site from the NPL. EPA will accept comments on this proposed deletion for thirty days following publication of this notice in the **Federal Register**.

Section II of this notice explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section IV discusses how the Woodbury Site meets the deletion criteria.

Deletion of sites from the NPL does not itself create, alter, or revoke any individual's rights or obligations with regard to an individual site. The NPL is designed primarily for informational

purposes and to assist EPA management.

II. NPL Deletion Criteria

The NCP establishes the criteria that EPA uses to delete sites from the NPL. In accordance with 40 CFR § 300.425(e), sites may be deleted from the NPL where no further response is appropriate. In making this determination, EPA will consider whether any of the following criteria have been met:

(i) EPA, in consultation with the State, has determined that responsible or other parties have implemented all appropriate response actions required; or

(ii) All appropriate Fund-financed responses under CERCLA have been implemented and EPA, in consultation with the State, has determined that no further cleanup by responsible parties is appropriate; or

(iii) Based on a remedial investigation, EPA, in consultation with the State, has determined that the release poses no significant threat to public health or the environment and, therefore, taking of remedial measures is not appropriate.

For all Remedial Actions (RA) which result in hazardous substances, pollutants, or contaminants remaining at the site above levels that allow for unlimited use and unrestricted exposure, it is EPA's policy that a review of such action be conducted no less than every five years after initiation of the selected RA. As stated under "Basis for Intended Deletion," the selected remedy for the Woodbury Site required the removal of the contaminated soils, rubble, and investigation-derived waste from the Site. There was no ground water component to the remedy since Site contaminants had not affected the ground water aquifer. As a result of implementing this remedy, hazardous substances, pollutants, and contaminants were removed from the Site and eliminated as potential sources of contamination, thereby allowing for unlimited use and unrestricted exposure. In accordance with 40 CFR 300.430(f)(4)(ii), a five-year review is, therefore, not required for this Site.

III. Deletion Procedures

EPA, Region VIII will accept and evaluate public comments before making a final decision to delete the Woodbury Site. The following procedures were used for the intended deletion of this Site:

1. EPA, Region VIII has recommended deletion of the Woodbury Site and has prepared the relevant documents.

2. The State of Colorado has concurred with EPA's recommendation for deletion.

3. Concurrent with this National Notice of Intent to Delete, a local notice has been published in local newspapers and has been distributed to appropriate Federal, State and local officials, and other interested parties.

4. The Region has made all relevant documents available in the Regional Office and local site information repositories.

The comments received during the notice and comment period will be evaluated before making a final decision to delete. The Region will prepare a Responsiveness Summary, which will address the comments received during the public comment period.

Subsequent to the public comment period, a deletion will occur after EPA publishes a Notice of Deletion in the **Federal Register**. The NPL will reflect any deletions in the next final update. Public notices and copies of the Responsiveness Summary will be made available to local residents by Region VIII.

IV. Basis for Intended Site Deletion

The following summary provides EPA's rationale for recommending deletion of the Woodbury Chemical Company Superfund Site.

The Woodbury Chemical Company Superfund Site is located at 5400 Monroe Street in Commerce City, a northern suburb of Denver in Adams County, Colorado. The Woodbury Chemical Company operated a pesticide formulation facility from the late 1950's to 1971. On May 10, 1965, the main Woodbury Chemical Company building was destroyed by fire. Shortly thereafter, the Woodbury Chemical Company constructed a new building at the original building location. Contaminated rubble and debris from the fire were deposited in various locations at the Site, including a vacant 2.2-acre lot directly east of the Woodbury Chemical Company facility.

The Site was proposed for listing on the NPL on July 23, 1982, and listed on September 8, 1983. The primary concerns for potential harm to human health and the environment presented by the Site were exposure to contaminated soils and sediments, and potential ingestion of drinking water from the contaminated ground water aquifer below the Site. Chemicals of concern in the soils and sediments included pesticides, metals, and volatile organic compounds (VOCs).

Chemicals of concern in the ground water are primarily VOCs. However, it has been determined that the Woodbury Site is not the source of the existing contaminants within the ground water aquifer. This determination is based upon ground water sampling results which clearly indicated that the contaminated ground water originated upgradient to the Site in concentrations similar to those identified below and downgradient to the Site.

In February 1985, EPA, Region VIII completed a Remedial Investigation and Feasibility Study (RI/FS) for Operable Unit I (OUI), the area described above as a vacant 2.2-acre lot. High levels of pesticides (including aldrin, chlordane, DDT, and toxaphene) and elevated concentrations of metals were found in the rubble piles on the soil surface. Lower concentrations were found in the underlying contaminated soil areas. Ground water sampling indicated that the Woodbury Site was not the source of contaminants within the ground water aquifer. EPA issued a Record of Decision (ROD) in July 1985, which selected a complete cleanup remedy for contaminated soils at the 2.2-acre lot.

This Remedial Action (RA), however, was not immediately implemented. During pre-design studies, the EPA discovered significant additional contaminated soils west of the 2.2-acre lot. The area of additional contaminated soils included the original Woodbury Chemical Company property and vacant property located west and north of the Woodbury Chemical Company facility. The decision to expand the RI/FS to these additional areas (OUII) was formalized in the September 1986, ROD amendment.

Additionally, an engineer's cost estimate developed during pre-design studies exceeded the +50/−30 standard established by EPA guidance for cost estimates to implement RA. EPA determined that it would be more cost-effective to delay RA at OUI for simultaneous implementation with the RA at OUII.

The RI for OUII was completed in August 1989. In addition to contaminated soils, the RI identified a large amount of rubble which had been buried near the southern boundary of the Site. Additional ground water sampling further documented EPA's determination that the ground water contamination originated off-site and upgradient to the Woodbury Site. The FS was completed in September 1989.

A final ROD for the Site was signed by the Regional Administrator on September 29, 1989. The 1989 ROD document incorporates and builds upon the ROD issued for this Site in July 1985. Off-site incineration and off-site landfiling of soils which presented an excess carcinogenic health risk greater

than one in one million (1×10^{-6}) was selected as the remedy for the Site. Action levels corresponding to the cumulative 1×10^{-6} cleanup goal were established based upon maximum reasonable exposure to the chemicals of concern present at the Site. The remedy addressed environmental concerns presented by soils contaminated with pesticides, VOCs, and metals, and eliminated the principal threat of contaminated soil as a potential source of contamination to ground water, on-site workers, and the surrounding residents.

The major components of the remedy included:

- Excavation and treatment, via off-site incineration, of all contaminated soils and rubble exceeding the California List Halogenated Organic Compound (HOC) levels (1,000 parts per million total concentration) and of soil/debris containing the 2,3,7,8-isomer of polychlorinated dibenzo-p-dioxin (PCDD) above EPA action levels and disposal of the incinerated soil ash in an off-site Resource Conservation and Recovery Act (RCRA) subtitle C landfill;
- Excavation of contaminated soils and rubble with concentrations of chemicals of concern between EPA action levels and California List HOC levels, and transport to an off-site RCRA subtitle C landfill for disposal; and
- Regarding of on-site soils below EPA action levels, backfilling of excavated areas with clean soil, as necessary, and revegetation of the Site.

The RA activities at the Site began in May 1991, and were completed in June 1992. Approximately 900 tons of highly contaminated soils were excavated, transported off-site, and incinerated with subsequent disposal of the ash in an approved hazardous waste disposal facility. An additional 56,210 tons of lesser contaminated soils, rubble, and investigation-derived waste were excavated, transported off-site, and directly placed in an approved hazardous waste disposal facility. The Site was regarded, backfilled with 11,500 cubic yards of clean fill, and seeded with a mixture of grasses in May 1992.

A risk assessment based upon results of the validation sample analyses was performed to calculate the potential risk associated with the remaining concentrations of chemicals of concern in the soil. The cumulative risk calculations indicated that the health risk associated with the remaining concentrations of the constituents is less than one in one million (1×10^{-6}). All cleanup activities have been completed as planned. No equipment remains on-site.

The remedies completed at the Site were mandated by the ROD and based on the 1985 and 1989 RI/FS Reports. The remedies were comprehensive "one-time" restoration activities and did not include operation and/or maintenance requirements. There are no outstanding institutional controls or field activities remaining at the Site.

V. Community Relations

Since the September 1983 addition of the Site to the NPL, community interest has been minimal. During the 1985 public comment period for OUI, no comments or inquiries were received. The public comment period for the 1989 ROD resulted in marginal community participation as well. While there are several local community groups active in other Superfund activities, no specific concerns regarding the Woodbury Site were presented to EPA prior to initiation of RA.

Due to the close proximity of an economically disadvantaged residential area to the Site, EPA initiated a proactive approach to community relations during RA. This included a door-to-door outreach effort immediately before initiating RA. EPA also distributed five bi-monthly fact sheet updates to the local community over a one-year period during the most intense RA activities. EPA and the State coordinated with local health and environmental offices, including Tri-County Health, Denver Human Health and Hospitals, and the Colorado Division of Wildlife to address community concerns during RA. Local residents and community groups, including the Rocky Mountain Chapter of the Sierra Club, have since expressed their support and praise for the safe, expedient, and efficient cleanup of the Site and the related community relations activities.

VI. Summary

The completed remedies do not result in hazardous substances remaining on-site above levels which allow for unlimited and unrestricted access; therefore, there are no requirements for a five-year review or operation and maintenance. All completion requirements for the Woodbury Site have been achieved as outlined in OSWER Directive 9320.2-3A.

EPA, with the concurrence of the State of Colorado, has determined that all appropriate response actions required by CERCLA at the Woodbury Chemical Company Site have been completed, and that no further cleanup by responsible parties is appropriate.

List of Subjects in 40 CFR Part 300

Environmental protection, Hazardous waste.

Dated: December 17, 1992.

Jack W. McGraw,

Acting Regional Administrator, Environmental Protection Agency, Region VIII.

[FR Doc. 92-31440 Filed 12-28-92; 8:45 am]

BILLING CODE 6560-50-M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Chapter V

[Docket No. 92-64; Notice 2]

RIM 2127-AE63

Motor Vehicle Content Labeling

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Request for comments, extension of comment period.

SUMMARY: This notice extends the comment period on a request for comments concerning the American Automobile Labeling Act, pursuant to which the agency will soon be writing regulations. The agency is taking this action in response to petitions from the Motor Vehicle Manufacturers Association (now the American Automobile Manufacturers Association), the Japan Automobile Manufacturers Association, Inc., and the Association of International Automobile Manufacturers, Inc., which requested additional time to submit comments. The agency is extending the comment period for two weeks, until January 11, 1993.

DATES: Written comments on Docket 92-64, Notice 1, must be received on or before January 11, 1993.

ADDRESSES: Written comments on Docket 92-64, Notice 1, must refer to those docket and notice numbers and be submitted (preferably in 10 copies) to the Docket Section, room 5109, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. Submissions containing information for which confidential treatment is requested should be submitted (three copies) to Chief Counsel, National Highway Traffic Safety Administration, room 5219, 400 Seventh Street, SW., Washington, DC 20590, and seven additional copies from which the purportedly confidential information has been deleted should be sent to the Docket Section.

FOR FURTHER INFORMATION CONTACT: Mr. Nelson Gordy, Office of Market Incentives, National Highway Traffic Safety Administration, room 5313, 400 Seventh Street SW., Washington, DC 20590. (202) 366–4797.

SUPPLEMENTARY INFORMATION: On November 18, 1992, NHTSA published in the **Federal Register** (57 FR 54351) a request for comments in order to obtain information that will assist it in developing proposed regulations to implement the American Automobile Labeling Act. That Act amended Title II of the Motor Vehicle Information and Cost Savings Act to require that all new passenger cars (regardless of weight), and all multipurpose passenger vehicles and light duty trucks that are rated at 8,500 pounds gross vehicle weight or less, manufactured on or after October 1, 1994, bear labels providing information regarding the exent to which their parts are of domestic origin.

NHTSA requested comments by December 28, 1992. The November 1992 document also announced a public meeting to receive oral comments, which was held on December 17, 1992.

NHTSA received three petitions requesting that the comment period be extended by at least 30 days. The first petition was submitted by the Motor Vehicle Manufacturers Association (now the American Automobile Manufacturers Association, AAMA) on December 2, 1992. This organization, which represents Chrysler, Ford, and General Motors, stated that the combination of a short (45-day) comment period and the automobile industry's traditional use of December as a vacation month, did not leave sufficient time for its members to provide detailed responses to the request for comments. AAMA also stated that the original deadline provided its members insufficient time subsequent to the December 17, 1992 public meeting to review all testimony presented, and respond adequately. This petitioner requested an extension of the comment period until January 28, 1993.

Petitions from the Association of International Automobile Manufacturers, Inc. (which represents 21 European and Japanese manufacturers) and the Japan Automobile Manufacturers Association, submitted on December 7, and December 16, 1992, respectively, gave virtually identical reasons for requesting the extension of the comment period. One petitioner requested a 30-day extension, the other requested an extension until January 31, 1993.

After consideration of the three petitions, NHTSA has decided to extend the comment period by two weeks. While the agency initially believed that a 45-day comment period was sufficient, it agrees that additional time is warranted given the complex nature of the questions asked in the request for comments, the fact that the original closing date fell within a vacation period for the automobile industry, and the petitioners' desire to respond to arguments made at the December 17 public meeting. NHTSA also believes that the more detailed comments that interested persons will be able to provide as a result of the extension will be useful to the agency in developing proposed rules. The agency believes that a two-week extension, with a closing date of January 11, will provide sufficient time, past the holiday season, for all parties to prepare comments. Given the time constraints inherent in the rulemaking at issue, especially the need to have a final rule in place in sufficient time to enable manufacturers to comply with it by October 1, 1994, the agency has concluded that a longer extension would be inappropriate.

Issued on: December 21, 1992.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 92–31390 Filed 12–22–92; 3:34 pm]

BILLING CODE 4910–59–M

INTERSTATE COMMERCE COMMISSION

49 CFR Part 1057

[Ex Parte No. MC–43 (Sub-No. 20)]

Petition To Amend Lease and Interchange of Vehicles Regulations—Household Goods Carriers

AGENCY: Interstate Commerce Commission.

ACTION: Proposed rule; extension of comment due date.

SUMMARY: By decision served November 9, 1992 (57 FR 53463, November 10, 1992), the Commission requested comments by December 10, 1992, on its proposal to amend written lease requirements by adding language explaining the intent of existing regulations applicable to household goods motor carriers. By petitions filed December 9, 11 and 17, 1992, respectively, the Institute for Injury Reduction (IIR), Dr. Salwa H. Hanna, M.D., and Congresswoman Pat Schroeder request extensions of the comment due date. IIR and Dr. Salwa request 60-day extensions, and Congresswoman Schroeder requests a 30-day extension. IIR states it needs additional time due to the press of its seasonal Toy Safety/Injury Prevention activities. Petitioners all state they have not had an opportunity to fully review the proposal and did not become aware of the rulemaking proposal until very recently.

By letter filed December 10, 1992, Senator Bob Graham filed a request on behalf of Donna Michaud-Berger. Ms. Michaud-Berger's comments were filed with the Commission on December 8, 1992. Accordingly, Senator Bob Graham's extension request is moot.

In view of the number of persons seeking an extension, and the Commission's interest in permitting all interesting persons to participate, a 60-day extension will be granted.

DATES: Comments are due on February 8, 1993.

ADDRESSES: Send an original and 10 copies of comments, referring to Ex Parte No. MC–43 (Sub-No. 20), to: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

FOR FURTHER INFORMATION CONTACT: Jessie Hodge, (202) 927–5302 or Richard Felder, (202) 927–5610. [TDD for hearing-impaired: (202) 927–572.]

Decided: December 17, 1992.

By the Commission.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92–31554 Filed 12–28–92; 8:45 am]

BILLING CODE 7035–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration (NOAA)

50 CFR Parts 672, 675, and 676

[Docket No. 921114–2314]

RIN 0648–AD19

Pacific Halibut Fisheries; Groundfish of the Gulf of Alaska; Groundfish of the Bering Sea and Aleutian Islands; Limited Access Management of Fisheries off Alaska

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Proposed rule; correction.

SUMMARY: This action corrects a proposed rule that appeared in the Federal Register on December 3, 1992 (57 FR 57130). The proposed rule would allocate fishing privileges for Pacific halibut in and off of Alaska, and would implement proposed Amendment 15 to the Fishery Management Plan (FMP) for the Groundfish Fishery of the Bering

Sea and Aleutian Islands (BSAI) Area and proposed Amendment 20 to the FMP for Groundfish of the Gulf of Alaska (GOA). This correction is necessary to inform the public of editorial errors made in the proposed rule, and to more accurately reflect the intent of the North Pacific Fishery Management Council (Council) in recommending this individual fishing quota (IFQ) management regime to the Secretary of Commerce.

DATES: Comments must be received at the following address no later than January 11, 1993.

ADDRESSES: Comments may be sent to Ronald J. Berg, Chief, Fisheries Management Division, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802, Attention: Lori J. Gravel, or delivered to 9109 Mendenhall Road, suite 6, Juneau, Alaska.

FOR FURTHER INFORMATION CONTACT: Jay J. C. Ginter, Fishery Management Biologist, Alaska Region, NMFS at (907) 586-7228.

SUPPLEMENTARY INFORMATION: A proposed rule was published in the Federal Register on December 3, 1992 (57 FR 57130), that would allocate future total catch quotas of Pacific halibut and sablefish among individual fishermen. Each quota share (QS) would represent a transferable harvest privilege, within specified limitations, and could be converted annually into an IFQ. This correction is necessary to inform the public of editorial errors made in the proposed rule. These errors resulted primarily from oversight in drafting and reviewing proposed rule text as evidenced by comparison with the Council's motion to approve the IFQ program and the council's proposed FMP amendment language.

The published text under Vessel Categories on page 57134, second column, incorrectly indicates that QS would be assigned to only one vessel category. However, a person could qualify for QS in more than one vessel category in different areas. In addition, persons who owned or leased two or more vessels in different vessel categories during their most recent year of participation during the qualification years would have QS allocated in separate vessel categories in proportion to their catch history in those categories. This provision is clearly stated in the Council's motion, proposed FMP amendment text, and the proposed rule text at § 676.20(c)(6). The incorrect language was published due to drafting oversight (see paragraph 1 below).

The published text under Limits on IFQ Harvests by Vessels on page 57137, third column, incorrectly indicates one-half of one percent. The originally published text is not consistent with the language of the Council's motion which states one percent in area 2C. Hence, this correction is necessary to implement Council intent accurately and correct a drafting error (see paragraph 2 below). To be consistent with this noted correction, the second column on page 57150 should also refer to one percent in area 2C (see paragraph 6 below).

The incorrect figures of 50,000 pounds and 23 mt used in the example on page 57138, first column, resulted from calculations using the incorrect one-half of one percent noted in the paragraph above. The example weights should be recalculated to be 100,000 pounds and 45 mt (see paragraph 3 below).

The drafting error under the definition of Sablefish CDQ Reserve on page 57145, first column, resulted from confusing 12 percent, which is used in a different context relevant to the sablefish community development quota (CDQ), with 20 percent. The proposed FMP amendment text states that 20 percent of the sablefish fixed-gear total allowable catch (TAC) should be withheld for purposes of the CDQ. Of the CDQ amount, not more than 12 percent should be allocated to a single community. This correction will make the proposed definition consistent with Council intent and with related proposed rule and preamble text (see paragraph 4 below).

Under paragraph (c) Assignment of QS to vessel categories on page 57148, first column, 1985 is changed to read 1988. This is an editorial change that makes the proposed rule text internally consistent. If a person's most recent year of making fixed gear landings of groundfish or halibut was prior to 1988, then that person would not qualify for an allocation of QS and the assignment of QS to a vessel category would be moot (see paragraph 5 below).

In rule document 92-29193 beginning on page 57130 in the issue of Thursday, December 3, 1992, make the following corrections:

1. On page 57134, second column, under Vessel Categories, the first sentence should read: "Each person eligible to receive QS would have it assigned to one or more of four vessel categories."

2. On page 57137, third column, under Limits on IFQ Harvests by Vessels, second paragraph, the second sentence should read: "In regulatory area 2C, the vessel restriction would limit harvests to no more than one percent of the halibut catch limit for this area."

3. On page 57138, first column, the first sentence should read: "Therefore, the vessel catch limit under the proposed rule would have been 100,000 pounds (45 mt)."

§ 676.11 [Corrected]

4. On page 57145, first column, under the definition of Sablefish CDQ Reserves, the first sentence should read: "*Sablefish CDQ Reserve* means 20 percent of the sablefish fixed gear TAC for each subarea in the Bering Sea and Aleutian Islands management area for which a sablefish TAC is specified."

§ 676.20 [Corrected]

5. On page 57148, first column, under Assignment of QS to vessel categories, paragraph (c), the first sentence should read: "Each qualified person's QS will be assigned to a vessel category based on the length of vessel(s) in which that person made fixed gear landings of groundfish or halibut in the most recent calendar year during the period 1988 through September 25, 1991, and the product type landed."

676.22 [Corrected]

6. On page 57150, second column, under Vessel limitations, paragraph (h)(1), lines 4 and 5 should read: "* * * used to harvest more than one percent (0.01) of the halibut catch limit * * *"

Dated: December 22, 1992.

Samuel W. McKeen,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 92-31561 Filed 12-23-92; 12:18 pm]

BILLING CODE 3510-22-M

Notices

Federal Register
Vol. 57, No. 250
Tuesday, December 29, 1992

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Exemption of Compartment 26 Salvage Project From Appeal

AGENCY: USDA Forest Service, Northern Region.

ACTION: Notification that a timber salvage project to recover insect-killed timber is exempt from appeal under the provisions of 36 CFR part 217.

SUMMARY: A mountain pine beetle epidemic in the Tenmile Creek drainage (Compartment 26) on the Rexford Ranger District, Kootenai National Forest, has killed approximately 60 percent of the lodgepole pine within the drainage. The remaining lodgepole pine is dying or has a high risk of attack. In 1992, the Rexford District Ranger proposed a timber sale salvage project to recover dead and dying timber, construction of one-half mile of permanent road, and reforestation of harvested areas. The District Ranger has determined, through an environmental analysis documented in the Compartment 26 Salvage Project Environmental Assessment (EA), that there is good cause to expedite these actions in order to rehabilitate National Forest System lands and recover damaged resources. Salvage of commercial sawtimber within the area affected must be accomplished quickly to avoid further deterioration of sawtimber, reduce the risk of catastrophic wildlife, and reduce the risk of mountain pine beetle infestation in adjacent healthy timber stands.

EFFECTIVE DATE: Effective on December 29, 1992.

FOR FURTHER INFORMATION CONTACT: Drew Bellon; Rexford District Ranger; Kootenai National Forest; 1299 HWY. 93 North; Eureka, MT 59917.

SUPPLEMENTARY INFORMATION: A mountain pine beetle epidemic has occurred in the Tenmile Creek drainage (Compartment 26) on the Rexford Ranger District, Kootenai National Forest during the last several years. The Tenmile drainage is approximately 21 miles southwest of Eureka, Montana. The project area is located within Management Area 12 as designated by the Kootenai Forest Plan, September 1987, as suitable timberland with both big game summer habitat and timber management goals. Approximately 17 percent of the suitable timberland within Compartment 26 consists of lodgepole pine timber of which 60 percent has been killed by mountain pine beetles. The remaining 40 percent of lodgepole pine is dying or at high risk of being infested.

In January 1991, the Rexford District Ranger proposed timber harvest within the Tenmile area, but after site surveys decided to modify the proposal in 1992 to include only the salvage harvest of lodgepole pine stands killed by insects and stands that are dying or have a high risk of being attacked by mountain pine beetle. This proposal is designed to meet the following needs: (1) Improve long-term timber growth and productivity by reforesting the affected area with coniferous species less susceptible to insect damage; (2) contribute to a continuing supply of timber for industry by salvaging merchantable timber products before they deteriorate in value; (3) reduce the potential for future pine beetle infestations by implementing integrated pest management prescriptions; (4) reduce the risk of catastrophic wildfire in stands killed by the beetle infestation by reducing fuel loading; and (5) expediting the re-establishment of coniferous species to provide security for wildlife and watershed protection by harvesting, site preparation, and planting.

An interdisciplinary team was convened and scoping began in January 1991. Environmental issues were identified and served as the foundation for the environmental analysis disclosed in the EA. Five alternatives including the proposed action and "no action" were analyzed. Estimated salvage of commercial sawtimber ranges from no salvage or rehabilitation activities to salvage of 6.4 million board feet of timber and rehabilitation of 428 acres affected by the insect infestation.

The selected alternative includes three major actions: (1) Salvage of 6.4 million board feet of dead, dying, and high risk sawtimber on 428 acres; (2) planting 373 acres to mixed conifer species, and naturally regenerating 55 acres; and (3) construction of one-half mile of permanent road to provide access to stands being harvested, to facilitate removal of sawtimber, and for long-term stand tending needs to maintain forest health and productivity including access for fire suppression.

The Compartment 26 Salvage Project is designed to accomplish the objectives as quickly as possible to minimize risk of additional tree mortality from mountain pine beetles, reduce the potential for catastrophic wildfire, and to recover merchantable sawtimber before it deteriorates and removal becomes economically infeasible. To expedite implementation of this decision, procedures outlined in 36 CFR 217.4(a)(11) are being followed. Under this Regulation the following may be exempt from appeal: Decisions related to rehabilitation of National Forest System lands and recovery of forest resources resulting from natural disasters or other natural phenomena, such as wildfires * * * when the Regional Forester * * * determines and gives notice in the **Federal Register** that good cause exists to exempt such decisions from review under this part.

Based upon the environmental analysis documented in the Compartment 26 Salvage EA and the District Ranger's Decision notice for this project, I have determined that good cause exists to exempt this decision from administrative review. Therefore, upon publication of this notice, this project will not be subject to review under 36 under CFR part 217.

Dated: December 7, 1992.

John M. Hughes,

Deputy Regional Forester, Northern Region.

[FR Doc. 92-30956 Filed 12-28-92; 8:45 am]
BILLING CODE 3410-11-M

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

Meeting

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of meeting.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) has scheduled its regular business meetings to take place in Washington, DC on Tuesday and Wednesday, January 12–13, 1993 at the times and location noted below.

DATES: The schedule of events is as follows:

Tuesday, January 12, 1993

9–11:30 am Rulemaking Work Group (closed meeting)
1–2 pm Technical Programs Committee
2:15–3:15 pm Planning and Budget Committee
3:30–4:30 pm Executive Committee

Wednesday, January 13, 1993

10–12 pm Board Meeting

ADDRESSES: The meetings will be held at: Holiday Inn Crowne Plaza, Metro Center, Salon B, 775 12th Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: For further information regarding the meetings, please contact Lawrence W. Roffee, Executive Director, (202) 272–5434 ext. 14

SUPPLEMENTARY INFORMATION: At its business meeting, the Access Board will consider the following agenda items:

- Approval of the Minutes of the November 18, 1992 Board Meeting.
- Executive Director's Report.
- Report on Use of Extraordinary Work.
- Proposed Supplemental Standards of Ethical Conduct for Board Members and Employees.
- Directive on Financial Disclosure Reports.
- Complaint Status Report.
- Progress Report on Technical Program Projects and Technical Assistance and Research Contracts.
- Draft Statement of Work for Research on Detectable Warnings.
- Status Report on Fiscal Year 1993 Budget.
- Status Report on Fiscal Year 1994 Budget.
- Report on Technical Bulletins and Telecommunications Study.
- Status Report on State and Local Government Facilities NPRM; Detectable Warnings NPRM; and Automated Teller Machines Final Rule (closed).
- Recreation Access Advisory Committee Charter and Federal Register Notice (closed).
- Children's Environments ANPRM (closed).
- Letter from Chemical Specialties Manufacturers Association on Slip Resistant Surfaces (closed).
- ADA Rulemaking Agenda and Timeframes (closed).

Some meetings or items may be closed to the public as indicated above. All meetings are accessible to persons with disabilities. Sign language interpreters and an assistive listening system are available at all meetings.

Lawrence W. Roffee,

Executive Director.

[FR Doc. 92–31434 Filed 12–28–92; 8:45 am]

BILLING CODE 8150–05–M

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of initiation of antidumping and countervailing duty administrative reviews.

SUMMARY: The Department of Commerce has received requests to conduct administrative reviews of various antidumping and countervailing duty orders, findings and suspension agreements with November anniversary dates. In accordance with the Commerce Regulations, we are initiating those administrative reviews.

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: Roland L. MacDonald, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230, telephone (202) 482–2104.

SUPPLEMENTARY INFORMATION:

Background

The Department of Commerce ("the Department") has received timely requests in accordance with §§ 353.22(a) and 355.22(a) of the Department's regulations, from interested parties as defined in §§ 353.2(k) and 355.2(i) of the Department's regulations, for administrative reviews of various antidumping and countervailing duty orders, findings, and suspension agreements, with November anniversary dates.

Initiation of Reviews

In accordance with §§ 353.22(c) and 355.22(c) of the Department's regulations, we are initiating administrative reviews of the following antidumping and countervailing duty orders, findings, and suspension agreements. We intend to issue the final results of these reviews not later than November 30, 1993.

Antidumping duty proceedings and firms	Periods to be reviewed
Japan:	
Bicycle Speedometers, A–588–038, Cateye Co., Ltd.	11/1/91–10/31/92
Light Scattering Instruments, A–588–813, Otsuka Electronics	11/1/91–10/31/92
Titanium Sponge, A–588–020, Showa Denko K.K.	11/1/91–10/31/92
Countervailing duty proceedings	
Argentina:	
Oil Country Tubular Goods, C–357–403	1/1/91–12/31/91

In addition, in accordance with § 353.25 of the Commerce Regulations, the following firm has requested revocation from the antidumping duty order.

Japan:
Titanium Sponge, A–588–020; Showa Denko K.K.

Interested parties must submit applications for administrative protective orders in accordance with §§ 353.34(b) and 355.34(b) of the Department's regulations.

These initiations and this notice are in accordance with section 751(a) of the Tariff Act of 1930 (19 U.S.C. 1675(a)) and 19 CFR 353.22(c)(1) and 355.22(c)(1) (1992).

Dated: December 15, 1992.

Joseph A. Spetrini,

Deputy Assistant Secretary for Compliance

[FR Doc. 92–31459 Filed 12–28–92; 8:45 am]

BILLING CODE 3510–DJ–M

[A–588–035]

Cadmium From Japan; Determination not to Revoke Antidumping Finding

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of determination not to revoke the antidumping finding.

SUMMARY: The Department of Commerce is notifying the public of its determination not to revoke the antidumping finding on cadmium from Japan.

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: Joseph A. Fargo, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 482–5253.

SUPPLEMENTARY INFORMATION: The Department of Commerce (the Department) may revoke an

antidumping duty order or finding, pursuant to § 353.25(d)(4) of the Department's regulations, if no interested party has requested an administrative review for four consecutive annual anniversary months and no interested party objects to the revocation (19 CFR 353.25 (d)(4) (1992)). We had not received a request to conduct an administrative review of the antidumping finding on cadmium from Japan (37 FR 15700, August 4, 1972) for the last four consecutive annual anniversary months. Therefore, pursuant to the Department's regulations, on August 3, 1992, we published in the **Federal Register** a notice of intent to revoke the finding and served written notice of the intent to revoke to each interested party on the Department's service list.

On August 27, 1992, and August 31, 1992, the Non-ferrous Metals Producers Committee (NFMPC), the legal successor to the Lead-Zinc Producers Committee, the original petitioner, and the Zinc Corporation of America, an interested party, objected to our intent to revoke this finding. On September 9, 1992 NFMPC confirmed that they are the legal successor to the original petitioner, the Lead-Zinc Producers Committee. On November 24, 1992, the Department requested that NFMPC and ZCA provide the certifications specified in 19 CFR 353.31(i). On December 2 and 3, NFMPC and ZCA, respectively provided these certifications. Therefore, because we received objections to the revocation, we no longer intend to revoke this finding.

Dated: December 18, 1992.

Joseph A. Spetrini,

Deputy Assistant Secretary for Compliance.

[FR Doc. 92-31454 Filed 12-28-92; 8:45 am]

BILLING CODE 3510-DS-M

International Trade Administration

[A-357-807]

Preliminary Determination of No Sales at Less Than Fair Value: Ferrosilicon From Argentina

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: Shawn Thompson, Office of Antidumping Investigations, Office of Investigations, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington DC 20230; telephone (202) 482-1776.

Preliminary Determination: We preliminarily determine that ferrosilicon from Argentina is not being, nor is likely to be, sold in the United States at less than fair value, as provided in section 733(b) of the Tariff Act of 1930, as amended (the Act).

Case History

Since the notice of initiation on June 11, 1992 (57 FR 27021, June 17, 1992), the following events have occurred.

On July 6, 1992, the International Trade Commission (ITC) issued an affirmative preliminary determination.

On July 7, 1992, the U.S. Embassy in Buenos Aires notified the Department that there were no exports of ferrosilicon from Argentina during the "standard" period of investigation (POI) in this case. The embassy also indicated that only one company, Industrias Siderurgicas Grassi (Grassi), had exported to the United States during the year prior to the initiation of the investigation (one export in July 1991 and one in October 1991). Consequently, the Department designated Grassi as the respondent and decided to extend the POI back six months—to June 1991 through May 1992—in order to capture Grassi's last known exports. (See memorandum dated July 21, 1992, from Richard W. Moreland, Director, Office of Antidumping Investigations, to Francis J. Sailer, Deputy Assistant Secretary for Investigations (the "July 21 memorandum").)

On July 17, 1992, the Department presented its questionnaire to Grassi.

On July 27, 1992, counsel for Grassi informed the Department that the dates of sale for Grassi's July and October exports were in February and May 1991, respectively, placing both shipments outside the expanded POI.

On July 31, 1992, the Department decided that it was not appropriate to extend the POI in this investigation beyond one year. (See memorandum dated July 31, 1992, from David L. Binder, Director, Antidumping Division II, Office of Antidumping Investigations, to Richard W. Moreland, Acting Deputy Assistant Secretary for Investigations (the "July 31 memorandum").) For further discussion of this topic, see the "Period of Investigation" section of this notice.

On August 5, 1992, Grassi submitted a response to section A of the questionnaire in which it reported that had no sales to the United States during the POI. On August 12, 1992, the Department informed Grassi that it would not be required to file a section B or C response to the questionnaire.

On August 14, 1992, we issued a supplemental questionnaire to Grassi regarding its response to section A. We received the response to this questionnaire on August 21, 1992.

On October 5, 1992, petitioners requested that the Department postpone the preliminary determination in this investigation until not later than December 18, 1992. At this time, petitioners also requested that the Department extend the POI back beyond one year in order to capture sales made during prior months.

On October 9, 1992, we granted petitioners' postponement request. However, as petitioners did not present new and compelling reasons to extend the POI further, we did not change the already once-extended POI established for Grassi. For further discussion of the appropriate POI in this case, see the "Period of Investigation" section of this notice.

Scope of Investigation

The product covered by this investigation is ferrosilicon, a ferroalloy generally containing, by weight, not less than four percent iron, more than eight percent but not more than 96 percent silicon, not more than 10 percent chromium, not more than 30 percent manganese, not more than three percent phosphorous, less than 2.75 percent magnesium, and not more than 10 percent calcium or any other element.

Ferrosilicon is a ferroalloy produced by combing silicon and iron through smelting in a submerged-arc furnace. Ferrosilicon is used primarily as an alloying agent in the production of steel and cast iron. It is also used in the steel industry as a deoxidizer and a reducing agent, and by cast iron producers as an inoculant.

Ferrosilicon is differentiated by size and by grade. The sizes express the maximum and minimum dimensions of the lumps of ferrosilicon found in a given shipment. Ferrosilicon grades are defined by the percentages, by weight, of contained silicon and other minor elements. Ferrosilicon is most commonly sold to the iron and steel industries in standard grades of 75 percent and 50 percent ferrosilicon.

Calcium silicon, ferrocalcium silicon, and magnesium ferrosilicon are specifically excluded from the scope of this investigation. Calcium silicon is an alloy containing, by weight, not more than five percent iron, 60 to 65 percent silicon and 28 to 32 percent calcium. Ferrocalcium silicon is a ferroalloy containing, by weight, not less than four percent iron, 60 to 65 percent silicon, and more than 10 percent calcium. Magnesium ferrosilicon is a ferroalloy

containing, by weight, not less than four percent iron, not more than 55 percent silicon, and not less than 2.75 percent magnesium.

Ferrosilicon is classifiable under the following subheadings of the *Harmonized Tariff Schedule of the United States* (HTSUS): 7202.21.1000, 7202.21.5000, 7202.21.7500, 7202.21.9000, 7202.29.0010, and 7202.29.0050. The HTSUS subheadings are provided for convenience and customs purposes. Our written description of the scope of this investigation is dispositive.

Period of Investigation

The POI is June 1, 1991, through May 31, 1992.

Prior to issuing the questionnaire in this case, the Department received information from the U.S. Embassy in Buenos Aires that no Argentine company had exported ferrosilicon to the United States during the Department's "standard" six-month POI, and that only Grassi had exported during the year prior to the initiation of the investigation. Specifically, the embassy reported that Grassi had two exports to the United States, one in July 1991 and one in October 1991. Because these exports were made within a year of the date of the initiation of this investigation (June 11, 1992), the Department determined that they were sufficiently current to serve as a basis for a dumping investigation. (See the July 21 memorandum.)

However, on July 27, 1992, Grassi informed the Department that the dates of sale for its July and October exports were in February and May 1991, respectively, placing both shipments outside the expanded POI. Consequently, the Department had to decide whether the POI should be extended further, beyond one year.

In past cases, the Department has extended the POI under various circumstances indicating that the normal six-month period did not adequately reflect the sales practices of the firms subject to investigation. For example, the Department has extended the POI where it found that one of the following conditions existed: (1) Seasonality (*e.g., Final Determination of Sales at Less Than Fair Value; Certain Fresh Cut Flowers from Colombia* (52 FR 6842, March 5, 1987)), (2) sales activity during the period which was not representative due to the existence of long-term contracts (*e.g., Final Determination of Sales at Less Than Fair Value; Certain Forged Steel Crankshafts from the United Kingdom* (52 FR 32951, September 1, 1987)), (3) sales activity which was unusually depressed (*e.g., Certain Iron Metal Castings from India; Antidumping: Final Determination of Sales at Less Than Fair Value* (46 FR 39869, August 5, 1981), where the depression in sales lasted for a short period within the normal POI), and (4) circumstances peculiar to the industry in question (*e.g., Offshore Platform Jackets and Piles from Japan: Final Determination of Sales at Less Than Fair Value* (51 FR 11788, April 7, 1986), where the typical sales were of special order or customized merchandise with extremely long production times).

In this case, Petitioners have not provided any evidence that the above-cited reasons for extending the POI exist. In addition, this case is similar to other cases where the Department has not extended the POI despite petitioner's request. For example, the Department made determinations of no sales at less than fair value, rather than expanding the POI to capture pre-period sales, in both *Electrolytic Manganese Dioxide from Ireland; Final Determination of No Sales at Less Than Fair Value* (54 FR 8776, March 2, 1989) (*EMD*) and *Notice of Preliminary Determination of Sales at Not Less Than Fair Value; High-Tenacity Rayon Filament from the Netherlands* (57 FR 6091, February 20, 1992). In both of those cases, the last entry into the United States was made more than 12 months prior to the filing of the petition.

In a recent decision, the U.S. Court of International Trade upheld the Department's decision not to extend the POI in the *EMD* case. *Kerr-McGee Chemical Corp.* v. *United States*, 739 F. Supp. 613, 622–24 (CIT 1990).

Given the Department's past practice on this issue, as well as the fact that the sales in question were made more than one year prior to the initiation of the investigation, we determined that there are no reasons on the record for this investigation that would justify extending the POI backward further. For further discussion, see the July 31, 1992 memorandum.

Fair Value Comparisons

In order to determine whether sales of subject merchandise to the United States by a respondent were made at less than fair value, the Department compares the United States prices to foreign market value. Grassi reported no sales of subject merchandise during the POI. Accordingly, there are no United States prices with which to compare to foreign market value and, thus, no dumping margins.

Verification

As provided in section 776(b) of the Act, we will verify the information used in making our final determination.

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, the ITC will determine whether imports of the subject merchandise are materially injuring, or threaten material injury to, the U.S. industry before the later of 150 days after the date of this preliminary determination or 75 days after our final determination.

Public Comment

In accordance with 19 CFR 353.38 (c) and (d), case briefs or other written comments in at least ten copies must be submitted to the Assistant Secretary for Import Administration no later than February 1, 1993, and rebuttal briefs no later than February 7, 1993. In accordance with 19 CFR 353.38(b), we will hold a public hearing, if requested, to give interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. Tentatively, the hearing will be held on February 11, 1993, at 10 a.m. at the U.S. Department of Commerce, room 3708, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, room B–099, within ten days of the publication of this notice in the **Federal Register**. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. In accordance with 19 CFR 353.38(b), oral presentations will be limited to issues raised in the briefs.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f)) and 19 CFR 353.15.

Dated: December 18, 1992.

Rolf Th. Lundberg, Jr.,

Acting Assistant Secretary for Import Administration.

[FR Doc. 92–31455 Filed 12–28–92; 8:45 am]

BILLING CODE 3510–DS–M

[A-834-804, A-821-804, A-823-804]

Preliminary Determinations of Sales at Less than Fair Value: Ferrosilicon From Kazakhstan, the Russian Federation, and Ukraine

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: Kimberly Hardin, Office of Antidumping Investigations, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482-0371.

Preliminarily Determination: We preliminarily determine that ferrosilicon from Kazakhstan, the Russian Federation, and Ukraine is being, or is likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930 (the Act), as amended. The estimated margins are shown in the "Suspension of Liquidation" section of this notice.

Case History

Since the notice of initiation on June 11, 1992 (57 FR 27021, June 17, 1992), the following events have occurred.

On June 23, 1992, we issued an Antidumping Survey to the Government of Kazakhstan via the U.S. Embassy in Alma Ata, Kazakhstan, and the Embassies of the Russian Federation and Ukraine, in order to identify the appropriate exporters of ferrosilicon in these three countries.

On July 1, 1992, we received a letter from the Embassy of the Russian Federation returning the Antidumping Survey. The letter indicated that the Embassy of the Russian Federation would be unable to respond and that the most appropriate and effective channel of submission would be through the U.S. Embassy in Moscow. As such, on July 6, 1992, we forwarded the Antidumping Survey to the American Embassy in Moscow and requested that it be forwarded to the appropriate representatives of the Government of the Russian Federation.

We received a response to our Antidumping Survey, dated July 22, 1992, from the Embassy of Ukraine. The letter contained a translation of a latter sent to the Embassy of Ukraine by the Ministry of Foreign Economic Relations and Trade of Ukraine (MOFERT Ukraine). The letter provided volume data, a statement that the United States has not been a purchaser of, nor an export destination for, ferrosilicon exported from Ukraine, and a statement that Ukraine is not aware of further use or terms and prices, in cases of the resale, of Ukrainian origin ferrosilicon. The letter also stated that no shipments of ferrosilicon took place in 1992.

On July 6, 1992, the International Trade Commission (ITC) issued an affirmative preliminary determination.

On July 8, 1992, we received a letter of appearance for Minerais U.S. Inc. and Societe Anonyme des Minerais (Minerais) in the investigation involving Kazakhstan. Minerals later stated that as an independent reseller of ferrosilicon from Kazakhstan, the Russian Federation, and Ukraine, it is the exporter whose U.S. sales are relevant to these investigations.

On July 8, 1992, we also received a cable from the American Embassy in Alma Ata stating that the Antidumping Survey was delivered to the Government of Kazakhstan.

On July 22, we received a cable from the American Embassy in Moscow stating that the Embassy would deliver the Antidumping Survey to the person designated by the Russian Ministry of Industry. On July 23, 1992, we received a cable from the American Embassy in Moscow proposing that the deadline for response to the Antidumping Survey be extended to take advantage of trade law seminars conducted by Department of Commerce personnel in Russia scheduled for August 1992.

On July 27, 1992, we issued a questionnaire to Minerais in the investigation involving Kazakhstan. On August 24, 1992, and September 8, 1992, we received responses to sections A, and B and C, respectively, to the Department's questionnaire. We issued deficiency letters on September 4 and September 22, 1992. We received the section A deficiency response on September 23 and the section B and C deficiency response on October 6, 1992. Minerais submitted a corrected section B and C deficiency response on October 7, 1992.

On July 29, August 5, and August 8, 1992, Department officials participating in the trade law seminars hand delivered Sections A, C, and D of the Department's questionnaire to appropriate representatives of the Governments of the Russian Federation, Kazakhstan, and Ukraine, respectively.

On August 18, 1992, we received a fax from Promsyrioimport, the primary exporter of the subject merchandise during the period of investigation from Kazakhstan, the Russian Federation, and Ukraine. The fax stated that Promsyrioimport sells its products to Minerais and, as such, that Minerais should respond to all matters in these investigations. Promsyrioimport also submitted volume and value data and sample contracts.

On September 4, 1992, we received a request from Promsyrioimport to extend the response deadline for the questionnaire in the investigation involving the Russian Federation. On September 8, 1992, we informed Promsyrioimport that the extension was granted and that the Russian questionnaire response was due on September 25, 1992. On September 17, 1992, we also extended until September 25, 1992, the deadline for the questionnaire responses in the Kazakh and Ukraine investigations. After numerous unsuccessful attempts at faxing the extension letter to the Government of Kazakhstan, we mailed the extension letter to the Government of Kazakhstan on September 18, 1992.

On September 25, 1992, Minerais submitted a letter of appearance in the investigation involving the Russian Federation. The letter indicated that because information was the same, Minerais' responses to section B of the Kazakh questionnaire was sufficient for the Russian investigation as well.

On September 25, 1992, Shearman and Sterling, counsel for Minerais, submitted a response to section A of the questionnaire and stated that this information was being submitted at the request of Promsyrioimport. Shearman and Sterling submitted this response to the official files of the Kazakh, Russian, and Ukraine investigations.

On September 25, 1992, Shearman and Sterling submitted another response to section A of the questionnaire and stated that this information was being submitted at the request of Ermak Ferro Alloys Works (Ermak), a Kazakh producer of ferrosilicon, the Government of Kazakhstan, and Promsyrioimport in the investigation involving Kazakhstan. This response lacked the certifications required by 19 CFR 353.31(i). Shearman and Sterling later informed us that they only represent Minerais, not the parties named in the questionnaire responses.

On October 1, 1992, we prepared letters informing the Governments of Kazakhstan and the Russian Federation that the questionnaire responses submitted were incomplete. We stated that complete, consolidated responses, including sections A, C, and D, were due by October 8, 1992, a then twice-extended deadline. As we were unable to fax the letters to either party, they were sent via the American Embassies in Alma Ata and Moscow.

On October 5, 1992, petitioners alleged that Minerais' third country sales of ferrosilicon from Kazakhstan, the Russian Federation, and Ukraine

were being sold at below the cost of production (COP). On October 28, 1992, we initiated a COP investigation of Minerais' sales of ferrosilicon to Japan. For details of analysis and parties' submissions, see analysis and recommendation memorandum dated October 28, 1992. (See also "COP" section of this notice.) On October 29, 1992, we served copies of the COP questionnaire on the Governments of Kazakhstan, via the American Embassy in Alma Ata, the Russian Federation, and Ukraine. We also requested that Minerais submit its profit and selling, general, and administrative costs for ferrosilicon purchased from each country.

On October 30, 1992, Minerais requested that we reconsider and rescind the COP investigation with regard to Kazakhstan. On November 6, 1992, Minerais again requested that we rescind the COP investigations with regard to Kazakhstan, the Russian Federation, and Ukraine. On November 16, 1992, petitioners submitted opposition to Minerais' November 6, 1992, submission. On November 18, 1992, Minerais submitted opposition to petitioners' November 16, 1992, comments.

On October 8, 1992, Minerais submitted a letter informing us that the Governments of Kazakhstan, the Russian Federation, and Ukraine would not respond to the Department's (original) questionnaire.

On October 8, 1992, Promsyrioimport informed us that the section A questionnaire response it submitted was complete. Promsyrioimport stated that because it has never sold to the United States, it is unable to submit a response to section C, and because Promsyrioimport is the trading organization, it is not aware of the information needed to respond to the request for factors of production information.

On October 16, 1992, we published a notice of postponement of the preliminary determinations in these investigations in the **Federal Register** (57 FR 47449) until not later than December 18, 1992.

On December 7, 1992, we received notification from the American Embassy in Alma Ata that they had just received the COP questionnaire (issued on October 29, 1992) and, therefore, had not yet passed it on to the Government of Kazakhstan.

On December 7, 1992, we received a letter from Promsyrioimport stating that, because it is a state trading export/import organization, its "response to section D is not appropriate".

Scope of Investigations

The product covered by these investigations is ferrosilicon, a ferroalloy generally containing, by weight, not less than four percent iron, more than eight percent but not more than 96 percent silicon, not more than 10 percent chromium, not more than 30 percent manganese, not more than three percent phosphorous, less than 2.75 percent magnesium, and not more than 10 percent calcium or any other element.

Ferrosilicon is a ferroalloy produced by combining silicon and iron through smelting in a submerged-arc furnace. Ferrosilicon is used primarily as an alloying agent in the production of steel and cast iron. It is also used in the steel industry as a deoxidizer and a reducing agent, and by cast iron producers as an inoculant.

Ferrosilicon is differentiated by size and by grade. The sizes express the maximum and minimum dimensions of the lumps of ferrosilicon found in a given shipment. Ferrosilicon grades are defined by the percentages by weight of contained silicon and other minor elements. Ferrosilicon is most commonly sold to the iron and steel industries in standard grades of 75 percent and 50 percent ferrosilicon.

Calcium silicon, ferrocalcium silicon, and magnesium ferrosilicon are specifically excluded from the scope of these investigations. Calcium silicon is an alloy containing, by weight, not more than five percent iron, 60 to 65 percent silicon and 28 to 32 percent calcium. Ferrocalcium silicon is a ferroalloy containing, by weight, not less than four percent iron, 60 to 65 percent silicon, and more than 10 percent calcium. Magnesium ferrosilicon is a ferroalloy containing, by weight, not less than four percent iron, not more than 55 percent silicon, and not less than 2.75 percent magnesium.

Ferrosilicon is classifiable under the following subheadings of the Harmonized Tariff Schedule of the United States (HTSUS): 7202.21.1000, 7202.21.5000, 7202.21.7500, 7202.21.9000, 7202.29.0010, and 7202.29.0050. The HTSUS subheadings are provided for convenience and customs purposes. Our written description of the scope of these investigations is dispositive.

Class or Kind Allegation

On October 2, 1992, Minerais requested that the Department identify two separate classes or kinds of merchandise: (1) Ferrosilicon with a silicon content of 55 percent silicon or less and (2) ferrosilicon containing more than 55 percent silicon. Minerais alleged that if two classes or kinds of merchandise were identified, petitioners would not have standing with respect to low silicon content ferrosilicon. On December 10, 1992, we received comments from petitioners in opposition to Minerais' request. Given that petitioners' comments were submitted only eight days before the deadline for the preliminary determinations, we have had insufficient time in which to consider this issue. We will, however, address this issue in the final determinations.

Period of Investigation

The period of investigation (POI) is December 1, 1991, through May 31, 1992.

Best Information Available

We have determined, in accordance with section 776(c) of the Act, that the use of best information available (BIA) is appropriate for sales of the subject merchandise in these investigations. In deciding to use BIA, section 776(c) provides that the Department may take into account whether the respondent was able to produce information requested in a timely manner and in the form required. In these cases, as noted in the "Case History" section of this notice, exporters of ferrosilicon from Kazakhstan, the Russian Federation, and Ukraine did not adequately respond to the Department's requests for information.

Kazakhstan

As detailed in the "Case History" section of this notice, the Department made numerous attempts to obtain adequate questionnaire responses from the Government of Kazakhstan. However, the information which has been provided is inadequate. We have granted every possible extension of time to give the Government of Kazakhstan sufficient time to prepare the information requested. The section A questionnaire response we received is inadequate on its face in that it was not certified by Ermak (the producer), Promsyrioimport (the trading company) or the government of Kazakhstan. The response was sent to the Department by Shearman and Sterling, counsel for Minerais, apparently at Minerais' request.

Consequently, because the Government of Kazakhstan did not produce the information requested, we based our preliminary determination in this investigation on BIA. As BIA, we used the highest margin listed in the notice of initiation for this investigation, which was based on the petition.

The Russian Federation

As detailed in the "Case History" section of this notice, the Department made numerous attempts to obtain adequate questionnaire responses from the Government of the Russian Federation. However, we did not receive adequate information. We have granted every possible extension of time to give the Government of the Russian Federation sufficient time to produce the information requested. We solicited factors of production information both as part of the original questionnaire (section D) and in the COP questionnaire. We did not receive factors of production information from any party in the Russian Federation. The section A questionnaire response we received from Promsyrioimport does not represent a complete questionnaire response. We did not receive responses to sections C, D, or to the COP questionnaire. Moreover, in addition to the request as part of the original questionnaire, we made a specific request that the Government of the Russian Federation indicate whether the section A response submitted by Promsyrioimport represented a consolidated response. The Government of the Russian Federation did not respond to this request.

Consequently, because the Government of the Russian Federation did not produce the information requested, we based our preliminary determination in this investigation on BIA. As BIA, we used the highest margin listed in the notice of initiation for this investigation, which was based on the petition.

Ukraine

As detailed in the "Case History" section of this notice, the Department made numerous attempts to obtain adequate questionnaire responses from the Government of Ukraine but were unable to obtain more than a response to the Antidumping Survey. The information which has been provided is inadequate. We have granted every possible extension of time to give the Government of Ukraine sufficient time to produce the information requested. We solicited factors of production information both as part of the original questionnaire (section D) and in the COP questionnaire. We did not receive factors of production information from any party in Ukraine. Nor did we receive a response to any section of the original questionnaire.

Consequently, because the Government of Ukraine did not produce the information requested, we based our preliminary determination in this investigation on BIA. As BIA, we used the highest margin listed in the notice of initiation for this investigation, which was based on the petition.

Minerais

As noted in the "Case History" section of this notice, Minerais submitted timely questionnaire responses in the Kazakh investigation. Minerais entered the same responses onto the record of the Russian investigation at a later date. Minerais purchases ferrosilicon from Promsyrioimport, the primary exporter of the subject merchandise from Kazakhstan and the Russian Federation to the United States during the period of investigation, then exports the merchandise to its U.S. affiliate. Minerais claimed that because it acted as an independent reseller in an intermediate country, foreign market value (FMV) should be based on Minerais' sales in third-country markets, not on a factor of production analysis. Minerais claims that it should be treated as the respondent in the Kazakh and Russian investigations and that the failure of the governments of these countries to respond to requests for information should not affect the analysis of Minerais' sales.

In order for Minerais to be treated as an intermediate country reseller pursuant to section 773(f) of the Act, the five criteria listed in section 773(f) must be satisfied. In this case two of the five criteria have not been satisfied.

(1) Regarding section 773(f)(2) which states the "producer of the merchandise does not know (at the timer of the sale to such reseller) the country to which such reseller intends to export the merchandise", we did not receive a complete response from the governments with which to determine this point. The Government of Kazakhstan did not provide factual certification or verifiable information that the government does not know to where the merchandise is being exported. The Government of the Russian Federation never certified Promsyrioimport's submissions as being on behalf of the Government of the Russian Federation as requested by the Department.

(2) Regarding section 773(f)(4) which states "the merchandise enters the commerce of such country but is not substantially transformed in such country", we have determined that the merchandise does not "enter the commerce" of the intermediate country, Finland. Minerais has stated that the merchandise enters a bonded warehouse in Finland. The Department has determined that entrance into a bonded warehouse is not entering the commerce of a country. The fact that some of this merchandise is subsequently resold in Finland does not demonstrate that the merchandise which is exported to the United States enters the commerce of Finland.

Cost of Production Investigations

We preliminarily determine that the COP investigations and comments thereon have become moot and need not be further addressed in these investigations. In a nonmarket economy situation involving sales from a country which qualifies as an intermediate country reseller, a COP allegation can be made against the sales which are the basis for FMV, in this case, Minerais' sales to Japan. Because the reseller does not produce the merchandise, we must determine the cost of production using the actual factors of production of the nonmarket economy producer to establish cost in accordance with section 773(b) of the Act. Minerais' acquisition price from the Kazakh producer is not the cost of production of the merchandise. However, since Minerais does not qualify for treatment as an intermediate country reseller its sales to Japan are irrelevant and a COP investigation is therefore unnecessary. The FMV for all of the sales during the POI must be based on factors of production in Kazakhstan, the Russian Federation, and Ukraine, pursuant to the nonmarket economy methodology in section 773(c) of the Act.

Standing Allegation

On October 1, 1992, we received a letter from Keokuk Ferro-Sil, Inc. (Keokuk), a ferroalloy plant in Iowa that produces 50 percent ferrosilicon, stating opposition to the antidumping investigations of ferrosilicon from Kazakhstan, the Russian Federation, and Ukraine. On October 7, 1992 we issued standing questionnaires to petitioners and Keokuk. We received responses on October 28 and October 29, 1992. We will conduct a thorough analysis of this information and consider written comments filed by all parties and comments made at a public hearing for the final determinations.

Fair Value Comparisons

To determine whether sales of ferrosilicon from Kazakhstan, the Russian Federation, the Ukraine were made at less than fair value, we compared the United States price (USP) to the foreign market value (FMV), as specified in the "United States Price" and "Foreign Market Value" sections of this notice.

United States Price

We based USP on BIA, which was information supplied by petitioners. Petitioners based their estimate of USP on the average U.S. f.o.b. import value of ferrosilicon from the former Union of Soviet Socialist Republics (U.S.S.R.) for the period of September 1991 to February 1992. The available import statistics did not differentiate U.S. imports of the subject merchandise from the former republics of the U.S.S.R.

Ferrosilicon is sold through the same centralized exporting company. All ferrosilicon exported from Kazakhstan, the Russian Federation, and Ukraine is priced for export by Promsyrioimport. Thus, the Customs value shown for imports from these countries reflects the prices actually paid for ferrosilicon sold for exportation. Petitioners made no adjustments to the estimated USP because they stated that they were unable to obtain information regarding foreign transportation costs.

Foreign Market Value

We based FMV on BIA, which was information provided by the petitioner. Petitioners contend that the FMV of Kazahk-Russian-, and Ukrainian-produced imports subject to this investigation must be determined in accordance with section 773(c) of the Act, which concerns non-market economy (NME) countries. In accordance with section 771(18)(c) of the Act, any determination that a foreign country has at one time been considered an NME shall remain in effect until revoked. This presumption covers the geographic area of the former U.S.S.R., each part of which retains the previous NME status of the former U.S.S.R. Therefore, Kazakhstan, the Russian Federation, and Ukraine will continue to be treated as NMEs until this presumption is overcome (see, Preliminary Determinations of Sales at Less Than Fair Value: Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine and Uzbekistan, 57 FR 23380 (June 3, 1992)). In accordance with section 773(c), FMV in NME cases is based on NME producers' factors of production (valued in a market economy country).

Petitioners calculated FMV on the basis of the valuation of the factors of production for AIMCOR, a U.S. producer of ferrosilicon. In valuing the factors of production, petitioners used Mexico as a surrogate country. For purposes of the initiation, we accepted Mexico as having a comparable economy and being a significant producer of comparable merchandise, pursuant to section 773(c)(4) of the Act.

Petitioners used AIMCOR's factors for raw material and processing material inputs, electricity, and labor. The raw material, energy and labor factors for producing ferrosilicon are based on AIMCOR's actual experience from October 1990 through September 1991. Overhead expenses are expressed as a percentage of the cost of manufacture as experienced by AIMCOR.

Petitioners based labor and electricity values on 1990 wage rates and 1991 energy rates in Mexico. Petitioners based the value of raw material costs for steel scrap, quartzite, coke, bituminous coal and charcoal on 1991 f.a.s. export values from the United States to Mexico. Petitioners added an amount for foreign inland freight expense to Mexico for these raw materials. Petitioners based the value of raw material costs of electrode paste on a delivered import price from Brazil to Mexico. Petitioners based raw material costs for diesel oil, woodchips, water and other processing materials on its own average costs from October 1990 through September 1991.

Pursuant to section 773(c) of the Act, petitioners added the statutory minima of 10 percent for general expenses and eight percent for profit, and an amount for shipment preparation.

Suspension of Liquidation

In accordance with section 733(d)(1) of the Act, we are directing the Customs Service to suspend liquidation of all entries of ferrosilicon from Kazakhstan, the Russian Federation, and Ukraine, as defined in the "Scope of Investigations" section of this notice, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. The Customs Service shall require a cash deposit or posting of a bond equal to the estimated margin amount by which the foreign market value of the subject merchandise exceeds the United States price as shown below. The suspension of liquidation will remain in effect until further notice.

Manufacturer/Producer/Exporter	Margin percent
All Manufacturers/producers/exporters	104.18

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determinations. If any of our final determinations are affirmative, the ITC will determine whether imports of the subject merchandise are materially injuring, or threaten material injury to, the U.S. industry, before the later of 120 days after the date of these preliminary determinations or 45 days after our final determinations.

Public Comment

In accordance with 19 CFR 353.38, case briefs or other written comments in at least ten copies must be submitted to the Assistant Secretary for Import Administration no later than February 5, 1992, and rebuttal briefs no later than February 12, 1992. In accordance with 19 CFR 353.38(b), we will hold a public hearing, if requested, to give interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. Tentatively, the hearings will be held on February 16, 1992, at 10 a.m. at the U.S. Department of Commerce, room 3708, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, room B-099, within ten days of the publication of this notice in the **Federal Register**. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. In accordance with 19 CFR 353.38(b), oral presentation will be limited to issues raised in the briefs.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673(f)) and 19 CFR 353.15(a)(4).

Alan M. Dunn,

Assistant Secretary for Import Administration.

[FR Doc. 92-31456 Filed 12-28-92; 8:45 am]

BILLING CODE 3510-DS-M

[A-307-807]

Notice of Preliminary Determination of Sales at Less Than Fair Value: Ferrosilicon From Venezuela

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: Shawn Thompson, Office of Antidumping Investigations, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482-1776.

PRELIMINARY DETERMINATION: We preliminarily determine that ferrosilicon from Venezuela is being, or likely to be, sold in the United States at less than fair value, as provided in section 733 of the

Tariff Act of 1930, as amended (the Act). The estimated margins are shown in the "Suspension of Liquidation" section of this notice.

Case History

Since the notice of initiation on June 11, 1992 (57 FR 27021, June 17, 1992), the following events have occurred.

On July 6, 1992, the International Trade Commission (ITC) issued an affirmative preliminary determination.

On July 17, 1992, the Department presented its questionnaire to CVG-Venezolana de Ferrosilicio C.A. (CVG-FESILVEN), the Venezuelan producer who accounted for at least 60 percent of known sales to the United States during the period of investigation (POI), in accordance with 19 CFR 353.42(b).

CVG-FESILVEN submitted a response to section A of the questionnaire on July 31, 1992, and a response to sections B and C of the questionnaire on August 21, 1992. On August 28 and September 24, 1992, we issued supplemental questionnaires to CVG-FESILVEN. We received the response to the first of these questionnaires on September 11, 1992, and the responses to the second on September 30 and October 2, 1992.

On October 5, 1992, petitioners requested a postponement of the preliminary determination. We granted this request, and on October 9, 1992, we postponed the preliminary determination until December 18, 1992.

On October 30, 1992, petitioners submitted a timely allegation that CVG-FESILVEN had made sales in the home market below the cost of production (COP). On November 19, 1992, we initiated a COP investigation of CVG-FESILVEN's home market sales and issued a COP questionnaire to CVG-FESILVEN.

On December 8, 1992, CVG-FESILVEN requested that the Department investigate whether certain of the petitioners in this investigation (AIMCOR; Alabama Silicon, Inc.; American Alloys, Inc.; Globe Metallurgical, Inc.; and Silicon Metaltech, Inc.) have standing to file the petition on "behalf of" the U.S. ferrosilicon industry. For further discussion of this topic, see the "Standing" section of this notice.

On December 18, 1992, we received the response to the COP questionnaire. Although this information was not received in time to use for purposes of the preliminary determination, we will consider it for the final determination.

Scope of Investigation

The product covered by this investigation is ferrosilicon, a ferroalloy generally containing, by weight, not less than four percent iron, more than eight percent but not more than 96 percent silicon, not more than 10 percent chromium, not more than 30 percent manganese, not more than three percent phosphorous, less than 2.75 percent magnesium, and not more than 10 percent calcium or any other element.

Ferrosilicon is a ferroalloy produced by combining silicon and iron through smelting in a submerged-arc furnace. Ferrosilicon is used primarily as an alloying agent in the production of steel and cast iron. It is also used in the steel industry as a deoxidizer and a reducing agent, and by cast iron producers as an inoculant.

Ferrosilicon is differentiated by size and by grade. The sizes express the maximum and minimum dimensions of the lumps of ferrosilicon found in a given shipment. Ferrosilicon grades are defined by the percentages by weight of contained silicon and other minor elements. Ferrosilicon is most commonly sold to the iron and steel industries in standard grades of 75 percent and 50 percent ferrosilicon.

Calcium silicon, ferrocalcium silicon, and magnesium ferrosilicon are specifically excluded from the scope of this investigation. Calcium silicon is an alloy containing, by weight, not more than five percent iron, 60 to 65 percent silicon and 28 to 32 percent calcium. Ferrocalcium silicon is a ferroalloy containing, by weight, not less than four percent iron, 60 to 65 percent silicon, and more than 10 percent calcium. Magnesium ferrosilicon is a ferroalloy containing, by weight, not less than four percent iron, not more than 55 percent silicon, and not less than 2.75 percent magnesium.

Ferrosilicon is classifiable under the following subheadings of the Harmonized Tariff Schedule of the United States (HTSUS): 7202.21.1000, 7202.21.5000, 7202.21.7500, 7202.21.9000, 7202.29.0010, and 7202.29.0050. The HTSUS subheadings are provided for convenience and customs purposes. Our written description of the scope of this investigation is dispositive.

Standing

On December 8, 1992, CVG-FESILVEN requested that the Department investigate whether certain of the petitioners in this investigation have standing to file the petition on "behalf of" the U.S. ferrosilicon industry. In this request, CVG-FESILVEN stated that one U.S. producer has affirmatively opposed this proceeding. However, this statement is incorrect. To date we have received a standing challenge from a domestic producer only in the companion antidumping investigations involving Kazakhstan, Russia and Ukraine and are investigating petitioners' standing in those cases. (See Preliminary Determination of Sales at Less Than Fair Value: Ferrosilicon From Kazakhstan, Russia and Ukraine, published elsewhere in this issue of the **Federal Register**.) We note that these investigations are separate and disinct from this proceeding. Nonetheless, because the petitioners in these cases are the same, our findings in the Kazakh, Russian and Ukrainian investigations may apply here as well.

Period of Investigation

The POI is December 1, 1991, through May 31, 1992.

Such or Similar Comparisons

We have determined for purposes of the preliminary determination that the product covered by this investigation comprises a single category of "such or similar" merchandise. We made similar merchandise comparisons on the basis of: (1) Silicon content range, (2) grade, and (3) sieve size, as described in appendix V of the questionnaire.

In its response, respondent proposed matching products using that three characteristics noted above, plus a fourth characteristic: Exact silicon content. However, we had already considered comments by all parties on this matter and determined that matching using only the three characteristics in appendix V was the most appropriate method. Therefore, we matched according to appendix V.

In addition, respondent designated certain matches as "identical," based on the four criteria it used to determine the most similar comparisons. However, appendix V requires that identical matches involve products which are identical in all physical characteristics, not just those identified in the appendix. As respondent did not claim that the products compared were identical in any physical characteristics other than the four noted above, we treated these matches as "similar" and revised this portion of the product concordance using the criteria outlined in appendix V.

Finally, respondent requested that we make price-to-price comparisons based on the assay weight (*i.e.*, the weight of contained silicon) of the merchandise. However, respondent failed to demonstrate that the prices, selling expenses, and movement charges involved in sales of this merchandise are based strictly on assay weight. Moreover, the sales documentation submitted in the questionnaire response

does not appear to support respondent's request. Accordingly, we made price-to-price comparisons based on the gross weight per metric ton.

Fair Value Comparisons

To determine whether sales of ferrosilicon from Venezuela to the United States were made at less than fair value, we compared the United States price (USP) to the foreign market value (FMV), as specified in the "United States Price" and "Foreign Market Value" sections of this notice.

United States Price

We based USP on purchase price, in accordance with section 772(b) of the Act, because the subject merchandise was sold to unrelated purchasers in the United States prior to importation and because exporter's sales price methodology was not otherwise indicated.

We calculated purchase price based on packed F.O.B. prices to unrelated customers. We increased USP by the amount of a price addition claimed by respondent on certain transactions. In accordance with section 772(d)(2)(A) of the Act, we made deductions, where appropriate, for foreign inland freight and pier rental charges.

In accordance with section 772(d)(1)(B) of the Act, respondent requested an addition to USP for the amount of duty drawback claimed by respondent from the Venezuelan government. We disallowed this adjustment, because not only did respondent not show that it actually received drawback on the exports in question, but also it failed to demonstrate that it had a reasonable expectation of ever receiving the drawback amounts claimed.

Foreign Market Value

In order to determine whether there were sufficient sales of ferrosilicon in the home market to serve as a viable basis for calculating FMV, we compared the volume of home market sales of ferrosilicon to the volume of third country sales of the same product, in accordance with section 773(a)(1)(B) of the Act. CVG–FESILVEN had a viable home market with respect to sales of ferrosilicon during the POI.

We calculated FMV based on packed F.O.T. (free on truck) prices to unrelated customers in the home market. For purposes of this preliminary determination, we excluded sales to related customers, pursuant to 19 CFR 353.45, as respondent failed to demonstrate that the prices paid by those customers were comparable to the prices paid by unrelated customers.

Pursuant to 19 CFR 353.56(a)(2), we made circumstance-of-sale adjustments, where appropriate, for differences in credit expenses and bank charges. Respondent calculated U.S. credit expenses based on the period between invoicing and payment by the customer. We recalculated U.S. credit expenses based on the period between shipment from the factory and payment.

We deducted home market packing costs and added U.S. packing costs, in accordance with section 773(a)(1) of the Act.

Currency Conversion

Because certified exchange rates from the Federal Reserve were unavailable, we made currency conversions based on the official monthly exchange rates in effect on the dates of the U.S. sales as certified by the International Monetary Fund.

Verification

As provided in section 776(b) of the Act, we will verify the information used in making our final determination.

Suspension of Liquidation

In accordance with section 733(d)(1) of the Act, we are directing the Customs Service to suspend liquidation of all entries of ferrosilicon from Venezuela that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. The Customs Service shall require a cash deposit or the posting of a bond equal to the estimated preliminary dumping margins, as shown below. The suspension of liquidation will remain in effect until further notice. The weighted-average dumping margins are as follows:

(In percent)

Manufacturer/producer/exporter	Weighted-average margin percentage
CVG-Venezolana de Ferrosilicio C.A	1.49
All others	1.49

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, the ITC will determine whether these imports are materially injuring, or threaten material injury to, the U.S. industry before the later of 120 days after the date of this preliminary determination or 45 days after our final determination.

Public Comment

In accordance with 19 CFR 353.38, case briefs or other written comments with at least ten copies must be submitted to the Assistant Secretary for Import Administration no later than February 10, 1992, and rebuttal briefs no later than February 16, 1992. In accordance with 19 CFR 353.38(b), we will hold a public hearing, if requested, to give interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. Tentatively, the hearing will be held on February 17, 1992, at 1 p.m. at the U.S. Department of Commerce, room 3708, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, room B–099, within ten days of the publication of this notice in the **Federal Register**. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. In accordance with 19 CFR 353.38(b), oral presentations will be limited to issues raised in the briefs.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f)) and 19 CFR 353.15(a)(4).

Dated: December 18, 1992.

Alan M. Dunn,

Assistant Secretary for Import Administration.

[FR Doc. 92–31457 Filed 12–28–92; 8:45 am]

BILLING CODE 3510–DS–M

[A–580–813]

Final Determination of Sales at Less Than Fair Value: Certain Welded Stainless Steel Butt-Weld Pipe Fittings From the Republic of Korea

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: John Gloninger, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–2778.

FINAL DETERMINATION: We determine that certain welded stainless steel butt-weld

pipe fittings from the Republic of Korea (Korea) are being, or are likely to be, sold in the United States at less than fair value, as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The estimated margins are shown in the "suspension of Liquidation" section of this notice.

Case History

Since the issuance of our notice of preliminary determination on October 21, 1992, (57 FR 48018, October 21, 1992) there has been no action taken by the Department, nor have any comments been submitted on the record from any party. Petitioner in this investigation is the Flowline Division of Markovitz Enterprises, Inc. Asia Bend Company, Ltd., the only respondent in this investigation, refused to respond to our questionnaire. For a discussion of the events leading up to the Department's preliminary determination and the use of best information available (BIA) see the notice cited above.

Scope of Investigation

The products subject to this investigation are certain welded stainless steel butt-weld pipe fittings ("pipe fittings"), whether finished or unfinished, under 14 inches inside diameter. Pipe fittings are used to connect pipe sections in piping systems where conditions require welded connections. The subject merchandise can be used where one or more of the following conditions is a factor in designing the piping system: (1) Corrosion of the piping system will occur if material other than stainless steel is used; (2) contamination of the material in the system by the system itself must be prevented; (3) high temperatures are present; (4) extreme low temperatures are present; (5) high pressures are contained within the system. Pipe fittings come in a variety of shapes, and the following five are the most basic: "elbows", "tees", "reducers", "stub ends", and "caps". The edges of finished fittings are beveled. Threaded, grooved, and bolted fittings are excluded from these investigations. The pipe fittings subject to this investigation are classifiable under subheading 7307.23.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Best Information Available

Our final determination is based on the use of best information available because we did not receive a response from Asia Bend Company, Ltd. during the course of this investigation. As best information, we have used the highest margin contained in the petition.

Critical Circumstances

Petitioner alleged that "critical circumstances" exist with respect to imports of the subject merchandise from Korea. Pursuant to section 733(e)(1) of the Act, we determined in our preliminary determination that there was a reasonable basis to believe or suspect that critical circumstances existed for imports of pipe fittings from Korea. If a final determination is affirmative, section 735(a)(3) requires us also to make a finding as to whether:

(A)(i) there is a history of dumping in the United States or elsewhere of the class or kind of merchandise which is the subject of the investigation, or

(ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise which is the subject of the investigation at less than its fair value, and

(B) there have been massive imports of the merchandise which is the subject of the investigation over a relatively short period.

Under 19 CFR 353.16(f), we normally consider the following factors in determining whether imports have been massive over a short period of time: (1) The volume and value of the imports; (2) seasonal trends (if applicable); and (3) the share of domestic consumption accounted for by imports.

In determining knowledge of dumping, we normally consider margins of 15 percent or more sufficient to impute knowledge of dumping under section 19 CFR 353.16(a)(1)(ii) for exporters sales price sales, and margins of 25 percent or more for purchase price sales. (See, *Final Determination of Sales at Less Than Fair Value; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from Italy,* 52 FR 24198, June 29, 1987 and *Final Determination of Sales at Less Than Fair Value; Extruded Rubber Thread from Malaysia,* 57 FR 38465, August 25, 1992). Since we received no responses from Asia Bend to our questionnaire, we are finding, as best information available, that its sales to the United States are exporters sales price transactions. Therefore, since the margin being assigned to Asia Bend Company, Ltd., which is based on the highest margin in the petition, is above 15 percent, we determine in accordance with our practice and section 735(a)(3) of the Act that the importer knew or should have known the exporter was dumping pipe fittings from Korea.

Because the Department did not receive a response to its questionnaire, we have also relied upon best information available for determining whether there have been massive imports of pipe fittings from Korea. Prior to our preliminary determination, although requested, we received no company-specific export statistics from Asia Bend. Therefore, absent any company-specific export statistics, we examined the Commerce Department's import statistics as one possible way to measure import levels of pipe fittings from Korea. The pipe fittings subject to this investigation are classifiable under subheading 7307.23.00 of the Harmonized Tariff Schedule of the United States (HTSUS). However, as stated in our notice of initiation, threaded, grooved, and bolted fittings are excluded from this investigation. Because we are unable to determine what percentage of the volume of imports under this HTSUS subcategory are made up of non-subject merchandise, we cannot rely on the Commerce Department's import statistics for this purpose.

Since respondents has refused to provide the Department with the requested shipment data, we have assumed, as best information available, that imports were massive over a relatively short period of time. Therefore, we find that imports of pipe fittings from Korea have been massive over a relatively short period of time.

Based on our analysis, we find, pursuant to section 735(a)(3) of the Act, that critical circumstances exist for imports of pipe fittings from Korea.

Continuation of Suspension of Liquidation

We are directing the Customs Service to continue to suspend liquidation of all entries of certain welded stainless steel butt-weld pipe fittings from the Republic of Korea that are entered, or withdrawn from warehouse, for consumption on or after July 23, 1992, which is 90 days prior to the date of publication of our preliminary determination in the **Federal Register**. The Customs Service shall require a cash deposit or bond equal to 21.2 percent on all entries of pipe fittings from Korea. This suspension of liquidation will remain in effect until further notice. The weighted-average dumping margins are as follows:

[In percent]

Producer/manufacturer/exporter	Weighted-average margin percentage
The Asia Bend Co., Ltd.	21.2
All other entries from Korea	21.2

ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our determination.

Notification to Interested Parties

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d). Failure to comply is a violation of the APO.

This determination is published pursuant to section 735(d) of the Act and 19 CFR 353.20(a)(4).

Dated: December 18, 1992.

Rolf Th. Lundberg, Jr.,

Acting Assistant Secretary for Import Administration.

[FR Doc. 92-31458 Filed 12-28-92; 8:45 am]

BILLING CODE 3510-DS-M

Export Trade Certificate of Review

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of initiation of process of revoke Export Trade Certificate of Review No. 90-00011.

SUMMARY: The Secretary of Commerce issued an export trade certificate of review to Strand International, Inc. Because this certificate holder has failed to file an annual report as required by law, the Department is initiating proceedings to revoke the certificate. This notice summarizes the notification letter sent to Strand International, Inc.

FOR FURTHER INFORMATION CONTACT: George Muller, Director, Office of Export Trading Company Affairs, International Trade Administration, 202/482-5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 ("the Act") (15 U.S.C. 4011-21) authorized the Secretary of Commerce to issue export trade certificates of review. The regulations implementing Title III ("the Regulations") are found at 15 CFR part 325. Pursuant to this authority, a certificate of review was issued on October 9, 1990 to Strand International, Inc.

A certificate holder is required by law (Section 308 of the Act, 15 U.S.C. 4018) to submit to the Department of Commerce annual reports that update financial and other information relating to business activities covered by its certificate. The annual report is due within 45 days after the anniversary date of the issuance of the certificate of review (§§ 325.14 (a) and (b) of the regulations). Failure to submit a complete annual report may be the basis for revocation (§§ 325.10(a) and 325.14(c) of the regulations).

The Department of Commerce sent to Strand International, Inc. on September 29, 1992 a letter containing annual report questions with a reminder that its annual report was due on November 23, 1992. Additional reminders were sent on November 24, 1992, and on December 8, 1992. The Department has received no written response to any of these letters.

On December 22, 1992, and in accordance with § 325.10(c)[2] of the Regulations, a letter was sent by certified mail to notify Strand International, Inc. that the Department was formally initiating the process to revoke its certificate. The letter stated that this action is being taken for the certificate holder's failure to file an annual report.

In accordance with § 325.10(c)(2) of the Regulations, each certificate holder has thirty days from the day after its receipt of the notification letter in which to respond. The certificate holder is deemed to have received this letter as of the date on which this notice is published in the **Federal Register**. For good cause shown, the Department of Commerce can, at its discretion, grant a thirty-day extension for a response.

If the certificate holder decides to respond, it must specifically address the Department's statement in the notification letter that it has failed to file an annual report. It should state in detail why the facts, conduct, or circumstances described in the notification letter are not true, or if they are, why they do not warrant revoking the certificate. If the certificate holder does not respond within the specified period, it will be considered an admission of the statements contained in the notification letter § 325.10(c)[2] of the regulations).

If the answer demonstrates that material facts are in dispute, the Department of Commerce and the Department of Justice shall, upon request, meet informally with the certificate holder. Either Department may require the certificate holder to provide the documents or information that are necessary to support its contentions (§ 325.10(c)[3] of the regulations).

The Department shall publish a notice in the **Federal Register** of the revocation or modification or a decision not to revoke or modify (§ 325.10(c)[4] of the regulations). If there is a determination to revoke a certificate, any person aggrieved by such final decision may appeal to an appropriate U.S. district court within 30 days from the date on which the Department's final determination is published in the **Federal Register** (§§ 325.10(c)[4] and 325.11 of the regulations).

Dated: December 21, 1992.

George Muller,

Director, Office of Export Trading Company Affairs.

[FR Doc. 92-31460 Filed 12-28-92; 8:45 am]

BILLING CODE 3510-DR-M

National Oceanic and Atmospheric Administration

Pacific Fishery management Council; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The Pacific Fishery Management Council's Coastal Pelagic Species Plan Development Team will hold a public meeting on January 6, 1993, beginning at 10 a.m. The meeting will be held in the small conference room at the California Department of Fish and Game, 330 Golden Shore, suite 50, Long Beach, CA.

The purpose of this meeting is to discuss the status of the coastal pelagic species fishery management plan.

For more information contact Patricia Wolf from the California Department of Fish and Game at (213) 590-5117 or Larry Jacobson from the National Marine Fisheries Service at (619) 546-7117.

Dated: December 22, 1992.

David S. Crestin,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 92-31474 Filed 12-28-92; 8:45 am]

BILLING CODE 3510-22-M

National Oceanic and Atmospheric Administration

Pacific Fishery Management Council; Notice of Teleconference

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The Pacific Fishery Management Council will hold a telephone conference on January 15, 1993, beginning at 10 a.m., Pacific Standard Time. The purpose of the telephone conference is to adopt a revised budget for fiscal year 1993 which began October 1, 1992. The final fund allocations to Regional Fishery Management Councils for fiscal year 1993 are yet to be determined by the National Marine Fisheries Service

(NMFS), but should be announced prior to January 15. At its November 1992 meeting, the Council decided that its primary concern was to maintain the four remaining council meetings and the salmon and groundfish management processes. The July 1993 meeting has already been canceled because of budget limitations.

Members of the public that wish to participate in this conference may do so at the following locations:

NMFS, Northwest Region, 7600 Sand Point Way, NE, Bldg. 1, Seattle, WA 98115–6300

California Department of Fish & Game, Ninth Street, room 1205, Sacramento, CA 95814–5560

NMFS, Southwest Region, 501 West Ocean Blvd., suite 4200, Long beach, CA 90802–4213

Pacific Fishery 1416, Management Council, 2000 S.W. First Avenue, suite 420, Portland, OR 97201

For more information contact Lawrence D. Six, Executive Director, Pacific Fishery Management Council, Metro Center, suite 420, 2000 SW First Avenue, Portland, OR 97201; telephone: (503) 326–6352.

Dated: December 22, 1992.

David S. Crestin,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 92–31475 Filed 12–28–92; 8:45 am]

BILLING CODE 3510–22–M

South Atlantic Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The South Atlantic Fishery Management Council (Council) will hold a joint public meeting of its Law Enforcement Committee and Advisory Panel on January 12–13, 1993, at the Town and Country Inn, 2008 Savannah Highway, Charleston, SC; telephone (803) 571–4366. The meeting will begin at 1:30 p.m. on January 12 and adjourn at 5 p.m., and at 10 a.m. on January 13 and adjourn at 5 p.m.

The planned law enforcement agenda items will include discussions on the enforceability of:

(1) Allowing fishermen to possess reef fish above the bag limit when using legal gear in other fisheries, for example, possessing hook and line gear while shrimp trawling;

(2) A possible rock shrimp season closure;

(3) Rock shrimping in the Oculina Coral Bank off Vero Beach, FL;

(4) Collecting commercial rock shrimp landings;

(5) Deep-water snapper-grouper closed areas;

(6) Marine fishery reserves;

(7) Allowing multi-gear trips in the North Carolina sink net fishery; and

(8) Management options in draft Amendment #6 to the Snapper-Grouper Fishery Management Plan.

For more information contact Carrie Knight, Public Information Officer: South Atlantic Fishery Management Council: One Southpark Circle, suite 306; Charleston, SC 29407–4699; telephone: (803) 571–4366.

Dated: December 22, 1992.

David S. Crestin,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 92–31473 Filed 12–28–92; 8:45 am]

BILLING CODE 3510–22–M

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement list; Proposed Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to Procurement List.

SUMMARY: The Committee has received proposals to add to the Procurement List commodities and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

COMMENTS MUST BE RECEIVED ON OR BEFORE: January 28, 1993.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Square 3, Suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202–3461.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603–7740.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the Federal Government (except as otherwise indicated) will be required to procure the commodities and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the commodities and services to the Government.

2. The action does not appear to have a severe adverse impact on the current contractors for the commodities and services.

3. The action will result in authorizing small entities to furnish the commodities and services to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the commodities and services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

It is proposed to add the following commodities and services to the Procurement List for production by the nonprofit agency listed:

Commodities

Cover, Protective, Life preserver
4220–00–926–9477

Nonprofit Agency: BESB Industries West Hartord, Connecticut.

Towel, Paper
7920–00–543–6492
7920–00–682–8710
7920–00–721–8884

Nonprofit Agency: Duluth Lighthouse for the Blind Duluth, Minnesota.

Carrier, Water Canteen
8465–01–314–4286

Nonprofit Agency: Human Technologies Corporation Utica, New York.

Services

Administrative Services, Marine Corps Systems Command, Quantico, Virginia

Nonprofit Agency: Didlake, Inc. Manassas, Virginia.

Janitorial/Custodial Ozark Lake Park, Pool #13 and Lake Dardanelle Area, Ozark, Arkansas

Nonprofit Agency: Abilities Unlimited of Fort Smith, Inc., Fort Smith, Arkansas.

Mailroom Operation, U.S. Army Engineer District, Prytania Street and Leake Avenue, New Orleans, Louisiana

Nonprofit Agency: Goodwill Industries of Southeastern Louisiana, Inc., New Orleans, Louisiana.

E.R. Alley, Jr.,

Deputy Executive Director.

[FR Doc. 92–31450 Filed 12–28–92; 8:45 am]

BILLING CODE 6820–33–M

Procurement List Additions

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Additions to Procurement List.

SUMMARY: This action adds to the Procurement List a commodity and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

EFFECTIVE DATE: January 28, 1993.

ADDRESSES: Committee for Purchase from People Who Are Blind or Severely Disabled, Crystal Square 3, Suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202-3461.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603-7740.

SUPPLEMENTARY INFORMATION: On January 17, June 12, September 18 and October 23, 1992, the Committee for Purchase from People Who are Blind or Severely Disabled published notices (57 FR 2081, 25023, 43224 and 48359) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to produce the commodity and provide the services, fair market price, and impact of the addition on the current or most recent contractors, the Committee has determined that the commodity and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46-48c and 41 CFR 51-2.4.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the commodity or services to the Government.

2. The action will not have a severe economic impact on current contractors for the commodity or services.

3. The action will result in authorizing small entities to furnish the commodity or services to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46-48c) in connection with the commodity or services proposed for addition to the Procurement List.

Accordingly, the following commodity and services are hereby added to the Procurement List:

Commodity

Cover, Water Canteen
8465-00-753-6490

Services

Commissary Shelf Stocking and Custodial, Fort McClellan, Alabama

Commissary Shelf Stocking and Custodial, Fort Campbell, Kentucky

Food Service Attendant, Scott Air Force Base, Illinois

Janitorial/Custodial, Federal Building (Floors 1 thru 7), 230 North First Avenue, Phoenix, Arizona

Janitorial/Custodial, Scott Air Force Base, Illinois

This action does not affect contracts awarded prior to the effective date of this addition or options exercised under those contracts.

E.R. Alley, Jr.,

Deputy Executive Director.

[FR Doc. 92-31451 Filed 12-28-92; 8:45 am]

BILLING CODE 6820-33-M

COMMODITY FUTURES TRADING COMMISSION

Minneapolis Grain Exchange Proposed Option on the Oats Futures Contract

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of availability of the terms and conditions of proposed commodity futures option contract.

SUMMARY: The Minneapolis Grain Exchange (MGE or Exchange) has applied for designation as a contract market in options on the oats futures contract. The Director of the Division of Economic Analysis (Division) of the Commission, acting pursuant to the authority delegated by Commission Regulation 140.96, has determined that publication of the proposal for comment is in the public interest, will assist the Commission in considering the views of interested persons, and is consistent with the purposes of the Commodity Exchange Act.

DATES: Comments must be received on or before January 28, 1993.

ADDRESSES: Interested persons should submit their views and comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581. Reference should be made to the MGE option on the oats futures contract.

FOR FURTHER INFORMATION CONTACT: Please contact Frederick Linse of the Division of Economic Analysis, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581, telephone 202-254-7303.

SUPPLEMENTARY INFORMATION: Copies of the terms and conditions will be available for inspection at the Office of the Secretariat, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581. Copies of the terms and conditions can be obtained through the Office of the Secretariat by mail at the above address or by phone at (202) 254-6314.

Other materials submitted by the MGE in support of the application for contract market designation may be available upon request pursuant to the Freedom of Information Act (5 U.S.C. 552) and the Commission's regulations thereunder (17 CFR part 145 (1987)), except to the extent they are entitled to confidential treatment as set forth in 17 CFR 145.5 and 145.9. Requests for copies of such materials should be made to the FOI, Privacy and Sunshine Act Compliance Staff of the Office of the Secretariat at the Commission's headquarters in accordance with 17 CFR 145.7 and 145.8.

Any person interested in submitting written data, views, or arguments on the proposed terms and conditions, or with respect to other materials submitted by the MGE, should send such comments to Jean A. Webb, Secretary, Commmodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581 by the specified date.

Issued in Washington, DC, on December 21, 1992.

Gerald D. Gay,

Director.

[FR Doc. 92-31430 Filed 12-28-92; 8:45 am]

BILLING CODE 6351-01-M

DEPARTMENT OF DEFENSE

Department of the Army

Office of the Secretary of the Army; Record of Decision (ROD) for the Development of the Armed Forces Recreation Center (AFRC) at Fort DeRussy, Waikiki, HI

AGENCY: United States Army, Department of Defense.

ACTION: Notice of Availability.

SUMMARY: This Notice of Availability (NOA) is a corrected copy of the NOA published in the Notices Section of the **Federal Register**, Volume 57, No. 225, page 54775, on November 20, 1992. The Army proponent for the proposed action is the U.S. Army Community and Family Support Center, Alexandria, Virginia, which directs the operation of the Hale Koa Hotel at Fort DeRussy. Full authority and responsibility for overall

development of Fort DeRussy as an installation lies with U.S. Army Support Command, Hawaii.

In March 1988, at the direction of Congress, the Secretary of the Army prepared a Master Plan for the AFRC at Fort DeRussy. The plan recommended the relocation of some U.S. Army Reserve units to Fort Shafter and the construction of new hotel and recreation facilities at Fort DeRussy. Studies showed a large demand for hotel accommodations in addition to the existing Hale Koa Hotel. To enhance the moral and recreation needs of the active and retired military community and to maximize recreational open space for shared use by the military and civilian communities, the plan recommended a proposed action.

The Army published a Notice of Intent to prepare a Draft Environmental Impact Statement (DEIS) in the **Federal Register** on January 23, 1989. Scoping meetings were held for governmental agencies on February 16, 1989, and for the public on February 22, 1989. The NOA of the DEIS was published by the U.S. Environmental Protection Agency in the **Federal Register** on January 19, 1990. A public hearing was held on February 5, 1990. Comments at the public hearing and in letters commenting on the DEIS have been considered in preparing the Final Environmental Impact Statement (FEIS).

The NOA of the FEIS was published in the **Federal Register** on March 6, 1992, and in the Bulletin of the (Hawaii) Office of Environmental Quality Control on March 8, 1992. The public comment period ended on April 5, 1992; no adverse comments were received.

The Department of the Army announces the ROD for development of the AFRC, Fort DeRussy, Waikiki, Hawaii, is available.

Under the recommended action, the U.S. Army would construct a hotel tower with up to 400 rooms to augment the existing Hale Koa Hotel; construct a hotel parking structure of 1,300 stalls in two stories (three levels); relocate utilities; and provide extensive landscaping and recreational facilities. Kalia Road, which crosses the Army post, would be realigned; its present intersection with Saratoga Road would be retained, and it would remain a two-lane road. The present Saratoga parking lot would be retained, landscaped and its parking stalls re-striped to accommodate 540–570 vehicles.

To provide space for construction of the new hotel tower and other facilities, some buildings now used by U.S. Army Reserve units will be demolished. The impact of these buildings being demolished and the U.S. Army Reserve units leaving Fort DeRussy are addressed in the FEIS. Construction of new U.S. Army Reserve facilities at Fort Shafter has been addressed in a separate Environmental Assessment.

Under the traditional design-construction contracting process, supplemental National Environmental Policy Act documents may be prepared after contract award to address any significant changes from the recommended action or significant changes in environmental impacts.

A NOA of the ROD will also be published in The Bulletin of the (Hawaii) Office of Environmental Quality Control.

Lewis D. Walker,

Deputy Assistant Secretary of the Army, (Environment, Safety and Occupational Health) OASA (IL&E).

[FR Doc. 92–31416 Filed 12–28–92; 8:45 am]

BILLING CODE 3710–08–M

Defense Logistics Agency

Cooperative Agreement Revised Procedures

AGENCY: Defense Logistics Agency (DLA).

ACTION: Cooperative Agreements; Proposed Revised Procedures.

SUMMARY: This proposed revised procedure implements Chapter 142, Title 10, United States Code, as amended, which authorized the Secretary of Defense, acting through the Director, Defense Logistics Agency (DLA), to enter into cost sharing cooperative agreements to support procurement technical assistance programs established by state and local governments, private nonprofit organizations, Tribal organizations, and Indian-owned economic enterprises. Subpart III of this issuance establishes the administrative procedures proposed to be implemented by DLA to enter into such agreements for this purpose.

DATES: Comments will be accepted until January 28, 1993. Proposed effective date: February 1, 1993.

FOR FURTHER INFORMATION CONTACT: Mr. Sim Mitchell, Program Manager, Office of Small and Disadvantaged Business Utilization (DLA–UM), Defense Logistics Agency, Cameron Station, Alexandria, VA 22304–6100, Telephone (703) 274–6471.

Sim C. Mitchell,

Program Manager, Office of Small and Disadvantaged Business Utilization.

I. Background Information

The Department of Defense's (DoD) efforts to increase competition in the private sector have been supplemented by many State and local governments and other entities which operate procurement technical assistance (PTA) programs. The DoD PTA Program increases DoD assistance to eligible entities providing PTA and assists in the payment of cost for and maintaining PTA programs. The PTA program is designed to expand the DoD industrial base and increase competition for its requirements for goods and services, thereby reducing the cost of maintaining a strong national security.

The PTA Cooperative Agreement Program was established by the Fiscal Year (FY) 1985 DoD Authorization Act, Public Law 98–525. The Public Law amended Title 10, United States Code (USC), by adding Chapter 142. Title 10, USC, as amended, continues to authorize the Secretary of Defense, acting through the Director, Defense Logistics Agency (DLA), to enter into cost sharing cooperative agreements with state and local governments, other nonprofit entities, Tribal organizations and Indian economic enterprises (hereafter referred to as eligible entities as defined in Section 3 of this procedure) to establish and conduct PTA programs.

U.S. Congress authorized a total of $12 million to support the program during FY 93. Of this total, $600,000 is available for Indian programs only.

Limitations placed on these funds are:

(a) DoD's share of an eligible entity's net program cost (NPC) shall not exceed 50%, unless the eligible entity/recipient proposes to cover a distressed area. If the eligible entity/recipient proposes to cover a distressed area, the DoD share may be increased to an amount not to exceed 75%. In no event shall DoD's share of NPC exceed $150,000 for programs providing less than statewide coverage or $300,000 for programs providing statewide coverage.

(b) For the Indian Program, DoD share of NPC shall not exceed 75% or $150,000, whichever is less, for programs providing services on reservation(s) within one Bureau of Indian Affairs (BIA) service area. For programs providing services to 100% of the reservations within one BIA service area and at least 50% of the reservations of at least one additional BIA service area (multi-area coverage), DoD's share of NPC shall not exceed 75% or $300,000, whichever is less.

(c) Eligible entities cannot subcontract more than 10% of their total program costs (TPC) for private profit and/or nonprofit consulting services to support the program. Under the American Indian Program, eligible entities cannot subcontract more than 25% of their TPC

for private profit and/or nonprofit consulting services to support the program.

DoD presently provides PTA to business firms through its network of Small Business Specialists located in industrial centers around the country. To the extent resources are available, the Defense Contract Management Command International/Defense Contract Management District (for purposes of this document referred to as DCMD) Associate Directors of Small Business (hereafter referred to as Associate Director) or representative(s) located in these industrial centers, will be available to provide: (1) assistance as necessary to facilitate full understanding of the solicitation requirements; and (2) general guidance in preparing proposals.

The purpose of the proposed revised procedure is to make available to all eligible entities the prerequisites, policies and procedures which will govern the award of cooperative agreements by DLA. Also, this procedure establishes the guidelines which will govern the administration of cooperative agreements.

Although this procedure will affect all eligible entities desiring to enter into a DLA awarded cooperative agreement, DLA has determined that this procedure does not involve a substantial issue of fact or law, and that it is unlikely to have a substantial or major impact on the nation's economy or large numbers of individuals or businesses. This determination is based on the fact that the proposed cooperative agreement procedure implements policies already published by the Office of Management and Budget pursuant to Chapter 63, Title 31, United States Code, Using Procurement Contracts and Grant and Cooperative Agreements. In addition, DLA cooperative agreements will be entered into pursuant to the authorities and restrictions contained in the annual DoD Authorization and Appropriation Acts. Therefore, public hearings were not conducted.

II. Other Information

The language contained in the current cooperative agreement procedure limited the period of coverage to the FY 92 Program in that it addressed the FY 92 Authorization Act requirements in specific terms, including the exact dollar amounts of funding applicable to the Program. This proposed revision to the procedure will provide general guidance for cooperative agreements entered into by the DLA and will become a permanent document for the duration of the FY 93 program.

Comments are invited on the procedure. Comments should be submitted to the Defense Logistics Agency, ATTN: DLA-UM, Cameron Station, Alexandria, VA 22304–6100. Comments received after 28 January 1993 may not be considered in formulating revisions to the Procedure.

Cooperation Agreement Procedure

III. Proposed Revision to DLA Procedure—Cooperative Agreements

3–1 Policy.

A. Proposals for cooperative agreements are obtained through the issuance of a Defense Logistics Agency (DLA) solicitation for cooperative agreement proposals (hereafter referred to as a SCAP). The contents of this procedure shall be incorporated, in whole or in part, into the SCAP to establish administrative requirements to execute and administer DLA awarded cooperative agreements. The SCAP may include additional administrative requirements that are not included herein.

B. The SCAP is issued through the Defense Contract Management District, or Defense Contract Management Command International (for purposes of this document referred to as DCMD), Associate Director of Small Business (hereafter referred to as Associate Director). The names, addresses and state or geographic areas under the cognizance of the Associate Directors are at Enclosure 1.

C. Only one proposal will be accepted from a single eligible entity. In cases where the area being or to be serviced by the eligible entity encompasses more than one DCMD's area of geographic cognizance, eligible entities will submit their proposals to the DCMD hearing cognizance over the preponderant part of the area being or to be serviced.

D. Cooperative agreements will be awarded on a competitive basis as a result of the SCAP. It is DLA's policy to encourage fair and open competition when awarding cooperative agreements.

E. Letters of support and recommendation from members of Congress are not necessary and will not be considered in the evaluation and selection of proposals to receive cooperative agreement awards.

F. The SCAP shall be given the widest practical dissemination. It will be provided to all known eligible entities and to those that request copies after it's issuance. All eligible entities that have advised DCMD of their interest in submitting a proposal under the SCAP will be invited to participate in preproposal conferences. The preproposal conferences will be held, at locations designated in the SCAP, approximately 30 calendar days prior to the SCAP's closing date.

G. Proposals will not be accepted from applicants who apply as co-equal partners or co-equal joint ventures. Only one organization can take the lead and primary responsibility for the program.

H. Proposals will not be accepted from applicants who propose to provide less than county or equivalent (i.e. parish, borough) coverage (hereafter referred to as county or equivalent). For example, if an applicant proposes to service any part of a county or equivalent, the applicant must service the entire county or equivalent.

I. The SCAP shall not be considered to be an offer made by DoD. It will not obligate DoD to make any awards under this Program.

J. The applicant's offer binds the eligible entity to perform the services described in its offer if selected for an award. The applicant's proposal will be incorporated into the cooperative agreement award document.

K. DoD is not responsible for any monies expended or expenses incurred by applicants prior to the award of a cost sharing cooperative agreement. However, actual expenses incurred by FY 93 award recipients to participate in a preproposal and/or postaward conference may be reimbursed under the FY 93 cooperative agreement award subject to the provisions of the applicable cost principles.

L. The award of a cooperative agreement under this program shall not in any way obligate DoD to enter into a contract or give preference for the award of a contract to a concern or firm which is or becomes a client of a DLA cooperative agreement recipient.

M. Eligible entities will receive consideration in the evaluation of proposals for assistance provided to clients resulting in the client(s) receiving prime and/or subcontracts with DoD, other Federal agency(ies), state(s) and/or local governments.

N. The period of performance for cooperative agreement awards shall cover a twelve month period.

O. To assist DoD in achieving its socioeconomic goals, applicants and cooperative agreement recipients must give special emphasis to assisting small disadvantaged business (SDB) firms which are participating or will be participating in DoD prime and subcontracting opportunities. A concerted effort must be made by recipients to identify SDB firms and provide them with marketing and technical assistance by a DoD component.

P. Award recipients are not required to obtain or retain the services of private profit and/or nonprofit consultants. Any subcontract costs being proposed for consulting services shall not exceed 10% of TPC (25% TPC under the American Indian Program). Proposals containing subcontracting costs for consultant services in excess of 10% of TPC (25% of TPC under the American Indian Program), will cause the proposal to be rejected.

Q. Reasonable quantities of government publications, such as "Selling to the Military," may be furnished to award recipients at no cost, subject to availability. All requests for such publications must be submitted to the organization to which administration is assigned.

R. For the purpose of executing cooperative agreements, authority is delegated to the Headquarters (HQ), DLA Cooperative Agreement Program Manager (hereafter referred to as Program Manager) and the Associate Director.

S. Each cooperative agreement recipient's area of performance will be limited to the county(ies) or equivalent specified in its cooperative agreement. For the American Indian program, the recipient's area of performance will be limited to the reservation(s) specified in its cooperative agreement.

T. The applicant/recipient will support the Mentor-Protege Pilot program as required by Section 831 of Public Law 101–510, "The National Defense Authorization Act."

U. For the American Indian program, if a tribal organization proposes to perform services benefiting more than one Indian tribe, written approval must be obtained by the eligible entity from each Indian Tribe to be serviced. Approval will consist of a written statement (signed by a responsible official authorized to legally bind the Indian tribe) indicating that the Indian tribe approves and agrees to accept the services to be provided by the eligible entity.

3–2 Scope.

This procedure implements Chapter 142 of Title 10, United States Code, as amended, and establishes procedure and guidelines for the award and administration of cost sharing cooperative agreements entered into between DLA and eligible entities. Under these agreements, financial assistance provided by DoD to recipients will cover the DoD share of the cost of establishing new and/or maintaining existing PTA programs for furnishing PTA to business entities.

3–3 Definitions.

The following definitions apply for the purpose of this procedure.

A. Act. The enabling legislation that authorizes the establishment and continuation of the PTA Cooperative Agreement Program each FY.

B. Agency. A field office of one of the twelve service areas, as published by the Bureau of Indian Affairs (BIA), U.S. Department of the Interior.

C. Civil jurisdiction. All cities with a population of at least 25,000 and all counties. Townships of 25,000 or more population are also considered as civil jurisdictions in four States (Michigan, New Jersey, New York, and Pennsylvania). In Connecticut, Massachusetts, Puerto Rico and Rhode Island where counties have very limited or no government functions, the classifications are done for individual towns.

D. Client. A recognized business entity, including a corporation, partnership, or sole proprietary ship, organized for profit or nonprofit, which is small or other than small, that has the potential or is seeking to market its goods and/or services to DoD, other Federal agency(ies), state(s) and/or local governments.

E. Consultant services. Marketing and technical assistance offered directly to cooperative agreement recipients by private nonprofit and/or profit seeking individuals, organizations or otherwise qualified business entities.

F. Cooperative agreement. A binding legal instrument reflecting a relationship between DLA and a cooperative agreement recipient for the purpose of transferring money, property, services or anything of value to the recipient to accomplish the requirements described in the agreement. The requirement shall be authorized by Federal statute and substantial involvement is expected between DLA and the recipient during performance of the agreement.

G. Cooperative agreement offer/application/proposal. An eligible entity's response to the SCAP describing its existing or planned PTA program.

H. Cooperative agreement award recipient. An organization receiving financial assistance directly from DLA to carry out the PTA program. The organization is the entire legal entity even if only a particular component of the entity is designated in the cooperative agreement award document.

I. Cost matching or sharing. The value of third party in-kind contributions and the portion of costs of a federally assisted project or program not borne by the Federal government.

J. Direct cost. Any cost that can be identified specifically with a particular final cost objective. No final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose, in like circumstances, have been included in any indirect cost pool to be allocated to that or any other final cost objective.

K. Distressed area. The geographical area being or to be serviced by an eligible entity in providing PTA to business firms physically located within an area that:

(1) has a per capita income of 80% of less of the State average; or

(2) has an unemployment rate that is one percent greater than the national average for the most recent 24-month period for which statistics are available; or

(3) is a "Reservation" which includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act.

L. Duplicate coverage. A situation caused by two or more applicants offering to provide marketing and technical assistance to clients located in county(ies) or equivalent within the same geographical area.

M. Eligible entities. Organizations qualifying to submit a proposal under the PTA program, including:

(1) State government. A State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State, exclusive of local governments. The term does not include any public and Indian housing agency under the U.S. Housing Act of 1937.

(2) Local government. A county, municipality, city, town, township, local public authority (including any public and Indian Housing agency under the United States Housing Act of 1937), school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under State law), any other regional or interstate government entity (such as regional planning agencies), or any agency or instrumentality of a local government. The term does not include institutions of higher education and hospitals.

(3) Private, nonprofit organizations. Any corporation, trust, foundation, or institution which is exempt or entitled to exemption under Section 501(c)(3)–(6) of the Internal Revenue Code, or which is not organized for profit and no part of the net earnings of which inure

to the benefit of any private shareholder or individual.

(4) Indian Economic enterprise. Any Indian-owned (as defined by the Secretary of the Interior) commercial, industrial, or business activity established or organized, whether or not such economic enterprise is organized for profit or nonprofit purposes: Provided, that such Indian ownership shall constitute not less than 51 per centum of the enterprise.

(5) Tribal organization. The recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body, or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities.

N. Follow-up counseling session. A documented counseling session (telephone call, correspondence, or personal discussion) held with a client, subsequent to the initial counseling session, where professional guidance is provided to assist the client in marketing its products and/or services to DoD, other Federal agency(ies), state(s) and/or local governments. This includes, but is not limited to providing advice and assistance regarding marketing opportunities or technical assistance in areas such as:

(1) matching the client's products and/or services with that being purchased by DoD, other Federal agency(ies), state(s) and/or local governments;

(2) assisting in understanding specifications;

(3) preparing requests to be placed on solicitation mailing lists;

(4) preparing offers; and

(5) providing postaward assistance in areas such as production, quality system requirements, finance, engineering and transportation.

The distribution of publications and specifications, or simply referring clients to another source for advice or assistance, is not considered to be a follow-up counseling session.

O. Existing program. Any PTA program that was the recipient of a cooperative agreement with DLA for any two or more years subsequent to FY88.

P. Federal funds authorized. The total amount of Federal funds obligated by the Federal government for use by the recipient.

Q. Indian. Any person who is a member of any Indian tribe, band, group, pueblo, or community which is recognized by the Federal Government as eligible for services from the BIA and any "Native" as defined in the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.].

R. Indian organization. The governing body of any Indian tribe (as defined below) or entity established or recognized by such governing body.

S. Indian tribe. Any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act [43 U.S.C. Section 1601 et seq.] which is recognized by the Federal Government as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

T. Indirect cost. Any cost not directly identified with a single final cost objective, but identified with two or more final cost objectives or an intermediate cost objective. An indirect cost is not subject to treatment as a direct cost.

U. Initial counseling session. The first documented session (telephone call, correspondence, or personal discussion) held with a client, where professional guidance is provided to assist the client in marketing its products and/or services to DoD, other Federal agency(ies), state(s) and/or local governments. This includes, but is not limited to providing advice and assistance regarding marketing opportunities or technical assistance in areas such as:

(1) matching the client's products and/or services with that being purchased by DoD, other Federal agency(ies), state(s) and/or local governments;

(2) assisting in understanding specifications;

(3) preparing requests to be placed on solicitation mailing lists;

(4) preparing offers; and

(5) providing postaward assistance in areas such as production, quality system requirements, finance, engineering and transportation.

The distribution of publications and specifications, or simply referring clients to another source for advice or assistance, is not considered to be an initial counseling session.

V. In-kind contributions/donations. The value of noncash contributions provided by the eligible entity and non-Federal parties to the PTA Program. Only when authorized by Federal legislation may property or services purchased with Federal funds be considered as in-kind contributions/donations. In-kind contributions/donations may be in the form of charges for real property and nonexpendable personal property and the value of goods and services directly benefiting and specifically identifiable to the project or program.

W. Multi-area coverage. A PTA program that proposes to service 100 percent of the reservations located within one BIA service area and at least 50 percent of the reservations located within another BIA service area. The list of areas administered as Indian Reservations, as compiled by the BIA, will be included in the SCAP to benefit American Indians.

X. Net program cost. The total program cost (TPC) (including all authorized sources) less any program income and/or other Federal funds not authorized to be shared.

Y. New start. An eligible entity that is not an existing program (see subparagraph O above for definition of an existing program).

Z. Other Federal funds. Federal funds such as those provided by the Job Training Partnership Act, and by Federal agencies other than DoD. When authorized by statute, Federal funds received from other sources, including grants, may be used as cost sharing and/or cost matching contributions.

AA. Per capita income. The estimated average amount per person of total money income received during a calendar year for all persons residing in a given political jurisdiction as published by the U.S. Department of Commerce, Bureau of the Census.

AB. Prior approval. Written approval by the authorized official evidencing prior consent, as required by the cooperative agreement award document.

AC. Procurement technical assistance (PTA). A program organized to generate employment and improve the general economy of a locality by assisting business firms in obtaining and performing under Federal, state and local government contracts.

AD. Program income. The gross income received by the recipient or subrecipient from cooperative agreement supported activities. It includes training fees received from other PTA centers and organizations. Such earnings exclude interest earned on advances. It may also include, but is not limited to, income from service fees, reimbursement for expenses incurred in conducting the program, sale of commodities, usage or initial fees, and royalties on patents and copyrights. It may be reported by the recipient on a cash or accrual basis, whichever is used for reporting outlays.

AE. Reservation. Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native

groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act [43 U.S.C., Section 1601 et seq.].

AF. Service area. Any of the twelve geographical regions, as published by the U.S. Department of the Interior, BIA, to include: Aberdeen, Albuquerque, Anardako, Billings, Eastern, Juneau, Minneapolis, Muskogee, Navajo, Phoenix, Portland and Sacramento.

AG. Solicitation for cooperative agreement proposals (SCAP). A document issued by DLA/DCMCs containing provisions and evaluation factors applicable to all applicants which apply for a PTA cooperative agreement.

AH. Statewide coverage. A PTA program which proposes to service at least 50% of a State's counties or equivalent and 75% of a State's labor force.

AI. Subrecipient. The legal entity to which a subagreement is awarded and which is accountable to the recipient of the cooperative agreement for the use of the PTA program funds for providing procurement technical assistance to business firms/clients.

AJ. Third party in-kind contributions. Property or services which benefit the PTA cooperative agreement program and which are contributed by non-Federal third parties without charge to the recipient.

AK. Total program cost (TPC). All allowable costs as set forth in OMB Circular Nos. A–21, A–87 and A–122, as applicable. All funds, and in-kind contributions/donations received from all sources, including third parties as a result of operating the program.

AL. Total quality management (TQM). Total quality is a philosophy of management which harnesses the creativity of employees, as well as management, in a structured approach to continuously improving the processes by which products or services are produced to meet customers' requirements and expectations. It is an integrated system of management with recognizable components which: acknowledges that the customer(s) define quality in product or service; focuses all of the efforts of the enterprise on understanding and meeting or exceeding customer needs; employs proven tools and techniques to map and measure processes so that variation can be reduced, defects can be prevented, and problems can be solved; and involves and values everyone.

3–4 Program Description.

A. The PTA Program assists eligible entities in providing marketing and technical assistance to business firms in selling their goods and services to Dod, other Federal agency(ies), State(s) and/or local governments. It also enhances the business climate and economies of the communities being served.

B. Program requirements will vary depending on location, the types of industries and business firms within the community, the level of economic activity in the community, and other factors.

C. A comprehensive PTA program should include, but not be limited to, the following:

(1) Personnel. Personnel qualified to counsel and advise business firms/clients regarding procurement policies and procedures as they apply to both prime contracts and subcontracts. The areas of consideration should relate to:

(a) Marketing techniques and strategies;

(b) Pricing policies and procedures;

(c) Preaward procedures;

(d) Postaward contract administration;

(e) Quality assurance;

(f) Production and manufacturing;

(g) Financing;

(h) Subcontracting requirements;

(i) Bid and proposal preparation; and

(j) Specialized acquisition requirements for such areas as construction, research and development, and data processing.

(2) Counseling tools. The publications which the eligible entity uses or plans to use for implementing its PTA program.

Some examples of what publications may be included follow:

(a) Commerce Business Daily;

(b) Federal Acquisitions Regulations (FAR);

(c) DoD FAR Supplement (DFARS);

(d) Commodity listings from Federal contracting activities; and

(e) Federal and military specifications and standards.

(3) Methods for providing PTA. The eligible entity's procedures and plans for activating and developing its outreach program, including networking throughout the area being serviced or which the applicant plans to service. Examples of networking include:

(a) locating assistance offices in areas of industrial concentration;

(b) establishing data links with other organizations; and

(c) creating data exchanges.

(5) Performance measurement. The program shall include a description of the methods, being used or to be used to periodically measure and verify the program's effectiveness. The program shall include time phased goals and techniques for measuring performance against proposed goals in the following areas:

(a) The total number of procurement outreach conferences sponsored/participated;

(b) The total number of initial and follow-up counseling sessions and types of business firms/clients to be assisted, including size of the business firms/clients (small businesses and other than small businesses) and socioeconomic status (small disadvantaged and women-owned businesses);

(c) The total number of applications submitted by clients for addition to solicitation (bidders) mailing list(s), which may include DoD, other Federal agency(ies), state(s) and/or local governments, as appropriate; and

(d) The total number and value of DoD prime contract and subcontract awards received by clients, including the client's size (small business and other than small business) and socioeconomic status (small disadvantaged and women-owned businesses) resulting from assistance received through the recipient's program.

(e) The total number and value of other Federal agencies' prime contract and subcontract awards received by clients, including the client's size (small business and other than small business) and socioeconomic status (small disadvantaged and women-owned businesses) resulting from assistance received through the recipient's program.

(f) The total number and value of state and/or local government agencies' prime contract and subcontract awards received by clients, resulting from assistance received through the recipient's program.

(g) Award recipients are required to have on file for their clients for each reported award, the following:

(1) prime contract number, dollar amount and date;

(2) subcontract number, dollar amount and date;

(3) a signed statement confirming that the contract award was obtained due to the assistance provided by the PTA center; and

(4) client's point of contact and telephone number.

(D) Fees and service charges. In the event the applicant charges or plans to charge clients a fee or service charge, details as to the amount and basis for the fee or service charge must be described. Also, recipients shall not charge a commission, percentage, brokerage or other fee that is contingent upon the success of the client securing a Government contract.

3–5 Procedures.

A. The Program Manager develops and prepares the SCAP.

B. The SCAP is approved by the Policy Committee and is issued by the Associate Director.

C. The Policy Committee is comprised of representatives from the HQ DLA Offices of General Counsel, Contracting Comptroller, Congressional Affairs and Small Business. The Staff Director, Small and Disadvantaged Business Utilization, serves as the Policy Committee Chairman.

D. The Policy Committee is responsible for reviewing the evaluations and recommendations of the Program Manager and the Evaluation Panel.

E. The Policy Committee is the final administrative appeal authority for disagreements between the Program Manager, and/or the Associate Director and the eligible entity and/or cooperative agreement recipient.

F. The evaluation of proposals submitted in response to the SCAP and the selection of award recipients shall be conducted as detailed below:

(1) Initial evaluation. The Associate Director will perform an evaluation of each proposal received to determine if the proposal:

(a) Provides county wide or equivalent coverage;

(b) Contains sufficient technical, cost and other information;

(c) Has been signed by a responsible official authorized to bind the eligible entity; and

(d) Generally meets all requirements of the SCAP.

If a proposal is removed from further consideration for an award by the Associate Director, the applicant will be promptly notified of the reason for removal. The applicant's proposal will be retained with other unsuccessful proposals by the Associate Director.

(2) Late proposals and revisions. Late or revised proposals will not be accepted from applicants after the deadline for receipt of proposals (to be specified in the SCAP) unless the revised proposal is determined acceptable based upon the following criteria:

(a) Acceptable evidence to support an otherwise late proposal or revised proposal received after the closing time and date shall consist of:

1. an original U.S. Post Office receipt for registered or certified mail showing date of mailing not later than the fifth calendar day before the date specified for receipt of proposals and revisions; or

2. when sent by U.S. Postal Service Express Mail Next Day Service Post Office to Addressee, 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. The postmark date must be two working days prior to the date specified for receipt of proposals. The term working days excludes weekends and Federal holidays. Applicants should request the postal clerk to place a legible hand cancellation "bull's-eye" postmark on the receipt and evelope or wrapper.

(b) If the proposal or revision is hand-delivered, the specific time and delivery date shall be supported by a receipt provided by the cognizant DCMD office.

(3) Minor informalities and mistakes. The Associate Director shall examine all proposals for mistakes.

(a) The Associate Director shall provide an eligible entity the opportunity to cure any deficiency resulting from a minor informality or irregularity contained in the offer or waive the deficiency, whichever is to the advantage of the Government. A minor informality or irregularity is one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in an offer or variation of an offer from the exact requirements of the solicitation that can be corrected or waived without being prejudicial to other offerors. The defect or variation is immaterial when the effect on program quality is negligible when contrasted with the program's total cost. (Two examples of minor informalities include the failure of the eligible entity to: (1) return the required number of copies of its proposal; and (2) execute the certifications required by the SCAP clauses).

(b) In cases of apparent mistakes and in cases where the Associate Director has reason to believe that a mistake may have been made, the Associate Director shall request verification from the entity that the offer "should read as stated" calling attention to the suspected mistake. Any clerical mistake, apparent in the offer may be corrected by the Associate Director. (Examples of apparent mistakes are: (1) obvious misplacement of a decimal point; (2) incorrect transposition of numbers; and (3) obvious mistake in identifying the program type (existing versus new start)). The Associate Director shall obtain from the eligible entity a written verification of the offer intended.

(c) Correction of a mistake by the Associate Director shall be effected by attaching the verification to the original offer. The Associate Director shall not make corrections on the entity's proposal. Corrections shall be restated in the cooperative agreement award document, if the entity receives an award.

(d) If an eligible entity requests permission to correct a mistake, including those identified by the Associate Director during their review and clear and convincing evidence establishes the existence of the mistake, the Associate Director may make a determination permitting the eligible entity to correct the mistake. If this correction would result in displacing one or more eligible entities that would otherwise rank higher, such a determination shall not be made unless the existence of the mistake and the proposed information actually intended are ascertainable substantially from the proposal itself.

(4) The Associate Director will review and verify the accuracy of the applicant's program status stated on block 8, "Type of Application" of the SF 424. If the Associate Director considers the proposal status misclassified, the matter will be reviewed with the applicant. If there is disagreement, the Associate Director's decision regarding the program classification is final and is not subject to further review.

(5) If the Associate Director determines that supporting documentation does not substantiate the applicant's proposed distressed area status (where greater than 50% funding as the DoD share is requested), the application will be disqualified and not be given further consideration for an award. The proposal will be retained with other unsuccessful applicants by the Associate Director.

(6) The Associate Director will forward all accepted proposals along with their recommendations to the Program Manager at HQ DLA. Proposals which pass the initial evaluation phase are subjected to a comprehensive evaluation by the Evaluation Panel.

(7) Comprehensive evaluation. The comprehensive evaluation is performed by a specially constituted HQ DLA Evaluation Panel comprised of small business specialists, contract management specialist, and other personnel deemed appropriate by the Policy Committee. A member of the Office of General Counsel, HQ, DLA, will provide legal assistance to the Evaluation Panel, as needed.

The purpose of the comprehensive evaluation is to assess the merits of the proposals to determine which offer the greatest likelihood of achieving the stated program objectives considering technical, quality, personnel qualifications, estimated cost, and other relevant factors. The Evaluation Panel

will conduct its evaluations in accordance with stated criteria.

(8) Upon completion of its review, the Evaluation Panel will submit its results and its recommendations to the Program Manager.

(9) Duplicate coverage. Proposals that include duplicate coverage will be processed by the Program Manager or designated representative(s) as follows:

(a) General program.

1. When two or more applicants submit proposals that provide duplicate coverage of the county(ies) or equivalent within the geographical area which the applicant plans to service, selection priority will be given to the proposal that is assigned the highest total points by the Evaluation Panel.

2. To be considered for an award, an applicant's proposal shall not duplicate more than 25% on an individual or cumulative basis any of the county(ies) or equivalent proposed by higher ranked applicant(s) as established by the Evaluation Panel.

3. Only one statewide program will be awarded in a state.

(b) American Indian program.

1. When two or more applicants submit proposals that provide duplicate coverage of the reservation(s) which the applicant plans to service, selection priority will be given to the proposal that is assigned the highest total points by the Evaluation Panel.

2. To be considered for an award, an applicant's proposal shall not duplicate more than 25% on an individual or cumulative basis any of the reservation(s) proposed by higher ranked applicant(s) as established by the Evaluation Panel.

(10) The Program Manager will submit his comments and the Evaluation Panel's recommendations to the Policy Committee for review.

(11) The Policy Committee will review the Evaluation Panel's award recommendations along with the Program Manager's comments. The results of the Policy Committee's review and its recommendations will be forwarded to the appropriate DCMD Commander for approval.

G. The award recommendations must be approved by the DCMD Commander and executed by the Associate Director.

3–6 Evaluation Factors.

A. The evaluation factors for new starts and existing programs, with their relative importance, will be specified in the SCAP.

B. The following evaluation factors (which may be subject to change) will be considered.

(1) Program development, and performance and effectiveness. (Existing Programs only.)

(2) Types and qualifications of personnel. (Existing Programs and New Starts.)

(3) Quality of the PTA Program. (New Starts only.)

(4) Potential number of business firms/clients in the county(ies) or equivalent being serviced and/or which the applicant plans to service. (Existing Program and New Starts). Under the American Indian program the potential number of business firms/clients on the reservation(s) being serviced and/or which the applicant plans to service will be evaluated.

(5) Amount and percentage of NPC to be shared by DoD. (Existing Programs and New Starts.)

(6) Level of unemployment in the area(s) being serviced and/or which the applicant plans to service. (Existing Programs and New Starts.)

(7) Subcontracting. (Existing Programs only.)

C. Certain of these evaluation factors will be evaluated based upon stated implementing policy for programs. For example, for the types and qualifications of personnel, applicants will be required to provide a list of professional personnel by name (or the qualification standard if a position is not occupied) along with salary and education information, previous experience (by technical discipline), and the percentage of time assigned or to be assigned to directly performing the program.

D. The amount of subcontracting for consultant services provided directly to cooperative agreement recipients by private nonprofit and/or profit seeking individuals, organizations or otherwise qualified business entities is limited to no more than 10% of TPC for both existing programs and new starts (25% of TPC under the American Indian Program). However, in evaluating this factor for existing programs, the smaller the amount of subcontracting for consultant services the greater the weight that will be given. In the case of new starts, subcontracting is not an evaluation factor. New starts are subject only to the 10% limitation (25% limitation under the American Indian Program).

3–7 DoD Funding.

A. Any funds authorized by Congress for the PTA program will be allocated equitably by the Program Manager among the DCMDs to cover the DoD share of NPC for existing and new starts programs.

B. The Program Manager is responsible for verifying that program limitations have not been exceeded.

C. If there is an insufficient number of satisfactory proposals in a DCMD to allow effective use of the funds allocated, the Program Manager will reallocate the funds among the DCMDs based upon the DCMD Commanders' approval of the award recommendations made by the Evaluation Panel and Policy Committee.

3–8 Cost Sharing Limitations.

A. The DoD share of NPC shall not exceed 50%, except in a case where an eligible entity meets the criteria for a distressed area. When the prerequisite conditions to qualify as a distressed area are met, the DoD share may be increased to an amount not to exceed 75%.

B. In no event shall the DoD share of NPC exceed $150,000 for programs providing less than statewide coverage or $300,000 for programs providing statewide coverage.

C. For the Indian Program, a request for DoD share shall not exceed 75% of NPC or $150,000 for programs providing service on reservation(s) within one BIA service area, or $300,000 for programs providing multi-area coverage.

D. The type and value of third-party in-kind contributions/donations is limited to no more than 25% of TPC.

E. The SCAP will provide that indirect costs are not to exceed 100% of direct costs. Indirect cost rates used in the proposal are subject to a downward revision only.

3–9 Cost Sharing Criteria.

A. Cost contributions may be either direct or indirect costs, provided such costs are otherwise allowable in accordance with the cost principles. Allowable costs which are absorbed by the applicant as its share of costs may not be charged directly or indirectly or may not have been charged in part or in whole to the Federal Government under other contracts, agreements, or grants.

B. The SCAP will require applicants to submit an annualized estimated budget, which may include cash contributions, in-kind contributions/donations, any fees and service charges to be earned under the program, and any other Federal agency funding (including grants, loans, and cooperative agreements) authorized to be used for this program.

C. Program income or other Federal funds, that are not authorized for use by Federal statute, (excluding loan guarantee agreements since these do not provide for disbursement of Federal funds) are not acceptable for use as the applicant's matching funds. Inclusion of other Federal funds in the program as part of TPC is subject to authorization by Federal statute and the terms of the

instrument containing such funds or written advice being obtained from the awarding Agency(s) authorizing such use. Any method used by the eligible entity in providing the required funds which relies upon Federal funds must be disclosed and identified in the eligible entity's proposal.

D. Where distressed area funding (greater than 50%) is requested and the civil jurisdiction(s) which the applicant services or plans to service includes both distressed areas and non-distressed areas, two budgets must be submitted based on the anticipated distribution of TPC between these two areas. In addition, the recipient's accounting system must segregate and accumulate costs in each of the two budget areas.

E. Recipients of PTA cooperative agreements are required to maintain records adequate to reflect the nature and extent of their costs and expenditures and to insure that the required cost participation is achieved. In addition, each state and local entity that receives Federal funding is required to have audits performed in accordance with the requirements of OMB Circular A-128. Nonprofit organizations and institutions of higher education are required to have audits performed in accordance with the requirements of OMB Circular A-133. Indian economic enterprises (for profit only) will also have an audit performed in accordance with the requirements of OMB Circular A-133. Recipients shall have the audit organization send a copy of all audit reports which pertain to the PTA cooperative agreement directly to the cognizant administration activity.

F. If the applicant charges or plans to charge a fee or service charge for PTA given to clients, or to receive any other income as a result of operating the PTA Program, the amount of such reimbursement must be added to TPC.

G. The recipient may add funds to its program after all program funds are properly expended. The reimbursable ratio will not be effected.

H. The following OMB Circulars (most recent issuance) will be used to determine allowable costs in performance of the program:

(1) OMB Circular No. A-21, Cost Principles for Educational Institutions;

(2) OMB Circular No. A-87, Cost Principles for State and Local Governments; and

(3) OMB Circular No. A-122, Cost Principles for Nonprofit Organizations. This circular will also be used by for-profit organizations.

3-10 Administration.

A. Cooperative Agreements will be assigned to the cognizant postaward administration activity listed in DLA Handbook 4105.4, DoD Directory of Contract Administration Service Components.

B. The organization having cognizance for postaward administration will be responsible for performing site reviews. The reviews will include:

(1) management control systems;

(2) financial management control systems;

(3) progress being made by the recipient in meeting its goals; and

(4) compliance with certifications, representations and other performance factors.

C. For eligible entities covered by OMB Circular No. A-102, Grants and Cooperative Agreements with State and Local Governments; or MB Circular No. A-110, Grants and Agreements with Institution of Higher Education, Hospitals and other Non-profit Organizations, the administrative requirements specified in those circulars will apply.

ASSOCIATE DIRECTORS OF SMALL BUSINESS

State or area	DCMC/DCMD	Associate Director for Small Business
Alaska, Hawaii, Puerto Rico and all U.S. Territories and Possessions	DCMC International, c/o DCMAO Puerto Rico Small Business Office, 209 Chapel Drive, Navy Security Group Activity, Sabana Seca, PR 00952	Mr. Victor Irizarry, Telephone (809) 795-3202.
Delaware, District of Columbia, Kentucky, Maryland, Michigan (inclusive of Alcona, Arenac, Bay, Genesee, Hillsdale, Huron, Iosco, Jackson, Lapeer, Lenawee, Macomb, Midland, Monroe, Oakland, Ogemaw, Oscoda, Saginaw, St. Clair, Sanilac, Tuscola, Washtenaw, Gladwin and Wayne counties), New Jersey, Ohio, Pennsylvania, Virginia and West Virginia.	DCMC Mid-Atlantic, 2800 South 20th St., P.O. Box 7478, Philadelphia, PA 19101-7478. For courier service delivery: DCMD Mid-Atlantic (DCMDM-DU) Bldg. 6-2, Pole 47B, 2800 South 20th St., Philadelphia, PA 19145	Mr. Tom B. Corey, Telephone (215) 737-4006, Toll Free 1-800-258-9503.
Colorado, Illinois, Indiana, Iowa, Kansas, Michigan (except Alcona, Arenac, Bay, Genesee, Hillsdale, Huron, Oosco, Jackson, Lapeer, Lenawee, Macomb, Midland, Monroe, Oakland, Ogemaw, Oscoda, Saginaw, St. Clair, Sanilac, Tuscola, Washtenaw, Gladwin and Wayne counties), Minnesota, Missouri, Nebraska, North Dakota, South Dakota, Utah, Wisconsin and Wyoming.	DCMD North Central, O'Hare Int'l Airport, 10601 West Higgins Rd., P.O. Box 66926, Chicago, IL 60666-0926.	Mr. James L. Kleckner, Telephone (312) 828-6020, Toll Free 1-800-637-3848.
Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont.	DCMD Northeast, 495 Summer Street, 8th Floor, Boston, MA 02210-2184.	Mr. John McDonough, Telephone (617) 451-4317/8, Toll Free (MA) 1-800-348-1011, (Outside MA) 1-800-321-1861.
Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas (except El Paso, Hudspeth, an Presidio counties and portions of Culberson, Jeff Davis, Brewster and Terrell counties or Zip codes 789xx and 799xx.	DCMD South, 805 Walker Street, Marietta, GA 30060-2789.	Mr. Howard Head, Jr., Telephone (404) 590-6195/6, Toll Free 1-800-331-6415, (GA Only) 1-800-551-7801.
California, Idaho, Montana, Nevada, New Mexico, Oregon, Texas (inclusive of El Paso, Udspeth and Presidio counties and portions of Culberson, Jeff Davis, Brewster and Terrell counties or counties in the 789xx or 799xx Zip Codes), and Washington.	DCMD West, 222 N. Sepulveda Blvd., El Segundo, CA 90245-4394.	Ms. E. Renee Deavens, Telephone (213) 335-3260, Toll Free (CA only) 1-800-233-6521, Toll Free (Others) 1-800-624-7373.

[FR Doc. 92-31549 Filed 12-28-92; 8:45 am]

BILLING CODE 3620-01-M

Department of the Navy

Public Hearing for the Draft Environmental Impact Statement for Base Realignment, Naval Air Warfare Center, Aircraft Division, Patuxent River, MD

Pursuant to Council on Environmental Quality regulations (40 CFR parts 1500–1508) implementing procedural provisions of the National Environmental Policy Act, the Department of the Navy has prepared and filed with the U.S. Environmental Protection Agency the Draft Environmental Impact Statement (DEIS) for Base Realignment, Naval Air Warfare Center, Aircraft Division (NAWC AD), Patuxent River, Maryland.

The DEIS has been distributed to various Federal, State, and local agencies, elected officials, special interest groups, local libraries, and the media. A limited number of single copies are available at the address listed at the end of this notice.

A public hearing to inform the public of the DEIS findings and to solicit comments will be held on January 21, 1993, at 7 p.m., in the Joseph E. Carter Office Building, St. Mary's County Governmental Center, State Route 245, Leonardtown, Maryland.

The public hearing will be conducted by the Navy. Federal, state, and local agencies, and interested parties are invited and urged to be present or represented at the hearing. Oral statements will be heard and transcribed by a stenographer; however, to assure accuracy of the record, all statements should be submitted in writing. All statements, both oral and written, will become part of the public record on this study and will be given equal weight.

In the interest of available time, each speaker will be asked to limit his oral comments to five (5) minutes. If longer statements are to be presented, they should be summarized at the public hearing and submitted in writing either at the hearing or mailed to the address listed at the end of this announcement. All written statements must be postmarked by February 1, 1993, to become part of the official record.

The Naval Air Warfare Center, Aircraft Division (NAWC AD), is relocating research and development operations from Warminster, Pennsylvania, and Trenton, New Jersey. This relocation will implement requirements stemming from the Defense Base Closure and Realignment Act of 1990. The relocation imposes total facilities requirements of approximately 1.1 million square feet which includes 852,000 square feet of new construction and 270,000 square feet of rehabilitated or remodeled space at NAWC AD. The action involves relocation of 2,700 personnel and their families (approximately 6,800 people), including Navy contractors, to the tri-county region of Calvert, Charles, and St. Mary's counties.

Additional information concerning this notice may be obtained by contacting Mr. Mike Bryan (Code 20N), Chesapeake Division, Naval Facilities Engineering Command, Building 212, Washington Navy Yard, Washington, DC 20374–2121, telephone (202) 325–3367.

Dated: December 22, 1992.

Michael P. Rummel,

LCDR, JAGC, USN, Federal Register Liaison Officer.

[FR Doc. 92–31466 Filed 12–28–92; 8:45 am]

BILLING CODE 3810–AE–M

DEPARTMENT OF ENERGY

Bonneville Power Administration

Wetland Involvement Notification for Irrigon Tower Restoration

AGENCY: Bonneville Power Administration (BPA), DOE.

ACTION: Notice of wetland involvement of their facilities located at Irrigon, Morrow County, Oregon.

SUMMARY: BPA proposes to add fill around Tower 11/3 of the McNary-John Day No. 1 line and Tower 11/3 of the McNary-Dalred No. 1 line and reestablish access to these towers for maintenance purposes. These towers have encountered problems with standing water, which reduces the uplift capacity of the tower footings and increases the potential risk of a tower failure. Over the last 10 years, the area of ponded water has increased in size and has developed characteristics of a wetland. The addition of approximately 2900 cubic yards of fill to this 7 acre wetland (including adjacent open water) would reduce it in size by 0.7 acre.

In accordance with DOE regulations for compliance with floodplain and wetland environmental review requirements (10 CFR part 1022), BPA will prepare a wetland assessment on this proposed action and will perform this action in a manner so as to avoid or minimize potential harm to or within the affected wetland.

DATES: Any comments are due by January 5, 1993. Comments should be sent to the address below.

FOR FURTHER INFORMATION CONTACT: John Taves, EFBG, Bonneville Power Administration, P.O. Box 3621, Portland, Oregon, 97208–3621, (503) 230–4995.

FOR FURTHER INFORMATION ON GENERAL DOE FLOODPLAIN/WETLANDS ENVIRONMENTAL REVIEW REQUIREMENTS CONTACT: Carol M. Borgstrom, Director, Office of NEPA Oversight, EH–25, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC, 20585, (202) 586–4600 or (800) 472–2756.

SUPPLEMENTARY INFORMATION: This wetland is located in Section 31, Township 5 North, Range 27 East. There are no alternatives to this proposed action.

It must be completed to reduce the risk of tower failure. Although the tower site has been dry historically, the development of agriculture fields and the use of irrigation has caused the pond to form.

If the project can be categorically excluded from further National Environmental Policy Act review, the wetland assessment will be included in the file on the project. If the project requires an environmental assessment or an environmental impact statement, the wetland assessment will be included in the appropriate environmental document. BPA shall take no action prior to fifteen days after publication of this notice. Maps and further information are available from BPA at the address shown above.

Issued in Portland, Oregon on December 10, 1992.

Karen A. Hunt,

Acting Administrator, Bonneville Power Administration.

[FR Doc. 92–31435 Filed 12–28–92; 8:45 am]

BILLING CODE 6450–01–M

Federal Energy Regulatory Commission

[Docket No. JD93–00981T South Dakota–1]

United States Department of Interior Bureau of Land Management; NGPA Amended Notice of Determination By Jurisdictional Agency Designating Tight Formation

December 21, 1992.

Take notice that on November 27, 1992, the Bureau of Land Management (BLM), Montana State Office, amended its notice of determination that was filed in the above-referenced proceedings on November 16, 1992, pursuant to section 271.703(c)(3) of the Commission's regulations. The November 16, 1992 notice determined that the Shannon Sandstone in the West Short Pine Hills Field, underlying certain lands in Harding County, South Dakota, qualifies

as a tight formation under section 107(b) of the Natural Gas Policy Act of 1978.

The amended notice of determination reduces the geographical area recommended for tight formation designation. The amended area covers 19,442.82 acres of federal mineral lands and 40 acres of non-Federal mineral lands more fully described on the attached appendix.

The notice of determination also contains BLM's findings that the referenced portion of the Shannon Sandstone Formation meets the requirements of the Commission's regulations set forth in 18 CFR part 271. On December 14, 1992, the State of South Dakota filed its concurrence to the amended notice of determination.

The application for determination is available for inspection, except for material which is confidential under 18 CFR 275.206, at the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426. Persons objecting to the determination may file a protest, in accordance with 18 CFR 275.203 and 275.204, within 10 days after the date this notice is issued by the Commission.

Lois D. Cashell,

Secretary.

Appendix

JD93-00981T—South Dakota-1

Township 15 North, Range 2 East
- Section 1: S/4W/4, W/2SE/4
- Section 2: Lots 2-4, SW/4NE/4, S/2NW/4, S/2
- Section 3: Lots 1-4, S/2N/2, S/2
- Section 4: Lots 1-4, S/2N/2, S/2
- Section 6: Lots 1-2, S/2NE4, SE/4SW/4, SE/4
- Section 7: E/2, E/2W/2
- Section 8: NE/4N/4, S/2NE/4, W/2, SE/4
- Section 9: All
- Section 10: N/2, SW/4, W/2SE/4
- Section 11: N/2, E/2SW/4, SE/4
- Section 12: W/2NE/4, W/2, W/2SE/4, SE/4SE/4
- Section 13: All
- Section 14: NE/4, S/2
- Section 15: S/2N/2, S/2
- Section 17: All
- Section 18: Lots 3-4, E/2, NE/4NW/4, NE/4SW/4
- Section 19: Lots 1-2, E/2W/2, E/2
- Sections 20-29: All
- Section 30: Lot 4, NE/4, NE/4SW/4, NE/4SE/4
- Section 31: Lots 1-4
- Sections 32-33: All
- Section 34: N/2
- Section 35: All

Township 16 North, Range 2 East
- Section 29: SW/4
- Section 30: NE/4SW/4, SE/4
- Section 31: Lot 2, E/2, SE/4SW/4
- Section 32: N/2, E/2SW/4, SE/4
- Section 33: S/2 (includes NE/4SW/4, Fee Tract)

[FR Doc. 92-31491 Filed 12-28-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. TF93-1-22-001; TM93-2-22-001]

CNG Transmission Corp.); Proposed Changes in FERC Gas Tariff

December 21, 1992.

Take notice that CNG Transmission Corporation ("CNG") on December 16, 1992, filed the following revised tariff sheets to First Revised Volume No. 1 of CNG's FERC Gas Tariff:

To be effective December 1, 1992:

Sub Twenty-Fourth Revised Sheet No. 31
Sub Twentieth Revised Sheet No. 34

To be effective January 1, 1993:

Sub Twenty-Fifth Revised Sheet No. 31

CNG states that the purpose of its amendment is to correct an inadvertent error contained in its November 30, 1992, filing made in this proceeding. CNG states that it inadvertently excluded the reconciliation surcharge portion of the rate charged by Tennessee Gas Pipeline Company in calculating its Transportation Cost Rate Adjustment ("TCRA"). To properly set its demand rate beginning December 1, CNG seeks waiver of the Commission's regulations to allow the instant filing to become effective on December 1, 1992, and January 1, 1993, as proposed.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before December 29, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-31487 Filed 12-28-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM93-7-21-000]

Columbia Gas Transmission Corp.; Proposed Changes in FERC Gas Tariff

December 21, 1992.

Take notice that Columbia Gas Transmission Corporation (Columbia) on December 16, 1992, tendered for filing the following revised tariff sheets to its FERC Gas Tariff, First Revised Volume No. 1, with the following proposed effective dates:

Effective December 17, 1992

Twenty-Ninth Revised Sheet No. 26
First Revised Substitute Twenty-First Revised Sheet No. 26.1

Effective January 1, 1993

Second Substitute Twenty-Second Revised Sheet No. 26.1

Columbia states that the aforementioned tariff sheets are being filed to increase the Gas Inventory Charge (GIC) pursuant to Section 28.6 of the General Terms and Conditions of Columbia's Tariff, from $0.3500 per Dth to $0.3702 per Dth.

Columbia states that copies of the filing is being mailed to all jurisdictional customers and affected state regulatory 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, Union Center Plaza Building, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protest should be filed on or before December 29, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of Columbia's filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-31488 Filed 12-28-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM93-2-24-002]

Equitrans, Inc.; Proposed Changes in FERC Gas Tariff

December 21, 1992.

Take notice that Equitrans, Inc. ("Equitrans"), on December 18, 1992, tendered for filing with the Federal Energy Regulatory Commission ("Commission") the following primary tariff sheets to its FERC Gas Tariff, Original Volume Nos. 1 and 3, to become effective January 1, 1993.

Original Volume No. 1

Second Substitute Forty-Second Revised Sheet No. 10
Substitute Twelfth Revised Sheet No. 23

Substitute First Revised Sheet No. 178
Original Sheet No. 179A

Original Volume No. 3

Substitute Twelfth Revised Sheet No. 8

Equitrans states that the purpose of the primary tariff sheets is to implement the Gas Research Institute (GRI) surcharge pursuant to Opinion No. 378 in Docket No. RP92-133-001, issued November 16, 1992, where the Commission authorized pipeline companies to collect the GRI funding unit from their customers. The proposed primary tariff sheets are intended to implement that authorization subject to the provision that the demand surcharge will not be effective for Rate Schedule PLS, all as more fully described in the Statement of Nature, Reasons and Basis for the proposed change. Equitrans states that the primary tariff sheets are substituted for the tariff sheets filed by Equitrans on December 1 and December 2, 1992 in Docket Nos. TM93-2-24-000 and TM93-2-24-001.

Equitrans also submitted the following alternate tariff sheets:

Original Volume No. 1

Alternate Second Substitute Forty-Second Revised Sheet No. 10
Alternate Substitute Twelfth Revised Sheet No. 23
Alternate Substitute First Revised Sheet No. 178

Original Volume No. 3

Alternate Twelfth Revised Sheet No. 4
Alternate Substitute Twelfth Revised Sheet No. 8

Equitrans requests that the foregoing alternate sheets be accepted effective January 1, 1993, in the event the primary sheets filed are not accepted. These alternate sheets eliminate any GRI charges from Equitrans' FERC Gas Tariff.

Pursuant to § 154.51 of the Commission's Regulations, Equitrans requests that the Commission grant any waiver of notice necessary to permit the proposed tariff sheets to become effective January 1, 1993, and any other waivers of its regulations or policy that may be required.

Equitrans states that a copy of its filing has been served upon its customers and interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before December 28, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-31489 Filed 12-28-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM93-3-5-000]

Midwestern Gas Transmission Co.; Notice of Rate Filing

(December 21, 1992).

Take notice that on December 17, 1992, Midwestern Gas Transmission Company ("Midwestern"), P.O. Box 2511, Houston, Texas 77252, filed its Eighth Revised Sheet No. 7 for a proposed effective date of January 1, 1993, pursuant to Article I of the Stipulation and Agreement filed by Midwestern in Docket No. RP91-78 and accepted by the Commission on June 25, 1992. Midwestern states that this filing reflects revisions in the recovery of take-or-pay and contract reformation costs billed to Midwestern by its upstream supplier, Tennessee Gas Pipeline Company (Tennessee) pursuant to Section XXX of Tennessee's General Terms and Conditions.

Midwestern further states that the revised demand surcharge amount reflects an increase over the previously effective demand surcharge amount, which was filed on June 30, 1992 in the above-referenced docket, resulting in a new proposed effective demand surcharge amount of $323,441, including interest. The proposed new demand surcharge amount has been amortized over an eighteen month period. The volumetric charge will not change.

Midwestern requests a waiver of the thirty-day notice period to the extent necessary to enable the revised demand surcharge amount to go into effect on January 1, 1993. Midwestern states that its Order No. 636 compliance filing as well as the press of end-of-year business prevented it from making the instant filing before this time. Midwestern further submits that such a waiver will not cause significant harm to any of Midwestern's customers.

Midwestern states that copies of the filing have been mailed to all of its jurisdictional customers and affected state regulatory commission.

Any person desiring to be heard or to make any protest with reference to said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with sections 211 and 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.211 and 385.214. All such petitions or protests should be filed on or before December 29, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to this proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file and available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-31490 Filed 12-28-92; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL-4549-6]

Notice of Withdrawal of the Information Collection Request for Activities Under Section 313 of the Emergency Planning and Community Right-to Know Act

On November 4, 1992, EPA informed OMB that it was withdrawing an Information Collection Request (ICR) entitled "Toxic Chemical Release Inventory Form R and Petitions" that was sent to them for review on September 8, 1992. This ICR was a renewal of the current ICR which was approved by OMB on May 19, 1992 (OMB #2070-0093) for activities under section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) and section 6007 of the Pollution Prevention Act. OMB acknowledged the withdrawal in a letter received at EPA on November 30, 1992.

In order to prevent a lapse in reporting under EPCRA and the PPA, the Pollution Prevention Act Implementation provision of the 1993 Appropriations Act (Public Law 102-879, approved October 6, 1992) provided that the May 19, 1992, version of Form R will remain in effect until revisions are promulgated. EPA withdrew the ICR to avoid confusion caused by this new statutory provision, and to allay any concerns of the regulated community about having to use an interim form. This means that facilities subject to Form R reporting requirements will be required to submit their 1992 reports by July 1, 1993, using the version of Form R approved on May 19, 1992. EPA plans to distribute the complete 1992 Form R and instructions

in early 1993, and will publish a notice of availability of the form and instructions as soon as they are ready. EPA will be initiating public dialogues in the near future to consult with interested parties as part of EPA's assessment of the public's experience with the new reporting requirements, and development of Form R and instructions. Because the changes in response to that experience may be significant, EPA believes it is appropriate to develop comprehensive revisions, and then to submit one revised ICR to OMB for review under the Paperwork Reduction Act, rather than continue with interim changes.

For further information contact: Anning Smith at EPA (202) 260-1576.

Dated: December 21, 1992.

Paul Lapsley, Director,

Regulatory Management Division.

[FR Doc. 92-31444 Filed 12-28-92; 8:45 am]

BILLING CODE 6560-50-M

[FRL-4550-1]

Agency Information Collection ActivitiesUnder OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden.

DATES: Comments must be submitted on or before January 28, 1993.

FOR FURTHER INFORMATION OR TO OBTAIN A COPY OF THIS ICR, CONTACT: Sandy Farmer at EPA, (202) 260-2740.

SUPPLEMENTARY INFORMATION:

Office of Policy Planning and Evaluation

Title: Evaluations of Environmental Programs (EPA No. 1629.01).

Abstract: This ICR is a new collection in support of independent environmental program evaluations to be conducted by the Program Evaluation Division (PED) of the Office of Policy, Planning and Evaluation (OPPE). As described in the Office of Management and Budget (OMB) Circular A-11, program evaluations are formal assessments, through objective measurement and systematic analysis, of the manner and extent to which Federal programs achieve objectives. These evaluations will identify and assess the cost-effectiveness of innovative approaches taken by EPA programs delegated to State agencies and the extent to which EPA is meeting its State customers' needs for the implementation of these programs.

Following approval of this ICR, PED representatives will conduct voluntary telephone or mail surveys of State representatives of specific State-delegated environmental programs. The information collected in each study will vary depending on the program evaluation objectives. In general, PED will ask questions pertaining to: (1) the objectives and priorities of the State agencies' program, (2) the strategies used by the States to fulfill objectives, (3) the use of resources (including EPA grant funds) to accomplish these objectives, (4) the extent of coordination with other agencies, (5) the State programs' staffing levels and experience, and (6) the State programs' communication and coordination with EPA Regional Offices.

The information will be tabulated, analyzed, and compiled into reports which will be used by PED program representatives, relevant EPA program and regional offices, and State environmental program managers to strengthen the implementation of EPA State-delegated programs.

PED representatives will conduct an average of 5 surveys of State-delegated environmental programs each year. There are no additional recordkeeping activities required of States for this collection of information.

Burden Statement: Public reporting burden for this collection of information is estimated to average 3.1 hours per response including time for listening to instructions and responding to survey questions.

Respondents: Representatives of State environmental programs.

Estimated Number of Respondents: 250.

Estimated Number of Responses Per Respondent: 1.

Frequency of Collection: One time.

Estimated Total Annual Burden on Respondents: 780 hours.

Send comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (PM-223Y), 401 M Street, SW.,Washington, DC, 20460.

and

Tim Hunt, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street, NW.,Washington, DC, 20503.

Dated: December 23, 1992.

Paul Lapsley,

Director, Regulatory Management Division.

[FR Doc. 92-31564 Filed 12-28-92; 8:45 am]

BILLING CODE 6560-50-F

[AD-FRL-4550-4]

Test Methods for Measurement of VOC Capture Efficiency

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of draft revised test methods.

SUMMARY: Draft revised test methods for measuring capture efficiency (CE) at coating and printing facilities equipped with a volatile organic compound (VOC) capture system and control device are available for public review and comment. These methods were published as part of the ozone Federal implementation plan (FIP) for Chicago in 1990, and they have been revised by the Agency since that time. The comments received will be considered in preparing the test methods for proposal prior to publication of the final methods in title 40 of the Code of Federal Regulations. The EPA will provide the public an additional opportunity for comment when the test methods are proposed in the **Federal Register**.

DATES: Comments must be received on or before March 1, 1993.

ADDRESSES: *Comments.* Comments should be submitted (in duplicate, if possible) to: Candace Sorrell, Office of Air Quality Planning and Standards (MD-19), Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

Draft test methods. Copies of the draft revised test methods may be obtained from David Cole, Office of Air Quality Planning and Standards (MD-15), Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number (919) 541-5565.

FOR FURTHER INFORMATION CONTACT: Candace Sorrell, Office of Air Quality Planning and Standards (MD-19), Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number (919) 541-1064.

SUPPLEMENTARY INFORMATION: On June 29, 1990, at 55 FR 26814, EPA published test protocols and procedures for measuring CE for VOC emissions at coating and printing facilities equipped with a VOC capture system and control device. These CE protocols and test procedures were presented in the

Chicago FIP at 40 CFR part 52.741(a)(4)(iii) and Appendix B, respectively. Subsequent to the promulgation of the FIP, EPA began to revise the CE test methods in anticipation of publishing them in Title 40 of the Code of Federal Regulations as recommended methods for States who are revising their ozone State implementation plan (SIP) rules for these source categories.

During this process, EPA received comments from several parties concerning the potentially excessive costs involved in using the recommended gas/gas and liquid/gas protocols that specify a temporary total enclosure (TTE) for measuring CE. In response to these comments, EPA has undertaken a 12-month study to develop and review possible alternatives and to assess their effect on VOC emission reduction efforts. These alternatives may include parameter monitoring correlated with emission results, as well as less expensive ways of using the current draft methods.

While the study is underway, EPA is allowing States to defer adoption of CE test requirements in the VOC rule corrections they are making in response to section 182(a)(2)(A) of the Clean Air Act, as amended in 1990. States that have already adopted EPA's recommended TTE methods (including the Chicago area covered by the FIP) may suspend the date for initial compliance certification until July 1, 1993, for sources subject to CE testing that involves the TTE method. A March 20, 1992, memorandum from the OAQPS director, John S. Seitz, entitled "Reanalysis of Capture Efficiency (CE) Guidance", discusses the 12-month study and provides interim guidance on the implementation of the CE protocols. This memorandum is available from the second contact shown in the ADDRESSES section of this notice.

As mentioned above, EPA has drafted revisions to the CE test procedures published as Appendix B of the Chicago FIP. The draft revisions to date are summarized below.

First, Appendix B, section 1.4, *Sampling requirements*, contained a requirement that the sampling time for each test run should be at least 8 hours, unless otherwise approved. This provision has been revised to specify that each run shall cover at least one complete production cycle, but must be at least 3 hours long. The sampling time for each run need not exceed 8 hours, even if the production cycle has not been complete. Alternative sampling times would be subject to EPA approval.

Second, a new section on audit sample procedures has been added to Procedure L, *VOC Input*.

Third, the directions for analysis audits have been expanded (newly added for Procedure L) to include information on audit sample availability and reporting directions for audit results.

Finally, a new method has been added for measuring liquid VOC input (called the distillation approach), as an alternative to Procedure L.

The EPA is soliciting comments on the draft revised CE test methods consisting of Appendix B of the Chicago FIP with the revisions discussed above. The Agency especially encourages comments on actual costs incurred where these or similar methods have been applied, on ways of reducing the cost of conducting the TTE test, and on the use of parameter monitoring. It is anticipated that EPA will find these comments helpful in completing the 1-year study. At the conclusion of this study, EPA intends to propose revised methods for CE in the **Federal Register**. A summary of the significant comments received, the Agency's response, and the conclusions of the study will be included in the proposal. At that time, the public will be given further opportunity to comment on the methods as proposed.

Dated: December 21, 1992.

Michael Shapiro,

Acting Assistant Administrator for Air and Radiation.

[FR Doc. 92-31565 Filed 12-28-92; 8:45 am]

BILLING CODE 6560-50-M

[FRL-4550-6]

Announcement of the Board of Trustees for the National Environmental Education and Training Foundation, Inc.

The National Environmental Education and Training Foundation was created by Public Law #101-619, the National Environmental Education Act of 1990. It is a private 501(c)(3) non-profit organization established to promote and support education and training as necessary tools to further environmental protection and sustainable, environmentally sound development. It provides the common ground upon which leaders from business and industry, all levels of government, public interest groups, and others can work cooperatively to expend the reach of environmental education and training programs beyond the traditional classroom. The Foundation will develop and support a grant program that promotes innovative environmental education and training programs; it will also develop partnerships with government and other organizations to administer projects that promote the development of an environmentally literate public.

The Administrator of the U.S. Environmental Protection Agency, per the terms of the Act, announces the following appointment to the National Environmental Education and Training Foundation, Inc. Board of Trustees. This appointee will join the current Board members, (see the **Federal Register**. October 21, 1991, May 7, 1992 and November 30, 1992) which include: Chairman Thomas H. Kean, President of Drew University; Vice Chairwoman Ellen Sulzberger Straus, President of Executive Service Strategies; Treasurer Francis Pandolfi, President and CEO of Times Mirror Magazines, Inc. and Chairman of the Board of The Sporting News Publishing Company; Ms. Rebecca Rimel, Executive Director of the Pew Charitable Trusts; Dr. James Crowfoot, Professor at the School of Natural Resources, University of Michigan; Mr. Edward Bass, Chairman of Space Biosphere Ventures and Chairman and CEO of FineLine Inc. and the Bass Company;

Mr. John Denver, Co-Founder and President of the Windstar Foundation; Mr. O. Mark De Michele, President and CEO of Arizona Public Service Company; Mr. Robert N. Wilson, Vice Chairman and member of the Board of Directors of Johnson & Johnson; Dr. Bonnie Guiton, now Dean of the McIntire School of Commerce at the University of Virginia and Michael J. Fuchs, Chairman and Chief Operating Officer of Home Box Office. Great care has been taken to assure that this new appointee not only has the highest degree of expertise and commitment, but also brings to the Board yet another point of view relating to environmental education and training. Terms of office for respective Board members will be determined and announced upon completion and announcement of the full complement of 13 Board members.

James R. Donnelley

Mr. James R. Donnelley has been the Vice Chairman of the Board of R.R. Donnelley & Sons since 1990 after holding positions as Group President of Corporate Development, Group President of Financial Services, Group Vice President of Financial Services, and Vice President as well as, Director of Financial and Legal Sales Division since 1972. R.R. Donnelley & Sons is the world's largest provider of printing and

printing-related services from data origination to final product distribution

Mr. Donnelley is a Trustee for Lake Forest College, WTTW Public Television, and the Associate Colleges of Illinois where he is also a member of the Executive Committee. Mr. Donnelley serves as a Director for the Barker Welfare Foundation, the John C. Griswold Foundation and The Donnelley Foundation, where he also serves as Vice President. Mr. Donnelley is also a Director for the Children's Memorial Hospital, Sierra Pacific Resources and Director and member of the Executive Committee of the National Merit Scholarship Corporation.

Mr. Donnelley is a member of The Conference Board, the University of Chicago Library Visiting Committee and the University of Chicago Council on the Graduate School of Business. He is also a member of the Commercial Club of Chicago and the Economic Clubs of Chicago and New York. Mr. Donnelley also serves on the Chicago Youth Centers Advisory Board.

Mr. Donnelley was born in Chicago on June 18, 1935 and currently resides in Chicago with his wife Nina. He received a B.A. from Dartmouth College in 1957 and an M.B.A. from the University of Chicago in 1962.

Mrr. Donnelley served in the U.S. Navy as a Lieutenant, qualified in Submarines, from 1957 through 1960.

For further information, please contact: Barbara Link, President, The National Environmental, Education and Training, Foundation, Inc., (202 628–8200.

William K. Reilly,

Administrator.

[FR Doc. 92–31567 Filed 12–28–92; 8:45 am]

BILLING CODE 6560–50–M

[FRL–4549–1]

Wisconsin: Final Partial Program Determination of Adequacy of State Municipal Solid Waste Landfill Permit Program

AGENCY: Environmental Protection Agency.

ACTION: Notice of final partial program determination of adequacy on Wisconsin's application.

SUMMARY: Section 4005(c)(1)(B) of the Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments (HSWA) of 1984, requires States to develop and implement permit programs to ensure that municipal solid waste landfills (MSWLFs) which may receive household hazardous waste or small quantity generator waste will comply with the revised Federal MSWLF Criteria (40 CFR part 258). RCRA section 4005(c)(1)(C) requires the Environmental Protection Agency (EPA) to determine whether States have adequate "permit" programs for MSWLFs, but does not mandate issuance of a rule governing such determinations. The EPA has drafted and is in the process of proposing a State/Tribal Implementation Rule (STIR) that will provide procedures by which the EPA will approve, or partially approve, State/Tribal landfill permit programs. The Agency intends to approve adequate State MSWLF permit programs as applications are submitted. Thus, these approvals are not dependent on final promulgation of the STIR. Prior to promulgation of the STIR, adequacy determinations will be made based on statutory authorities and requirements. In addition, States/Tribes may use the draft STIR as an aid in interpreting these requirements. The Agency believes that early approvals have an important benefit. Approved State/Tribal permit programs provide for interaction between the State/Tribe and the owner/operator regarding site-specific permit conditions. Only those owners/operators located in States/Tribes with approved permit programs can use the site-specific flexibility provided by 40 CFR part 258 to the extent the State/Tribal permit program allows such flexibility.

Wisconsin applied for a partial program determination of adequacy under section 4005 of RCRA. The EPA reviewed Wisconsin's application and made a tentative determination of adequacy for those portions of the MSWLF permit program that are adequate to ensure compliance with the revised Federal MSWLF Criteria. After reviewing all comments received, the EPA today is granting final partial approval to Wisconsin's program.

EFFECTIVE DATE: The determination of adequacy for Wisconsin shall be effective on December 29, 1992.

FOR FURTHER INFORMATION CONTACT: U.S. EPA Region 5, 77 West Jackson Boulevard, Chicago, Illinois, 60604, Attn: Mr. Andrew Tschampa, mailcode HRP–8J, telephone (312) 886–0976.

SUPPLEMENTARY INFORMATION:

A. Background

On October 9, 1991, the EPA promulgated revised Federal MSWLF Criteria (40 CFR part 258). Subtitle D of RCRA, as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), requires States to develop permitting programs to ensure that facilities comply with the revised Federal Criteria. Subtitle D also requires in section 4005 that the EPA determine the adequacy of State municipal solid waste landfill permit programs to ensure that facilities comply with the revised Federal MSWLF Criteria. To fulfill this requirement, the Agency has drafted and is in the process of proposing the State/Tribal Implementation Rule (STIR). The rule will specify the requirements which State/Tribal programs must satisfy to be determined adequate.

The EPA intends to propose in the STIR to allow partial approval if; (1) the Regional Administrator determines that the State/Tribal permit program largely meets the requirements for ensuring compliance with 40 CFR part 258; (2) changes to a limited narrow part(s) of the State/Tribal permit program are needed to meet these requirements; and, (3) provisions not included in the partially approved portions of the State/Tribal permit program are a clearly identifiable and separable subset of 40 CFR part 258. As provided in the revised Federal MSWLF Criteria, the EPA's national Subtitle D standards will take effect in October 1993. Consequently, any portions of the revised Federal MSWLF Criteria which are not included in an approved State/Tribal program by October 1993 would apply directly to owners/operators. The requirements of the STIR, if promulgated, will ensure that any mixture of State/Tribal and Federal rules that take effect will be fully workable and leave no significant gaps in environmental protection. These practical concerns apply to individual partial approvals granted prior to the promulgation of the STIR. Consequently, the EPA reviewed the program approved today and concluded that the State and the Federal requirements mesh reasonably well and leave no significant gaps. Partial approval would allow the Agency to approve those provisions of the State/Tribal permit program that meet the requirements and provide the State/Tribe time to make necessary changes to the remaining portions of its program. As a result, owners/operators will be able to work with the State/Tribal permitting agency to take advantage of the revised Federal MSWLF Criteria's flexibility for those portions of the program which have been approved.

The EPA will review the State/Tribe's requirements to determine whether they are "adequate" under section 4005(c)(1)(C) of RCRA. The EPA interprets the requirements for States or Tribes to develop "adequate" programs for permits or other forms of prior

approval to impose several minimum requirements. First, each State/Tribe must have enforceable standards for new and existing MSWLFs that are technically comparable to the revised Federal MSWLF Criteria. Second, the State/Tribe must have the authority to issue a permit or other notice of prior approval to all new and existing MSWLFs in its jurisdiction. The State/Tribe must also provide for public participation in permit issuance and enforcement as required in section 7004(b) of RCRA. Third, the EPA believes that the State/Tribe must show that it has sufficient compliance monitoring and enforcement authorities to take specific action against any owner or operator who fails to comply with an approved MSWLF program.

The EPA Regions will determine whether a State/Tribe has submitted an "adequate" program based on the interpretation outlined above. The EPA plans to provide more specific criteria for this evaluation when it proposes the STIR. The EPA expects State/Tribes to meet the STIR requirements for a MSWLF program before it gives full approval to a MSWLF program. The EPA is also requesting States/Tribes seeking partial program approval to provide a schedule for the submittal of all remaining portions of their MSWLF permit programs. The EPA notes that it intends to propose making submissions of a schedule mandatory in the STIR.

B. State of Wisconsin

On July 27, 1992, Wisconsin submitted an application to obtain a partial program adequacy determination for the State's municipal solid waste landfill permit program. On September 25, 1992, the EPA published a tentative determination of adequacy for Wisconsin's program. Further background on the tentative partial program determination of adequacy appears at 57 FR 44377, September 25, 1992.

Along with the tentative determination, the EPA announced the availability of the application for public comment and the date of a public hearing on the application. The public hearing was held on November 17, 1992.

The EPA has reviewed Wisconsin's application and has determined that the following portions of the Wisconsin solid waste permit program will ensure compliance with the revised Federal MSWLF Criteria.

1. Location restrictions for airport safety, floodplains, and wetlands (40 CFR 258.10, 258.11, and 258.12);

2. Operating criteria for cover materials, disease vector control, access, surface water, and liquids restrictions (40 CFR 258.21, 258.22, 258.25, 258.27, and 258.28);

3. Groundwater monitoring and corrective action criteria for groundwater monitoring systems, groundwater sampling and analysis requirements, assessment of corrective measures, selection of remedy, and implementation of the corrective action program (40 CFR 258.51, 258.53, 258.56, 258.57, and 258.58);

4. Closure and post-closure care requirements (40 CFR 258.60 and 258.61); and

5. Financial assurance requirements and allowable mechanisms for closure, post-closure care, and corrective action (40 CFR 258.71, 258.72, 258.73, and 258.74).

Wisconsin's MSWLF permit program has the authority to issue permits that incorporate the requirements of the revised Federal MSWLF Criteria to all MSWLFs in the State, with the exception of those located on Tribal Lands. In addition, the EPA has determined that Wisconsin's permit program contains provisions for public participation, compliance monitoring, and enforcement. When a feasibility report for a proposed MSWLF has been deemed administratively complete by Wisconsin, a public notice is published to solicit public comment and requests for a public hearing. All information submitted to Wisconsin for the feasibility report is available for public review. All written or verbal comments received from the public are considered by Wisconsin before a feasibility determination is made. A public notice concerning the final feasibility determination is published as a matter of policy. All information submitted with regard to modifications involving corrective action remedies is contained in a facility file, which is available for public review. Any information submitted by the public either verbally or in writing, is responded to by Wisconsin, with the written responses by the State placed in the facility file. As a matter of policy, Wisconsin publishes a notice for corrective action modifications that are proposed to be taken by a responsible party.

The Wisconsin compliance monitoring program has the authority to obtain information from a MSWLF facility, as well as the authority to enter and inspect any MSWLF site or record pertaining to solid waste management, to determine compliance. Wisconsin has mechanisms to verify the accuracy of information submitted by a MSWLF facility, to verify the sampling methods used by a MSWLF facility, and to produce evidence admissible in an enforcement proceeding. Wisconsin has the authority to conduct monitoring or testing to ensure compliance. Wisconsin inspects MSWLFs to verify and document compliance with solid waste regulations, deter violations, and provide opportunities to inform and educate the regulated community.

Wisconsin has the authority to implement the following remedies for violation of program requirements:

1. Authority to restrain a person from conducting an activity that may endanger or cause damage of human health or the environment;

2. Authority to sue an individual who is violating provisions of any statutes, regulations, orders, or permits that have been issued by the State; and

3. Authority to administratively assess penalties for violating statutes, regulations, orders, or permits.

To ensure compliance with all of the revised Federal MSWLF Criteria, Wisconsin intends to revise the following aspects of its permit program.

1. Wisconsin will revise its regulations to incorporate the Federal location restrictions for fault areas, seismic impact zones, and unstable areas in 40 CFR 258.13, 258.14, and 258.15.

2. Wisconsin will revise its regulations to incorporate the Federal operating requirements for the exclusion of hazardous waste, explosive gases control, run-on/run-off control systems, and recordkeeping in 40 CFR 258.20, 258.23, 258.26, and 258.29. Wisconsin will also seek to amend a State statute to meet the Federal operating requirements for air criteria in 40 CFR 258.24.

3. Wisconsin will revise its regulations to include a minimum composite liner design which consists of a 60-mil high density polyethylene geomembrane over 4 feet of compacted clay, which is more stringent than the Federal design requirements in 40 CFR 258.40(a).

4. The Federal Criteria require unfiltered groundwater samples to be used in laboratory analysis. Currently, Wisconsin requires samples to be filtered and preserved in the filed in accordance with standard published procedures. The Agency intends to revisit this issue during a proposed rulemaking. If the proposed rulemaking upholds the ban on field filtering, the State will be required to come into compliance with the provisions in 40 CFR 258.53(b). In the meantime, the State will not be given approval of this requirement.

5. Wisconsin will revise its regulations to incorporate detection and assessment groundwater monitoring

parameters that are consistent with the revised Federal Criteria, but take advantage of the flexibility provided in 40 CFR 258.54 and 258.55.

6. Wisconsin will seek to amend a State statute to fully meet the financial assurance requirements in 40 CFR 258.70(a).

The EPA received the following written public comments on its tentative determination of partial program adequacy for Wisconsin's MSWLF permit program.

One commenter expressed concern that certain definitions in the Wisconsin application did not completely correspond to the definitions in the revised Federal MSWLF Criteria. The EPA does not intend the adequacy review process to result in State/Tribal programs that are mirror images of the Federal program. Instead, the Agency will review the State/Tribal programs to determine whether the programs are adequate to ensure compliance with the revised Federal MSWLF Criteria. The EPA has reviewed the definitions in the Wisconsin program that correspond to the definitions in the revised Federal MSWLF Criteria, as well as State correspondence to owners/operators that was included in Wisconsin's application. The EPA believes the Wisconsin definitions and the State's implementation actions to date reflect the intent of the revised Federal MSWLF Criteria.

One commenter asserted that the EPA should not approve Wisconsin's daily cover material requirements because the State has the authority to grant an exemption from daily cover to MSWLFs serving a population equivalent of less than 2,500 people. The Wisconsin application acknowledged this exemption, but also indicated that the State does not anticipate any MSWLFs that meet this condition to remain open after October 9, 1993. In addition, the Wisconsin application indicated that the State has regulations to control disease vectors, blowing litter, and public access to minimize exposure of the public to potential hazards. The EPA has determined that this exemption will not pose a significant deviation from the revised Federal MSWLF Criteria.

One commenter asserted that Wisconsin's application indicated that the State's existing regulations concerning air criteria do not adequately address the requirements in the revised Federal MSWLF Criteria. Wisconsin acknowledged in its application that current State statute allows open burning at small MSWLF facilities. Wisconsin states that it intends to seek an amendment to this statute, to ban open burning at all MSWLF facilities. The State expects to be in compliance with the revised Federal MSWLF Criteria by October 9, 1995. The EPA agrees with this revision to the State program and the schedule for completion.

One commenter suggested that the EPA should reconsider granting Wisconsin approval of the liquid restrictions portion of its program because the State allows a small quantity exemption for the acceptance of liquid wastes (55-gallon maximum) on a one-time basis provided that the facility is in compliance. As Wisconsin explained in its application, this exemption has been granted less than a dozen times, and has concerned small quantities of liquids such as spoiled beer, ice cream, pudding, and rotten eggs that have been generated from local manufacturers. The EPA has determined that this exemption is a legitimate "safety valve" for local emergencies, and is not a significant deviation from the revised Federal MSWLF Criteria.

One commenter stated that it was unclear which portions of Wisconsin's groundwater monitoring program the EPA has approved. As the tentative determination in 57 FR 44378 indicated, the EPA tentatively approved the requirements in the State program that correspond to 40 CFR 258.51 (Groundwater Monitoring Systems), 40 CFR 258.53 (Groundwater Sampling and analysis), 40 CFR 258.56 (Assessment of Corrective Measures), 40 CFR 258.57 (selection of Corrective Action Remedy), and 40 CFR 258.58 (Implementation of the Corrective Action Program). As Wisconsin's application acknowledged, the State's detection and assessment groundwater monitoring programs must be revised. Wisconsin intends to modify its detection monitoring parameters to include a set of inorganic parameters, dissolved iron, and all the volatile organic compounds in Appendix I of the revised Federal MSWLF Criteria. In addition, the State intends to modify its assessment monitoring program to require all MSWLFs, where detection monitoring shows that a statistically significant release has occurred, to sample and analyze leachate for all the parameters in Appendix II of the revised Federal MSWLF Criteria, and then monitor the appropriate groundwater wells for all those substances found in the leachate. The EPA agrees with these revisions to the State program and the schedule for completion.

One commenter suggested that the EPA should grant partial approval to the groundwater sampling and analysis portion of Wisconsin's application because the State allows filtered groundwater samples. The revised Federal MSWLF Criteria require unfiltered groundwater samples to be used in laboratory analysis. Currently, Wisconsin requires samples to be filtered and preserved in the field in accordance with standard published procedures. The EPA intends to revisit this issue during a proposed rulemaking. The proposed rulemaking will defer the ban on field filtering while the EPA studies the issue of field filtering. If the EPA determines the ban should be upheld, Wisconsin will be required to come into compliance with the provisions of 40 CFR 258.53(b). In the meantime, the State will not be given approval of this requirement.

One commenter asserted that Wisconsin does not require a final cover that is as restrictive as the revised Federal MSWLF Criteria. As Wisconsin's application indicated, the State requires, at minimum, a 2-foot compacted earth infiltration layer. The State may require a specific soil type. It is State policy to require all MSWLFs closing after October 9, 1991, to place 2 feet of a fine-grained soil that has a maximum permeability of 1×10^{-5} cm/sec or that has a permeability less than or equal to any bottom liner system. In addition, the Wisconsin application indicated that it is State policy to require a composite cap when a facility has a composite liner. The State currently has the discretion to require a notation on the deed to a landfill. Wisconsin also maintains a list of all locations of known active and abandoned landfills. The EPA considers Wisconsin's closure requirements to be substantially equivalent to the revised Federal Criteria.

One commenter stated that it is unclear which portion of Wisconsin's financial assurance program were tentatively approved by the EPA. As the determination in 57 FR 44378 indicated, the EPA tentatively approved the requirements in the State program that correspond to 40 CFR 258.71 (Financial Assurance Requirements for Closure), 40 CFR 258.72 (Financial Assurance Requirements for Post-Closure Care), 40 CFR 258.73 (Financial Assurance Requirements for Corrective Action), and 40 CFR 258.74 (Allowable Mechanisms). As Wisconsin's application indicated, the State will seek to amend a statute to require all MSWLFs to maintain proof of financial responsibility. Wisconsin anticipates securing this amendment by October 9, 1995. The EPA agrees with this revision to the State program and the schedule for completion.

One commenter suggested that the EPA should condition approval of the Wisconsin application upon the State's

commitment that a general exemption process will not result in requirements for a facility that are less stringent than the revised Federal MSWLF Criteria. Discussions with the State have indicated that the situations in which the exemption has been used in the past would not pose a deviation from the revised Federal MSWLF Criteria. The general exemption process serves to foster innovative, but equivalent, methods of complying with Wisconsin requirements. Furthermore, the same commenter acknowledged that the State has acted responsibly in granting exemptions from the solid waste rules. The EPA is satisfied that the use of this general exemption does not undermine the effectiveness of Wisconsin's program.

One commenter suggested that the EPA should condition approval of the Wisconsin application upon the State's agreement that nonapproved facilities that fail to satisfy the revised Federal MSWLF Criteria by October 9, 1993, will be ordered to close immediately. In its application, Wisconsin outlined the manner in which existing facilities will be brought into compliance or closed. If an unapproved facility does not close by October 9, 1993, and intends to come into full compliance with the revised Federal MSWLF Criteria, the facility will be ordered to close if it is found to be causing groundwater contamination. If groundwater contamination is not found, Wisconsin will issue an order requiring the facility to submit a plan modification or a closure plan. The EPA is confident of the State's commitment to expeditiously close facilities not in compliance with the revised Federal MSWLF Criteria.

Wisconsin submitted a schedule indicating that it will be able to complete these revisions and amendments by October 9, 1995. As explained in the notice of tentative determination, the EPA reviewed the schedule and concluded that it was reasonable.

The EPA cautions Wisconsin that it currently plans to propose in the STIR that all partial approvals will expire in October 1995 for States/Tribes that have not received final approval for all provisions of 40 CFR part 258. Expiration of a partial approval would mean that the less flexible revised Federal Criteria would once again be effective in that State/Tribe. The EPA urges Wisconsin to work diligently to make all of the necessary revisions to those portions of its permit program that are not receiving approval today.

C. Decision

After reviewing the public comments submitted since the tentative decision, I conclude that Wisconsin's application for partial program adequacy determination meets all of the statutory and regulatory requirements established by RCRA.

Accordingly, Wisconsin is granted a partial program determination of adequacy for the following areas of its municipal solid waste program.

1. Location restrictions for airport safety, floodplains, and wetlands (40 CFR 258.10, 258.11, and 258.12);
2. Operating criteria for cover materials, disease vector control, access, surface water, and liquids restrictions (40 CFR 258.21, 258.22, 258.25, 258.27, and 258.28);
3. Groundwater monitoring and corrective action criteria for groundwater monitoring systems, groundwater sampling and analysis requirements, assessment of corrective measures, selection of remedy, and implementation of the corrective action program (40 CFR 258.51, 258.53, 258.56, 258.57, and 258.58);
4. Closure and post-closure care requirements (40 CFR 258.60 and 258.61); and
5. Financial assurance requirements and allowable mechanisms for closure, post-closure care, and corrective action (40 CFR 258.71, 258.72, 258.73, and 258.74).

Section 4005(a) of RCRA provides that citizens may use the citizen suit provisions of section 7002 of RCRA to enforce the revised Federal MSWLF Criteria in 40 CFR part 258 independent of any State enforcement program. As the EPA explained in the preamble to the revised Federal MSWLF Criteria, the EPA expects that any owner or operator complying with provisions in a State/Tribal program approved by the EPA should be considered to be in compliance with the revised Federal MSWLF Criteria. See 56 FR 50978, 50995 (October 9, 1991).

Today's action takes effect on the date of publication. The EPA believes it has good cause under section 553(d) of the Administrative Procedure Act, 5 U.S.C. 553(d), to put this action into effect less than 30 days after publication in the **Federal Register**. All of the requirements and obligations in the State's program are already in effect as a matter of State law. The EPA's action today does not impose any new requirements that the regulated community must begin to comply with. Nor do these requirements become enforceable by the EPA as Federal law. Consequently, the EPA finds that it does not need to give notice prior to making its approval effective.

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.

Certification Under the Regulatory Flexibility Act: Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this final approval will not have a significant economic impact on a substantial number of small entities. It does not impose any new burdens on small entities. This Rule, therefore, does not require a regulatory flexibility analysis.

Authority: This notice is issued under the authority of section 4005 of the Solid Waste Disposal Act as amended; 42 U.S.C. 6946.

Dated: December 17, 1992.

David A. Ullrich,

Acting Regional Administrator.

[FR Doc. 92-31441 Filed 12-28-92; 8:45 am]

BILLING CODE 6560-50-M

[OPPT-59956; FRL-4181-7]

Certain Chemicals; Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the **Federal Register** of May 13, 1983 (48 FR 21722). In the **Federal Register** of November 11, 1984, (49 FR 46066) (40 CFR 723.250), EPA published a rule which granted a limited exemption from certain PMN requirements for certain types of polymers. Notices for such polymers are reviewed by EPA within 21 days of receipt. This notice announces receipt of 10 such PMN(s) and provides a summary of each.

DATES: Close of review periods:

Y 93-23, December 15, 1992.
Y 93-24, December 23, 1992.
Y 93-25, December 15, 1992.
Y 93-26, 93-27, 93-28, 93-29, 93-30, 93-31, 93-32, December 22, 1992.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (TS-799), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E-545, 401 M St., SW.,

Washington, DC, 20460, (202) 554–1404, TDD (202) 554–0551.

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer on the PMNs received by EPA. The complete nonconfidential document is available in the TSCA Public Docket Office, NE–G004 at the above address between 8 a.m. and noon and 1 p.m. and 4 p.m., Monday through Friday, excluding legal holidays.

Y 93–23

Importer. UBE Industries (America), Inc.

Chemical. (G) Aromatic polymide.

Use/Import. (G) Base material for heat resistant or abrasion resistant mechanical parts. Import range: Confidential.

Y 93–24

Manufacturer. Confidential.

Chemical. (G) Fatty acids, polymer with pentaerythritol, isphthalic acid, trimethylolethylolethane and anhydrides.

Use/Import. (G) Coatings binder. Import range: Confidential.

Y 93–25

Manufacturer. Confidential.

Chemical. (G) Unsaturated polyester resin.

Use/Production. (S) Fiberglass reinforced plastics. Prod. range: Confidential.

Y 93–26

Importer. Peninsula Polymers.

Chemical. (G) Saturated polyester resin.

Use/Import. (S) Used as an ingredient in the manufacture of powder coating. Import range: 90,000–360,000 kg/yr.

Y 93–27

Importer. Peninsula Polymers.

Chemical. (G) Saturated polyester resin.

USE/IMPOR.(S) Used as an ingredient in the manufacture of powder coating. Import range: 90,000–380,000 kg/yr

Y 93–28

Importer. Peninsula Polymers.

Chemical. (G) Saturated polyester resin.

Use/Import. (S) Used as an ingredient in the manufacture of powder coating. Import range: 90,000–360,000 kg/yr.

Y 93–29

Importer. Peninsula Polymers.

Chemical. (G) Saturated polyester resin.

Use/Import. (S) Used as an ingredient in the manufactute of power coating. Import range: 90,000–360,000 kg/yr.

Y 93–30

Importer. Peninsula Polymers.

Chemical. (G) Saturated polyester resin.

Use/Import. (S) Used as an ingredient in the manufacture of powder coating. Import range: 90,000–360,000 kg/yr.

Y 93–31

Importer. Peninsula Polymers.

Chemical. (G) Saturated polyester resin.

Use/Import. (S) Used as an ingredient in the manufacture of powder coating. Import range: 90,000–360,000 kg/yr.

Y 93–32

Importer. Peninsula Polymers.

Chemical. (G) Saturated polyester resin.

Use/Import. (S) Used as an ingredient in the manufacture of powder coating. Import range: 90,000–360,000 kg/yr.

Dated: December 16, 1992.

Frank V. Caesar,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxic Substances.

[FR Doc. 92–31446 Filed 12–28–92; 8:45 am]

BILLING CODE 6560–50–F

[OPPTS–140204; FRL–4180–1]

Access to Confidential Business Information by Martin Marietta Technical Services, Incorporated

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor, Martin Marietta Technical Services, Incorporated (MAR), of Research Triangle Park, North Carolina, for access to information which has been submitted to EPA under all sections of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be confidential business information (CBI).

DATES: Access to the confidential data submitted to EPA will occur no sooner than January 13, 1993.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, TSCA Environmental Assistance Division (TS–799), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E–545, 401 M St., SW., Washington, DC 20460, (202) 554–1404, TDD: (202) 554–0551.

SUPPLEMENTARY INFORMATION: Under contract number 68–W2–0025, contractor MAR, of 79 Alexander Drive, Research Triangle Park, NC, will assist the Office of Pollution Prevention and Toxics (OPPT) in maintaining and operating the EPA CBI computer facilities located in Research Triangle Park, NC.

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA contract number 68–W2–0025, MAR will require access to CBI submitted to EPA under all sections of TSCA to perform successfully the duties specified under the contract. MAR personnel will be given access to information submitted to EPA under all sections of TSCA. Some of the information may be claimed or determined to be CBI.

EPA is issuing this notice to inform all submitters of information under all sections of TSCA that EPA may provide MAR access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract will take place at EPA Research Triangle Park, NC facilities and EPA Headquarters only.

MAR will be authorized access to TSCA CBI under the EPA "Contractor Requirements for the Control and Security of TSCA Confidential Business Information" security manual. Before access to TSCA CBI is authorized for MAR, EPA will approve MAR's security certification statement.

Clearance for access to TSCA CBI under this contract may continue until September 30, 1997.

MAR personnel will be required to sign nondisclosure agreements and will be briefed on appropriate security procedures before they are permitted access to TSCA CBI.

Dated: December 17, 1992.

George A. Bonina,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 92–31568 Filed 12–28–92; 8:45 am]

BILLING CODE 6560–50–F

[OPPTS–140203; FRL–4179–9]

Access to Confidential Business Information by ABT Associates, Incorporated and Eastern Research Group, Incorporated

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor, ABT Associates, Incorporated (ABT), of Cambridge, Massachusetts, and its subcontractor Eastern Research Group, Incorporated (ERG) of Lexington, Massachusetts, for access to information which has been submitted to EPA under all sections of the Toxic Substances Control Act

(TSCA). Some of the information may be claimed or determined to be confidential business information (CBI).

DATES: Access to the confidential data submitted to EPA will occur no sooner than January 12, 1993.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, TSCA Environmental Assistance Division (TS-799), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E-545, 401 M St., SW., Washington, DC 20460, (202) 554-1404, TDD: (202) 554-0551.

SUPPLEMENTARY INFORMATION: Under contract number 68-D2-0175, contractor ABT, of 55 Wheeler St., Cambridge, MA, and 4800 Montgomery Lane, Bethesda, MD and its subcontractor ERG, of 110 Hartwell Ave., Lexington, MA, will assist the Office of Pollution Prevention and Toxics (OPPT) in performing economic and regulatory impact analyses of actual or potential EPA actions taken under TSCA.

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA contract number 68-D2-0175, ABT and ERG will require access to CBI submitted to EPA under all sections of TSCA to perform successfully the duties specified under the contract. ABT and ERG personnel will be given access to information submitted to EPA under all sections of TSCA. Some of the information may be claimed or determined to be CBI.

EPA is issuing this notice to inform all submitters of information under all sections of TSCA that EPA may provide ABT and ERG access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract will take place at EPA Headquarters, ABT's Cambridge, MA and Bethesda, MD facilities, and ERG's Lexington, MA facility only.

ABT and ERG will be authorized access to TSCA CBI at their facilities under the EPA "Contractor Requirements for the Control and Security of TSCA Confidential Business Information" security manual. Before access to TSCA CBI is authorized at ABT's and ERG's sites, EPA will approve their security certification statements, perform the required inspection of their facilities, and ensure that the facilities are in compliance with the manual. Upon completing review of the CBI materials, ABT and ERG will return all transferred materials to EPA.

Clearance for access to TSCA CBI under this contract may continue until September 30, 1996.

ABT and ERG personnel will be required to sign nondisclosure agreements and will be briefed on appropriate security procedures before they are permitted access to TSCA CBI.

Dated: December 17, 1992.

George A. Bonina,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 92-31569 Filed 12-28-92; 8:45 am]

BILLING CODE 6560-50-F

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA-972-DR]

Connecticut; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Connecticut (FEMA-972-DR), dated December 17, 1992, and related determinations.

EFFECTIVE DATE: December 17, 1992.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3606.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 17, 1992, 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.*), as follows:

I have determined that the damage in certain areas of the State of Connecticut, resulting from a winter storm and coastal flooding on December 10-13, 1992, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("the Stafford Act"). I, therefore, declare that such a major disaster exists in the State of Connecticut.

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 the Stafford Act 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, 42 U.S.C. 5153, 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 Richard H. Strome 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 State of Connecticut to have been affected adversely by this declared major disaster:

The counties of Fairfield, New Haven, and Middlesex, for Individual Assistance and the counties of Fairfield and New Haven for Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Wallace E. Stickney,

Director.

[FR Doc. 92-31395 Filed 12-28-92; 8:45 am]

BILLING CODE 6718-02-M

[FEMA-971-DR]

Republic of the Marshall Islands; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the Republic of the Marshall Islands (FEMA-971-DR), dated December 16, 1992, and related determinations.

EFFECTIVE DATE: December 16, 1992.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3606.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 16, 1992, 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.*), as follows:

I have determined that the damage in certain areas of the Republic of the Marshall Islands, resulting from Typhoon Gay on November 17-18, 1992, (Republic Time Zone) is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("the Stafford Act"). I, therefore, declare that such a major disaster exists in the Republic of the Marshall Islands.

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 the Stafford Act for Public Assistance will be limited to 75 percent for the first $10 per capita of the total eligible costs. Eligible costs beyond $10 per capita will be funded 90 percent by the Federal government. The law specifically prohibits a similar waiver for funds provided for the Individual and Family Grant Program. These funds will continue to be reimbursed at 75 percent of total eligible costs, as required by law.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, 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 Mr. A. Roy Kite 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 Republic of the Marshall Islands to have been affected adversely by this declared major disaster:

Ailuk, Aur, Bikini, Enewetak, Likiep, Utirik, Wotho, Wotje, Maloelap, and Ujelang Atolls and Mejit Island for Individual Assistance and Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Wallace E. Stickney,

Director.

[FR Doc. 92-31396 Filed 12-28-92; 8:45 am]

BILLING CODE 6718-02-M

[FEMA-973-DR]

New Jersey; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of New Jersey (FEMA-973-DR), dated December 18, 1992, and related determinations.

EFFECTIVE DATE: December 18, 1992.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3606.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 18, 1992, 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.*), as follows:

I have determined that the damage in certain areas of the State of New Jersey, resulting from a severe coastal storm, unusual high tides, heavy rain, and riverine flooding, beginning December 10, 1992 and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("the Stafford Act"). I, therefore, declare that such a major disaster exists in the State of New Jersey.

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 the Stafford Act 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, 42 U.S.C. 5153, 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 Stephen Kempf, Jr. 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 state of New Jersey to have been affected adversely by this declared major disaster:

The counties of Atlantic, Monmouth, and Ocean for Individual Assistance and Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Wallace E. Stickney,

Director

[FR Doc. 92-31397 Filed 12-28-92; 8:45 am]

BILLING CODE 6718-02-M

[FEMA-975-DR]

Massachusetts; Notice of Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the Commonwealth of Massachusetts (FEMA-975-DR), dated December 21, 1992, and related determinations.

EFFECTIVE DATE: December 21, 1992.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3606.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 21, 1992, 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.*), as follows:

I have determined that the damage in certain areas of the Commonwealth of Massachusetts, resulting from a winter storm and coastal storm on December 11-13, 1992, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("the Stafford Act"). I, therefore, declare that such a major disaster exists in the Commonwealth of Massachusetts.

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 Public Assistance in the designated areas. Individual Assistance may be designated at a later date, if requested and warranted. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act 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, 42 U.S.C. 5153, 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 Richard H. Strome 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 Massachusetts to have been affected adversely by this declared major disaster: The counties of Barnstable, Essex, Plymouth, and Suffolk for Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Wallace E. Stickney,

Director.

[FR Doc. 92-31538 Filed 12-28-92; 8:45 am]

BILLING CODE 6718-02-M

[FEMA-974-DR]

New York; Notice of Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of New York (FEMA-974-DR), dated December 21, 1992, and related determinations.

EFFECTIVE DATE: December 21, 1992.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3606.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 21, 1992, 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.*), as follows:

I have determined that the damage in certain areas of the State of New York, resulting from a coastal storm, high tides, heavy rain, and riverine flooding on December 10, 1992, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("the Stafford Act"). I, therefore, declare that such a major disaster exists in the State of New York.

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 the Stafford Act 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, 42 U.S.C. 5153, 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 Mr. Jose Bravo 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 State of New York to have been affected adversely by this declared major disaster: Suffolk and Nassau Counties and New York City for Individual Assistance and Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Wallace E. Stickney,

Director.

[FR Doc. 92-31539 Filed 12-28-92; 8:45 am]

BILLING CODE 6718-02-M

FEDERAL MARITIME COMMISSION

Security for the Protection of the Public; Financial Responsibility To Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages; Issuance of Certificate (Casualty)

Notice is hereby given that the following have been issued a Certificate of Financial Responsibility to Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages pursuant to the provisions of Section 2, Public Law 89-777 (46 U.S.C. 817(d)) and the Federal Maritime Commission's implementing regulations at 46 CFR part 540, as amended: Seaspirit Cruise Line, Inc. and Seaspirit, Inc., 2800 University Avenue Southeast, Minneapolis, Minnesota 55414-3293. Vessel: Seaspirit.

Dated: December 21, 1992.

Joseph C. Polking,

Secretary.

[FR Doc. 92-31393 Filed 12-28-92; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM

[Docket No. R-0778]

Federal Reserve Bank Services

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice; Extension of comment.

SUMMARY: On October 14, 1992, the Board requested comment on a proposal to change the opening time for the Fedwire funds transfer service from 8:30 am Eastern Time (ET) to 6:30 am ET, effective October 4, 1993. The Board also requested comment on whether the operating hours for the book-entry securities transfer service should be changed from 8:30 am ET to 6:30 am ET, should the earlier funds transfer opening time be implemented. The Secretary of the Board, acting pursuant to delegated authority, has extended the comment period for 30 days.

DATES: Comments must be received by February 8, 1993.

ADDRESSES: Comments, which should refer to Docket No. R-0778, may be mailed to Mr. William Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551; or may be delivered to the Board's mail room between 8:45 am and 5:15 pm. All comments received at the above address will be included in the public file and may be inspected at Room B-1122 between 9 am and 5 pm.

FOR FURTHER INFORMATION CONTACT: For information regarding Fedwire funds and securities transfer operating hours, contact Gayle Brett, Manager (202/452-2394), or Lisa Hoskins, Senior Financial Services Analyst (202/452-3474), Division of Reserve Bank Operations and Payment Systems, Board of Governors of the Federal Reserve System. For information regarding the market needs for extended Fedwire operating hours, contact Patrick M. Parkinson, Assistant Director (202/452-3526) or Patricia White, Senior Economist (202/452-2912), Division of Research and Statistics, Board of Governors of the Federal Reserve System. For the hearing impaired *only*, Telecommunications Device for the Deaf, Dorothea Thompson (202/452-3544), Board of Governors of the Federal Reserve System, 20th & C Streets, NW., Washington, DC 20551.

SUPPLEMENTARY INFORMATION: The Board is extending the comment period for the proposed expansion of Fedwire funds transfer operating hours because discussions with several depository institution representatives suggest that a clarification of the Board's interest in receiving comments on the broader context of the proposal is needed. (57 FR 47080, October 14, 1992). The Board encourages comment on the proposed two hour extension in light of the possibility of the need for significantly longer operating hours (*i.e.*, the potential for 24 hour per business day operations) in the future to facilitate risk reduction associated with certain international financial transactions. A longer comment period is provided to allow commenters additional time to respond based on this clarification.

The Board requests comment on the proposed extension of the Fedwire service both for the specified two hour period and within the context of a longer-term strategic objective of

significantly expanded processing hours. Comments on longer hours for both the Fedwire funds and securities transfer services are sought. With regard to the longer-term, the Board seeks public comment on the potential implications of longer processing hours for reducing payment system risk in the settlement of foreign currency and other types of international transactions. In particular, how would Fedwire operating hours of 16, 18, or even 24 hours help to reduce settlement or other risks? What current or future business opportunities could be facilitated in Asia and in Europe, in the longer-term, if Fedwire payment processing capabilities were expanded? What potential impact could expanded hours have on operational needs and risks associated with international transactions? In the longer-term, could expanded processing hours facilitate the development of private-sector delivery-versus-payment mechanisms for settling foreign exchange transactions?

By order of the Board of Governors of the Federal Reserve System, December 21, 1992.

William W. Wiles,

Secretary of the Board.

[FR Doc. 92-31394 Filed 12-28-92; 8:45 am]

BILLING CODE 6210-01-F

Supplement to the FFIEC 002; "Call Report" for U.S. Branches and Agencies of Foreign Banks

AGENCY: Board of Governors of the Federal Reserve System, on behalf of the Federal Financial Institutions Examination Council.

ACTION: Final Notice of supplementary information collection.

SUMMARY: On a quarterly basis, all U.S. branches and agencies of foreign banks are required to file detailed schedules of their assets and liabilities in the form of a condition report and a variety of supporting schedules (FFIEC 002). This report is a uniform report established by the Federal Financial Institutions Examination Council ("FFIEC"), which is collected and processed by the Federal Reserve on behalf of all three federal banking regulatory agencies (the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency).

On December 10, 1991, the FFIEC, on behalf of the Board of Governors of the Federal Reserve System, announced for public comment a proposal for the addition of a supplement to the FFIEC 002 report. After consideration of comments submitted, the FFIEC has adopted the supplement (FFIEC 002S) and the Office of Management and Budget has approved the supplementary information collection. The new supplement will collect information on assets and liabilities of any non-U.S. branch that is "managed or controlled" (as defined below) by a U.S. branch or agency of a foreign bank.

The supplement will be implemented as of March 1993. A separate supplement must be completed for each non-U.S. branch that is managed or controlled by a U.S. office of the foreign bank. The supplements must be filed quarterly along with the U.S. branch's or agency's FFIEC 002.

DATES: The supplementary information collection will be implemented as of March 1993.

FOR FURTHER INFORMATION CONTACT: Henry S. Terrell, Senior Economist (202–452–3785), Division of International Finance, and Martha C. Bethea, Deputy Associate Director (202–452–3181), Division of Research and Statistics, Board of Governors of the Federal Reserve System.

SUPPLEMENTARY INFORMATION: The FFIEC has approved the addition of a supplement to the quarterly Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks (FFIEC 002: OMB No. 7100–0032) in order to collect information on assets and liabilities of any non-U.S. branch that is managed or controlled by a U.S. branch or agency of a foreign bank. This supplementary information collection is necessary because for a number of years foreign banks with U.S. branches or agencies have conducted a large banking business at branches domiciled in offshore centers, primarily in the Cayman Islands and the Bahamas. Foreign banks are able to use these offshore branches to conduct a banking business free of any U.S. reserve requirements, FDIC premiums, or statistical reporting requirements. While nominally domiciled in these offshore centers, these branches are often largely run out of the banks' U.S. agency or branch office, with a separate set of books but often with overlapping management responsibilities. The transactions of these offshore branches are often largely with U.S. residents. Therefore, the situation exists where a large amount of banking business is being conducted in the United States with U.S. residents for which no statistical reporting was previously available. The same statistical problem does not exist for offshore branches of U.S. banks because several statistical reports are collected covering their operations in these centers.

This situation, in which foreign bank activities, including large and potentially volatile transactions with U.S. residents, escaped statistical reporting, needed to be addressed. Better data are needed primarily to obtain improved data on U.S. credit and deposit flows and international indebtedness. The supplement also will be available to supervisory personnel.

Three comment letters concerning the proposed information collection were submitted—from (1) the Institute of International Bankers (the "Institute"), (2) Peat Marwick Management Consultants ("Peat Marwick"), and (3) the Honorable Donald W. Riegle, Jr., Chairman, Committee on Banking, Housing, and Urban Affairs, United States Senate. In response to these comments, the definition of "managed or controlled" and the extent to which the existing FFIEC 002 report will be used to develop the reporting panel have been refined and clarified. Also, as requested, an option has been added to permit reporting on the basis of either cash or accrual accounting. A few minor clarifications also have been made to the form and instructions. The report, as amended, will be implemented as of March 1993.

The supplement and instructions, as amended, are published in full below. Starting with the March 1993 "call report", the supplement and instructions will be distributed in the FFIEC 002 package.

Major issues raised by the commentators, as well as amendments to the supplement and instructions made in response thereto, are designed below.

Summary of Public Comments

The major thrust of the comments from the Institute and Peat Marwick concerned the definition of "managed or controlled" and the intended scope of the reporting panel for the new supplement. The Institute noted that it "does not oppose the FRB's proposal to gather data on offshore branches of international banks that are not staffed and operated at such locations ("non-free-standing branches") given their close relationship with U.S. offices that are subject to host country supervision." At the same time, the institute expressed concern that the proposed definition of "managed or controlled" also could require the submission of the supplement with respect to branches that are locally staffed and operated ("free-standing branches") "simply because those branches report to a senior executive officer of the bank based in the United States with ultimate responsibility for them or because

records used in providing data processing or other services to the non-U.S. branches are maintained in the United States." The Institute suggested that the "managed or controlled" test be modified so that a report is required only for non-free-standing branches. The Institute also noted that the supplement should not be required where the primary responsiblity for maintaining records with respect to assets and liabilities of a free-standing non-U.S. branch rests with such a branch or with the head office.

The Institute urged "careful consideration of any increased supervision of non-free-standing branches of international banks beyond the proposed report requirement because it could undermine the legal and regulatory separateness of such branches which are important to both U.S. and international banks to facilitate participation in the Eurocurrency markets." The Institute also requested that, because many international banks use the cash method of accounting, respondents should be given the option of reporting on either a cash or an accrual basis.

Peat Marwick commented that a strict construction of the proposed "managed or controlled" test would not capture many foreign branches. Peat Marwick noted that, although bankers may acknowledge that there may be value in the data collection, they may resist reporting because of concerns that reporting could compromise confidentiality and that reporting would establish a presumption that the branch, including its customer accounts, is subject to examination by Federal Reserve examiners. Peat Marwick suggested that, if the Federal Reserve wishes to achieve as complete a reporting panel as possible, the "managed or controlled" test should be dispensed with, and a policy statement should be issued stating that: (i) Filing the supplement does not establish a presumption that the offshore branch is managed or controlled by the U.S. office that files the supplement; and (ii) collection of data is for economic and monetary policy needs and not for supervisory analysis of individual branches or agencies.

Peat Marwick also noted the cost associated with completion of the supplement by reporting institutions and the issues raised by the supplement regarding extraterritoriality of U.S. supervision. Both Peat Marwick and the Institute questioned whether an entry by a U.S. branch or agency in the data cell on the FFIEC 002 for "due to" or "due from" related offshore branches should signal a need to complete the supplement.

Senator Riegle strongly supported the FFIEC's intention to collect balance sheet data on offshore offices of foreign banks where those offices are "managed or controlled" by U.S. branches and agencies of the foreign bank. However, Senator Riegle suggested that the scope of the supplement should be expanded to collect even more information for regulatory purposes. In particular, Senator Riegle recommended collecting information in order to determine whether such offshore branches are issuing deposits that would not be legal if issued by the U.S. branch or agency, and whether they are using these offshore branches to avoid relevant U.S. regulatory requirements, such as limits on loans to single borrowers.

In light of these comments, several revisions have been made to the proposed supplement and instructions in order to clarify and improve the information collection. The major topics raised in the comments, the agencies' responses thereto, and consequential revisions made to the supplement and instructions are discussed below.

Definition of "Managed or Controlled"; Scope of Supplementary Reporting Requirement

Following consideration of the comments of the Institute and Peat Marwick with regard to this topic, a number of clarifying changes have been made to the definition of "managed or controlled." Peat Marwick's suggestion to drop the "managed or controlled" test in favor of a general policy statement to encourage increased reporting was considered and rejected; in the agencies' view, it is this test, which limits the supplementary reporting requirements to those non-U.S. branches that are "managed or controlled" by U.S. branches, that negates any extraterritorial effect of the information collection.

In response to concerns expressed by the Institute, the definition has been revised to clarify that the supplement will be required only for those non-U.S. branches for which a U.S. branch or agency has substantial responsibility with regard to assets or liabilities or recordkeeping and that determinations regarding whether the supplemental should be completed will be made with regard to where substantive decision-making authority or responsibility lies. Examples of situations in which the supplement should be completed have been added and situations also are identified that, by themselves, generally would not give rise to a need to complete the supplement. In particular, the institutions have been revised to clarify that the fact that a foreign branch manager may report to a U.S. branch manager pursuant to reporting lines established by the foreign bank will not, by itself, necessitate completion of the supplement. The revised definition of "manages or controls" is set out below in the General Institutions.

Scope and Use of Information Collected

Peak Marwick suggested that a policy statement should be issued with regard to the supplement in order to clarify that information collected pursuant thereto will be for economic and monetary policy purposes and not for purposes of supervisory analysis of individual branches or agencies. Senator Riegle, however, was concerned that the scope of the information collected pursuant to the supplement may be too narrow. He suggested that the scope of the supplement should be expanded to collect even more information for supervisory purposes.

Having given careful consideration to these comments, no changes have been made to the original proposal regarding the scope and the use of the information to be collected in the supplement. As explained in the proposal, a primary purpose of the supplement is to obtain improved data on U.S. credit and deposit flows and international indebtedness. As is also clear from the proposal, however, the supplement will be made available to supervisory personnel, as is the case with all information contained in the call report. Such information may be of use in the assessment of the condition of the U.S. branches and agencies of foreign banks, and will help to focus attention on any activities that may require further supervisory review. The U.S. regulator, of course, would not depend on the new supplement to the call report in carrying out its examination responsibilities but, as noted, the supplement would be available to the regulator and may provide useful information.

Senator Riegle also expressed concern regarding whether the supplement would collect sufficient information to allow regulators to ascertain whether offshore branches were being used to evade limits on loans to single borrowers. The lending limits contained in the International Banking Act, however, apply only to the U.S. offices of foreign banks. Just as one U.S. bank may participate a loan to an affiliated bank, a U.S. office of a foreign bank may participate a loan or portion of a loan to another branch of the foreign bank without violating U.S. law.

Use of FFIEC 002 To Develop Reporting Panel

Both the Institute and Peat Marwick questioned whether an entry by a U.S. branch or agency in the data cell on the existing FFIEC 002 for "due to" or "due from" related offshore branches should automatically signal a need to complete the supplement. Determinations regarding whether the supplement should be completed will be made with reference to the "managed or controlled" test in the light of all relevant information. An entry in the "due to" or "due from" data cell will be considered to be relevant information in making the determination on whether an offshore branch is "managed or controlled" and therefore whether the supplement should be filed.

Accrual Versus Actual Method of Accounting

The Institute requested that, because many international banks use the cash method of accounting, respondents should be given the option of reporting the information on either a cash or an accrual basis. This option has been provided in the instructions. However, this may be reassessed by the agencies in the future.

Description of Information Collection

The supplement covers all of the foreign branch's assets and liabilities, regardless of the currency in which they are payable. The supplement also covers transactions with all entities, both related and nonrelated, regardless of location. All due from/due to relationships with related institutions, both depository and nondepository, would be reported on a gross basis—that is, without netting due-from and due-to items against each other. This reporting treatment of due to/due from transactions with related institutions parallels the treatment called for in Schedule M of the FFIEC 002, *Due From/Due to Related Institutions in the U.S. and in Foreign Countries.*

Both the assets and the liabilities sections of the proposed supplement call for detail by location and type of the other party to the transaction and by whether the transaction is denominated in U.S. or non-U.S. currency. In addition, for claims on U.S. addressees (other than related depository institutions) denominated in U.S. dollars, detail on the type of claim is required. In general, the definitions of the specific types of claims (that is, portfolio items) called for, and their reporting treatment, correspond to FFIEC 002 definitions of those items. Further detail on transactions with U.S addressees denominated in U.S. dollars also is called for in a Memoranda section.

All items would be reported in U.S. dollars. Transactions denominated in other currencies would be converted to U.S. dollars under currency translation procedures used for the FFIEC 002.

The supplement would be completed as of the close of business of the last calendar day of the quarter (March, June, September, and December) and submitted to the Federal Reserve Bank together with the managing U.S. branch or agency's FFIEC 002 under the filing schedule and procedures stipulated for that report. (The Federal Reserve serves as the collection agent for the FFIEC 002. The report is submitted to the Federal Reserve Bank in whose district the reporting U.S branch or agency is located.)

Legal Status

This report is required by law (12 U.S.C. 3105(b)(2); 12 U.S.C. 1817(a); and 12 U.S.C. 3102(b)). The data will be treated as confidential information.

Board of Governors of the Federal Reserve System, December 22, 1992

William W. Wiles,

Secretary of the Board

The FFIEC regards the information reported in this supplement as confidential.

Supplement—Report of Assets and Liabilities of Non-U.S. Branch Licensed in _____ (country) That Is Managed or Controlled by _____(legal title of U.S. branch or agency) at close of business on _____, 19____

Please read instructions carefully

Assets

1. Claims on U.S.-domiciled offices of related depository institutions denominated in U.S. dollars
2. Claims on all other U.S addressees (including related nondepository institutions) denominated in U.S. dollars:
   a. Balances due from nonrelated depository institutions:
      (1) With remaining maturities of one day or under continuing contract ("overnight")
      (2) All other maturities ("term")
   b. Securities
      (1) U.S. Treasury securities and U.S. Government agency and corporation obligations
      (2) All other securities
   c. Loans:
      (1) Loans secured by real estate
      (2) Loans to nonrelated depository institutions in the United States
      (3) Commercial and industrial loans
      (4) All other loans
      (5) Less: Any unearned income on loans reflected in Items 2.c(1) through 2.c(4) above
      (6) Total loans, net of unearned income (sum of Items 2.c(1) through 2.c(4) minus Item 2.c(5))
   d. All other claims
   e. Total claims on U.S. addressees other than related depository institutions, denominated in U.S. dollars (sum of Items 2.a, 2.b, 2.c(6), and 2.d)
3. Claims on all U.S. addressees denominated in currencies other than U.S. dollars
4. Claims on home-country addressees denominated in any currency:
   a. Related depository institutions
   b. Nonrelated depository institutions
   c. Home-country government and official institutions (including home-country central bank)
   d. All other home-country addressees
5. Claims on all other non-U.S. addressees denominated in any currency
6. All other assets
7. Total assets (sum of Items 1, 2.e, 3, 4, 5, and 6)

Liabilities

8. Liabilities to U.S.-domiciled offices of related depository institutions denominated in U.S. dollars
9. Liabilities to all other U.S. addressees (including related nondepository institutions) denominated in U.S. dollars:
   a. Liabilities to nonrelated depository institutions in the U.S.:
      (1) With remaining maturities of one day or under continuing contract ("overnight")
      (2) All other maturities ("term")
   b. Liabilities to all other U.S. addressees denominated in U.S. dollars
      (1) With remaining maturities of one day or under continuing contract ("overnight")
      (2) All other maturities ("term")
10. Liabilities to all U.S. addressees denominated in currencies other than U.S. dollars
11. Liabilities to home-country addressees denominated in any currency:
   a. Related depository institutions
   b. Nonrelated depository institutions
   c. Home-country government and official institutions (including home-country central bank)
   d. All other home-country addressees
12. Liabilities to all other non-U.S. addressees denominated in any currency
13. All other liabilities
14. Total liabilities (sum of Items 8 through 13)

Memoranda—Transactions with U.S. addressees denominated in U.S. dollars

1. Amount included in Items 1 and 2.d above for U.S. Government securities purchased under agreements to resell:
   a. With original maturities of one day or under continuing contract ("overnight")
   b. All other maturities ("term")
2. Amount included in Items 8 and 9 above for U.S. Government securities sold under agreements to repurchase:
   a. With depository institutions in the U.S. (related and nonrelated) included in Items 8 and 9.a above):
      (1) With original maturities of one day or under continuing contract ("overnight")

(2) All other maturities ("term")
b. With all other U.S. addressees (included in Item 9.b above):
(1) With original maturities of one day or under continuing contract ("overnight")
(2) All other maturities ("term")
3. Amount included in Item 9.b above for negotiable certificates of deposit issued by the reporting foreign branch:
a. Held in custody by the reporting foreign branch or by the managing U.S. branch or agency
b. All other negotiable certificates of deposit
4. Amount included in Item 9.b above for deposits that are guaranteed payable in the U.S. or for which the depositor is guaranteed payment by a U.S. office:
a. With original maturities of one day or under continuing contract ("overnight")
b. All other maturities ("term")

Supplement—Report of Assets and Liabilities of a Non-U.S. Branch That is Managed or Controlled by a U.S. Branch or Agency of a Foreign (Non-U.S.) Bank (FFIEC 002S)

I. General Instructions

Who Must Report

The Supplement must be completed by any U.S. branch or agency of a foreign (non-U.S.) bank that "manages or controls" a banking branch of its parent bank that is licensed outside the 50 states of the United States or the District of Columbia (hereafter referred to as a "foreign branch"). "Manages or controls" means that a majority of the responsibility for business decisions, including but not limited to decisions with regard to lending or asset management or funding or liability management, or the responsibility for recordkeeping in respect of assets or liabilities for that foreign branch resides at the U.S. branch or agency.

Examples of a need to complete the Supplement would be if: (1) the branch manager for both the U.S. branch or agency and the foreign branch are the same person or there is other significant overlap in personnel; or (2) substantial responsibility for decisions regarding either assets or liabilities of the foreign branch reside with staff in the U.S. office; or (3) recordkeeping systems for either assets or liabilities of the foreign branch are maintained in the U.S. office. The supplement, however, generally need not be completed in respect of foreign branches that maintain full-service facilities, that is, foreign branches that are managed and controlled by staff located at the foreign branch or at locations other than in the United States. Further, the fact that a foreign branch manager may report to a U.S. branch manager pursuant to reporting lines established by the foreign bank will not, by itself, necessitate the completion of the supplement by the U.S. branch.

All U.S. branches and agencies should consider carefully whether the Supplement should be completed. If there are any questions regarding the need to complete form FFIEC 002S, the local Reserve Bank should be contacted. Determinations regarding which U.S. branches or agencies should complete form FFIEC 002S will be made by the Board of Governors of the Federal Reserve System, in consultation with the Office of the Comptroller of the Currency for federal branches and agencies and with the Federal Deposit Insurance Corporation for insured state-licensed branches. These determinations will be made with reference to whether substantive decision-making authority lies.

A separate Supplement must be completed for each applicable foreign branch. No consolidation of statements for multiple branches is permitted.

Supplements shall be filed with the U.S. branch or agency's FFIEC 002. Please refer to the FFIEC 002 General Instructions, *Where and When to Submit the Report.*

Scope of the Supplement

The Supplement covers *all of the foreign branch's assets and liabilities,* regardless of the currency in which they are payable. The Supplement also covers *transactions with all entities, both related and nonrelated,* regardless of their location.

All due from/due to relationships with *related institutions* (both depository and nondepository) are to be reported on a *gross* basis—i.e., without netting due-from and due-to items against each other. This reporting treatment of due to/due from transactions with related institutions parallels the treatment called for in Schedule M of the FFIEC 002, *Due From/Due to Related Institutions in the U.S. and in Foreign Countries.* That is, the gross due from and gross due to items to be reported will include all claims *between* the foreign branch and any related institutions (whether depository or nondepository) arising in connection with:

(1) Deposits of any kind.
(2) Loans and borrowings of any kind.
(3) Overdrafts, federal funds and repurchase and resale agreements.
(4) Claims resulting from clearing activities, foreign exchange transactions, bankers acceptance transactions, and other activities.
(5) Capital flows and contributions.
(6) Gross unremitted profits and any accounting or regulatory allocation entered on the books of the reporting foreign branch that ultimately affect unremitted profits such as statutory or regulatory capital requirements, reserve accounts, and allowance for possible loan losses.
(7) Any other transactions or entries resulting in claims between the reporting foreign branch and its head office and other related institutions.

Report Date

Reports are to be prepared as of the close of business on the last calendar day of the quarter (March, June, September, and December).

How to Report

Accounting Basis

The report may be prepared on either an accrual or a cash basis of accounting. The accounting basis used for an individual foreign branch should be consistent from quarter to quarter.

Currency Translation

For some line items, the report distinguishes between transactions denominated in U.S. dollars and transactions denominated in other currencies. However, *all items shall be reported in U.S. dollars.* Transactions or balances denominated in currencies other than the U.S. dollar shall be converted to U.S. dollar equivalents prior to their incorporation in the report.

If an asset or liability may be paid optionally in either U.S. dollars or in another currency, report that transaction as denominated in U.S. dollars.

Rounding

See the entry for "Rounding" in the *General Instructions for preparation of the FFIEC 002.*

Negative Entries

Negative entries are not permitted for any item.

Total Assets Must Equal Total Liabilities

In order to report on this form, exchange rates are used to convert non-U.S. currency values into equivalent U.S. dollar values. Changes in those exchange rates may create unrealized gains or unrealized losses. If such a gain or loss is not reflected in, for example, an equity or unremitted profit account on the foreign branch's own books, there will be a discrepancy between total assets and total liabilities on this report unless an adjustment is made. In such cases, the foreign branch's liabilities to its parent bank, which would be included in Item 11.a, should be increased to reflect unrealized gains and should be reduced to reflect unrealized losses.

General Definitions

Related and Nonrelated Institutions

In certain line items, the Supplement distinguishes between transactions of the reporting foreign branch with *related* and *nonrelated* depository institutions. For purposes of the Supplement, the definition of "related depository institution" corresponds to that used for the FFIEC 002 itself. Please refer to the entry for "Related Institutions" in the Glossary section of the FFIEC 002 instructions and to the reporting instructions for Schedule M of that report.

U.S. and Non-U.S. Addressees (Domicile)

The Supplement also distinguishes between transactions of the reporting foreign branch with U.S. addressees and non-U.S. addressees. For *related institutions* (whether depository or nondepository), the definitions of U.S. and non-U.S. addressees (domicile) correspond to those used for Schedule M of the FFIEC 002. That is, "U.S. addressees" encompasses offices domiciled in the 50 states of the United States and the District of Columbia. "*Non-U.S. addressees*" encompasses offices domiciled in a foreign country, in Puerto Rico, or in a U.S. territory or possession. For additional information, see the detailed instructions for preparation of Schedule M.

For *nonrelated parties,* the definitions of U.S. and non-U.S. addressees correspond to those used in the FFIEC 002 for determining the domicile of customers of the respondent.

That is, "*U.S. addressees*" encompasses residents of the 50 states of the United States, the District of Columbia, Puerto Rico, and U.S. territories and possessions. "*Non-U.S. addressees*" encompasses residents of any foreign country. For additional information, see the entry for "Domicile" in the Glossary section of the FFIEC 002 instructions.

Transactions with International Banking Facilities (IBFs), whether related or nonrelated, are regarded as transactions with U.S. addressees.

Maturities

Several items call for a maturity breakdown between those transactions with maturities of one day or under continuing contract ("overnight") and those transactions with all other maturities ("term").

One-day transactions are those that are (1) made on one business day and maturing on the next business day, (2) made on Friday to mature on Monday, or (3) made on the last business day prior to a holiday (for either or both parties to the transaction) that mature on the first business day after the holiday.

A *continuing contract* is a contract or agreement that remains in effect for more than one business day but has no specified maturity and that does not require advance notice of either party to terminate. Such contracts may also be known as rollovers or as open-end agreements.

All other maturities. This maturity category encompasses transactions maturing in more than one business day that are not under continuing contract.

II. Line Item Instructions

Both the assets and liabilities sections of the Supplement call for detail by location and type of the other party to the transaction and by whether the transaction is denominated in U.S. or non-U.S. currency.

In addition, for claims on U.S. addressees (other than related depository-institutions) denominated in U.S. dollars, detail on type of claim is required. In general, the definitions of the specific types of claims (i.e., portfolio items) called for, and their reporting treatment, correspond to the FFIEC 002 definitions of those items. As appropriate, references to specific FFIEC 002 line items are provided.

Assets

Item Number and Captions and Instructions

1. *Claims on U.S.-domiciled offices of related depository institutions denominated in U.S. dollars.* Report, on a gross basis, all claims on U.S.-domiciled offices of related depository institutions (including their IBFs), as defined for Schedule M, Column A, Items 1.a and 1.b, that are denominated in U.S. dollars. Please refer to the instructions for Schedule M and to the entries in the *General Definitions* section of this Supplement for "Related and Nonrelated Institutions" and "U.S. and Non-U.S. Addressees." As noted, U.S.-domiciled offices of related depository institutions are those offices located in the 50 states of the U.S. and the District of Columbia.

2 *Claims on all other U.S. addressees (including related nondepository institutions denominated in U.S. dollars.* As noted in the *General Definitions* section above, for *related nondepository institutions*, "U.S. addressees" encompasses institutions domiciled in the 50 states of the United States and the District of Columbia. For *all nonrelated entities* (both depository and nondepository), "U.S. addressees" encompasses residents of the 50 states of the United States, the District of Columbia, Puerto Rico, and U.S. territories and possessions.

2.a *Balances due from nonrelated depository institutions in the U.S.* Report by *remaining* maturity in the appropriate category below all balances due from nonrelated depository institutions domiciled in the U.S., as defined for Schedule A, Item 3, that are denominated in U.S. dollars.

For definitions of the maturity categories called for below, see the entry for "Maturities" in the *General Definitions* section above.

2.a(1) *With remaining maturities of one day or under continuing contract ("overnight").*

2.a(2) *All other maturities ("term").*

2.b *Securities.* Include in this item all securities, as defined for Schedule RAL, Items 1.b and 1.c, that are issued by U.S. addressees and denominated in U.S. dollars. Please note that as stated in those definitions, securities purchased under agreements to resell are not reported as securities. For purposes of this Supplement, such transactions shall be included in Item 2.d below.

2.b(1) *U.S. Treasury securities and U.S. Government agency and corporation obligations.* Report those securities as defined for Schedule RAL, Items 1.b(1) and 1.b(2), that are denominated in U.S. dollars.

2.b(2) *All other securities.* Report all other bonds, notes, debentures, and corporate stock (including securities of state and local governments in the U.S.), as defined for Schedule RAL, Item 1.c, that are issued by U.S. addressees and denominated in U.S. dollars.

2.c *Loans.* Report in the appropriate subitem below the aggregate book value of all U.S. dollars-denominated loans (and leases) to U.S. addressees (other than related depository institutions), before deduction of any allowance for loan losses (which is to be reported in Item 4.a or 11.a) but net of any specific reserves. Each subitem should be reported net of (1) unearned income (to the extent possible) and (2) deposits accumulated for the payment of personal loans (hypothecated deposits). For additional general information on loans, please refer to the general instructions for FFIEC 002 Schedule C, *Loans*. References to specific line items in Schedule C are provided for each subitem below.

2.c(1) *Loans secured by real estate.* Report all loans secured by real estate, as defined for Schedule C, Item 1, that are made to U.S. addressees (other than related depository institutions) and denominated in U.S. dollars. (Also see the Glossary entry in the FFIEC 002 instructions for "Loans Secured by Real Estate.")

2.c(2) *Loans to nonrelated depository institutions in the U.S.* Report all loans to nonrelated depository institutions in the U.S., as defined for Schedule C, Items 2.a and 2.b, that are denominated in U.S. dollars.

2.c(3) *Commerical and industrial loans.* Report all commercial and industrial loans to U.S. addresses, as defined for Schedule C, Item 4.a., that are denominated in U.S. dollars.

2.c(4) *All other loans.* Report all other loans to U.S. addresses (other than related depository institutions) denominated in U.S. dollars that cannot properly be reported in one of the preceding loan items, including such loans that are called for in the following items on Schedule C of the FFIEC 002:

- Item 3, Loans to other financial institutions.
- Item 5.a, Acceptances of other U.S. banks.
- Item 7, Loans for purchasing of carrying securities (secured and unsecured).
- Item 8, All other loans (including obligations other than securities of state and local governments in the U.S.; loans

to individuals; and lease financing receivables (net of unearned income)).

2.c(5) *Less: Any unearned income on loans reflected in Items 2.c(1)–2.c(4) above.* As noted earlier, to the extent possible, the preferred treatment is to report the specific loan categories net of unearned income. A reporting institution should enter here unearned income only to the extent that it is included in (i.e., *not* deducted from) the various loan items (Items 2.c(1) through 2.c(4)) above. If a respondent reports each loan item above net of unearned income, enter a zero or the word "none" for Item 2.c(5).

2.c(6) *Total loans, net of unearned income.* Report the sum of Items 2.c(1) through 2.c(4) minus Item 2.c(5).

2.d *Othem claims.* Report any remaining U.S. dollar-denominated claims on U.S. addressees (other than related depository institutions) that cannot properly be reported in Items 2.a through 2.c above, such as:

- Federal funds sold and securities purchased under agreements to resell, as defined for Schedule RAL, Item 1.d, that are transacted with U.S. addressees and denominated in U.S. dollars.
- Customers liability to the reporting foreign branch on acceptances outstanding—to U.S. addresses, as defined for Schedule RAL, Item 1.f(1), denominated in U.S. dollars.
- Any other claims, as defined for Schedule RAL, Item 1.g, on U.S. addressees denominated in U.S. dollars.

Exclude cash items in process of collection and unposted debits. All cash items in process of collection and unposted debits shall be reported in Item 6 below, *All other assets.*

2.e *Total claims on U.S. addressees other than related depository institutions, denominated in U.S. dollars.* Report the sum of Items 2.a, 2.b, 2.c(6), and 2.d above.

3 *Claims on all U.S. addressees denominated in currencies other than U.S. dollars.* Report, on a gross basis, all claims on all U.S. addressees (including U.S.—domiciled offices of all related institutions, both depository and nondepository) that are *not* denominated in U.S. dollars. Please refer to the entry for "Related Institutions" in the Glossary section of the FFIEC 002 instructions and to the entries in the *General Definitions* section of this Supplement for "Related and Nonrelated Institutions" and "U.S. and Non-U.S. Addressees." As noted, for related institutions (both depository and nondepository), U.S. addressees are those entities domiciled in the 50 states of the United States and the District of Columbia. For nonrelated entities, U.S. addressees are those parties domiciled in the 50 states of the United States, the District of Columbia, Puerto Rico, and U.S. territories and possessions.

4 *Claims on home-country addressees denominated in any currency.* Report in the appropriate subitem all claims (on a gross basis), regardless of the currency in which they are payable, on addressees of the home country of the reporting foreign branch's parent bank.

4.a *Related depository institutions.* Report all claims on related depository institutions, as defined for Schedule M, Items 2.a, 2.b, and 2.c, that are domiciled in the home country of the reporting foreign branch's parent bank.

4.b *Nonrelated depository institutions.* Report all claims on nonrelated depository institutions that are domiciled in the home country of the reporting foreign branch's parent bank.

4.c *Home-country government and official institutions (including home-country central bank).* Report all claims on those governments and official institutions, as defined in the entry for "Foreign Governments and Official Institutions" in the Glossary section of the FFIEC 002 instructions, that are domiciled in the home country of the reporting foreign branch's parent bank.

4.d *All other home-country addressees.* Report all claims on any remaining home-country addressees that cannot properly be reported in Items 4.a, 4.b, or 4.c above.

5 *Claims on all other non-U.S. addressees, denominated in any currency.* Report all claims on all other non-U.S. addressees (i.e., other than the home country of the foreign branch's parent bank), regardless of the currency in which they are payable.

6 *All other assets.* Report all other assets that cannot properly be reported in Items 1 through 5 above. Also include all cash items in process of collection and unposted debits, which are excluded from Items 1 through 5 above.

7 *Total assets (gross).* Report the sum of Items 1, 2.e, 3, 4, 5, and 6.

Liabilities

Item Number and Captions and Instructions

8 *Liabilities to U.S.-domiciled offices of related depository institutions denominated in U.S. dollars.* Report, on a gross basis, all liabilities to U.S.-domiciled offices of related depository institutions, as defined for Schedule M, Column B, Items 1.a and 1.b, that are denominated in U.S. dollars. Please refer to the instructions for Schedule M and to the entries in the *General Definitions* section of this supplement of "Related and Nonrelated Institutions" and U.S. and Non-U.S. Addressees." As noted, U.S.-domiciled offices of related depository institutions are those offices located in the 50 states of the United States and the District of Columbia.

9 *Liabilities to all other U.S. addressees (including related nondepository institutions) denominated in U.S. dollars.* As notes earlier, for *related nondepository institutions,* "U.S. addressees" encompasses institutions domiciled in the 50 states of the United States and the District of Columbia. For *all nonrelated entities* (both depository and nondepository), "U.S. addressees" encompasses residents of the 50 states of the United States, the District of Columbia, Puerto Rico, and U.S. territories and possessions.

9.a *Liabilities to nonrelated depository institutions in the U.S.* Report by *remaining* maturity in the appropriate category below all liabilities (gross) to nonrelated depository institutions in the U.S. that are denominated in U.S. dollars.

For definitions of the maturity categories called for below, see the entry for "Maturities" in the *General Definitions* section above.

9.a(1) *With remaining maturities of one day or under continuing contract ("overnight").*

9.a(2) *All other maturities ("term").*

9.b *Liabilities to all other U.S. addressees denominated in U.S. dollars.* Report by *remaining* maturity in the appropriate category below all liabilities (gross) to all other U.S. addressees (including related nondepository institutions), that the denominated in U.S. dollars.

For definitions of the maturity categories called for below, see the entry for "Maturities" in the *General Definitions* section above.

9.b(1) *With remaining maturities of one day or under continuing contract ("overnight").*

9.b(2) *All other maturities ("term").*

10 *Liabilities to all U.S. addressees denominated in currencies other than U.S. dollars.* Report, on a gross basis, all liabilities to all U.S. addressees (including U.S.-domiciled offices of all related institutions, both depository and nondepository) that are *not* denominated in U.S. dollars. Please refer to the entry for "Related Institutions" in the *Glossary* section of the FFIEC 002 Instructions and to the entries in the *General Definitions* section of this Supplement for "Related and Nonrelated Institutions" and "U.S. and Non-U.S. addressees." As noted, for related institutions (both depository and nondepository), U.S. addressees are those entities domiciled in the 50 states of the United States and the District of Columbia. For nonrelated entities, U.S. addressees are those parties domiciled in the 50 states of the United States, the District of Columbia, Puerto Rico, and U.S. territories and possessions.

11 *Liabilities to home-country addressees denominated in any currency.* Report in the appropriate subitem all liabilities (on a gross basis), regardless of the currency in which they are payable, to addressees of the home country of the reporting foreign branch's parent bank.

11.a *Related depository institutions.* Report all liabilities to related depository institutions, as defined for Schedule M, Items 2.a, 2.b, and 2.c, that are located in the home country of the reporting foreign branch's parent bank.

11.b *Nonrelated depository institutions.* Report all liabilities to nonrelated depository institutions that are domiciled in the home country of the reporting foreign branch's parent bank.

11.c *Home-country government and official institutions (including home-country central bank).* Report all liabilities to those governments and official institutions, as defined in the entry for "Foreign Governments and Official Institutions" in the Glossary section of the FFIEC 002 Instructions, that are located in the home country of the reporting foreign branch's parent bank.

11.d *All other home-country addressees.* Report all liabilities to any remaining home-country addressees that cannot properly be reported in Items 11.a, 11.b, or 11.c above.

12 *Liabilities to all other non-U.S. addressees denominated in any currency.* Report all liabilities to all other non-U.S. addressees (i.e., other than the home country of the reporting foreign branch's parent bank), regardless of the currency in which they are payable.

13 *All other liabilities.* Report all other liabilities that cannot properly be reported in Items 8 through 12 above.

14 *Total liabilities.* Report the sum of Items 8 through 13 above.

Memoranda—Transactions With U.S. Addressees Denominated in U.S. Dollars

Item Number and Captions and Instructions

1, 2 Item 1 and 2 below call for information on resale and repurchase agreements on U.S. Government securities transacted with U.S. addressees and denominated in U.S. dollars, which are included in certain assets and liabilities items above. For additional information on security repurchases and resale agreements, see the entry for "Repurchase/Resale Agreements" in the Glossary section of the FFIEC 002 Instructions.

U.S. Government securities include U.S. Treasury securities and U.S. Government agency and corporation obligations. For a partial listing of the U.S. Government agencies and corporations whose obligations are to be included, see the instructions for Schedule RAL, Item 1.b(2).

For definitions of the maturity categories called for under Items 1 and 2 below, see the entry for "Maturities" in the *General Definitions* section above.

1 *Amount included in Items 1 and 2.d above for U.S. Government securities purchased under agreements to resell.* Report by *original* maturity in the appropriate category below all resale agreements involving U.S. Government securities (including U.S. Treasury securities and obligations of U.S. Government agencies and corporations) transacted with U.S. addresses and denominated in U.S. dollars.

1.a *With original maturities of one business day or under continuing contract ("overnight").*

1.b *All other maturities ("term").*

2 *Amount included in Items 8 and 9 above for U.S. Government securities sold under agreements to repurchase.* Report by *original* maturity in the appropriate category below all repurchase agreements involving U.S. Government securities (including U.S. Treasury securities and obligations of U.S. Government agencies and corporations) denominated in U.S. dollars.

2.a *Transacted with depository institutions in the U.S. (related and nonrelated (included in Items 8 and 9.a above).*

2.a(1) *With original maturities of one day or under continuing contract ("overnight").*

2.a(2) *All other maturities ("term").*

2.b *Transacted with all other U.S. addressees (included in Item 9.b above).*

2.b(1) *With original maturities of one day or under continuing contract ("overnight").*

2.b(2) *All other maturities ("term").*

3 *Amount included in Item 9.b above for negotiable certificates of deposit issued by the reporting foreign branch.* Report in the appropriate subitem below all negotiable certificates of deposit denominated in U.S. dollars that were issued to U.S. addressees other than depository institutions (related or unrelated).

3.a *Held in custody by the reporting foreign branch or by the managing U.S. branch or agency.*

3.b *All other negotiable certificates of deposit.*

4 *Amount included in Item 9.b above for deposits that are guaranteed payable in the U.S. or for which the depositor is guaranteed payment by a U.S. office.* Report by *original* maturity in the appropriate category below all deposits, as defined for Schedule E, denominated in U.S. dollars that were issued to U.S. addressees other than depository institutions (related or nonrelated) and that are payable in the U.S. or for which the depositor is guaranteed payment by a U.S. office.

For definitions of the maturity categories called for below, see the entry for "Maturities" in the *General Definitions* section above.

4.a *With original maturities of one day or under continuing contract ("overnight").*

4.b *All other maturities.*

[FR Doc. 92-31550 Filed 12-28-92; 8:45 am]

BILLING CODE 6210-01-M

BB&T Financial Corporation; Acquisition of Company Engaged in Permissible Nonbanking Activities

The organization listed in this notice has applied under § 225.23(a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23(a)(2) or (f)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The 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 on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a

hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 22, 1993.

A. Federal Reserve Bank of Richmond (Lloyd W. Bostian, Jr., Senior Vice President) 701 East Byrd Street, Richmond, Virginia 23261:

1. BB&T Financial Corporation, Wilson, North Carolina; to acquire Security Financial Holding Company, Durham, North Carolina, and thereby engage in operating a savings and loan association, pursuant to § 225.25(b)(9) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, December 22, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92-31546 Filed 12-28-92; 8:45 am]

BILLING CODE 6210-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention (CDC)

Savannah River Site Dose Reconstruction Project: Public Meeting

The National Center for Environmental Health (NCEH), Centers for Disease Control and Prevention (CDC), and the Radiological Assessments Corporation (RAC) announce the following meeting:

Name: Savannah River Site Dose Reconstruction Project.

Time and Date: 7 p.m.–9 p.m., January 20, 1993.

Place: Radisson Riverfront Hotel, 2 Tenth Street, Augusta, Georgia 30901.

Status: Open to the public for observation and comment, limited only by space available. The meeting room accommodates approximately 50 people.

Purpose: Under a Memorandum of Understanding with the Department of Energy (DOE), the Department of Health and Human Services has been given the responsibility and resources for conducting analytic epidemiologic investigations of residents of communities in the vicinity of DOE facilities and other persons potentially exposed to radiation or to potential hazards from non-nuclear energy production and use. This workshop, which represents the first of its kind for the Savannah River Site dose reconstruction, is to provide an overview of the document review process and findings to date on the quantity, types, and locations of potentially useful documents. Members of RAC will discuss the design and content of the document database that is to be developed during the study.

At the conclusion of the meeting all attendees will have an opportunity to provide oral and/or written comments for the record.

Agenda items are subject to change as priorities dictate.

CONTACT PERSON FOR MORE INFORMATION: Paul Renard, Radiation Studies Branch, Division of Environmental Hazards and Health Effects, NCEH, CDC, 4770 Buford Highway, NE., (F-35), Atlanta, Georgia 30341-3724, telephone 404/488-7040.

Dated: December 22, 1992.

Elvin Hilyer,

Associate Director for Policy Coordination, Centers for Disease Control and Prevention (CDC).

[FR Doc. 92-31545 Filed 12-28-92; 8:45 am]

BILLING CODE 4160-18-M

Health Resources and Services Administration

Final Funding Preference for Grants for Health Careers Opportunity Program

The Health Resources and Services Administration (HRSA) announces the final funding preference for fiscal year (1993) Health Careers Opportunity Grant Program authorized under section 740 (previously section 787) of the Public Health Service Act (the Act) as amended by the Health Professions Education Extension Amendments of 1992, Public Law 102-408, dated October 13, 1992. These amendments make the following revisions to the HCOP program. The former section 787 has been changed to section 740 of the Public Health Service Act and provides for the payment of stipends to students in student enhancement programs other than the regular course of study in an amount of $40 per day (notwithstanding any other provision of law regarding the amount of stipends), except that such a stipend may not be provided to an individual for more than 12 months, and requires the Secretary to ensure that services and activities under HCOP awards are equitably allocated among the various racial and ethnic populations.

Section 740 authorizes the Secretary to make grants and to enter into contracts with schools of allopathic medicine, osteopathic medicine, public health, dentistry, veterinary medicine, optometry, pharmacy, allied health, chiropractic and podiatric medicine and public and nonprofit private schools which offer graduate programs in clinical psychology and other public or private nonprofit health or educational entities to carry out programs which assist individuals from disadvantaged backgrounds to enter and graduate from such schools. The assistance authorized by the section may be used to: Identify, recruit, and select individuals from disadvantaged backgrounds for education and training in a health profession; facilitate the entry and retention of such individuals in health and allied health professions schools; providing, for a period prior to the entry of such individuals into the regular course of education of such a school, preliminary education designed to assist them to complete successfully such regular course of education at such a school, or referring such individuals to institutions providing such preliminary education; and to provide counseling and advice on financial aid to assist such individuals to complete successfully their education at such schools.

A proposed funding preference was published in the **Federal Register** dated August 5, 1992, at 57 FR 34572, for public comment. Two comments were received. Both comments related to the proposed funding preference.

One respondent recommended that the second criterion of the preference be changed to favor those programs that demonstrate consistent increasing enrollments over a specific period of time. It appears that this respondent interpreted the criterion to mean that the cohort of first-year disadvantaged students must exceed the prior year's number of 50 percent of total enrollment, instead of by a number equal to at least 50 percent of postbaccalaureate participants projected for enrollment in 1992.

Another respondent supported the proposed funding preference but felt that second criterion does not necessarily reflect whether an ongoing program is successful. An applicant who intends to qualify for this preference is required to meet the entire funding preference.

The purpose of this preference is to direct assistance to quality postbaccalaureate programs that have documented, sustained, or increased accomplishments under this program. The Department believes that emphasis on increases in enrollments is a valid indicator of accomplishment. Therefore, the proposed funding preference will be retained as follows:

A funding preference will be given to competing continuation applications for postbaccalaureate programs funded under the fiscal year 1990 HCOP Funding Preferences (as defined in the **Federal Register** notice of March 27, 1990, 55 FR 11264) which score in the upper 50th percentile of all

applications, and which can evidence the following:

1. Disadvantaged students were recruited into the postbaccalaureate program at a level at least equal to the number of students originally projected in FY 1990; and

2. The cohort of first-year disadvantaged students entering the health or allied health professions school in September 1992 first-year class in September 1991 by a number equal to at least 50 percent of the postbaccalaureate participants projected for enrollment in 1992.

Additional Information

If additional programmatic information in needed, please contact: Mr. Darl W. Stephens, Chief, Program Coordination Branch, Division of Disadvantaged Assistance, Bureau of Health Professions, Health Resources and Services Administration, 5600 Fishers Lane, room 8A–09, Parklawn Building, Rockville, Maryland 20857. Telephone: (301) 443–4493. FAX: (301) 443–5242.

This program is listed at 93.822 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).

This program is not subject to the Public Health System Reporting Requirements.

Dated: December 21, 1992.

Robert G. Harmon,

Administrator.

[FR Doc. 92–31433 Filed 12–28–92; 8:45 am]

BILLING CODE 4160–15–M

Public Health Service

Title V of the Public Health Service Act; Delegation of Authority

Notice is hereby given that I have delegated to the Assistant Secretary for Health, with authority to redelegate, the authorities vested in the Secretary under title V of the Public Health Service Act (42 U.S.C. 290aa et seq.), as amended hereafter. This delegation excludes the authority to promulgate regulations, submit reports to the Congress or a congressional committee, establish advisory committees, and appoint members to advisory committees.

This delegation is effective upon the date of signature and supersedes the July 5, 1985, delegation of authority for title V of the PHS Act from the Secretary to the Assistant Secretary for Health. In addition, I hereby affirm and ratify any actions taken by the Assistant Secretary for Health or other Public Health Service officials that involved the exercise of the authorities delegated herein prior to the effective date of this delegation.

Dated: December 16, 1992.

Louis W. Sullivan,

Secretary.

[FR Doc. 92–31399 Filed 12–28–92; 8:45 am]

BILLING CODE 4160–17–M

DEPARTMENT OF THE INTERIOR

National Park Service

Final Policy and Guidelines for Recreational Technical Assistance in Hydropower Licensing

AGENCY: National Park Service.

ACTION: Publication of final policy and guidelines.

SUMMARY: The National Park Service is issuing a management policy and guidelines for its Recreation Technical Assistance in Hydropower Licensing Program. The policy and guidelines will give direction to National Park Service staff in providing technical assistance and assist the public in understanding this program. The policy and guidelines affect only the technical assistance conducted by the National Park Service prior to license filing. It is not part of, and does not affect, formal National Park Service environmental review procedures.

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: Tracy Miller, National Park Service, Recreation Resources Assistance Division, P.O. Box 37127, Washington, DC 20013, telephone: (202) 343–3780.

SUPPLEMENTARY INFORMATION:

Summary of Comments

On June 3, 1992, the National Park Service published in the **Federal Register** (57 FR 23425, June 3, 1992) draft policy and guidelines, with a comment period ending on July 6, 1992. The policy and guidelines were developed using input from a public workshop held in Washington, DC, on January 22, 1992 and from written comments. The National Park Service received a total of seven written comments on the draft. Of these, two were from government agencies, four from non-governmental organizations and one from an individual.

No commenters objected to the process used in developing the policy and guidelines. No one argued with the need for the policy and guidelines. Five commenters addressed the intent, wording or need for clarification of specific articles in the document.

Analysis of Public Comments

General Comments

One commenter stated that the National Park Service's activities should be performed within the processes identified by Federal Energy Regulatory Commission guidelines and relevant energy legislation. This is identified in the Guidelines Preface and has been added to the policy statement.

One commenter felt the National Park Service should have as its goal the protection and restoration of recreation values associated with undeveloped rivers, and that the National Park Service should have as its standard the conditions present before hydropower development. These comments went on to state that the National Park Service should try to achieve pre-licensing conditions to the greatest extent possible. For original licenses, the National Park Service considers recreational opportunities that could be lost if the project is constructed, and strives to protect undeveloped river resources from development where and when this is appropriate. In the case of relicensing, however, the Federal Energy Regulatory Commission considers existing conditions as the baseline (Hydroelectric Relicensing Regulations Under the Federal Power Act; 18 CFR parts 4 and 16). Therefore, the National Park Service focuses the majority of its effort on the enhancement of recreation and aesthetic resources at the project site.

It was also pointed out that the guidelines suggest that hydropower developers are as much a part of the program's constituency as the recreating public. The technical assistance program is available to developers, as resources permit, for advising on recreational plans. However, we do not see this as separate from representing the recreation needs of the public. The program is designed to advocate recreation, and ensure that present and future needs are met, through the cooperation and input of all involved parties. It is the result—enhanced recreation—that is important, not which party receives assistance.

Preface Comments

There was some confusion over the term "National Park Service mandates," with the comments suggesting that the technical assistance should be conducted outside of political influence. Mandates are those laws, rules, regulations and policies under which the National Park Service operates on a

daily basis and carries out its varied functions. Also, one commenter wanted those mandates and relationships clearly defined. This is beyond the purpose of this document and would be voluminous in nature; therefore, no action was taken.

Kayaking was asked to be specifically identified as a National Park Service considered activity. It should be emphasized that the list of mentioned recreation activities was to serve as examples, not be comprehensive. However, whitewater rafting has been changed to whitewater boating.

The point that the National Park Service should recognize all forms of recreation associated with a hydroelectric site was considered to be critical, and it was suggested that this be added as an article to the guidelines. We agree, and an article confirming this has been added under Program Scope.

The statement that the National Park Service represents the national interest with regard to recreation was asked to be clarified. The commenter noted that "[r]ecreation interests at hydro projects tend to be local and project-specific * * *." The guidelines make clear that the National Park Service is charged with considering how a project fits into recreational planning on a broader basis. The activities may be local in nature, but the planning is done on a broader scale.

The suggestion was also made that "national interest" should be "construed more broadly than the interests of the recreation community * * * and includes such factors as economically efficient energy generation and equitable consideration of recreation along with all other natural resources * * *." This is an important point, but it is one that is stated several times within the guidelines. No further changes are needed.

The phrase "hydropower-related recreation" also triggered another concern that "* * * the program will focus on recreational resources associated with, and perhaps dependent upon, developed hydropower projects." This was not our intent, but we can see how this could cause confusion. As the National Park Service represents all forms of recreation, the qualifier "hydropower-related" has been removed.

The U.S. Fish and Wildlife Service expressed the need to consider other resource values when comparing competing recreational needs at a project site. Maintaining environmental integrity is an important factor in National Park Service assistance. The preface has been amended to emphasize this fact.

Policy Comments

There was only one concern expressed with the policy statement. The comment was made that the policy implied that the National Park Service would only deal with hydropower projects that were approved and that the National Park Service would not oppose development. The policy statement has been amended to clarify that licensing refers to both original licenses and relicensing of existing projects. As stated in the general comments section, for original licenses, the National Park Service considers recreational opportunities that could be lost if the project is constructed, and strives to protect undeveloped river resources from development where and when this is appropriate.

Guidelines Comments

I. Program Scope

Extent: No comments.

Environmental Quality: One commenter felt this section was unclear but offered no suggestions for clarifying. The U.S. Fish and Wildlife Service indicated a need for coordination between the National Park Service and other resource agencies. The article was amended to reflect this intent.

Long-term Benefit: The suggestion that the National Park Service also assist in the planning to mitigate the impacts of recreation throughout the license was made. It is important that the National Park Service consider impacts of increased and changing recreation use to the environment, other users, and local communities, and this is an appropriate role for the National Park Service. The article has been changed to reflect this role.

Comprehensive Perspective: Comments suggested that the impacts of recreation should also be considered with a comprehensive perspective. The article is amended to reflect this for the reason cited above under Long-term Benefits.

It was emphasized that the National Park Service must balance all aspects of a project when providing technical assistance and that this should be reflected by adding "projects" to "resources considered." This was our intent and the change was made.

Coordination of Planning: The U.S. Forest Service expressed the desire that the National Park Service coordinate with their comprehensive planning processes where hydropower projects impact national forest land and that land management agencies be expressly identified. As this was the intent, this article and the mitigation article have been changed to expressly include land management agencies.

Communication: No comments.

Conflict Resolution: It was noted that this is an appropriate role for the National Park Service, but that other elements of the guidelines gave the impression that we were playing an advocacy role for recreation. This is true to an extent. It is the role of the National Park Service to advocate for recreation and to seek out and represent recreation interests. However, this does not conflict with our mandate to also consider cultural, natural and economic factors in providing technical assistance. The appropriate and equitable advocacy of recreation is, and always has been, the role of the National Park Service.

Given that we consider all relevant factors in the licensing equation, advocating for recreation does not diminish our role in bringing all interests together to try to reach an equitable agreement on licensing considerations. One of the key functions for National Park Service technical assistance is to act as a facilitator in those instances where none may otherwise exist. For these reasons, no changes are necessary.

Balance: One commenter was concerned that economic considerations would take precedence over less easily definable factors such as recreational experience. We agree it is often difficult to define recreation in monetary terms. However, the article already states that the National Park Service will consider all pertinent factors in its technical assistance role; therefore, no changes were necessary.

Other comments suggested that balance should include "* * * consideration of non-recreational competing resource needs. We suggest that this * * * be incorporated into the policy statements * * *." As it has been addressed several times throughout the guidelines that the technical assistance program will consider all relevant factors to the licensing, we believe no further clarification is necessary. However, this article did mention only three possible factors and has been amended to indicate its broad intent.

Timeliness: No comments.

II. Project Selection

One commenter felt that the selection guidelines were too vague but offered no clarification. Modifications were made only to those articles for which we received specific comments, and we hope this clarifies this section. This commenter also stated that the procedures for requesting technical

assistance should be outlined, if not in this document, then in subsequent guidance. This is a valid point; however, it is beyond the intent of these guidelines. Regional National Park Service Offices can provide direction on requesting technical assistance.

Resource Significance: No comments.

Potential for Positive Impact: One commenter felt this section meant that the National Park Service would only become involved in projects where it was politically feasible and where the Park Service knew it could influence the licensing outcome. The actual goal was to become involved in those projects where there was a high potential for recreational improvements. The article has been changed to reflect this meaning.

Variety of Recreational Opportunities: One commenter felt that the National Park Service should place an emphasis on enhancing in-stream boating activities as these activities are often heavily influenced by license conditions and hydroelectric generation. The National Park Service must remain objective in its evaluation of recreational opportunities and assistance to applicants, agencies, organizations and individuals. It is also the responsibility of the National Park Service to represent different forms of recreation as individual situations justify. With this as the guideline, no changes were made.

Concentration of Projects: No comments.

Assistance Requests: There was concern that giving priority to those interests with little or no access to professional planning resources ran counter to the goal of not recognizing one form of recreation over another and that the National Park Service should act independent of any single recreation interest. The program's intent is to represent all forms of recreation; however, it is easy to see how this article could be misinterpreted. The article has been amended to more clearly reflect its original intent.

It was also suggested that priority be given to "* * * projects that have a direct relationship to units of the National Park System and to recreation facilities that are directly related to the continued existence and operation of those facilities. The Service will provide special consideration to the continued operation and power supply needs of those projects when developing recommended recreation plans." This could be construed to mean several things. The answer to all connotations, however, is that the technical assistance program is not aimed at National Park Service lands, nor is special consideration given to one interest over another.

III. Information

Equitable Information: Comments suggested that recreation potential be added to the list of factors. As this was the intent, the change has been incorporated.

Eliminating the size of the project from consideration was proposed. However, project size is one of several factors that the National Park Service considers when requesting the generation of information; therefore, no changes are warranted.

Relevant Information: No comments.

Scope of Information: No comments.

Information Dissemination: No comments.

IV. Results

There was concern that the National Park Service would try to overlay comprehensive planning efforts in areas where it was not feasible due to differences in license terms, state requirements, water allocation, resources, project characteristics, etc. This is a valid point and was never the intent of either article. Both articles have been amended to correct this misinterpretation.

Mitigation: The U.S. Fish and Wildlife Service raised concerns that the National Park Service recommendations take into account the need to coordinate recreational mitigation with fish and wildlife resource mitigation. This coordination is very important to the National Park Service and was our intent. This section and the environmental quality article under Program Scope have been amended to reflect this.

Cooperative Comprehensive Planning: Amended as noted above.

Final Policy and Guidelines

Preface

Under the National Park Service Organic Act (39 Stat. 535), the Outdoor Recreation Act (Pub. Law 88–29), the Wild and Scenic Rivers Act (Pub. Law 90–542), Council on Environmental Quality guidelines (45 FR 59190–59191), and Federal Energy Regulatory Commission guidelines, the National Park Service is authorized to provide technical assistance for recreation planning in the licensing of hydropower facilities. This is but one element of the National Park Service's overall technical assistance role in the licensing process, and planning assistance is just one aspect of the National Park Service environmental review of Federal Energy Regulatory Commission applications.

The following policy and guidelines provide direction for recreational technical assistance activities concerning hydropower licensing. They are flexible enough to allow for creativity in addressing the individual recreation, conservation and hydropower objectives of each individual project. They are also designed so as not to conflict with other National Park Service mandates.

The National Park Service considers all forms of outdoor recreation in its hydropower activities, including, but not limited to, such activities as birdwatching, whitewater boating, canoeing, hiking and fishing. The National Park Service does not recognize one form of recreation over another, but instead weighs the merits of all activities and resource values in providing assistance. It is the responsibility of the National Park Service to represent the national interest regarding recreation and to assure an appropriate recognition of recreation interests.

Policy

It is the policy of the National Park Service to recognize the full potential that hydroelectric projects subject to original licensing and relicensing under the Federal Power Act may offer for: (1) Meeting present and future public outdoor recreation demands, and (2) the maintenance and enhancement of the quality of the environmental setting of these projects.

This policy is to be implemented by providing appropriate recreation planning assistance to applicants and licensees, the concerned agencies of federal, state and local governments, and the private sector in accordance with Federal Energy Regulatory Commission guidelines. The objectives stated in clauses 1 and 2 are also to be accomplished by providing to the Secretary of the Interior factual information, analyses and finding relating to recreation for incorporation in the Department's comments and recommendations to the Federal Energy Regulatory Commission.

Guidelines

I. Program Scope

The National Park Service will:

Extent: Consider the full range of land and water recreation opportunities and factors associated with hydropower projects. These opportunities and factors may include, but not limited to, land use, access, shorelands conservation, flow, facilities, aesthetics, reservoir levels and safety.

Opportunities: Consider and evaluate all forms of recreational activities

associated, or potentially associated, with a hydroelectric site. The National Park Service will avoid discrimination of one activity over another and, instead, evaluate differing uses from a broad perspective and consider the relative merits of each use.

Environmental Quality: Ensure that recreation programs are consistent with the preservation of environmental integrity. The National Park Service will coordinate with federal and state resource agencies to ensure that National Park Service recommendations are consistent with fish and wildlife needs to the extent possible.

Long-term Impact/Benefit: Assist in planning for recreation impacts and needs that could arise throughout the term of the license.

Comprehensive Perspective: Evaluate recreational needs, opportunities and impacts from a basin-wide or region-wide perspective as appropriate to the projects and resources considered.

Coordination of Planning: Encourage joint comprehensive planning with: (1) Other public and private river conservation, recreation and energy interests, and (2) all appropriate land management and resource agencies. The National Park Service will avoid duplication of the efforts of other planning agencies.

Communication: Provide a channel for recreation and conservation interests to participate in the licensing process with the applicants. The National Park Service will provide a channel for the applicants to identify and involve those interests.

Conflict Resolution: Provide a facilitation and conflict resolution role among the involved parties and provide a forum to actively seek input from, and facilitate dialog between, all interested parties.

Balance: Ensure that the importance and significance of the resources and opportunities will be fully considered in balancing such factors as competing recreation needs, power production, cultural needs, economics and all other pertinent considerations.

Timeliness: Become involved as early as possible in the licensing process to promote advance planning in an equitable manner.

II. Project Selection

Because of finite resources, the National Park Service technical assistance program can only become involved with a limited number of projects. In selecting these projects, the National Park Service will:

Resource Significance: Give priority to those projects located in areas with high natural, cultural and/or recreational resource values.

Potential for Positive Impact: Give priority to projects where there is significant opportunity to create or improve recreation opportunities.

Variety of Recreational Opportunities: Provide assistance on a diverse mix of recreation experiences, settings and geographical locations in the program portfolio.

Concentration of Projects: Provide special consideration to rivers, or river basins, with multiple projects, especially where a holistic approach will serve to advance public recreation opportunities more than a site-by-site approach.

Assistance Requests: Respond and provide technical assistance as resources allow to requests from public and private energy, conservation and recreation interests. The National Park Service will ensure that those interests that have little or no access to professional sources of planning assistance and analysis have equal consideration and opportunity to participate in the process.

III. Information

The National Park Service will:

Equitable Information: Use and request the generation of information appropriate to the size of the project, the project impacts, the recreation potential of the project, and its relationship to other projects.

Relevant Information: Encourage and participate in the generation of objective data necessary to evaluate recreation needs and opportunities, such as flow studies, recreation needs assessments, and carrying capacity studies.

Scope of Information: Where possible, use and request the generation of information that considers cumulative and basin-wide impacts and follows the intentions of board-scale planning.

Information Dissemination: Maintain a source of case studies and similar data generated by the technical assistance program and make this information available to public and private entities.

IV. Results

The National Park Service will:

Mitigation: Seek opportunities to increase the cumulative benefit to recreation and conservation through alternative ideas such as clustering of mitigation from several projects in one area, coordination of recreation flow releases along a river or throughout a region, providing access and portage from a river-wide perspective, or encouraging cooperative efforts by multiple applicants with projects on the same river where physically, socially and economically feasible. The National Park Service will coordinate these proposals with appropriate land management and resource agencies to ensure consistency and environmental integrity.

Cooperative Comprehensive Planning: Encourage an applicant with several projects to develop a comprehensive recreation plan for all projects or for multiple applicants in the same basin to prepare a joint comprehensive plan where physically, socially and economically feasible.

Dated: September 10, 1992.

James Ridenour,

Director, National Park Service.

[FR Doc. 92-31437 Filed 12-28-92; 8:45 a.m.]

BILLING CODE 4310-70-M

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before December 19, 1992. Pursuant to § 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013-7127. Written comments should be submitted by January 13, 1993.

Carol D. Shull,

Chief of Registration, National Register.

LOUISIANA

Orleans Parish

Congo Square, Jct. of Rampart and St. Peter Sts., New Orleans, 92001763

MISSISSIPPI

Alcorn County

Downtown Historic District, Roughly bounded by Wick, Jackson, Foote and Webster Sts., Corinth, 92001792

MONTANA

Carbon County

Baldwin Building (Fromberg MPS), Jct. of W. River St. and Harley Ave., Fromberg, 92001777

Benson, Dr. Theodore J., House (Fromberg MPS), 10 N. Montana, Fromberg, 92001780

Blewett, John, House (Fromberg MPS), 2411 E. River St., Fromberg, 92001789

Brooder, Frank, House (Fromberg MPS), 303 North St., Fromberg, 92001787

Fromberg Concrete Arch Bridge (Fromberg MPS), River St. over the Clarks Fork of the Yellowstone R., Fromberg, 92001790

Fromberg High School (Fromberg MPS), Kids Ct., Fromberg, 92001788

Fromberg Methodist—Episcopal Church (Fromberg MPS), Jct. of N. Montana Ave. and School St., Fromberg, 92001781
Fromberg Opera House (Fromberg MPS), Jct. of Harley Ave. and C St., Fromberg, 92001779
Gibson, John, House (Fromberg MPS), 219 W. River St., Fromberg, 92001785
Greenbelt, Samuel, House (Fromberg MPS), 215 W. River St., Fromberg, 92001784
IOOF Hall and Fromberg Co-operative Mercantile Building (Fromberg MPS), 123 W. River St., Fromberg, 92001778
McCall, Tracy, House (Fromberg MPS), 110 N. Montana Ave., Fromberg, 92001782
Northern Pacific Railroad Depot—Fromberg (Fromberg MPS), Jct. of US 310 and River St., Fromberg, 92001776
Rahrer, Francis, House (Fromberg MPS), 309 School St., Fromberg, 92001786
Suydam, Hester E., Boarding House (Fromberg MPS), 209 W. River St., Fromberg, 92001783

Fergus County

Anderson House (Stone Buildings in Lewistown MPS), 1015 W. Watson, Lewistown, 92001770
Big Springs Stone Quarry Historic District (Stone Buildings in Lewistown MPS), Along MT 238, Upper Spring Cr., S of Lewistown junction, Lewistown vicinity, 92001775
Bright House (Stone Buildings in Lewistown MPS), 707 W. Boulevard, Lewistown, 92001766
Hopkins Brothers Grocery Warehouse (Stone Buildings in Lewistown MPS), 612—616 Fourth Ave. N., Lewistown, 92001772
House at 324 W. Corcoran (Stone Buildings in Lewistown MPS), 324 W. Corcoran, Lewistown, 92001773
House at 805 W. Watson (Stone Buildings in Lewistown MPS), 805 W. Watson, Lewistown, 92001767
House at 809 W. Watson (Stone Buildings in Lewistown MPS), 809 W. Watson, Lewistown, 92001768
House at 813 W. Watson (Stone Buildings in Lewistown MPS), 813 W. Watson, Lewistown, 92001769
Lewis House (Stone Buildings in Lewistown MPS), 702 W. Boulevard, Lewistown, 92001765
Lewistown Airport Hangar (Stone Buildings in Lewistown MPS), 1.5 mi. W of Lewistown off US 87, Lewistown vicinity, 92001774
Mill House (Stone Buildings in Lewistown MPS), MT 466 4.5 mi. SE of Lewistown, along Spring Cr., Lewistown vicinity, 92001764
Schroeder Hospital (Stone Buildings in Lewistown MPS), 502 Fifth Ave. S., Lewistown, 92001771

Judith Basin County

Wood Lawn Farm, 5 mi. W of Hobson on Utica Rd. No. 329, Hobson vicinity, 92001762

Lewis and Clark County

Porter Flats Apartments, 335 N. Ewing St., Helena, 92001761

NEW MEXICO

Hidalgo County

Alamo Hueco Site (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001800
Archeological Site No. LA 54021 (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001802
Archeological Site No. LA 54042 (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001811
Archeological Site No. LA 54049 (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001813
Archeological Site No. LA 54050 (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001814
Box Canyon Site (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001796
Brushy Creek Ruin (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001815
Clanton Draw Site (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001795
Cloverdale Park Site (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001808
Culberson Ruin (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001799
Double Adobe Creek Site (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001807
Fortress—Stewart Ranch Site (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001803
Hoskins Site (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001804
Joyce Well Site (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001798
Little Site (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001805
Lunch Box Site (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001801
Metate Ruin (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001812
Pendleton Ruin (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001794
Pigpen Creek Site (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001806
Saddle Bronc—Battleground Site (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001810
Sycamore Well Site (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001797
Timberlake Ruin—Walnut Creek Site (Animas Phase Sites in Hidalgo County MPS), Address Restricted, Animas vicinity, 92001809

NORTH CAROLINA

Sampson County

Patrick—Carr—Herring House, 226 McKoy St., Clinton, 92001791

(FR Doc. 92-31436 Filed 12-23-92; 8:45 am)

BILLING CODE 4310-70-M

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 303-TA-23 (Final) and 731-TA-566 and 568-570 (Final)]

Ferrosilicon From Kazakhstan, Russia, Ukraine, and Venezuela

AGENCY: United States International Trade Commission

ACTION: Institution and scheduling of final antidumping investigations and scheduling of the ongoing countervailing duty investigation.

SUMMARY: The Commission hereby gives notice of the institution of final antidumping investigations Nos. 731-TA-566 and 568-570 (Final) under section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the Act) to determine whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Kazakhstan, Russia, Ukraine, and Venezuela of ferrosilicon, provided for in subheadings 7202.21.10, 7202.21.50, 7202.21.75, 7202.21.90, and 7202.29.00 of the Harmonized Tariff Schedule of the United States. The Commission also gives notice of the schedule to be followed in these antidumping investigations and the ongoing countervailing duty investigation regarding imports of ferrosilicon from Venezuela (inv. No. 303-TA-23 (Final)), which the Commission instituted effective August 21, 1992 (57 FR 41777, September 11, 1992). The schedules for the subject investigations will be identical, pursuant to Commerce's alignment of its final subsidy and dumping determinations (57 FR 43222, September 18, 1992).

For further information concerning the conduct of these investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

EFFECTIVE DATE: December 21, 1992.

FOR FURTHER INFORMATION CONTACT: Brad Hudgens (202-205-3189), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-

impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202-205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000.

SUPPLEMENTARY INFORMATION:

Background

The subject antidumping investigations are being instituted as a result of affirmative preliminary determinations by the Department of Commerce that imports of ferrosilicon from Kazakhstan, Russia, Ukraine, and Venezuela are being sold in the United States at less than fair value within the meaning of section 733 of the Act (19 U.S.C. 1673b). The Commission instituted the subject countervailing duty investigation on August 21, 1992 (57 FR 41777, September 11, 1992). The investigations were requested in a petition filed on May 22, 1992, by AIMCOR, Pittsburgh, PA; Alabama Silicon, Inc., Bessemer, AL; American Alloys, Pittsburgh, PA; Globe Metallurgical, Inc., Cleveland, OH; Silicon Metaltech, Inc., Seattle, WA; United Autoworkers of America (locals 523 and 12646); United Steelworkers of America (locals 2528, 3081, and 5171); and Oil, Chemical & Atomic Workers (local 389).

Participation in the Investigations and Public Service List

Any person having already filed an entry of appearance in the countervailing duty investigation is considered a party in the antidumping investigation. Any other persons wishing to participate in the investigations as parties must file an entry of appearance with the Secretary of the Commission not later than seven (7) days after publication of this notice in the **Federal Register**. Section 201.11 of the Commission's rules is hereby waived. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations upon the expiration of the period for filing entries of appearance.

Limited Disclosure of Business Proprietary Information (BPI) Under an Administrative Protective Order (APO) and BPI Service List

The Secretary will make BPI gathered in these final investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made not later than seven (7) days after the publication of this notice in the **Federal Register**. Section 207.7(a) of the Commission's rules is hereby waived. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff Report

The prehearing staff report in these investigations will be placed in the nonpublic record on January 8, 1993, and a public version will be issued thereafter, pursuant to § 207.21 of the Commission's rules.

Hearing

The Commission will hold a hearing in connection with these investigations beginning at 9:30 a.m. on January 22, 1993, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before January 19, 1993. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on January 21, 1993, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by §§ 201.6(b)(2), 201.13(f), and 207.23(b) of the Commission's rules. Parties are strongly encouraged to submit as early in the investigations as possible any request to present a portion of their hearing testimony *in camera*.

Written Submissions

Each party is encouraged to submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of § 207.22 of the Commission's rules; the deadline for filing is January 15, 1993. Parties may also file written testimony in connection with their presentation at the hearing, as provided in § 207.23(b) of the Commission's rules, and posthearing briefs, which must conform with the provisions of § 207.24 of the Commission's rules. The deadline for filing posthearing briefs is February 1, 1993; witness testimony must be filed no later than three (3) days before the hearing. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations on or before February 1, 1993. A supplemental brief addressing only the final antidumping determinations of the Department of Commerce is due on March 8, 1993. The brief may not exceed five (5) pages in length. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 207.20 of the Commission's rules.

Issued: December 22, 1992.

By order of the Commission.

Paul R. Bardos,

Acting Secretary.

[FR Doc. 92-31498 Filed 12-23-92; 8:45 am]

BILLING CODE 7020-02-M

[Investigations Nos. 731-TA-540-541 (Final)]

Certain Welded Stainless Steel Pipes From the Republic of Korea and Taiwan

Determinations

On the basis of the record [1] developed in the subject investigations, the Commission determines,[2] pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the Act), that an industry in the United States is materially injured by reason of imports from the Republic of Korea and Taiwan of certain welded stainless steel pipes,[3] provided for in subheadings 7306.40.10 and 7306.40.50 of the Harmonized Tariff Schedule of the United States, that have

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Commissioners Brunsdale and Crawford dissenting with respect to the investigation involving the Republic of Korea. Commissioner Brunsdale dissenting and Commissioner Crawford not participating with respect to the investigation involving Taiwan.

[3] The subject product is defined as welded austenitic stainless steel pipes that meet the standards and specifications set forth by the American Society for Testing and Materials (ASTM) for the welded form of chromium-nickel pipe designated ASTM A-312. The merchandise covered by the scope of the investigations also includes welded austenitic stainless steel pipes made according to the standards of other nations which are comparable to ASTM A-312.

been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

Background

The Commission instituted these investigations effective June 22, 1992, following a preliminary determination by the Department of Commerce that imports of certain welded stainless steel pipes from the Republic of Korea and Taiwan were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the institution of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of July 29, 1992 (57 FR 33521). The hearing was held in Washington, DC, on November 10, 1992, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on December 18, 1992. The views of the Commission are contained in USITC Publication 2585 (December 1992), entitled "Certain Welded Stainless Steel Pipes from the Republic of Korea and Taiwan: Determinations of the Commission in Investigations Nos. 731-TA-540-541 (Final) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigations."

Issued: December 22, 1992.

By order of the Commission.

Paul R. Bardos,

Acting Secretary.

[FR Doc. 92-31497 Filed 12-28-92; 8:45 am]

BILLING CODE 7020-02-M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 32180 (Sub-No. 1)]

Danbury Terminal Railroad Company and Maybrook Properties, Inc.—Acquisition and Operation Exemption—Consolidated Rail Corporation

Danbury Terminal Railroad Company (DTR) and Maybrook Properties, Inc. (MPI), noncarriers, have modified their previously filed notice of exemption for MPI to acquire and DTR to operate approximately 157.15 miles of certain rail lines owned or operated by Consolidated Rail Corporation (Conrail) in the States of Connecticut and New York.[1] DTR will become a class III rail carrier.[2]

DTR will acquire from Conrail: (1) Operating rights in Danbury Yard (owned by State of Connecticut); (2) operating and freight rights over the Harlem Line between milepost 22.0 in White Plains, NY, and milepost 81.6 in Wassaic, NY (leased by metropolitan Transportation Authority and controlled by Metro North Commuter Railroad between milepost 22.0 and milepost 76.6, and owned by new York and Harlem Railroad and leased to Penn Central Corporation between milepost 76.6 and milepost 81.6); and (3) incidental trackage rights over the Waterbury Branch (owned by the State of Connecticut and controlled by Metro North Commuter Railroad) between milepost 0.0 in Devon, CT, and milepost 8.9 in Derby, CT.

MPI will acquire from Conrail and DTR will operate: (1) The Danbury Secondary Track (a) between milepost 0.0 in Beacon, NY, and milepost 12.8 in Hopewell Junction, NY, and (b) between milepost 42.9 in Hopewell Junction, and milepost 104.8 in Derby, CT; (2) The Stepney Branch in Botsford (Newtown), CT, between milepost 14.2 and milepost 14.6; and (3) The New Milford Secondary Track between milepost 0.0 in Berkshire Junction, CT, and milepost 13.65 in New Milford, CT. MPI will not conduct operations and will continue to be a noncarrier after its acquisition of the properties.

The proposed transaction will be consummated immediately after the effective date of this notice and after obtaining Commission approval or exemption for the related common control.

Any comments must be filed with the Commission and served on: Edward J. Rodriquez, P.O. Box 537, Old Saybrook, CT 06475.

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

[1] See Finance Docket No. 32180, Danbury Terminal Railroad Company and Maybrook Properties, Inc.—Acquisition and Operation Exemption—Consolidated Rail Corporation (not printed), served and published in the **Federal Register** (55 FR 55570) on November 25, 1992.

[2] This proceeding is related to Finance Docket No. 32163, wherein DTR's corporate parent, Housatonic Transportation Company (HTC), has filed a petition for an exemption from the prior approval requirements of 49 U.S.C. 11343 to continue in control of DTR when DTR becomes a carrier upon consummation of the transaction described in this notice.

Decided: December 21, 1992

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92-31555 Filed 12-28-92; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 32216]

Gulf, Colorado & San Saba Railway Corporation—Acquisition and Operation Exemption—Atchison, Topeka and Santa Fe Railway Company

The Gulf, Colorado & San Saba Railway Corporation has filed a notice of exemption to acquire and operate approximately 67.5 miles of rail line owned by the Atchison, Topeka and Santa Fe Railway Company, which extends between milepost 0.00 at Lometa, TX, and milepost 67.5 at Brady, TX in Lampasas, Mills, San Saba and McCullouch Counties, TX. The proposed transaction is expected to be consummated on or after December 21, 1992.

Any comments must be filed with the Commission and served on: Thomas J. Kelly, Pedersen & Houpt, 180 North LaSalle Street, suite 3400, Chicago, IL 60601.

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

Decided: December 21, 1992.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr,

Secretary.

[FR Doc. 92-31553 Filed 12-28-92; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 32205]

The Indiana Northeastern Railroad Company—Acquisition and Operation Exemption—Lines of the Hillsdale County Railway Company, Inc. in Steuben and De Kalb Counties, IN, and Williams County, OH

The Indiana Northeastern Railroad Company, a noncarrier, has filed a notice of exemption to acquire and operate two lines of railroad owned by the Hillsdale County Railway Company, Inc. The lines, which connect at Steubenville, extend 42.8 miles: (1) Between milepost 0.0, at Montpelier, OH, and milepost 24.0, at Hudson, IN;

and (2) between milepost 21.1, at Steubenville, IN, and milepost 39.9, at Ray, IN. The transaction is expected to be consummated after the effective date of this notice.

Any comments must be filed with the Commission and served on: Carl M. Miller, Miller, Harper & Rorick, 2270 Lake Avenue, suite 270, Fort Wayne, IN 46805.

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

Decided: December 22, 1992.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92-31552 Filed 12-28-92; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Clean Water Act

In accordance with Department policy, 28 CFR 50.7, notice is hereby given that a proposed consent decree in *United States* v. *City of Bossier City, and the State of Louisiana,* Civil action No. 91-0904, was lodged on December 15, 1992 with the United States District Court for the Western District of Louisiana, Shreveport Division. The Consent Decree resolves issues pertaining to the United States' allegations that the City of Bossier City, Louisiana violated the Clean Water Act, 33 U.S.C. 1251 *et seq.*, by failing adequately to administer its Pretreatment Program and by violating the terms of the National Pollutant Discharge Elimination System ("NPDES") permits for the Red River and Northeast Sewage Treatment Plants. Under the terms of the Consent Decree, the City will modify its existing Pretreatment Program, implement and effectively enforce the Program and any modifications to it, comply with effluent limits and monitoring requirements in the NPDES permits, pay a $200,000 civil penalty, and develop and implement a sludge management plan.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *City of Bossier City, et al.*, DOJ Ref. #90-5-1-1-3640.

The proposed consent decree may be examined at the Office of the United States Attorney, 401 Edwards St., suite 2100, Louisiana Tower, Shreveport, LA; the Region 6 Office of the Environmental Protection Agency, 1445 Ross Avenue, Dallas, Texas; and the Consent Decree Library, 601 Pennsylvania Avenue, NW., Washington, DC 20044, (202) 347-2072. A copy of the proposed consent decree may be attained in person or by mail from the Consent Decree Library, 601 Pennsylvania Ave, NW, Box 1097, Washington, DC 20044. In requesting a copy, please refer to the referenced case and enclose a check in the amount of $17.25 (25 cents per page reproduction costs), payable to the Consent Decree Library.

John C. Cruden,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 92-31401 Filed 12-28-92; 8:45 am]

BILLING CODE 4410-01-M

Notice of Lodging of Consent Decree in "United States v. Brandenburg Industrial Service Company"

In accordance with Department policy, 28 CFR 50.7, notice is hereby given that on December 9, 1992, a proposed Consent Decree in *United States* v. *Brandenburg Industrial Services* was lodged with the United States District Court for the Northern District of Illinois.

The Consent Decree resolves the United States' claims against Brandenburg Industrial Service Company for violating Section 112(c) of the Clean Air Act, 42 U.S.C. 7412(c), and the Natural Emission Standards for Hazardous Air Pollutants for Asbestos, 40 CFR part 61, subpart M. The Consent Decree requires Brandenburg Industrial Service Company to: (a) Achieve and maintain full compliance with all requirements of the National Emission Standards for Hazardous Air Pollutants for Asbestos; (b) pay stipulated penalties for any violation of the National Emission Standards for Hazardous Air Pollutants for Asbestos; and (c) pay a $20,000 civil penalty.

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Acting Assistant Attorney General for the Environment and Natural Resources Division, U.S. Department of Justice, P.O. Box 7611, Ben Frankin Station, Washington, DC 20044. All comments should refer to *United States* v. *Brandenburg Industrial Services*, DOJ Ref. No. 90-5-2-1-1260.

The proposed Consent Decree may be examined at the Region V Office of the U.S. Environment Protection Agency, 230 South Dearborn Street, Chicago, Illinois 60604. Copies of the proposed Consent Decree may also be obtained in person or by mail from the Consent Decree Library, 601 Pennsylvania Ave., NW., Box 1097, Washington, DC 20044 ((202) 347-2072)). Any request for a copy of the Decree should be accompanied by a check in the amount of $3.25 (13 pages at 25 cents per page reproduction cost) payable to "Consent Decree Library."

John C. Cruden,

Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 92-31402 Filed 12-28-92; 8:45 am]

BILLING CODE 4410-01-M

Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

In accordance with section 122(d)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9622(d)(2), and Departmental policy, 28 CFR 50.7, 38 FR 19029 (July 17, 1973), notice is hereby given that on December 16, 1992 a proposed Natural Resources Consent Decree in *United States of America* v. *French Limited, Inc., et al.*, Civil Action No. H-89-2544, was lodged with the United States District Court for the Southern District of Texas.

In 1989, a Complaint in this action was filed by the United States of America Against French Limited, Inc. and 84 other defendants under sections 106 and 107 of CERCLA, 42 U.S.C. 9606 and 9607, in connection with a release or threatened release of hazardous substances from the French Limited Site in Crosby, Texas.

On March 7, 1990, the United States District Court for the Southern District of Texas entered a Consent Decree between the United States and the defendants named in the Complaint, which secured implementation of the remedy selected by the U.S. Environmental Protection Agency for cleanup on the Site and reimbursement of response costs incurred by the United States.

Under the terms of the proposed Natural Resources Consent Decree, the

defendants would implement the marsh restoration project developed by the U.S. Department of the Interior, the National Oceanic and Atmospheric Administration of the Department of Commerce, and the State of Texas.

The Department of Justice will receive, for thirty (30) day from the date of publication of this notice, written comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resource Division, Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, DC 20044, and should refer to *United States* v. *French Limited Inc. et al.*, D.O.J. Ref. No. 90-11-3-46A.

The proposed Natural Resources Consent Decree may be examined at the office of the United States Attorney, Southern District of Texas, U.S. Courthouse and Federal Building, 515 Rusk Avenue, Houston, Texas 77002; the Region VI Office of the Environmental Protection Agency, 1445 Ross Avenue, Dallas, Texas 75202; and the Consent Decree Library, 601 Pennsylvania Ave., NW., Box 1097, Washington, DC 20004, (202) 347-2072. A copy of the proposed Consent Decree can be obtained in person or by mail from the Consent Decree Library. In requesting a copy, please enclose a check in the amount of $21.25 (25 cents per page reproduction charge) payable to the Consent Decree Library.

Vicki A. O'Meara,

Acting Assistant Attorney General, Environment and Natural Resources Division.

[FR Doc. 92-31405 Filed 12-28-92; 8:45 am]

BILLING CODE 4410-01-M

Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on December 17, 1992, a proposed Consent Decree in *United States* v. *Charles George Trucking Co., Inc.*, Civil Action Nos. 85-2463-WD and 85-2714-WD, was lodged with the United States District Court for the District of Massachusetts. The proposed Consent Decree resolves a suit against certain parties brought by the United States and the Commonwealth of Massachusetts under section 107(a) of the Comprehensive Environmental Compensation, Recovery Act, 42 U.S.C. 9607(a), to recover response costs incurred in cleaning up the Charles George Reclamation Trust Landfill, located in Tyngsboro, Massachusetts.

The United States and the Commonwealth are resolving their claims against the following defendants: Analog Devices, Inc., Borden, Inc., Browning-Ferris of Massachusetts, Clean Harbors of Braintree, Inc., Dennison Manufacturing, Domino Sugar Corporation, DYMEC, Inc., Eckel Industries, Inc., Federal Metal Finishing, Inc., The Gillette Company, Hussey Plastics, Inc., Jenike and Johanson, Inc., Lam Lighting Systems, Inc., Millipore Corporation, National Aluminum Corporation, Polaroid Corporation, PPG Industries, Inc., Pride Printers, Inc., Standex International Corporation, Stephan Company, and W.R. Grace & Company—Conn. Also taking part in the settlement are the following third party defendants: Analogic Corporation, Barry Wright Corporation, Bellofam Corporation, Boston Edison Company, Brewer Petroleum Service, Inc., Bull HN Information Systems, Inc., Chevron USA, Inc., Cooper Industries, Inc., Jet-Services, Inc., Jet-Line Services of Rhode Island, Inc., P&T Container Service Co., Inc., Reichhold Chemicals, Inc., Roche Brothers Barrell & Drum Co., Inc., Rochester Midland Corporation, Sherwin-Williams Co., Inc., Tech/Ops, Inc., Town of Bedford (Massachusetts), Town of Bridgewater (Massachusetts), Town of Burlington (Massachusetts), Town of Chelmsford (Massachusetts), Town of Groveland (Massachusetts), Town of Hanson (Massachusetts), Town of Milford (New Hampshire), Town of North Reading (Massachusetts), Town of Tyngsboro (Massachusetts), City of Malden (Massachusetts), City of Revere (Massachusetts), Refuse Energy Systems Co. (RESCO), and Turner Trucking and Salvage Company, Inc.

The Consent Decree will result in a total settlement of $34,188,000 for cost recovery and $1,378,350 for natural resource damages. Of this amount, the United States will receive $22,988,000 in response costs and $459,450 for natural resource damages. Included in the United States' share is $2,600,800 in cost recovery and $88,400 for natural resource damages to be paid on behalf of United States Coast Guard for claims asserted against the United States. The Commonwealth of Massachusetts will receive $11,200,000 for cost recovery and $918,900.05 for natural resource damages. Included in the Commonwealth's share is $459,540 for cost recovery and $15,000 for natural resource damages to be paid by the University of Massachusetts at Lowell for claims asserted against it.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed consent decree. Comments should be addressed to the Acting Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *Charles George Trucking Co. et. al.*, D.J. Ref. 90-11-3-91.

The proposed Consent Decree may be examined at the office of the United States Attorney, District of Massachusetts, McCormick Federal Building, Post Office Square, Boston, Massachusetts 02109, and at the Region I Office of the Environmental Protection Agency, Office of Regional Counsel, 10th Floor, 1 Congress Street, Boston, Massachusetts 02203. The proposed Consent Decree may also be examined at the Consent Decree Library, 601 Pennsylvania Ave., NW., Box 1097, Washington, DC 20004, (202) 347-2072. A copy of the proposed Consent Decree may be obtained in person or by mail from the Document Center. In requesting a copy, please enclose a check in the amount of $33.25 (25 cents per page reproduction cost), payable to Consent Decree Library.

John C. Cruden,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 92-31403 Filed 12-28-92; 8:45 am]

BILLING CODE 4410-01-M

Lodging of Consent Decree Under Comprehensive Environmental Response, Compensation, and Liability Act

In compliance with Departmental policy, 28 CFR 50.7, and consistent with section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), 42 U.S.C. 9622(i), notice is hereby given that on November 23, 1992, a proposed consent decree in *United States* v. *GNB, Inc./Chloride Western, Inc., et al*, No. 92-1473-RE was lodged with the United States District Court for the District of Oregon. The consent decree requires six settling Defendants to reimburse the United States in the sum of $980,103.00 for response costs incurred and to be incurred in connection with the soils operable unit ("Soils Unit") at the Gould Superfund Site in Portland, Oregon. The Gould Site has been placed on the National Priorities List. Each of the Defendants was responsible for sending batteries or lead scrap to the Site and has been determined by EPA to

be eligible for a *de minimis* settlement under section 122(g) of CERCLA.

The proposed consent decree requires each of the Defendants to pay a sum which is proportional to the percentage of waste sent to the Site by that party. In return, the United States will covenant not to take any civil or administrative action under CERCLA for further response costs or remedial action in connection with the Soils Unit of the Site, unless it is discovered after the settlement that a settling Defendant contributed a greater amount of wastes than originally calculated, such that the party can no longer be considered eligible for a *de minimis* settlement.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed partial consent decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530 and should refer to *United States* v. *GNB, Inc./Chloride Western, Inc.*, D.J. #90-11-3-397B.

The proposed consent decree may be examined at the Office of the Clerk of Court of the United States District Court for the District of Oregon, 531 U.S. Courthouse, 620 SW Main Street, Portland, Oregon 97205-3090; at the Region 10 Office of the Environmental Protection Agency, 1200 Sixth Avenue, Seattle, Washington; and at the Environmental Enforcement Section Document Center, 601 Pennsylvania Avenue, NW., Box 1097, Washington, DC 20004, (202) 347-2072. A copy of the proposed consent decree may be obtained in person or by mail from the Document Center. In requesting a copy, please enclose a check in the amount of $6.75 (25 centers per page reproduction costs), made payable to the Consent Decree Library.

John C. Cruden,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 92-31404 Filed 12-28-92; 8:45 am]

BILLING CODE 4410-01-M

Lodging of Consent Decree Pursuant to the Clean Water Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that a proposed consent decree in *United States* v. *Kodiak Reduction, Inc.*, Civil Action No. 92-750, was lodged on December 10, 1992 with the United States District Court for the District of Alaska. The complaint in this case alleged that Kodiak Reduction, Inc. violated its National Pollutant Discharge Elimination System (NPDES) permit by discharging excess fish waste from its fish meal plant into waters off Kodiak Island. The consent decree provides for payment of a $90,000 civil penalty and injunctive relief to require construction of a new, larger fish meal plant with greater processing capacity that will eliminate the need to dispose of excess fish waste.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *Kodiak Reduction, Inc.*, DOJ Ref. #90-5-1-1-3620.

The proposed consent decree may be examined at the Office of the United States Attorney, 222 West Seventh Avenue, Anchorage, Alaska; the Region 10 Office of the Environmental Protection Agency, 1200 Sixth Avenue, Seattle, Washington; and at the Consent Decree Library, 601 Pennsylvania Avenue, NW., Washington, DC 20044, 202-347-2072. A copy of the proposed consent decree may be obtained in person or by mail from the Consent Decree Library, 601 Pennsylvania Avenue, NW., Box 1097, Washington, DC 20044. In requesting a copy, please refer to the referenced case and enclose a check in the amount of $3.75 (25 cents per page reproduction costs), payable to the Consent Decree Library.

Vicki A. O'Meara,

Acting Assistant Attorney General, Environment and Natural Resources Division.

[FR Doc. 92-31406 Filed 12-28-92; 8:45 am]

BILLING CODE 4410-01-M

Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

In accordance with Departmental policy, 28 CFR 50.7, 38 FR 19029, and 42 U.S.C. 9622(d)(2), notice is hereby given that on October 26, 1992, a proposed Consent Decree in *United States* v. *Midwest Gas et al.*, Civil Action No. C92-1046, was lodged with the United States District Court for the Northern District of Iowa. The proposed Consent Decree resolves the liability of the Settling Defendants under sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. 9606 and 9607, at the Peoples Natural Gas Superfund Site ("Site") in Dubuque, Iowa. Under the terms of the Consent Decree, the Settling Defendants have agreed to conduct a remedial action at the Site, to reimburse EPA for past costs of $136,735.31, plus interest of $22,010.00, and to reimburse the United States for all oversight and future costs incurred at the Site.

The Department of Justice will receive, for thirty (30) days from the date of publication of this notice, written comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, DC 20044, and should refer to *United States* v. *Midwest Gas, et al.*, D.J. Ref. No. 90-11-2-775.

The proposed Consent Decree may be examined at the office of the United States Attorney, Northern District of Iowa, 425 2nd St., SE., suite 950, The Centre, Cedar Rapids, Iowa 52401, the Region VII Office of the Environmental Protection Agency, 726 Minnesota Avenue, Kansas City, Kansas 66106, and at the Consent Decree Library, 601 Pennsylvania Avenue, NW., Box 1097, Washington, DC 20044, 202-347-2072. A copy of the proposed Consent Decree can be obtained in person or by mail from the Consent Decree Library. In requesting a copy, please enclose a check in the amount of $21.75 (25 cents per page reproduction charge) payable to the Consent Decree Library.

John C. Cruden,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 92-31407 Filed 12-28-92; 8:45 am]

BILLING CODE 4410-01-M

Drug Enforcement Administration

Manufacturer of Controlled Substances; Registration

By Notice dated November 5, 1992, and published in the Federal Register on November 13, 1992, (57 FR 53934), Hoffman-LaRoche, Inc., 340 Kingsland Street, Nutley, New Jersey 07110, made application to the Drug Enforcement Administration to be registered as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Tetrahydrocannabinols (7370)	I
Levorphanol (9220)	II

No comments or objections have been received. Therefore, pursuant to Section 303 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and Title 21, Code of Federal Regulations

Section 1301.54(e), the Deputy Assistant Administrator hereby orders that the application for registration submitted by the above firm for registration as a bulk manufacturer of the basic classes of controlled substances listed above is granted.

Dated: December 21, 1992.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control Drug Enforcement Administration.

[FR Doc. 92-31560 Filed 12-28-92; 8:45 am]

BILLING CODE 4410-09-M

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated November 12, 1992, and published in the **Federal Register** on November 13, 1992, (57FR53935), Norac Company Inc., 405 S. Motor Avenue, Azusa, California 91702, made application to the Drug Enforcement Administration to be registered as a bulk manufacturer of Tetrahydrocannabinols (7370), a basic class of controlled substance listed in Schedule I.

No comments or objections have been received. Therefore, pursuant, to section 303 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and title 21, Code of Federal Regulations § 1301.54(e), the Deputy Assistant Administrator hereby orders that the application for registration submitted by the above firm for registration as a bulk manufacturer of the basic class of controlled substance listed above is granted.

Dated: December 21, 1992.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control; Drug Enforcement Administration.

[FR Doc. 92-31558 Filed 12-28-92; 8:45 am]

BILLING CODE 4410-09-M

DEPARTMENT OF LABOR

Office of the Secretary

Use of Negotiated Rulemaking Procedures by Agencies of the Department of Labor

AGENCY: Office of the Secretary, Labor.

ACTION: Notice of policy.

SUMMARY: Public notice is provided of a policy adopted by the Department of Labor to facilitate the use of the negotiated rulemaking process in the development of regulations by Department of Labor components, and to ensure that such efforts are carried out in a manner consistent with the provisions of the Negotiated Rulemaking Act (5 U.S.C. 561 *et. seq.*) and the provisions of the Federal Advisory Committee Act (5 U.S.C. Appendix). This policy supplements more general statements about the use of negotiated rulemaking contained in an interim policy on the use by Department of Labor components of alternative dispute resolution techniques. In addition, notice is provided of the availability to the public of a Handbook on negotiated rulemaking in the Department of Labor, and a soon to be completed videotape about the negotiated rulemaking process.

FOR FURTHER INFORMATION CONTACT: Marshall J. Breger, Solicitor of Labor, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210. Telephone 202-219-7675.

SUPPLEMENTARY INFORMATION: This notice announces the adoption by the Department of Labor of a policy to facilitate the use of the negotiated rulemaking process in the development of regulations by Department of Labor components, and the availability of explanatory and training materials about the negotiated rulemaking process.

Negotiated rulemaking is a process that brings together those who would be significantly affected by a rule, including the Government, to reach consensus on some or all aspects thereof before the rule is formally proposed by the Government. The process is a voluntary one, and the participants establish their own rules of procedure. An impartial mediator is used to facilitate intensive discussions among the participants, who operate as a committee open to the public. Working groups are often used to study the issues involved: Including technical, feasibility and cost issues. Since the participants have come together voluntarily and in good faith to try and reach a consensus, each participant has a strong interest in helping to find a solution to the concerns of all the other parties. As a result, agreements which emerge from this process tend to be more technically accurate, clear and specific, and less likely to be challenged in litigation than are rules produced without such interaction.

The Department of Labor was one of the originators of the negotiated rulemaking process. A review of these early DOL efforts are reviewed in the Negotiated Rulemaking Sourcebook, Administrative Conference of the United States, 1990 (pp. 336-337, 563 et. seq., 605 et. seq., 661 et. seq.). The Department's most recent experience had involved an Occupational Safety and Health Administration rule on a carcinogen known as MDA (the final rule was published August 10, 1992, 57 FR 35630). Developing the final rule through the negotiated rulemaking process, including appropriate clearances, took a long time; but essentially full compliance was achieved even prior to issuance of the final rule (no enforcement required), and there was no litigation regarding the standard.

In 1990 the Congress enacted Public Law 101-648, the Negotiated Rulemaking Act, to encourage all agencies to consider use of this process in appropriate cases. The Negotiated Rulemaking Act was enacted to remove various legal uncertainties discouraging widespread use of this technique. The Congress noted its concern that traditional rule development procedures may discourage agreement among the potentially affected parties and the Federal government. Negotiated rulemaking, however, is a process explicitly designed to facilitate the search for potential agreement.

Despite the enactment of the new law, Federal agencies continue to face a number of practical internal problems that discourage use of negotiated rulemaking. First and foremost, many in the Federal Government remain unfamiliar with the process, and have a number of questions about how the provisions of the new law would fit within the framework of agency, Departmental and Executive branch rulemaking practices and requirements. The same is true for those outside the Federal Government, whose willingness to participate in the process in good faith is essential for success.

Moreover, use of a negotiated rulemaking process requires most agencies to change the way they normally coordinate their rule development activities. Closer than normal budgetary and priority coordination among involved offices of the Government is needed to ensure that the interests of the Government are fully and timely represented during the negotiations. In addition, negotiated rulemaking costs the agency more money at the front end. Operating a negotiated rulemaking advisory committee involves certain expenditures that would not be needed in normal rule development procedures: e.g. the costs of an impartial mediator to facilitate the discussion, room space for meetings, and in some cases travel and per diem for those essential parties who can otherwise not afford to participate.

Soon after the enactment of the Negotiated Rulemaking Act, the Department took its first step to encourage agencies to consider use of

the process. The Department amended its internal regulatory review procedures to require that Department of Labor agencies must consider using negotiated rulemaking to develop a rule when making an initial recommendation to proceed with rulemaking action.

Following an opportunity for public comment (see 56 FR 23599 and 56 FR 28177), the Department of Labor gave notice that it had established an interim policy on the use of alternative dispute resolution (ADR) and negotiated rulemaking procedures by Department of Labor agencies (57 FR 7292, February 28, 1992). The interim policy was issued pursuant to the provisions of the Administrative Dispute Resolution Act (5 U.S.C. 571 *et. seq.*), which lists rulemaking disputes as one type of dispute for which ADR procedures should be considered in appropriate cases.

The interim policy stated that the Department would encourage its component agencies to experiment with negotiated rulemaking wherever such a process has the potential to result in a rule which is more technically accurate, clear and specific, and less likely to be challenged in litigation by interested parties than a rule produced by traditional rule development procedures. The interim policy stated that the Department would only initiate negotiated rulemaking efforts where the time and resource investment by public and private parties is expected to be prudent and efficient. Moreover, the interim ADR policy explicitly stated that a more articulated policy on the use of negotiated rulemaking would be issued at a later date.

Following issuance of the interim policy, the Office of the Solicitor initiated a series of almost a dozen seminars to study specific aspects of the negotiated rulemaking process. Experienced DOL regulatory staff from throughout the Department engaged in an active discussion with experts on the process and those who had participated in negotiated rulemaking activities. Particular consideration was devoted to features of the new Act and how its guidance could be integrated with prior experience in negotiated rulemaking, with individual agency rulemaking problems and practices, and with the requirements of the Federal Advisory Committee Act. The Department's own administrative law experts were joined in these seminars by experts from the Environmental Protection Agency, the Administrative Conference of the United States, the General Services Administration, the Department of Health and Human Services, academia and the private sector. This effort helped to educate a number of key Departmental personnel about the negotiated rulemaking process. It also helped provide answers to a number of questions about maximizing the chances for the process to operate successfully.

As a result of these efforts, the Department of Labor is able to refine the general guidance provided in the interim policy by adopting a fully articulated policy on the use of negotiated rulemaking. The Department's policy explicitly states, among other things, that negotiated rulemaking is to be conducted:

- In accordance with the guidance set forth in the provisions of the Negotiated Rulemaking Act, absent explicit public notification to the contrary in a particular case;
- In full compliance with the requirements of the Federal Advisory Committee Act in a manner consistent with the requirements of the Negotiated Rulemaking Act;
- With particular attention to ensuring full and adequate representation of interests that may be significantly affected by the proposed rule; and
- In good faith by the agency, in each of the roles it has in any such effort: As initiator of the process; as provider of administrative support for the process; as a participant in the negotiations; and in the agency's capacity as rulemaker. The policy provides more specific guidance on what good faith by an agency means in each of these capacities.

The Department is convinced that adhering to the policy's criteria will set a positive tone and encourage a positive result in negotiated rulemaking efforts, thus increasing the confidence of potential participants who must make a significant commitment of time and resources for the process to succeed. The continued success of this process in producing rules that are more technically accurate, clear and specific, and less likely to be challenged in litigation, or to at least significantly narrow the issues which are not so resolved, should lead to increased interest in use of the process.

A second product of the Department's study of the negotiated rulemaking process is a detailed user handbook. The Handbook provides a much more complete explanation of the negotiated rulemaking process and how it differs from traditional rule development approaches used in the Department. It also contains important definitions, explains the implications of various provisions of the Department's policy, and provides detailed information on how to carry out each step in the negotiated rulemaking process. The Handbook is designed to serve as a working tool for those who are considering or actually using the process, providing answers to myriad questions that will arise in any negotiated rulemaking effort and thus reducing the need to delay the process from time to time in order to obtain legal opinions on particular procedural questions.

The Department is in the process of completing an educational videotape, in VHS format, about the negotiated rulemaking process. The tape was complied primarily from one of the seminars arranged by the Office of the Solicitor in which participants who represented labor and management in OSHA's MDA negotiated rulemaking effort discuss why they decided to participate, how the process differed from traditional rulemaking practices, how the committee functioned, how they kept in touch with those whom they represented, and other practical issues. A third member of the panel from academia provides insights and recommends factors that should be considered by potential participants. The tape provides an excellent introduction to the negotiated rulemaking process and to the rationale behind the Department's policy.

The policy, handbook and videotape all emphasize that they are not intended to limit the flexibility of agencies and negotiated rulemaking committees to carry out their activities in innovative ways. The Negotiated Rulemaking Act itself involves both specificity and flexibility. On the one hand, the NRA sets forth a detailed set of instructions on how to conduct the process; and on the other hand, it explicitly provides that: "Nothing in this subchapter should be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process of with other innovative rulemaking procedures otherwise authorized by law." 5 U.S.C. 561. Until they gain familiarity with the concepts of negotiated rulemaking, agencies and negotiated rulemaking committees of the Department may derive comfort from following the "safe harbor" guidance in the Act, the policy and the Handbook. Moreover, following a consistent approach can help other interested parts of the Government, other parties and the public understand and have confidence in negotiated rulemaking efforts undertaken by *all* DOL agencies and negotiated rulemaking committees—particularly during the initial years of operation under the new law.

The Department has established an ADR Steering Committee to facilitate guidance on how to utilize ADR techniques in the activities of the Department. The negotiated rulemaking policy states that the Solicitor shall take the lead and chair these Steering Committee efforts.

A copy of the negotiated rulemaking policy adopted by the Department of Labor is published with this public notice. Copies of the Department's Negotiated Rulemaking Handbook, and, when it is completed, the educational videotape on the negotiated rulemaking process, can be obtained by contacting: Peter Galvin, Co-Counsel for Administrative Law, Office of the Solicitor, room N-2428, U.S. Department of Labor, Washington, DC 20210.

Signed at Washington DC, this 21st day of December 1992.

Lynn Martin,

Secretary of Labor.

Negotiated Rulemaking Policy of the United States Department of Labor

Background and Purpose

Negotiated (or mediated) rulemaking is a process in which a proposed rule is developed by a committee composed of representatives of all those interests that will be significantly affected by the rule, including those interests represented by the Federal government. Decisions are made by consensus, which generally requires unanimous concurrence among the interests represented.

The Congress has found that negotiated rulemaking can result in rules that are technically more accurate, clear and specific, and less likely to be challenged in litigation than are rules developed without such interaction. The Negotiated Rulemaking Act accordingly encourages all Federal Agencies to utilize this approach in appropriate cases.

The purpose of this policy is to provide guidance to Federal personnel and to the public on the negotiated rulemaking principles that will be followed by agencies of the Department of Labor. The Department of Labor was an early pioneer in the use of negotiated rulemaking. The Department is convinced that the process is applicable in a wide range or regulatory activities for which the Department is responsible, and is committed to its use in appropriate cases. Establishment of this policy, and education of Federal personnel and the public about how it is to be implemented, are the building blocks upon which the Department's commitment can be fulfilled.

This policy is one of the steps being taken by the Department of Labor to establish regulatory development and implementation approaches that promote improved communications between the Federal government and the public. The Department expects that the experience gained by the Federal personnel and the public through the use of negotiated rulemaking will provide valuable lessons that can improve all of the Department's regulatory activities.

Consideration of Negotiated Rulemaking Approach

Negotiated rulemaking shall be actively considered for use by all Department of Labor agencies exploring the possibility of rulemaking. Consistent with Departmental regulatory review procedures, such consideration shall begin early in the rulemaking conceptualization process, and the results reported to the Department. The consideration shall involve an assessment of the benefits, drawbacks and appropriateness of using the process in a particular situation, in comparison to alternative ways of proceeding. In addition, agencies should continue to reassess the suitability of the process as further information is developed.

Agencies are encouraged to use the services of impartial third parties (commonly known as conveners) to assist them in this assessment and reassessment process.

Applicability of the Negotiated Rulemaking Act

The Department shall undertake all future negotiated rulemaking activities in accordance with the provisions of the Negotiated Rulemaking Act absent explicit public notification to the contrary in a particular case.

The procedural steps set forth in the Act are based on prior agency experience with the negotiated rulemaking process. The provisions of the Act, and those of this policy, are designed to be flexible enough to meet the needs of all programs administered by the Department and the particularities of diverse rulemaking situations. Each agency has its own pattern of doing business, and the Act of this policy permit each negotiated rulemaking to be structured by the participants to suit the needs of the situation. Nevertheless, the specific procedural steps set forth in the Act, while sometimes appearing mundane, are important enough to merit attention by all agencies engaged in negotiated rulemaking activity. Moreover, the provisions of the Act provide a legal "safe harbor" for agency action. Accordingly, although the procedural steps set forth in the Act do not have to be followed as a matter of law, agencies in the Department are expected to follow those steps until they and their legal counsel gain sufficient experience with the negotiated rulemaking process to warrant a decision to the contrary.

Agencies of the Department are encouraged to consider other innovative rulemaking procedures otherwise authorized by law, and nothing in this policy should be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or other innovative rulemaking procedures.

Applicability of the Federal Advisory Committee Act

All negotiated rulemaking committees shall be formed and operated in full compliance with the requirements of the Federal Advisory Committee Act (FACA) in a manner consistent with the requirements of the Negotiated Rulemaking Act. In addition, agencies of the Department shall make efforts to ensure that interested members of the public have opportunities to keep abreast of, and contribute to, the deliberation of negotiated rulemaking committees. Agencies considering negotiated rulemaking activities will be expected to seek early and regular advice on FACA compliance procedures and requirements from legal counsel, so that this guidance can be taken into account: in considering whether negotiated rulemaking is appropriate; and in the development and implementation of plans for negotiated rulemaking activity.

Commitment to Full Representation of Significantly Affected Interests

It shall be the policy of the Department of Labor to conduct negotiated rulemaking proceedings with particular attention to ensuring full and adequate representation of those interests that may be significantly affected by the proposed rule.

In this regard, the Department of Labor recognizes that the regulatory actions it takes under its programs affect various segments of society in different ways; accordingly, particular attention shall be given to this fact in ensuring full and adequate representation of significantly affected interests.

Commitment of Good Faith Effort by the Department's Representatives, Components, Officials and Personnel

The Department and its agencies are committed to acting in good faith in undertaking negotiated rulemaking

efforts in each of the roles it has in any such effort: as initiator; as provider of administrative support; as a participant in the negotiations; and in its capacity as rulemaker.

In initiating a negotiated rulemaking process, an agency head is making a commitment by the Department of Labor that the agency and all the other parts of the Department that will have to participate in the process will provide adequate resources to ensure timely and successful completion of the process. This commitment includes making the process a priority activity for all representatives, components, officials and personnel of the Department who need to be involved in the rulemaking, from the time of initiation until such time as a final rule is issued or the process expressly terminated. Once the process has been initiated, all representatives, components, officials and personnel of the Department will be expected to act in accordance with this commitment.

As provider of administrative support, the Department and its agencies will take steps to ensure that negotiated rulemaking committees have the dedicated resources they require to complete their work in a timely fashion. These include the provision or procurement of such support services as: Properly equipped space adequate for public meetings and caucuses; logistical support and timely payment of participant travel and expenses where necessary as provided for under the Act; word processing, information dissemination, storage and other information handling services required by negotiated rulemaking committees; qualified conveners and facilitators; and the provision of statistical, economic, health, legal, computing or other highly technical skills that may be required by a negotiated rulemaking committee.

As a participant in the negotiations, any agency member of a negotiated rulemaking committee shall be empowered by the agency head to represent the full range of significantly affected interests of the agency, and such member shall take the necessary steps to fully and fairly represent the full range of interests of the Department and the Federal government. The interests of the Federal government that must be represented include those arising out of its obligations under any statute or Executive Order. Participation in a negotiated rulemaking effort does not eliminate any requirements of statute or Executive Order with respect to any proposed rule, and early and regular coordination within the government is essential if the consensus of the negotiated rulemaking committee is to be acceptable to all significantly affected interests.

In its capacity as rulemaker, the agency shall, to the maximum extent possible consistent with its legal obligations, use the consensus of the committee as the basis for the agency's rulemaking actions. Under the Negotiated Rulemaking Act, Federal officials retain their full statutory and constitutional responsibility to make all administrative determinations on regulatory matters; under the Appointments Clause of the Constitution, governmental authority may be exercised only by officers of the United States. The Negotiated Rulemaking Act does, however, provide that agencies are to consider whether they can make a commitment to act on the consensus of a negotiated rulemaking committee prior to deciding whether to establish such a committee. Accordingly, if a decision is made to establish a committee, potential participants have a right to expect that the Department will follow through on the commitment inherent in that decision and base its rulemaking actions on the committee consensus. Moreover, since other parties also retain their legal rights not to accept the committee consensus, the Department's good faith willingness to abide by its commitments is intended to set an example for all to follow.

Assistance by the Department

To help facilitate the Department's commitment to utilize this process in appropriate cases, the Department is taking additional actions to assist in implementation of this policy.

The Department will arrange for the provision to requesting agencies, with full reimbursement by program agencies for services actually utilized, of certain additional administrative support services which may be difficult for agencies to provide on their own: Including room space adequate and conducive for extended public meetings and for related negotiation activities; dedicated clerical support required by negotiated rulemaking committees; the services of qualified mediators and other expert personnel to assist the process; and training.

The Department's Steering Committee on Alternative Dispute Resolution shall provide agencies with guidance, advice and training in the use of the negotiated rulemaking process, and encourage and facilitate use of the process in cases the Department deems appropriate. The Steering Committee shall develop and maintain a handbook and other materials to facilitate implementation of this policy, which shall be made available to the public. In addition, following consultations with program agency heads, the Steering Committee shall recommend to the Secretary any changes that may be appropriate to this policy, and shall recommend any further initiatives that could facilitate use of this process by agencies of the Department. The Office of the Solicitor shall take the lead and chair these Steering Committee efforts.

[FR Doc. 92-31415 Filed 12-28-92; 8:45 am]

BILLING CODE 4510-23-M

Pension and Welfare Benefits Administration

[Application No. D-9222, et al.]

Proposed Exemptions; Gilead Sciences 401(k) Plan, et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and request for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. stated in each Notice of

Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, room N-5507, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons.

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Gilead Sciences 401(k) Plan (the Plan) Located in Foster City, California

[Application No. D-9222]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted the restrictions of sections 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to (1) the proposed extension of credit (the Loan) to the Plan by Gilead Sciences, Inc. (the Employer), the sponsor of the Plan, with respect to two guaranteed investment certificates (the GICs) issued by Mutual Benefit Life Insurance Company of New Jersey (Mutual Benefit); and (2) the potential repayment of the Loan (the Repayments) by the Plan; provided that the following conditions are satisfied:

(A) All terms of such transactions are no less favorable to the Plan than those which the Plan could obtain in arm's-length transactions with an unrelated party;

(B) No interest and/or expenses are paid by the Plan;

(C) The Repayments shall not exceed the amount of the Loan;

(D) The Repayments shall not exceed the amounts actually received by the Plan from Mutual Benefit, any state guaranty fund, and other responsible third party payors with respect to the GICs; and

(E) The Repayment of the Loan shall be waived to the extent that the amount of the Loan exceeds the total GIC Proceeds.

Summary of Facts and Representations

1. The Plan is a defined contribution retirement plan which includes a cash or deferred compensation arrangement under section 401(k) of the Code and provides for employer matching contributions and additional employer discretionary contributions. As of June 30, 1992, the Plan had approximately 43 participants and total assets of approximately $346,966.23. The Employer is a Delaware privately-held corporation with its principal offices in Foster City, California. The assets of the Plan are held and invested under the Gilead Sciences 401(k) Plan Trust (the Original Trust). Since the Plan's inception, the trustees of the Original Trust have been Michael L. Riordan and Michael F. Bigham (the Original Trustees), each of whom is an executive officer of the Employer. The Plan provides for individual participant accounts (the Accounts) and for participant-directed investment of the Accounts among investment options offered by the Original Trustees.

2. Prior to October 1, 1992, the Original Trustees had contracted for the investment and management of Plan assets by Mutual Benefit, under an agreement effective August 1, 1989 (the MB Contract). The MB Contract is a master group annuity contract under which a total of six different investment choices were offered to Plan participants for the investment of their Accounts. These investment choices included a guaranteed certificate fund (the GC Fund), which invested in guaranteed investment certificates, issued by Mutual Benefit, featuring interest guarantees over stated periods. The sole remaining assets in the GC Fund are the GICs. Each GIC is a "window" contract which provides that principal deposits over a stated window period will earn interest at rates designated by its terms (the Contract Rates). Withdrawals from the GICs may be made to enable the GC Fund to effect, in accordance with the terms of the Plan, benefit distributions, in-service withdrawals, participant loans, and participant-directed transfers of Account balances to other investment options offered by the Plan (collectively, the Withdrawal Events). In addition to withdrawals for the Withdrawal Events, each GIC requires Mutual Benefit to make a final payment to the GC Fund, upon a maturity date defined by each GIC, in the amount of the GIC's accumulated book value, representing total principal deposits plus interest earnings at the Contract Rates, less previous withdrawals. As of June 30, 1992, the GICs had a total accumulated book value of $174,994.61, representing total principal deposits plus interest at the Contract Rates less previous withdrawals, and constituting approximately 50 percent of the Plan's assets. The GICs are the only certificates held by the GC Fund. The GICs are further identified as follows:

Certificate No. 0001: Effective August 1, 1989, with a deposit period of August 1, 1989 through July 31, 1990, a Contract Rate of 9.10 percent per annum, and a maturity date of July 31, 1992.

Certificate No. 0002: Effective August 1, 1990, with a deposit period of August 1, 1990 through July 31, 1991, a Contract Rate of 9.10 percent per annum until July 31, 1991 and thereafter of 8.65 percent per annum, and a maturity date of July 31, 1995.

3. Effective October 1, 1992, the Plan was amended and restated by the Employer in the form of a prototype plan (the New Plan) under a document provided by Fidelity Management and Research Company (Fidelity). The terms of the New Plan provide for the establishment of a new trust (the New Trust), of which the trustee will be Fidelity Management Trust Company (the New Trustee). All Employer contributions due under the Plan with respect to participants' compensation earned on or after October 1, 1992 are deposited in the New Trust. Assets of the Plan which are transferred from the Original Trust to the New Trust, and all assets of the New Plan, are invested at the direction of participants in various investment options offered by Fidelity. The Original Trustees continue to act as

trustees of the Original Trust, which continues to exist as a separate trust under the Plan until it no longer hold any Plan assets.

4. On July 15, 1991, the Original Trustees notified Mutual Benefit that the Employer's contributions under the MB Contract would be discontinued immediately, and they directed Mutual Benefit to transfer all Original Trust assets to a successor investment manager. By an order entered July 16, 1991 in the Superior Court of New Jersey, Mutual Benefit was placed into receivership and rehabilitation by the New Jersey Commissioner of Insurance (the Receivership).[1] Since the commencement of the Receivership, payments on all Mutual Benefit guaranteed investment certificates, including the GICs, have been suspended.[2] Consequently, the Original Trustees' have been unable to effect a transfer to Fidelity of all Plan assets which are under Mutual Benefit's management (the Asset Transfer), the Withdrawal Events are not being funded by the GC Fund, and the maturity payment which was due June 30, 1992, under Certificate No. 0001, has not been made.

The Employer represents that under prevailing circumstances it is likely that Plan assets invested in the GICs will be subject to restrictions for an extended period of time, and potentially subject to loss of interest and principal. In order to resume the funding of Withdrawal Events, to prevent loss of guaranteed principal and interest under the GICs by the Plan, and to enable the completion of the transfer of all Plan assets to Fidelity management, the Employer proposes to make the Loan to the Plan. The Employer is requesting an exemption to permit the Loan, and its potential Repayment by the Plan, under the terms and conditions described herein.

4. The terms of the Loan and the Repayments are set forth in a written agreement (the Agreement) between the Employer and the Original Trustees. Under the Agreement the Employer is obligated to make the Loan in a lump sum in the amount of the total accumulated book values of the GICs on the date of the Loan, representing total principal deposits under each GIC plus interest accrued at the Contract Rates less previous withdrawals. With respect to Certificate No. 0001, which matured July 31, 1992, the Loan amount will include interest on the maturity value from the maturity date through the date of the Loan at the highest rate permitted by the Internal Revenue Service (the Service) under a closing agreement with the Employer, up to a maximum of 9.10 percent per annum. The Agreement provides for the Loan to be made no earlier than January 29, 1993, and only after the Employer has secured the requested exemption and a closing agreement with the Service regarding the Loan. The Employer will receive no interest or fees for the Loan.

In return for the Loan, the Original Trustees agree to make the Repayments of the Loan as specified in the Agreement. The Agreement provides that the Repayments will be made only from the proceeds received by the Plan with respect to the GICs from Mutual Benefit or other responsible third parties making payment with respect to the GICs (collectively, the GIC Proceeds). No other Plan assets may be used to repay the Loan. Pursuant to the Agreement, whenever the Original Trustees receive GIC Proceeds, they will pay such amounts to the Employer until the Loan principal is repaid in full. The Agreement provides that if the total amount of GIC Proceeds is less than the Loan amount, then the Employer will forgive repayment of the deficiency.

5. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act for the following reason: (1) The Plan will be relieved of any further risk of loss of principal or interest with respect to the GICs; (2) The Loan will allow the Original Trustees to complete the transfer of all Plan assets to Fidelity management; (3) The Plan will receive its full investment in the GICs as of the date of the Loan, represented by the GICs' accumulated book values, which consist of total principal deposits plus accrued interest at the Contract Rates, less previous withdrawals; (4) The Plan will pay no interest or expenses for the Loan; (5) The Repayments will be restricted to the GIC Proceeds; and (6) The Repayments will be waived to the extent the Loan exceeds the GIC Proceeds.

[1] The Department notes that the decisions to acquire and hold the GICs are governed by the fiduciary responsibility requirements of part 4, subtitle B, title I of the Act. In this regard, the Department herein is not proposing relief for any violations of part 4 which may have arisen as a result of the acquisition and holding of the GICs.

[2] The Employer represents that Plan assets other than the GICs are not affected by the suspension of payments on Mutual Benefit's guaranteed investment certificates, and have been withdrawn from Mutual Benefit's custody, because such assets were invested in funds considered to be "separate accounts" to which the court-ordered withdrawal and transfer restrictions do not apply. The Employer states that the terms of the Receivership imposed by the Superior Court specifically allow payment from and withdrawal of funds invested in Mutual Benefit separate accounts.

FOR FURTHER INFORMATION CONTACT: Ronald Willett of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

Ultronix, Inc. Employee Defined Contribution Profit Sharing Plan (the Plan) Located in Grand Junction, Colorado

[Application No. D–9185]

Proposed Exemption

The Department of Labor is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to the proposed sale by the Plan of its interest in a Guaranteed Investment Contract (the GIC) of Pacific Standard Life Insurance Company (PSL) to Ultronix, Inc. (Ultronix), a party in interest with respect to the Plan, provided the following conditions are satisfied: (1) The sale is a one-time transaction for cash; (2) the Plan receives no less than the fair market value of the GIC at the time of the transaction; (3) the Plan's actuary, Robert W. Jones, Jr., acting as independent fiduciary for the Plan, has determined that the proposed sales price is not less than the current fair market value of the GIC; and (4) Mr. Jones has determined that the proposed transaction is appropriate for the Plan and in the best interests of the Plan and its participants and beneficiaries.

Summary of Facts and Representations

1. Ultronix is a company which manufactures and markets resistors and other electronic components. The Plan is a qualified defined contribution plan which currently has approximately 79 active participants, 19 of whom have amounts invested in the GIC. Additionally, there are three former Plan participants who have retired or terminated their employment with Ultronix with amounts invested in the GIC. The Plan had assets of approximately $192,000 as of June 30, 1992.

2. The Plan was originally established effective January 1, 1987. At that time, the Plan's then trustees had total investment discretion unless they were directed otherwise by Ultronix. All Plan assets were invested either in a series of insurance contracts, including the GIC,

or in a mutual fund. Effective January 1, 1991, Manufacturers Bank, N.A. (the Bank) became a custodian of the Plan. The Plan's participants were then given a choice of three investment funds, including a GIC Fund. All Plan assets, with the exception of the GIC, were held by the Bank after January 1, 1991. The GIC remained with the Plan's trustees.

3. The GIC is a flexible premium deferred annuity, policy number 20L0208347, issued on March 17, 1989. The GIC's maturity date is March 16, 2016. The original rate of interest paid on the GIC was 9.0%, but the rate has changed every several months as the market has changed. PSL represents that the changing interest rates were determined based upon a variety of factors, including pricing assumptions for the GIC, competition, investment rate of return and current prevailing rates of interest in financial markets. On December 11, 1989, the California Superior Court issued an order of conservation and appointed the California Insurance Commissioner as conservator of PSL. The Conservator imposed a six month moratorium on all payments under the GIC. The moratorium was extended for an additional 90 days on May 21, 1990. However, under the extended order, the Plan was permitted to receive an annual distribution of 10% of the "gross account value" (defined as the value of the GIC including accumulated interest), and it received such distributions, in the amount of $4,932.81 on April 29, 1991 and $4,148.60 on March 27, 1992. In May, 1992, a new moratorium of indefinite duration was imposed on all payments from the GIC, including the 10% annual distributions, and the rate at which interest is credited on amounts held under the GIC was reduced to 4.5 %.[3] The total accumulated value of the GIC (deposits plus accrued interest less distributions) was $37,825 as of June 30, 1992, which represented approximately 19.7% of the Plan's assets as of that date.

4. Due to the uncertainty of payment under the GIC, Ultronix proposes to eliminate the financial risk to the Plan's participants and to protect their benefits by purchasing the GIC from the Plan at its accumulated value. The GIC's accumulated value will be re-determined by PSL as of the purchase date. PSL will base its valuation on the interest rates credited on the GIC since its purchase, beginning with a 9.0% rate for the period from March 17, 1989 to September 30, 1989, and falling to its current rate of 4.5% from May 1, 1992 until the present. PSL represents that future rates are not predictable. The amount paid by Ultronix will be allocated to the accounts of the affected participants in the Plan's trust with the Bank and invested in accordance with their investment directions in one of the Plan's investment funds.

5. Ultronix represents that it has not filed a request for a closing agreement with the Internal Revenue Service under Revenue Procedure 92–16.[4] Ultronix represents that it has read Revenue Procedure 92–16 and is aware of the potential tax consequences, but still wishes to proceed with the proposed transaction.

6. Mr. Robert W. Jones, Jr., the Plan's actuary, acting as the Plan's independent fiduciary with respect to this transaction, has reviewed the proposed transaction on behalf of the Plan. Mr. Jones represents that he has determined that the proposed purchase price for the GIC is at least equal to the GIC's current fair market value. In addition, Mr. Jones has represented that he has determined that the proposed transaction is appropriate for the Plan and in the best interest of its participants and beneficiaries.

7. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act because: (1) The Plan will receive cash for the GIC in the amount of the accumulated value of the GIC, as of the sale date, which Mr. Jones has determined to be equal to or in excess of the fair market value of the GIC; (2) the transaction will enable the Plan to avoid any risk associated with continued holding of the GIC and to redirect assets to safer investments; (3) the Plan will not incur any expenses related to the transaction; and 4) Mr. Jones has determined that the proposed sale of the GIC by the Plan to Ultronix at the proposed price is in the best interests of the participants and beneficiaries of the Plan.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz of the Department, telephone (202) 523–8881. (This is not a toll-free number.)

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. Retirement Program Master Trust (the Trust) Located in Boston, Massachusetts

[Application Nos. D–9138 through D–9141]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply, effective December 5, 1991, to (1) the past extension of credit (the Loan) to the Trust by Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. (the Employer), the sponsor of employee benefit plans participating in the Trust, with respect to the Trust's proportionate interest in guaranteed investment contract number CG 0128203A (the GIC) issued by Executive Life Insurance Company of California (Executive Life); and (2) the potential repayment of the Loan (the Repayments) by the Trust; provided that the following conditions are satisfied:

(A) All terms of such transactions are no less favorable to the Trust than those which the Trust could obtain in arm's-length transactions with an unrelated party;

(B) No interest and/or expenses are paid by the Trust;

(C) The Repayments shall not exceed the principal amount of the Loan;

(D) The Repayments shall not exceed the proceeds actually received by the Trust from Executive Life and any other responsible payors with respect to the GIC (the GIC Proceeds); and

(E) Repayment of the Loan shall be waived to the extent that the principal amount of the Loan exceeds the GIC Proceeds.

EFFECTIVE DATE: This exemption, if granted, will be effective as of December 5, 1991.

Summary of Facts and Representations

1. The Trust is a master trust which holds the assets of four employee benefit plans (the Plans) sponsored by Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. (the Employer). The Employer is a law firm organized as a Massachusetts and District of Columbia professional corporation. The Plans are identified and described as follows:

[3] The Department notes that the decisions to acquire and hold the GIC are governed by the fiduciary responsibility requirements of Part 4, Subtitle B, Title I of the Act. In this regard, the Department herein is not proposing relief for any violations of Part 4 which may have arisen as a result of the acquisition and holding of the GIC.

[4] Revenue Procedure 92–16 (I.R.B. 1992–7, February 18, 1992) provides for a temporary closing agreement program to settle certain tax liabilities that arise out of transactions between an employer-sponsor and the trust of a qualified defined contribution plan. This temporary closing agreement program applies to transactions in which the employer makes conditional payments to the plan on account of plan assets that are invested in contracts issued by a life insurance company that has been placed in state insurer delinquency proceedings.

(a) The Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. Retirement Plan, a defined benefit pension plan covering non-lawyer employees of the Employer;

(b) The Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. Target Benefit Plan for Members, a defined contribution target benefit plan covering lawyer members of the Employer;

(c) The Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. Staff Savings Plan for Members and Staff, a defined contribution 401(k) savings plan covering employees other than those classified as associates of the Employer; and

(d) The Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. Savings Plan for Associates, a defined contribution 401(k) savings plan covering employees classified as associates of the Employer.

As of September 30, 1991, there were approximately 918 participants in the Plans, and the Trust held total assets of approximately $18,519,423, representing all the assets of the Plans. The trustees of the Trust are Francis X. Meaney and Charles D. Ferris (the Trustees), each of whom is a director of the Employer.

2. Contributions to the Trust, on behalf of participants in the three defined contribution plans, are maintained in individual participant accounts (the Accounts). The Accounts are invested according to participant directions among four investment options (the Investment Funds) which included, prior to November 1991, a guaranteed investment contract fund (the GIC Fund) managed by State Street Bank and Trust Company (State Street). Among the assets in the GIC Fund is an undivided interest in the GIC, a benefit-responsive guaranteed investment contract issued by Executive Life on February 3, 1988. State Street purchased the GIC on behalf of the Trust and one other State Street client (the Co-Investor). The proportions of the Trust's and the Co-Investor's interests in the GIC are determined by the amounts of principal deposited by each under the GIC. The terms of the GIC provide for a deposit period of six months, from January 1 to June 30, 1988, and interest on principal at the rate of 9.04 percent per annum (the Contract Rate) over five years and six months. The GIC requires Executive Life to make annual interest payments to the Trust on December 31 of each year and a final maturity payment on December 31, 1993.

In January and February, 1991, the Employer issued a written advisory to the Plans' participants warning of the possible financial risks of continued investments in the GIC Fund, due to the risk of insurer insolvency. At this time, the Employer offered the Plans' participants a special investment election (the Special Election) enabling participants to direct changes in the investment of their Account balances among the Investment Funds. The Employer represents that the Special Election resulted in a transfer of approximately 84 percent of the total GIC Fund to other Investment Funds then available for Account investments.

3. On April 12, 1991, Executive Life was placed in conservatorship by the Commissioner of Insurance of the State of California (the Conservatorship).[5] Since that date, Executive Life's contracts, including the GIC, have been frozen and payments on such contracts have been suspended. The Employer represents that under the prevailing circumstances, it is questionable whether Executive Life will be able to honor fully its obligations to the Trust under the terms of the GIC. State Street represents that as of April 30, 1991, the Trust's interest in the GIC had an accumulated book value of $85,514.48, representing the Trust's total principal deposits plus interest at the Contract Rate less previous withdrawals. Since April 30, 1991, State Street has continued to value the GIC at $85,514.48 (the Frozen GIC Value) for recordkeeping purposes and Account statements.

During 1991, the Employer determined that a change in the Trust's investment approach was needed in order to enhance the choices and flexibility available to participants for Account investments, and to increase the efficiency of the administration of Account investments. After conducting a study, the Employer decided to replace the Investment Funds with a choice of mutual funds (the New Funds) under common management. Under the new approach, each Plan participant may direct the investment of his or her Account in any of approximately 20 of the New Funds having different investment policies and objectives and offering different levels of risk and potential return.

The Trust's new investment approach, utilizing the New Funds, became effective on November 1, 1991, with the bulk of the assets in the Investment Funds transferred to the New Funds on that date, although the Employer represents that some of the Investment Fund assets were transferred during the subsequent weeks as they were made available. Effective January 1, 1992, Plan participants may direct the investments of their Accounts among the New Funds on a daily basis.

4. Because of the Conservatorship and the related freeze on withdrawals from Executive Life guaranteed investment contracts, the Employer represents that it was not possible to redeem the Trust's interest in the GIC in order to transfer that asset's proceeds to the New Funds. The Employer states that in order to enable participants, whose Accounts were totally or partially invested in the GIC Fund, to participate in the New Funds program, and to protect such participants from any adverse effects of the Executive Life conservatorship, the Employer made the Loan to the Trust on December 5, 1991, in an amount representing the Frozen GIC Value. The Employer is requesting an exemption for the Loan and its potential repayment by the Trust under the terms and conditions described herein.

5. The terms of the Loan were reduced to writing commensurate with the making of the Loan, in a promissory note dated December 5, 1991 (the Note) evidencing an agreement between the Employer and the Trustees, under which the Employer made the Loan in a lump-sum amount of $85,514.48 (the Loan Amount). The Note provides that the Loan Amount does not bear interest. The Employer represents that the Loan Amount was equal to the Frozen Book Value, constituting total Trust deposits under the GIC plus accrued interest at the Contract Rate less previous withdrawals through April 30, 1991. State Street represents that the Loan Amount was not less than the fair market value of the GIC as of the date of the Loan.

The Employer represents that its objective in making the Loan was to enable the Plans' participants to participate in the New Funds program with the Account balances which were invested in the GIC and unavailable due to the Conservatorship. The Employer maintains that in order to accomplish this objective, it was appropriate to make the Loan in the amount of the Frozen GIC Value, rather than the GIC's accumulated book value as of the date of the Loan, because the Employer, based on State Street's determinations, concluded that the GIC's actual fair market value as of the Loan date was below the Frozen GIC Value. Additionally, the Employer represents that the Loan Amount was established appropriately for the following reasons: (a) Earlier in 1991, the Plans' participants had been advised by the

[5] The Department notes that the decisions to acquire and hold the GIC are governed by the fiduciary responsibility requirements of part 4, subtitle B, title I of the Act. In this proposed exemption, the Department is not proposing relief for any violations of part 4 which may have arisen as a result of the acquisition and holding of the GIC.

Employer of risks inherent in continued investment in guaranteed investment contracts and had been offered the Special Election as an opportunity to remove their Account balances from the GIC; (b) The Employer determined, and has subsequently confirmed, that it is highly unlikely that any holders of Executive Life contracts, including the Trust, will recover any amounts in excess of the accumulated book values of such contracts as of the commencement of the Conservatorship; and (c) In the unlikely event that the Trust recovers, from Executive Life, its conservator, or any other third party, any amounts in excess of the GIC's Frozen GIC Value, such excess amounts will be retained by the Plans in accordance with the Repayment provisions of the Note, described below.

6. In return for the Loan, the Trustees agree to make the Repayments as specified on the Note. Under the terms of the Note, the Repayments may be made only from proceeds received by the Trust with respect to the GIC (the GIC Proceeds), and other assets of the Trust will not be available to make the Repayments. The GIC Proceeds, from which the Repayments are to be made, are any proceeds received by the Trust with respect to the GIC from Executive Life, its successors or assigns, any conservator, trustee or other person performing similar functions with respect to Executive Life, any state guaranty or similar fund, any person or entity (other than the Employer) acting as surety or insurer, with respect to Executive Life, and any other responsible third party with respect to Executive Life. In the event the Loan exceeds the total amount of GIC Proceeds received by the Trust, the Repayment of such excess will be waived, and the Trust will have no Repayment obligation with respect to any such excess. The Note provides that whenever the Trustees receive any GIC Proceeds, the Trustees shall pay such amounts to the Employer, but not in excess of the Loan Amount. Accordingly, any GIC Proceeds received by the Trust in excess of the principal Loan Amount will be retained by the Plan.

7. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act for the following reasons: (1) The Loan enabled the Trust to complete the transfer of the Plans' assets into the New Funds and commence the new investment approach selected by the Trustees; (2) The Loan relieves the Trust of any further risk or uncertainty with respect to payments due from Executive Life under the GIC; (3) The Accounts which were invested in the GIC received the full Frozen GIC Value, representing total principal deposits under the GIC plus accrued interest at the Contract Rate, less previous withdrawals, as of April 30, 1991, the end of the month in which the Conservatorship commenced; (4) The Trust will incur no interest or expenses for the Loan; (5) The Repayments will be restricted to the GIC Proceeds, and no other Trust assets may be used for repayment; (6) The Plan will retain any amounts of GIC Proceeds received which are in excess of the Loan Amount; and (7) The Repayments will be waived to the extent the Loan exceeds the GIC Proceeds.

FOR FURTHER INFORMATION CONTACT: Ronald Willett of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 23rd day of December, 1992.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 92–31572 Filed 12–28–92; 8:45 am]

BILLING CODE 4510–29–M

NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

Cooperative Agreement for Evaluation of Arts Plus Initiative

AGENCY: National Endowment for the Arts; NFAH.

ACTION: Notification of availability.

SUMMARY: The National Endowment for the Arts is requesting proposals leading to the award of a Cooperative Agreement with a qualified organization or individual to support an evaluation of the effectiveness of the intent and procedural structure of the Arts Plus Initiative. The recipient of the Cooperative Agreement will examine the use of three-year funding support as a means to ensure sufficient time to develop and sustain committed partnerships between arts organizations and schools; the needs of various artistic fields for this type of funding category; the intra-agency collaboration between the Arts in Education Program and other Endowment discipline programs; and the administrative structure and processes by which Arts Plus has been implemented. Those interested in receiving the Solicitation package should reference Program Solicitation PS 93–03 in their written request and include two (2) self-addressed labels. Verbal requests for the Solicitation will not be honored.

DATES: Program Solicitation PS 93–03 is scheduled for release approximately January 4, 1993 with proposals due on February 4, 1993.

ADDRESSES: Requests for the Solicitation should be addressed to National Endowment for the Arts, Contracts Division, room 217, 1100 Pennsylvania Ave., NW Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: William I. Hummel, Contracts Division, National Endowment for the Arts, 1100

Pennsylvania Ave., NW. Washington, DC 20506 (202/682-5482).

William I. Hummel,

Director, Contracts and Procurement Division.

[FR Doc. 92-31409 Filed 12-28-92; 8:45 am]

BILLING CODE 7537-01-M

NATIONAL SCIENCE FOUNDATION

Collection of Information Submitted for OMB Review

In accordance with the Paperwork Reduction Act and OMB Guidelines, the National Science Foundation is posting a notice of information collection that will affect the public. Interested persons are invited to submit comments by January 26, 1993. Comments may be submitted to:

(A) *Agency Clearance Officer.* Herman G. Fleming, Division of Personnel and Management, National Science Foundation, Washington, DC 20550, or by telephone (202) 357-7335. Copies of materials may be obtained at the above address or telephone.

Comments may also be submitted to:

(B) *OMB Desk Officer.* Office of Information and Regulatory Affairs, ATTN: Dan Chenok, Desk Officer, OMB, 722 Jackson Place, room 3208, NEOB, Washington, DC 20503.

Title: 1993 National Survey of Recent College Graduates.

Affected Public: Individuals.

Respondents/Reporting Burden: 11,500 respondents; 30 minutes per response.

Abstract: The data collected in this survey will enable the NSF to partially fulfill the requirement to serve as a clearinghouse for information on the scientific and technical population of the U.S. That information allows for policy and planning activities by officials of government, private industry, and academic institutions.

Dated: December 22, 1993.

Herman G. Fleming,

Reports Clearance Officer.

[FR Doc. 92-31412 Filed 12-28-92; 8:45 am]

BILLING CODE 7555-01-M

Collection of Information Submitted for OMB Review

In accordance with the Paperwork Reduction Act and OMB Guidelines, the National Science Foundation is posting a notice of information collection that will affect the public. Interested persons are invited to submit comments by January 26, 1993. Comments may be submitted to:

(A) *Agency Clearance Officer.* Herman G. Fleming, Division of Personnel and Management, National Science Foundation, Washington, DC 20550, or by telephone (202) 357-7335. Copies of materials may be obtained at the above address or telephone.

Comments may also be submitted to:

(B) *OMB Desk Officer.* Office of Information and Regulatory Affairs, ATTN: Dan Chenok, Desk Officer, OMB, 722 Jackson Place, room 3208, NEOB, Washington, DC 20503.

Title: 1993 Survey of Doctorate Recipients.

Affected Public: Individuals.

Respondents/Reporting Burden: 23,500 respondents: 23 minutes per response.

Abstract: This survey will collect demographic and laborforce data on Ph.D scientists, engineers, and humanists. This information will be used in policy and planning activities by government agencies, educational institutions and private industry.

Dated: December 22, 1993.

Herman G. Fleming,

Reports Clearance Officer.

[FR Doc. 92-31413 Filed 12-28-92; 8:45 am]

BILLING CODE 7555-01-M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-344]

Portland General Electric Company, et al.; Trojan Nuclear Plant; Environmental Assessment and Finding of No Significant Impact

In the matter of the City of Eugene, OR and Pacific Power and Light Company.

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of a one time schedular exemption from the requirements of 10 CFR 50, appendix E, (IV)(F)(2) to Portland General Electric Company, et al., (the licensee), for Facility Operating License No. NPF-1, for operation of the Trojan Nuclear Plant located in Columbia County, Oregon.

Environmental Assessment

Identification of Proposed Action

The proposed action would grant a one time schedular exemption from the requirement of 10 CFR 50, appendix E, (IV)(F)(2) to annually exercise its emergency plan. By letter dated December 11, 1992, the licensee requested an exemption from 10 CFR 50, appendix E, (IV)(F)(2) which would defer conducting its annual emergency plan exercise scheduled for December 15, 1992, until the first quarter of 1993.

The Need for the Proposed Action

Title 10 of the Code of Federal Regulations, part 50, appendix E, paragraph IV, section F, item 2 requires that each licensee annually exercise its emergency plan. The 1992 annual exercise for Trojan Nuclear Plant was initially scheduled for November 17, 1992. The licensee had completed necessary preparation for this exercise. However, the Trojan Nuclear Plant experienced a steam generator tube leak that resulted in a plant shutdown November 9, 1992. The licensee does not expect the plant to startup until after January 1, 1993. As a result of the steam generator tube leak and subsequent plant shutdown, the initial scheduled date of November 17, 1992, was deferred until December 15, 1992. The licensee undertook the necessary preparatory actions to conduct the annual exercise on this date. However, as a result of the continued forced outage, the annual exercise could not be practicably performed on December 15, 1992. The current forced outage for steam generator eddy current inspection requires the reactor coolant system to be operated in a reduced inventory condition. Due to the potential impact on plant personnel and the outage duration, the licensee considers it prudent to conduct emergency plan exercises at times other than while the plant is in reduced inventory. The combination of added workload on the remaining plant staff and the economic impact from the potential outage extension, make the performance of the 1992 annual exercise on its scheduled date of December 15, 1992, an undue hardship. The one time exemption from the annual requirement will allow the licensee to defer the exercise until the first quarter of 1993.

Environmental Impact of the Proposed Action

The proposed exemption affects only the licensee's required date for conducting the annual emergency plan exercise. Thus, post-accident radiological releases will not differ from those determined previously, and the proposed exemption does not otherwise affect facility radiological effluents, or any significant occupational exposures. With regard to potential nonradiological impacts, the proposed exemption does not affect plant nonradiological effluents and has no other environmental impact. Therefore, the Commission concludes that there are no measurable radiological or nonradiological environmental impacts associated with the proposed exemption.

Alternative to the Proposed Action

Since the Commission concluded that there are no significant environmental effects that would result from the proposed action, any alternatives with equal or greater environmental impacts need not be evaluated.

The principal alternative would be to deny the requested exemption. This would not reduce environmental impacts of plant operation and would result in reduced operational flexibility.

Alternative Use of Resources

This action does not involve the use of resources not previously considered in the Final Environmental Statement related to operation of the Trojan Nuclear Plant, dated August 1973.

Agencies and Persons Consulted

The NRC staff reviewed the licensee's request and did not consult other agencies or persons.

Finding of No Significant Impact

The Commission has determined not to prepare an environmental impact statement for the proposed exemption.

Based upon the foregoing environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment.

For further details with respect to this action, see the licensee's application for amendment dated December 11, 1992, which is available for public inspection at the Commission's Public Document Room, Gelman Building, 2120 L Street, NW., Washington, DC 20555 and at the local public document room at the Branford Price Millar Library, Portland State University, 934 SW. Harrison Street, P.O. Box 1151, Portland, Oregon 97207.

Dated at Rockville, Maryland, this 18th day of December 1992.

For the Nuclear Regulatory Commission.

Theodore R. Quay,

Director, Project Directorate V, Division of Reactor Project III/IV/V, Office of Nuclear Reactor Regulation.

[FR Doc. 92-31391 Filed 12-28-92; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-528, 50-529, and 50-530]

Arizona Public Service Co., et al.; Palo Verde Nuclear Generating Station, Units 1, 2, and 3; Withdrawal of Application for Amendments to Facility Operating Licenses

The U.S. Nuclear Regulatory Commission (the Commission) is announcing the withdrawal of an application dated March 20, 1992, for amendments to Facility Operating License Nos. NPF-41, NPF-51, and NPF-74, issued to Arizona Public Service Company, *et al.* (the licensee), for operation of Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3, located in Maricopa County, Arizona. Notice of consideration of issuance of the amendments was published in the **Federal Register** on May 13, 1992 (57 FR 20508).

The amendment request proposed a change to the surveillance requirements for the containment purge valve isolation system to provide an alternate surveillance requirement to be applied when the system is not operable.

By letter dated October 15, 1992, the NRC staff explained to the licensee why the proposed change was not necessary and that the NRC staff considered the proposed change to be withdrawn unless it was advised otherwise within 10 days. No subsequent notice was received from the licensee. Thus, the application for amendments is considered to be withdrawn.

For further details with respect to this action, see the application for amendments dated March 20, 1992, and the NRC staff's letters to the licensee dated October 15 and December 22, 1992.

These documents are available at the Commission's Public Document Room located in the Gelman Building, 2120 L Street, NW., Washington, DC 20555 and at the local public document room in the Phoenix Public Library, 12 East McDowell Road, Phoenix, Arizona 85004.

Dated at Rockville, Maryland this 22nd day of December, 1992.

For the Nuclear Regulatory Commission.

Charles M. Trammell,

Senior Project Manager, Project Directorate V, Division of Reactor Projects III/IV/V, Office of Nuclear Reactor Regulation.

[FR Doc. 92-31590 Filed 12-28-92; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-382]

Entergy Operations, Inc.; Withdrawal of Application for Amendment to Facility Operating License

The United States Nuclear Regulatory Commission (the Commission) has granted the request of Energy Operations, Inc. (the licensee), to withdraw the November 3, 1989, application for proposed amendment to Facility Operating License No. NFP-38 for the Waterford Steam Electric Station, Unit No. 3, located in St. Charles Parish, Louisiana.

The proposed amendment would have revised the operability requirements for the main feedwater isolation valves, main feedwater control valves, and feedwater regulating bypass valves.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on February 21, 1990 (55 FR 6107). However, by letter dated December 9, 1992, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated November 3, 1989, and the licensee's letter dated December 9, 1992, which withdrew the application for license amendment. The above documents are available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC and the University of New Orleans Library, Louisiana Collection, Lakefront, New Orleans, Louisiana 70122.

Dated at Rockville, Maryland this 17th day of December 1992.

For the Nuclear Regulatory Commission.

David L. Wigginton,

Senior Project Manager, Project Directorate IV-1, Division of Reactor Projects - III/IV/V, Office of Nuclear Reactor Regulation.

[FR Doc. 92-31392 Filed 12-28-92; 8:45 am]

BILLING CODE 7590-01-M

PENSION BENEFIT GUARANTY CORPORATION

Request for Extension of OMB Approval for Information Collection: Certain Reporting and Notification Requirements

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of request for extension of OMB approval.

SUMMARY: The Pension Benefit Guaranty Corporation ("PBGC") has requested an extension of approval by the Office of Management and Budget of a collection of information from plan administrators when a reportable event occurs. The information collection is prescribed by sections 4043 and 4065 of the Employee Retirement Income Security Act of 1974 and is contained in subpart A of the PBGC's regulation on Certain Reporting and Notification Requirements, 29 CFR part 2615. There is no change in the substance of the information to be collected or in the method of collection. This notice advises the public of the PBGC's request for extension of this previously approved collection of information.

ADDRESSES: Written comments (at least three copies) should be addressed to the Office of Management and Budget, Paperwork Reduction Project (1212–0013), Washington, DC 20503, with a copy to the Pension Benefit Guaranty Corporation, Office of the General Counsel, Code 22000, 2020 K Street, NW., Washington, DC 20006. The request for extension will be available for public inspection at the PBGC Communications and Public Affairs Department, Suite 7100, at the above address, between the hours of 9 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Renae R. Hubbard, Special Counsel, Office of the General Counsel (Code 22000), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington, DC 20006, 202–778–8850 (202–778–1958 for TTY and TDD). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35) establishes policies and procedures for controlling the paperwork burdens imposed by Federal agencies on the public. The Act vests the Office of Management and Budget ("OMB") with regulatory responsibility over these burdens; OMB has promulgated rules on the clearance of collections of information by Federal agencies. Pursuant to those rules, the PBGC has requested an extension of OMB approval of its collection of information concerning certain reportable events, which is contained in subpart A of 29 CFR part 2615, entitled "Certain Reporting and Notification Requirements."

Section 4043(b) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. 1301 *et seq.* ("ERISA"), sets forth ten events that pension plan administrators must report to the PBGC after the event occurs. The statute also gives the PBGC authority to add additional reportable events, to waive reporting of any event, and to require that a waived event be reported on the plan's annual report (IRS/DOL/PBGC Form 5500 Series). Section 4065 of ERISA provides that these reportable events be included in the plan's annual report except to the extent waived by the PBGC. In its regulation on reportable events, the PBGC added three additional events to be reported, modified four of the events to narrow the reporting requirements, waived reporting of six of the events, and waived the requirement that any of the reportable events be included on the plan's annual report.

This information collection was previously approved by OMB under control number 1212–0013, and the PBGC is requesting that the approval be extended. There is no change in the substance or in the method of collection of information.

An event that must be reported to the PBGC under subpart A of the regulation occurs only upon the occasion of an infrequent or nonrecurring event and, based on its experience, the PBGC expects to receive 80 reports annually. The public reporting burden for this collection of information is estimated to average one-half hour per report, including time for reviewing the statutory and regulatory provisions and preparing a letter or memorandum about the established event using existing data.

Issued at Washington, DC this 22nd day of December, 1992.

James B. Lockhart III,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 92–31597 Filed 12–28–92; 8:45 am]

BILLING CODE 7708–01–M

POSTAL RATE COMMISSION

[Docket No. SS93–2]

Recycled Mail Incentives; Notice

December 23, 1992.

Before Commissioners: George W. Haley, Chairman; Henry R. Folsom, Vice-Chairman; John W. Crutcher; W. H. "Trey" LeBlanc, III; H. Edward Quick, Jr.

In a letter to the Commission dated December 7, 1992, Representative Charles Hayes, Chairman of the Subcommittee on Postal Personnel and Modernization of the House Committee on Post Office and Civil Service, Representative Nancy Pelosi, and Representative Richard Durbin, requested the Commission to "conduct an inquiry into the feasibility of reduced rates or other financial incentives for mailers who use recycled paper." This request is an outgrowth of a provision in the fiscal 1992 appropriations bill for Treasury, Postal Service, and General Government (H.R. 2622, 102 Cong. 1st Sess., Cong. Rec. H7298–7312, 7302) that encouraged the Commission to "explore the establishment of a preferred rate category for mailings which use recycled paper." A copy of this letter is Attachment A to this notice.

The Postal Rate Commission is establishing Docket No. SS93–2 to conduct a public inquiry in response to the Representatives' request. The Commission understands that the primary purpose of the requested inquiry is to compile the views of those with expertise in the economics of the paper industry, the direct mail industry, consumer affairs, and environmental affairs, to assist Congress in its consideration of this issue. Accordingly, the Commission invites submissions from interested parties that address the following or related questions.

Is postal ratemaking an appropriate forum for assessing the social costs of mail, as well as its social benefits?

Are there special environmental problems associated with mail, or should these problems be considered the same as those presented by the paper industry generally?

Are the ratemaking provisions of the Postal Reorganization Act broad enough to authorize rate incentives for recycled mail, or is further authority from Congress needed?

What are the environmental costs of mail, and to what extent can the use of recycled paper ameliorate them?

If financial incentives are appropriate, should they be based on the recycled content of mailstock, its subsequent recyclability, or some other characteristic?

To what extent is the mailing industry currently using recycled or recyclable paper, or otherwise minimizing the impact of mail on the environment, on a voluntary basis?

Should recycled content be defined as including preconsumer, as well as post-consumer waste, and what minimum level should be chosen?

Is it technically and economically feasible to make various kinds of mailstock with a substantial percentage of post-consumer waste?

How might reduced rates or other financial incentives for mailers who use recycled paper be designed?

Is it administratively feasible to identify mail with the requisite recycled content, or recyclability characteristics?

Submissions that address these or related questions should be filed with the Postal Rate Commission, Office of the Secretary, 1333 H Street, NW., Washington, DC 20268–0001, on or before May 1, 1993. After reviewing these submissions, the Commission will determine whether it would be useful to conduct a legislative style hearing on these issues.

By the Commission.

Cyril J. Pittack,

Acting Secretary.

Attachment A

Congress of the United States, Washington, DC 20515

December 7, 1992.

Honorable George Haley, Chairman,

Postal Rate Commission, 1333 H Street, NW., Washington, DC 20268–0001.

Dear Mr. Chairman: Pursuant to our letter of July 23, 1992, and the Treasury-Postal Service-General Government law (P.L. 102-141), we would like the Postal Rate Commission to conduct an inquiry into the feasibility of reduced rates or other financial incentives for mailers who use recycled paper.

We look forward to your response on this matter.

Sincerely,

Richard Durbin,

Member of Congress.

Charles A. Hayes,

Member of Congress.

Nancy Pelosi,

Member of Congress.

[FR Doc. 92-31557 Filed 12-28-92; 8:45 am]

BILLING CODE 7710-FW-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-31624 File No. SR-PHLX-92-11]

Self-Regulatory Organizations, Philadelphia Stock Exchange Inc.; Order Approving Proposed Rule Change Relating to the Creation of an Options Floor Procedure Advice Dealing With Priority and Parity Rules for Foreign Currency Options

December 21, 1992.

On April 20, 1992, the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") submitted to the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to adopt Options Floor Procedure Advice ("OFPA") B-7 that restates the Exchange's existing priority and parity rules applicable for foreign currency options orders and includes a fine schedule for violations of these rules in accordance with the Exchange's Minor Infraction Rule Plan.

The proposed rule change was published in Securities Exchange Act Release No. 30693 (May 12, 1992), 57 FR 21436. No comments were received on the proposed rule change.

In 1991, the Commission approved an amendment to PHLX Rule 1014 that amended the parity and priority rules for foreign currency options orders.[3] In general, the Exchange's parity and priority rules for foreign currency options orders provide that, except for customer orders for less than 100 contracts and as otherwise specified,[4] all bids and offers for foreign currency options, regardless of account type (*i.e.*, registered options trader ("ROT"), member, or customer) or size or whether representing an "opening" or "closing" transaction, shall be treated the same for purposes of determining time priority pursuant to PHLX Rule 119. In order to facilitate small customer orders, however, PHLX Rule 1014 provides that all foreign currency options orders on behalf of customer accounts for under 100 contracts shall have time priority over all other bids and offers regardless of account type (except specialists). Moreover, PHLX Rule 1014 provides that any bid or offer for the account of a member that relies on the exemption under section 11(a)(1)(G) of the Act must yield time priority to any bid or offer for the account of a customer. The PHLX now proposes to put into OFPA B-7 the same identical language from PHLX Rule 1014 that sets forth the method for determining parity and priority for foreign currency options orders.

In accordance with the Exchange's Minor Infraction Rule Plan, the PHLX also proposes to include in OFPA B-7 a fine schedule in order to address minor instances of non-compliance with the Exchange's parity and priority rules for foreign currency options orders. Specifically, the proposed monetary penalties for first and second minor instances of non-compliance with these rules are $100.00 and $250.00, respectively. The sanction for the third and subsequent infractions of the PHLX's priority and parity rules pursuant to the Minor Infraction Rule Plan will be determined within the discretion of the PHLX's Business Conduct Committee ("BCC") up to an amount of $2,500.[5] The BCC does have the authority to impose fines greater than $2,500 for violations of the rules, however, such fines will not be imposed pursuant to the Minor Infraction Rule Plan, meaning, among other things, that notice of the disciplinary action must be filed promptly with the Commission.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of Section 6[6] and the rules and regulations thereunder. Specifically, the Commission finds that establishing an OFPA that incorporates the Exchange's existing parity and priority rules for foreign currency options orders will enable participants in the foreign currency options trading crowds to have ready access to the applicable Exchange rules regarding the priority and parity of orders and, thereby, facilitate compliance with these Exchange rules.

Moreover, the Commission also believes that it is appropriate for the Exchange to establish a fine schedule consistent with its Minor Infraction Rule Plan for minor infractions of its foreign currency options parity and priority rules.[7] Specifically, the Commission believes that the use of the fine schedule will enable Exchange officials to impose sanctions for minor infractions of the foreign currency options parity and priority rules in a timely manner. The Commission also believes that this streamlined disciplinary process will help the Exchange to ensure that members of the foreign currency options trading crowds abide by the Exchange's rules for determining the parity and priority of foreign currency options orders.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[8] that the proposed rule change (SR-PHLX-92-11) hereby is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Jonathan G. Katz,

Secretary.

[FR Doc. 92-31484 Filed 12-28-92; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-31622; International Series No. 512; File No. SR-PHLX-92-40]

Self-Regulatory Organizations; Filing and Order Granting Accelerated Approval of a Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to the Trading Hours for Foreign Currency Options During the Period December 20-31, 1992

December 18, 1992.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on December 14, 1992,

[1] 15 U.S.C. 78s(b)(1) (1982).

[2] 17 CFR 240.19b-4 (1989).

[3] *See* Securities Exchange Act Release No. 28934 (March 4, 1991), 56 FR 10005 ("Approval Order").

[4] For additional information regarding the PHLX's parity and priority rules for foreign currency options orders, see Approval Order, *supra* note 3.

[5] *See also supra* note 7.

[6] 15 U.S.C. 78f (1982).

[7] Even though the Exchange has proposed that violations of the parity and priority rules for foreign currency options be sanctioned according to the PHLX's Minor Infraction Rule Plan, violations of the parity and priority rules do not necessarily have to be subject to the Minor Infraction Rule Plan. For instance, for egregious violations, the Commission would expect that these matters will be handled directly by the Exchange's BCC.

[8] 15 U.S.C. 78s(b)(2) (1982).

[9] 17 CFR 200.30-3(a)(12) (1989).

the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PHLX hereby submits, pursuant to Rule 19b–4 under the Act, a proposal to change its foreign currency options ("FCO") trading hours for the period December 20–31, 1992. Specifically, the Exchange does not intend to open FCOs for trading between the hours of 6 p.m. and 3 a.m. during this period.

The text of the proposed rule change is available at the Office of the Secretary, PHLX, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and statutory basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The PHLX's trading hours for FCOs generally commence at 6 p.m. Eastern Time each Sunday through Thursday and terminate at 2:30 p.m. Eastern Time each Monday through Friday. Historically, the Christmas and New Year's holiday period, which occurs on and between December 20 and December 31, 1992 this year, is marked by reduced trading interest and liquidity, particularly during the trading hours between 6 p.m. and 3 a.m. ("6 to 3 segment"). While the "6 to 3 segment" generally corresponds with the primary business hours of the Far East, this segment has recently received very limited trading volume. In this regard, the PHLX believes that the anticipated limited trading interest that would be reflected in the "6 to 3 segment" can be adequately handled and executed during the 3 a.m. to 2:30 p.m. trading session during the holiday period. The modified trading hours during this period also will ease the staffing burden on current FCO specialist units at a time when key employees traditionally take holiday vacations.

Accordingly, the PHLX proposes to institute revised trading hours during the holiday period and will resume normal FCO trading hours starting Sunday, January 3, 1993.

The PHLX believes that the proposed rule change is consistent with section 6(b)(5) of the Act in that it is designed to further promote the mechanism of a free and open market and to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden and Competition

The PHLX does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either received or requested.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has requested that the proposed rule change be given accelerated effectiveness pursuant to section 19(b)(2) of the Act.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of section 6(b) (5).[1]

The Commission believes that the Exchange's proposal to amend the trading hours for FCOs during the holiday period likely will ease market liquidity concerns and help to reduce operational burdens during this season. In particular, the Commission believes that the PHLX's decision to suspend the "6–3 segment" during the period December 20–31, 1992, is within the Exchange's business judgement given the realities of the global foreign currency market, which, according to the Exchange, historically is marked by reduced or declining liquidity during the holiday season.[2] In addition, as noted above, the PHLX FCO market wi[11] remain open during the 3 a.m. to 2:30 p.m. trading session so that investors will have the ability to access the PHLX FCO market. Moreover, the Commission notes that the PHLX has issued circulars to its membership advising them of these changes, thereby avoiding any possible investor confusion. Based on the above, the Commission finds that the PHLX's proposal to change the FCO trading hours is consistent with just and equitable principles of trade and the protection of investors.[3]

The Commission finds good cause for approving the proposed change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission believes the PHLX's proposal presents no new regulatory issues and that it is appropriate to approve the proposed rule change on an accelerated basis so that the Exchange can commence implementing the revised trading hours for FCOs during the holiday season period from December 20–31, 1992. The Commission believes, therefore, that granting accelerated approval of the proposed rule change is appropriate and consistent with sections 6 and 19 of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory

[1] 15 U.S.C. 78f(b)(5) (1982).

[2] The Commission notes that in the future the Exchange must submit a section 19(b)(2) filing if the PHLX intends to terminate an entire FCO trading session.

[3] The Commission recognizes that the regular business hours for the Far East market occurs during the "6–3 segment." Nevertheless, because the PHLX has represented that the trading volume is extremely limited, we believe given the staff limitations at the Exchange due to the holiday season, it is permissible and within the PHLX's business judgment to alter its trading hours as proposed.

organization. All submissions should refer to the file number in the caption above and should be submitted by January 19, 1993.

It is therefore ordered, pursuant to section 19(b) (2) of the Act,[4] that the proposed rule change (SR–PHLX–92–40) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Jonathan G. Katz,

Secretary.

[FR Doc. 92–31985 Filed 12–28–92; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–31621; File No. SR–PHLX–92–21]

Self-Regulatory Organizations; Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc., Relating to Fines for Infractions of Position/Exercise Limits and Hedge Exemptions

December 18, 1992

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on August 19, 1992, the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change, as amended on December 18, 1992,[1] as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PHLX proposes to amend its rules by adopting Options Floor Procedure Advice ("OFPA") F–15, entitled "Minor Infractions of Position/Exercise Limits and Hedge Exemptions." Paragraph (a) of proposed OFPA F–15 establishes a fine schedule for minor violations of the Exchange's position and exercise limits. Specifically, for minor[2] position and exercise limit infractions amounting to less than 5% of the applicable limit, the OFPA provides a fine of $500 for the first occurrence, $1000 for the second occurrence, $2000 for the third occurrence, and a sanction discretionary with the Exchange's Business Conduct Committee ("BCC") for subsequent infractions. The fines established under paragraph (a) also apply to position and exercise limit infractions resulting from lapsed hedged position limit exemptions. Paragraph (b) of the proposed OFPA exempts from the position and exercise limit aggregation count each option of a stock option position that is hedged by 100 shares of the underlying stock or securities convertible into the stock.[3] The exemption is limited to an amount of option contracts no greater than twice the standard limit of the option, and is available for the following permissible hedges: (i) long stock-short call; (ii) long stock-long put; (iii) short stock-long call; (iv) short stock-short put. Failures to provide the Exchange with the requisite hedge exemption form are subject to fines of $100 for the first occurrence, $250 for the second occurrence, $500 for the third occurrence, and a sanction discretionary with the BCC for subsequent infractions. Failure to reduce the respective option position following a decrease in the stock position may result in a fine of $500 for the first occurrence, $2000 for the second occurrence, and a sanction discretionary with the BCC for subsequent infractions, in the case of options positions that exceed the applicable limit by less than 5%. Options positions that exceed the applicable limit by more than 5% are subject to review by the BCC.[4] The text of the proposal is available at the Office of the Secretary, PHLX and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The PHLX proposes to amend its rules by adopting OFPA–15, entitled "Minor Infractions of Position/Exercise Limits and Hedge Exemptions." Paragraph (a) of proposed OFPA F–15 establishes a fine schedule for minor violations of the Exchange's position and exercise limits. Specifically, for minor position and exercise limit infractions amounting to less than 5% of the applicable limit, the OFPA provides a fine of $500 for the first occurrence, $1000 for the second occurrence, $2000 for the third occurrence, and a sanction discretionary with the Exchange's BCC for subsequent infractions. The fines established under paragraph (a) also apply to position and exercise limit infractions resulting from lapsed hedged position limit exemptions.

Paragraph (b)(i) of the proposed OFPA exempts from the position and exercise limit aggregation count each option of a stock option position that is hedged by 100 shares of the underlying stock or securities convertible into the underlying stock. The exemption is limited to an amount of option contracts no greater than twice the standard position limit for the option, and is available for the following permissible hedges: (i) long stock-short call; (ii) long stock-long put; (iii) short stock-long call; and (iv) short stock-short put. A party utilizing the exemption must report his position to the Exchange's Market Surveillance Department in a manner prescribed by the Exchange no later than the close of the business day following the day the exemption is availed upon. When the stock side to a hedge exemption is decreased, the appropriate number of options must be liquidated prior to or simultaneously with the stock decrease to continue to maintain the automatic hedge

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[4] 15 U.S.C. 78s(b)(2) (1982).

[5] 17 CFR 200.30–3(a)(12) (1991).

[1] *See* letter from Edith Hallahan, Attorney, Market Surveillance, PHLX, to Yvonne Fraticelli, Staff Attorney, Options Branch, Division of Market Regulation ("Division"), Commission, dated December 18, 1992 ("Amendment No. 1").

[2] On November 4, 1992, the PHLX amended its proposal to clarify that the OFPA applies to "minor" rather than "inadvertent" infractions. Telephone conversation between William W. Uchimoto, General Counsel, PHLX, and Yvonne Fraticelli, Staff Attorne r, Division, Commission, on November 4, 1992.

[3] Paragraph (b) of the proposed OFPA corresponds to the hedge exemption provided currently in Exchange Rule 1001, Commentary .07. Commentary .07 establishes an exemption from position limits for stock options "hedged" by 100 shares of stock for the following hedge positions: (i) long call and short stock; (ii) short call and long stock; (iii) long put and long stock; and (iv) short put and short stock. *See also* Securities Exchange Act Release No. 25738 (May 24, 1988), 53 FR 20201. Under Commentary .07, a member or member organization who utilizes the automatic hedge exemption must file a form with the Exchange's Market Surveillance Department no later than the close of the business day following the day the exemption is utilized.

[4] *See* Amendment No. 1, *supra* note 1.

exemption. Failures to provide the Exchange with the requisite hedge exemption form are subject to fines of $100 for the first occurrence, $250 for the second occurrence, $500 for the third occurrence, and a sanction discretionary with the BCC for subsequent infractions. Paragraph (b)(ii) of the proposed OFPA provides that the failure to reduce the respective option position following a decrease in the stock position may result in a fine of $500 for the first occurrence, $2000 for the second occurrence, and a sanction discretionary with the BCC for subsequent infractions, in the case of options positions that exceed the applicable limit by less than 5%. Options positions that exceed the applicable limit by more than 5% are subject to review by the BCC.

The purpose of the proposed rule change is to create separate fine schedules for (1) minor position/exercise limit violations; and (2) failure to give prompt notice when utilizing an automatic hedge exemption.

Paragraph (a) of the proposed OFPA specifies that any position or exercise limit violation which does not exceed 5% of the established limit, or is caused by the failure to request a renewal of an expiring exemption, may be subject to the preset fine schedule provided in the OFPA. Any violation which exceeds the 5% threshold, however, is subject to review by the BCC for formal disciplinary action.

Paragraph (b) of the proposed OFPA refers to the requirement under PHLX Rule 1001, Commentary .07 [5] that hedge exemption forms be submitted promptly in connection with any hedged position limit exemption. Specifically, the OFPA restates the requirement that hedge exemptions must be reported to the Exchange's Market Surveillance Department no later than the close of the business day following the day the exemption is availed upon.

The PHLX believes that the proposed rule change is consistent with Section 6 of the Act, in general, and with Section 6(b)(5), in particular, in that it is designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to foster cooperation and coordination with persons engaged in regulating, clearing, settling and processing information with respect to securities. In addition, the PHLX believes that the proposal is designed to remove impediments to and perfect the mechanism of a free and open market and the national market system and to protect investors and the public interest.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The PHLX does not believe that the proposed rule change will impose any inappropriate burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reason for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) by order approve such proposed rule change, or

(b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by January 19, 1993.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 92-31579 Filed 12-28-92; 8:45 am]

BILLING CODE 8010-01-M

[5] *See* footnote 1, *supra*.

[Rel. No. IC-19168; 811-4352]

Allegro Growth Fund, Inc.; Application for Deregistration

December 18, 1992.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: Allegro Growth Fund, Inc.

RELEVANT ACT SECTION: Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATE: The application was filed on November 24, 1992.

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 January 13, 1993, and should be accompanied by proof of service on 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. Applicant, Post Office Box 74450, Cedar Rapids, Iowa 52407-4450.

FOR FURTHER INFORMATION CONTACT: Marc Duffy, Staff Attorney, (202) 272-2511, or C. David Messman, Branch Chief, (202) 272-3018 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is a diversified open-end management investment company incorporated under the laws of Maryland. On July 15, 1985, applicant

registered under the Act by filing a Notification of Registration pursuant to section 8(a). On this same date, applicant filed a registration statement on Form N-1A, pursuant to section 8(b) of the Act, and registered an indefinite number of shares under the Securities Act of 1933. Applicant's registration statement was declared effective, and its initial public offering commenced, on October 31, 1985.

2. On August 31, 1992, applicant's board of directors approved an Agreement and Plan of Reorganization (the "Reorganization") between the applicant and the SteinRoe Prime Equities portfolio (the "SteinRoe Portfolio") of the SteinRoe Investment Trust, a Massachusetts business trust. On or about September 11, 1992, proxy materials relating to the Reorganization were distributed to applicant's shareholders. At a special meeting held on September 28, 1992, the holders of a majority of applicant's outstanding shares approved the reorganization.

3. On September 30, 1992 (the "Closing Date"), applicant transferred substantially all of its assets to the SteinRoe Portfolio. In exchange for its shares, applicant received shares of the SteinRoe Portfolio having an aggregate value equal to the value of the assets transferred by applicant. Applicant distributed the SteinRoe Portfolio shares it received to its shareholders *pro rata* in complete liquidation of the applicant.

4. On the Closing Date, applicant had shares outstanding with an aggregate net asset value of $1,919,707, and a net asset value per share of $12.16.

5. Applicant paid all expenses related to the Reorganization. Such expenses, consisting of accounting, printing, administrative, legal, and other miscellaneous expenses, totaled approximately $22,000.

6. Applicant intends to dissolve its corporate existence in accordance with the provisions of the Maryland General Corporation Law.

7. At the time of filing of the application, applicant had no assets or liabilities. Applicant has no shareholders and is not a party to any litigation or administrative proceedings. Applicant is not engaged in, and does not propose to engage in, any business activities other than those necessary for the winding up of its affairs.

For the SEC, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 92-31584 Filed 12-28-92; 8:45 am]

BILLING CODE 8010-01-M

[Investment Company Act Rel. No. 19167; 812-8136]

American Capital Bond Fund, Inc. et al.; Application December 18, 1992.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 ("Act").

APPLICANTS: American Capital Bond Fund, Inc., American Capital Comstock Fund, Inc., American Capital Convertible Securities, Inc., American Capital Corporate Bond Fund, Inc., American Capital Emerging Growth Fund, Inc., American Capital Enterprise Fund, Inc., American Capital Equity Income Fund, Inc., American Capital Exchange Fund, American Capital Federal Mortgage Trust, American Capital Government Securities, Inc., American Capital Government Target Series ("Target"), American Capital Growth and Income Fund, Inc., American Capital Harbor Fund, Inc., American Capital High Yield Investments, Inc., American Capital Income Trust, American Capital Life Investment Trust, American Capital Municipal Bond Fund, Inc., American Capital Pace Fund, Inc., American Capital Reserve Fund, Inc., American Capital Small Capitalization Fund, Inc., American Capital Tax-Exempt Trust, American Capital Texas Municipal Securities, Inc., American Capital U.S. Government Trust for Income, American Capital World Portfolio Series, Inc., American General Equity Accumulation Fund, Inc., American General Fixed-Income Accumulation Fund, Inc., American General Money Market Accumulation Fund, Inc., Common Sense Trust, each portfolio of the foregoing, and future funds or future portfolios of existing funds advised or subadvised by American Capital Asset Management, Inc. (the "Adviser") or a subsidiary or affiliate thereof, except Mosher, Inc. (all of the above except Target being referred to collectively, in whole or in part, as the context requires, as the "Funds"), and the Adviser.

RELEVANT ACT SECTION: Exemption requested under section 6(c) from section 17(d) and Rule 17d-1 thereunder.

SUMMARY OF APPLICATION: Applicants seek to amend a prior order that permits the applicants thereunder to operate a joint trading account in repurchase agreements by adding additional Funds as applicants.

FILING DATE: The application was filed on October 30, 1992 and amended on December 7, 1992.

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 applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 12, 1993, 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 such notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicants, 2800 Post Oak Blvd., Houston, Texas 77056.

FOR FURTHER INFORMATION CONTACT: Diane L. Titus, Paralegal Specialist, at (202) 272-3023, or Barry D. Miller, Senior Special Counsel, at (202) 272-3018 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicants' Representation

1. On May 9, 1991, the Commission issued an order under section 17(d) of the Act and rule 17d-1 thereunder (Investment Company Act Release No. 18142) (the "Prior Order"), that permits Applicants, other than Target, to operate a joint trading account in repurchase agreements. Target is a Massachusetts business trust registered as an open-end diversified management investment company under the Act. Target and the other applicants are seeking to amend the Prior Order to permit Target to participate in the joint trading account. Target and the Funds are either advised or subadvised by the Adviser. Target has consented to the procedures required by the Prior Order and agrees to be bound by its terms and provisions to the same extent as the Funds.

2. In addition to Target, the following investment companies were not listed as applicants in the prior application but are in this application: American Capital Small Capitalization Fund, Inc., American Capital Texas Municipal Securities, Inc., American Capital U.S. Government Trust for Income, and American Capital World Portfolio Series, Inc. The previous application included as applicants thereunder

"future funds and future series of existing funds advised or subadvised by American Capital Asset Management, Inc." American Capital Small Capitalization Fund, Inc., American Capital Texas Municipal Securities, Inc., American Capital U.S. Government Trust for Income, and American Capital World Portfolio Series, Inc. would fall within this general category; however, did not exist at the time of filing the previous original application. Because they are now existing funds, they also are included as applicants in this application.

For the SEC, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 92-31583 Filed 12-28-92; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-19172; 812-7990]

Declaration Fund, et al.; Application

December 21, 1992.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the InvestmentCompany Act of 1940 ("Act").

APPLICANTS: Declaration Fund (the "Fund"), Declaration Service Company, and Consistent Asset Management Company, Inc.

RELEVANT ACT SECTIONS: Application pursuant to section 6(c) of the Act for an order granting an exemption from the provisions of sections 18(f), 18(g), and 18(i) of the Act.

SUMMARY OF APPLICATION: Applicants seek an order permitting certain series of the Fund to issue two classes of shares representing interests in the same investment portfolio. The two classes will be identical in all respects except for differences relating to class designations, the allocation of certain expenses, voting rights, and exchange privileges.

FILING DATE: The application was filed on July 15, 1992, and amended on November 13, 1992. By supplemental letter dated December 17, 1992, counsel, on behalf of applicants, agreed to file a further amendment during the notice period to make certain changes. This notices reflects the changes to be made to the application by such further amendment.

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 applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 15, 1993, and should be accompanied by proof of service on 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 that wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, N.W., Washington, D.C. 20549. Declaration Fund and Declaration Service Company, Suite 6160, 555 North Lane, Conshohocken, PA 19428. Consistent Asset Management Company, Inc., 116 Commons Court, Chadds Ford, PA 19317.

FOR FURTHER INFORMATION CONTACT: Nicholas D. Thomas, Staff Attorney, at (202) 504-2263, or Elizabeth G. Osterman, Branch Chief, at (202) 272-3016 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representation:

1. The Fund is an open-end, diversified, management investment company of the series type. The Fund currently has four series of shares for sale to the public, Declaration Cash Account series,[1] CAMCO 100% U.S. Treasury-Short Term Fund series, CAMCO 100% U.S. Treasury-Intermediate Term Fund series and CAMCO 100% U.S. Treasury-Total Return Fund series. The United States Treasury securities series are collectively referred to as the "CAMCO Funds."

2. Consistent Asset Management Company, Inc. ("Consistent"), serves as investment adviser for each of the CAMCO Funds. Declaration Service Company provides administrative services, as well as transfer agency, dividend disbursing, and plan agent services to the shareholders of the CAMCO Funds.

3. Shares of the CAMCO Funds are sold at their current per share net asset value without a sales charge. The shares are not subject to a redemption fee or a contingent deferred sales charge upon redemption.

4. The Fund acts as distributor of the shares of each of the CAMCO Funds in accordance with the terms of each CAMCO Fund's rule 12b-1 distribution plan (the "Plan"). The Plans currently provide for the following services: (a) advertising, (b) compensation of persons engaged in sales support services, (c) the preparation, printing, and mailing of prospectuses and other reports, (d) the printing and mailing of sales literature, and (e) the distribution of the CAMCO Fund shares and the servicing of the CAMCO Fund shareholders' accounts.

5. The Fund requests an exemption from the provisions of section 18(f), 18(g), and 18(i) to permit it to divide the shares of each CAMCO Fund into two classes: Class A and Class B.[2] The Class A shares of each CAMCO Fund will be offered and sold to investors that deal directly with the Fund. Class B shares will be offered and sold only to individual investors through registered broker-dealers and other qualified distributors. Any CAMCO Fund shares issued prior to the requested exemptive order will become Class A shares once the order is granted.

6. Upon the creation of the separate share classes, the individual Plans will be amended to provide for the payment of the costs of distributing the Class A and Class B shares. Plan payments will consist of two segments: a basic fee and a distributors' fee.

7. The basic fee, which will be paid by both the Class A shares and the Class B shares, will be used for the following purposes: (1) to pay advertising costs; (2) to pay the costs of distribution of materials and information concerning the CAMCO Funds and their shares including the prospectus, statement of additional information, shareholder updates and sales literature, and the costs incurred in the preparation, printing, and mailing of such materials and information; and (3) to pay the costs incurred in presentations and promotions made by affiliates of Consistent to corporations, trusts companies, educational, religious, and charitable organizations, banks, retirement plans, insurance companies, and other institutional type investors.

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[1] The Fund's Declaration Cash Account series is not included in the Fund's request for relief.

[2] In addition, the Fund requests that any relief granted also apply to any future series of the Fund, (a) the investment adviser of which is Declaration Investment Advisers, Inc. or Consistent Asset Management Company, Inc.; (b) the shares of which are distributed by the Fund; (c) that holds itself out to investors as being related for purposes of investment or investor services; and (d) the shares of which are divided into two classes and the rate of distribution fees, exchange privileges, and differences in voting rights are substantially identical to those applicable to the Class A shares and the Class B shares of the CAMCO Funds. Any such future series will be subject to each of the conditions found in the application.

8. The distributors' fee, which will be paid only with respect to the Class B shares, will be paid to broker-dealers and other qualified persons engaged in the sale and distribution of the Class B shares of each CAMCO Fund and/or who administer Class B shareholder accounts.

9. Shares purchased through the reinvestment of dividends and other distributions will be of the same class as the shares on which the dividends and distributions are paid.

10. Shares of each CAMCO Fund may be exchanged for shares of any other CAMCO Fund of the same class at the per share net asset value next determined. Any exchange will be conducted in compliance with rule 11a-3 under the Act.

11. The net asset value will be computed separately for each class of shares of a CAMCO Fund by first allocating gross income and expenses (other than rule 12b-1 fees and any other incremental expenses properly attributable to one class which the Commission will approve by an amended order) to each class of shares based on the net assets attributable to each such class at the beginning of the day and then by separately applying the differing 12b-1 fees and other incremental expenses to the appropriate class. The net asset value attributable to each share of each class will then be calculated by dividing the net assets calculated for each class by the number of shares outstanding in that class. Because of the higher ongoing distribution fees paid by the holders of Class B shares, the net income attributable to and the dividends payable on Class B shares will be lower than the net income attributable to and the dividends payable on Class A shares. To the extent that a Fund has undistributed net income, the net asset value of the Class A shares will be higher than the net asset value of the Class B shares.

Applicants' Legal Conclusions

1. Applicants seek an exemption from sections 18(g), 18(f), and 18(i) of the Act to the extent that the proposed classification of the CAMCO Fund shares ("Classification System") may result in the creation of a senior security, as defined by section 18(g), the issuance and sale of which would be prohibited by section 18(f), and to the extent the allocation of voting rights may violate the provisions of section 18(i).

2. Applicants believe that the Classification System will result in a more equitable allocation of the distribution expenses in that it will permit those investors that do not require the services of a broker or other professional distributor to avoid the distribution costs attributable to such services. In addition, owners of both classes of shares may be relieved of a portion of the fixed costs normally associated with open-end management investment companies since such costs, applicants believe, will be spread over a greater number of shares than would otherwise be the case.

3. The proposed Classification System will not create the potential for the abuses that section 18 was designed to redress. The proposed Classification System will not increase the speculative character of the shares of the Fund, and will not involve borrowings. Both Class A and Class B shares of the CAMCO Funds will participate *pro rata* in the Fund's income and expenses (which relate solely to the CAMCO Funds), except for different rule 12b-1 distribution expenses and such additional transfer agency sots, as there may be, if any. Each class of shares will be redeemable at all times, and no class will have any distribution or liquidation preference with respect to particular assets or any right or require that lapsed dividends be paid before dividends are declared on the other class, and no class will be protected by any reserve or other account. Moreover, the proposed allocation of expenses and voting rights relating to the Fund's Plans relating to the CAMCO Fund share is equitable and will not discriminate against any group of shareholders. Finally, applicants believe that the Fund's capital structure under the proposed arrangements and the procedures devised will not enable insiders to manipulate expenses among the classes of shares.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. The Class A Shares and Class B Shares of each CAMCO Fund will represent interests in the same portfolio of investments and be identical in all respects, except as set forth below. The only difference between Class A Shares and Class B Shares of a CAMCO Fund will relate solely to (a) the impact of the disproportionate Plan payments allocated to the holders of Class B Shares of a Fund, the incremental transfer agency costs, if any, attributable to the Class B Shares of a CAMCO Fund, and any other incremental expenses subsequently identified that should be properly allocated to one class of shares which allocation will be approved by the SEC; (b) the fact that each class of shares will vote separately as a class with respect to a CAMCO Fund's Plan; (c) the fact that the designation of each class of shares of the several CAMCO Funds will differ; and (d) the different exchange privileges of the classes.

2. The trustees of the Fund, including a majority of the trustees who are not interested persons of the Fund within the meaning of section 2(a)(10) of the Act (the "independent trustees") will approve the Classification System. The minutes of the meeting of the trustees regarding the deliberations of the trustees with respect to the approvals necessary to implement the Classification System will reflect in detail the reasons for the trustees' determination that the proposed Classification System is in the best interests of both the Fund and its shareholders and such minutes will be available for inspection by the SEC's staff.

3. On an ongoing basis, the trustees, pursuant to their fiduciary responsibilities under the Act and otherwise, will monitor the Fund for the existence of any material conflicts between the interests of the classes of shares. The trustees, including a majority of the independent trustees, will take such action as is reasonably necessary to eliminate any such conflicts that may develop. Consistent will be responsible for reporting any potential or existing conflicts of which it may be aware, to the trustees. If a conflict arises, Consistent, at its cost, will remedy such conflict up to and including establishing a new registered investment company.

4. The trustees will receive quarterly and annual statements concerning distribution and shareholder servicing expenditures complying with paragraph (b)(3)(ii) of rule 12b–1, as it may be amended from time to time. In the statements, only distribution expenditures properly attributable to the sale or servicing of a particular class of shares will be used to justify any distribution or servicing fee charged to that class. Expenditures not related to the sale or servicing of a particular class of shares will not be presented to the trustees to justify the distribution fee attributable to that class. The statements, including the allocations upon which they are based, will be subject to the review and approval of the independent trustees in the exercise of their fiduciary duties.

5. Dividends paid with respect to Class A Shares and Class B Shares, to the extent any dividends are paid, will be calculated in the same manner, at the same time, on the same day, and will be in the same amount, except that distribution fee payments relating to

each respective class of shares will be borne exclusively by that class and any incremental transfer agency costs relating to Class A or Class B Shares will be borne exclusively by that class.

6. The methodology and procedures for calculating the net asset value and dividends and distributions of the two classes of each CAMCO Fund and the proper allocation of expenses between the two classes were reviewed by the expert who rendered a report to the applicants, which report was provided to the staff of the SEC that such methodology and procedures are adequate to ensure that such calculations and allocations will be made in an appropriate manner subject to the conditions and limitations in that report. On an ongoing basis, the expert, or an appropriate substitute expert, will monitor the manner in which the calculations and allocations are being made and, based upon such review, will render at least annually a report that the calculations and allocations are being made properly. The reports of the expert will be filed as part of the periodic reports filed with the SEC pursuant to sections 30(a) and 30(b)(1) of the Act. The work papers of the expert with respect to such reports, following request by the Fund (which the Fund agrees to provide), will be available for inspection by the SEC staff upon the written request to the Fund for such work papers by a senior member of the Division of Investment Management, limited to the Director, an Associate Director, the Chief Accountant, the Chief Financial Analyst, an Assistant Director, and any Regional Administrator or Associate and Assistant Administrators. The initial report of the expert is a "Special Purpose" report on the "Design of a System" and the ongoing reports will be "Special Purpose" reports on the "Design of a System and Certain Compliance Tests" as defined and described in SAS NO. 44 of the AICPA, as it may be amended, from time to time, or in similar auditing standards as may be adopted by AICPA, from time to time.

7. The Fund has adequate facilities in place to ensure implementation of the methodology and procedures for calculating the net asset value and dividends and distributions of the two classes of shares and the proper allocation of expenses between the two classes of shares, and this representation has been concurred with by the expert in the initial report referred to in condition six above and will be concurred with by the expert, or an appropriate substitute expert, on an ongoing basis at least annually in the ongoing reports referred to in condition six above. The Fund will take immediate corrective measures if this representation is not concurred in by the expert or appropriate substitute expert.

8. The prospectus of the Fund will contain a statement to the effect that a salesperson and any other person entitled to receive compensation for selling Fund shares may receive different compensation with respect to one particular class of shares over another in the Fund.

9. The conditions pursuant to which any exemptive order is granted and the duties and responsibilities of the trustees with respect to the Classification System will be set forth in guidelines which will be furnished to the trustees.

10. The Fund will disclose the respective expenses, performance data, distribution arrangements, services, and fees applicable to each class of shares of each CAMCO Fund in every CAMCO Fund prospectus, regardless of whether all classes of shares are offered through each prospectus. The Fund will disclose the respective expenses and performance data applicable to all classes of shares in every shareholder report. To the extent any advertisement or sales literature describes the expenses or performance data applicable to any classes of shares, it will also disclose the respective expenses and/or performance data applicable to all classes of shares. The information provided by applicants for publication in any newspaper or similar listing of the Funds' net asset values and public offering prices will present each class of shares separately.

11. Applicants acknowledge that the grant of any exemptive order requested by the Application will not imply SEC approval, authorization, or acquiescence in any particular level of payments that the Fund may make pursuant to its Plans in reliance on the exemptive order.

12. The Fund will adopt compliance standards as to when Class A and Class B Shares may appropriately be issued to particular investors. Applicants will require all persons selling shares of any of the CAMCO Funds to agree to conform to those standards.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 92-31582 Filed 12-28-92; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-19165; 812-7823]

Dreyfus A Bonds Plus, Inc., et al.; Notice of Application

December 18, 1992.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the "Act").

APPLICANTS: Dreyfus A Bonds Plus, Inc., Dreyfus Adjustable Rate Securities Fund, Inc., Dreyfus Appreciation Fund, Dreyfus Balanced Fund, Inc., Dreyfus BASIC Money Market Fund, Inc., Dreyfus BASIC U.S. Government Money Market Fund, Dreyfus California Intermediate Municipal Bond Fund, Dreyfus California Tax Exempt Bond Fund, Inc., Dreyfus California Tax Exempt Money Market Fund, Dreyfus Capital Value Fund, Inc., Dreyfus Cash Management, Dreyfus Cash Management Plus, Inc., Dreyfus Connecticut Intermediate Municipal Bond Fund, Dreyfus Connecticut Municipal Money Market Fund, Inc., The Dreyfus Convertible Securities Fund, Inc., Dreyfus Edison Electric Index Fund, Inc., Dreyfus Florida Intermediate Municipal Bond Fund, The Dreyfus Fund Incorporated, Dreyfus Global Investing, Inc., Dreyfus GNMA Fund, Inc., Dreyfus Government Cash Management, Dreyfus Growth and Income Fund, Inc., Dreyfus Growth Opportunity Fund, Inc., Dreyfus Index Fund, Dreyfus Institutional Money Market Fund, Dreyfus Insured Municipal Bond Fund, Inc., Dreyfus Intermediate Municipal Bond Fund, Inc., Dreyfus Investors GNMA Fund, L.P., Dreyfus Investors Municipal Money Market Fund, Inc., The Dreyfus Leverage Fund, Inc., Dreyfus Life and Annuity Index Fund, Inc., Dreyfus Liquid Assets, Inc., Dreyfus Massachusetts Intermediate Municipal Bond Fund, Dreyfus Massachusetts Municipal Money Market Fund, Dreyfus Massachusetts Tax Exempt Bond Fund, Dreyfus Michigan Municipal Money Market Fund, Inc., Dreyfus Money Market Instruments, Inc., Dreyfus Municipal Cash Management Plus, Dreyfus Municipal Money Market Fund, Inc., Dreyfus New Jersey Intermediate Municipal Bond Fund, Dreyfus New Jersey Municipal Bond Fund, Inc., Dreyfus New Jersey Municipal Money Market Fund, Inc., Dreyfus New Leaders Fund, Inc., Dreyfus New York Insured Tax Exempt Bond Fund, Dreyfus New York Municipal Cash Management, Dreyfus New York Tax Exempt Bond Fund, Inc., Dreyfus New York Tax Exempt Intermediate Bond Fund,

Dreyfus New York Tax Exempt Money Market Fund, Dreyfus Ohio Municipal Money Market Fund, Inc., Dreyfus 100% U.S. Treasury Intermediate Term Fund, L.P., Dreyfus 100% U.S. Treasury Long Term Fund, L.P., Dreyfus 100% U.S. Treasury Money Market Fund, L.P., Dreyfus 100% U.S. Treasury Short Term Fund, L.P., Dreyfus Pennsylvania Municipal Money Market Fund, Dreyfus Short-Intermediate Government Fund, Dreyfus Short-Intermediate Tax Exempt Bond Fund, Dreyfus Short-Term Fund, Inc., Dreyfus Short-Term Income Fund, Inc., The Dreyfus Socially Responsible Growth Fund, Inc., Dreyfus Strategic Aggressive Investing, L.P., Dreyfus Strategic Income, Dreyfus Strategic Investing, Dreyfus Strategic World Investing, L.P., Dreyfus Tax Exempt Bond Fund, Inc., Dreyfus Tax Exempt Cash Management, The Dreyfus Third Century Fund, Inc., Dreyfus Treasury Cash Management, Dreyfus Treasury Prime Cash Management, Dreyfus U.S. Government Income Fund, Dreyfus Variable Investment Fund, Dreyfus-Wilshire Target Funds, Inc., Dreyfus Worldwide Dollar Money Market Fund, Inc., Comstock Partners Strategy Fund, Inc., First Prairie Cash Management, First Prairie Diversified Asset Fund, First Prairie Equity/Income Fund, First Prairie Growth Equity Fund, First Prairie International Fund, First Prairie Money Market Fund, First Prairie Municipal Income Fund, First Prairie Quality Income Fund, First Prairie Special Equity Fund, First Prairie Tax Exempt Bond Fund, Inc., First Prairie Tax Exempt Money Market Fund, First Prairie U.S. Government Income Fund, First Prairie U.S. Treasury Securities Cash Management, FN Network Tax Free Money Market Fund, Inc., General Aggressive Growth Fund, Inc., General California Municipal Bond Fund, Inc., General California Municipal Money Market Fund, General Government Securities Money Market Fund, Inc., General Money Market Fund, Inc., General Municipal Bond Fund, Inc., General Municipal Money Market Fund, Inc., General New York Municipal Bond Fund, Inc., General New York Municipal Money Market Fund, McDonald Money Market Fund, Inc., McDonald Tax Exempt Money Market Fund, Inc., McDonald U.S. Government Money Market Fund, Inc., Pacific American Fund, Peoples Index Fund, Inc., Peoples S&P MidCap Index Fund, Inc., Premier California Municipal Bond Fund, Premier GNMA Fund, Premier Municipal Bond Fund, Premier New York Municipal Bond Fund, and Premier State Municipal Bond Fund (collectively, the "Funds"); The Dreyfus Corporation (the "Adviser"); Dreyfus Service Corporation (the "Distributor"); and such other registered, open-end management investment companies for which the Adviser (or any entity controlling, controlled by, or under common control with the Adviser) hereafter may serve as investment adviser, sub-investment adviser, or administrator, or for which the Distributor (or any entity controlling, controlled by, or under common control with the Distributor) hereafter may serve as distributor of such investment company's shares.

RELEVANT ACT SECTIONS: Exemption requested under section 6(c) from sections 18(f)(1), 18(g), 18(i), 2(a)(32), 2(a)(35), 22(c), and 22(d) of the Act and rule 22c–1 thereunder.

SUMMARY OF APPLICATION: Applicants seek an order that would permit the Funds (a) to issue and sell separate classes of shares representing interests in the same investment portfolio, which classes would be identical in all respects except for class designation, voting rights, exchange privileges, conversion features, and the allocation of certain expenses, and (b) to assess a contingent deferred sales charge ("CDSC") on certain redemptions of the shares of one of the classes, and to waive the CDSC under certain circumstances.

FILING DATE: The application was filed on November 15, 1991, and amended and restated on February 13, 1992, February 28, 1992, March 9, 1992, September 17, 1992, November 2, 1992, and December 17, 1992.

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 applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 13, 1993, and should be accompanied by proof of service on 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, N.W., Washington, D.C. 20549. Applicants, The Dreyfus Corporation, 200 Park Avenue, New York, NY 10166, Attention: Secretary.

FOR FURTHER INFORMATION CONTACT: Barry A. Mendelson, Senior Attorney, at (202) 504–2284, or C. David Messman, Branch Chief, at (202) 272–3018 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicants' Representations

1. Each of the Funds is an open-end management investment company registered under the Act. Several of the Funds consist of multiple series, each of which has separate investment objectives and policies and segregated assets. The term "Portfolio" will be used herein to mean a single series Fund or a particular series of a multiple series Fund.

2. The Adviser acts as investment adviser, sub-investment adviser, or administrator to each Fund. The Distributor, a wholly-owned subsidiary of the Adviser, acts as the distributor for each Fund's shares.

3. Except for Comstock Partners Strategy Fund, Inc. ("Comstock Fund"), each Fund currently is authorized to issue only one class of shares.[1] Applicants propose to establish a multiple class distribution system ("Distribution System") to enable each of the Funds to offer investors the option of purchasing shares that are offered in conjunction with a distribution plan pursuant to rule 12b–1 under the Act ("12b–1 Plan"), with a non-rule 12b–1 "Shareholder Services Plan," with neither type of plan, or with combinations of these or similar arrangements. The 12b–1 Plans and Shareholder Services Plans are collectively referred to as the "Plans."

4. Under existing 12b–1 Plans, certain Portfolios have entered into agreements with certain financial institutions, securities dealers, and other industry professionals (collectively, "Service Agents") providing for the performance of certain services, some of which could be construed as distribution assistance. These services may include: answering client inquiries regarding the Portfolio; assisting clients in changing dividend options, account designations and addresses; performing sub-accounting; establishing and maintaining shareholder accounts and records; processing purchase and redemption transactions; investing client cash

[1] The Comstock Fund currently offers more than one class of shares pursuant to exemptive relief granted by the Commission. Investment Company Act Release Nos. 18761 (June 5, 1992) (notice) and 18828 (July 1, 1992) (order).

account balances automatically in Portfolio shares; providing periodic statements showing a client's account balance and integrating such statements with those of other transactions and balances in the client's other accounts serviced by the Service Agent; arranging for bank wires; and such other services as a Portfolio may request, to the extent the Service Agent is permitted by applicable statute, rule, or regulation. Under existing 12b–1 Plans, a Portfolio typically pays the Distributor or Service Agent for such services at an annual rate of approximately .25% of the Portfolio's average daily net assets.

5. After implementation of the proposed Distribution System, a Portfolio or its distributor may enter into agreements with Service Agents for services pursuant to a 12b–1 Plan ("12b–1 Plan Agreements") or pursuant to a Shareholder Services Plan ("Shareholder Services Plan Agreements"). Shareholder Services Agreements and 12b–1 Plan Agreements are referred to collectively as "Plan Agreements." Services to be provided under a 12b–1 Plan Agreement include advertising, marketing, and distributing a particular class of Fund shares. Services to be provided under a Shareholder Services Agreement relate to servicing shareholder accounts, such as answering shareholder inquiries regarding the Portfolio and providing reports and other information.

6. The provision of distribution assistance and support services by the Service Agents under a Portfolio's Plan Agreement(s) will augment (and not be duplicative of) the services that otherwise would have been provided to the Portfolio by its adviser, distributor, transfer agent, and custodian.

7. The expense of payments made pursuant to a 12b–1 Plan Agreement ("12b–1 Plan Payments") or a Shareholder Services Plan Agreement ("Shareholder Services Plan Payments") will be borne entirely by the beneficial owners of the class to which the particular Plan Agreement relates. Shareholder Services Plan Payments and 12b–1 Plan Payments are referred to collectively as "Plan Payments." The rate of 12b–1 Plan Payments will be determined by the directors of a Fund in compliance with rule 12b–1 and Article III, Section 26 of the NASD Rules of Fair Practice.

8. Certain Portfolios in the future may offer a class of share ("Benefit Plan Class") only to qualified or non-qualified employees benefit plans or programs where (a) each employer maintaining a plan or program has a minimum of 250 employees eligible for participation, or such plan's or program's aggregate initial investment in the Dreyfus family of funds or certain other products made available by the Distributor to such plans or programs exceeds one million dollars, and (b) the participants in such plan or program are not permitted to direct the investment of their accounts. Investors eligible to purchase shares of the Benefit Plan Class will not be permitted to purchase shares of any other classes offered by the Portfolio and investors eligible to purchase shares of other classes of the Benefit Plan Class.

9. It is anticipated that a class of shares ("Trust Class") in one or more of the First Prairie Funds will be sold only to clients of the Personal Investments Department of The First National Bank of Chicago ("FNBC") for their qualified trust, custody, and/or agency accounts, and to clients of affiliates of FNBC for their similar accounts maintained at such affiliates. The Trust Class is not expected to bear 12b–1 Plan Payments. It is anticipated that another class of shares ("Retail Class") in the First Prairie Funds will be offered generally on a retail basis, including to the same clients of FNBC for their non-fiduciary accounts. The Retail Class is expected to bear 12b–1 Plan Payments.

10. Each Portfolio seeks the ability to offer investors the option of purchasing shares that either are subject to a conventional front-end sales load ("Front-End Option") or subject to a CDSC ("Deferred Option"). Shares offered pursuant to either such option could be offered in conjunction with a 12b–1 Plan or Shareholder Services Plan, and thus be subject to Plan Payments. In a Portfolio offering classes with both Front-End and Deferred Options, Plan Payments will be higher for shares issued under the Deferred Option. Although the CDSC is discussed as part of the multiple class distribution arrangement, applicants intend that Portfolios with only a single class be permitted to sell their shares with a CDSC.

11. A Portfolio's gross income will be allocated *pro rata* to each class on the basis of the net assets of each class. Expenses incurred by a Fund not attributable to a particular Portfolio of the fund or to a particular class of a Portfolio ("Fund Expenses"), and expenses incurred by a particular Portfolio of a Fund not attributable to any particular class of the Portfolio ("Series Expenses") will be allocated to each class on the basis of net assets. Expenses specifically attributable to a particular class of a Portfolio's shares ("Class Expenses") will be allocated directly to such class. Class Expenses will consists only of those expenses specified in condition 1 below.[2]

12. Under the proposed Distribution System, each Portfolio's shares, regardless of class, will represent a *pro rata* interest in its portfolio securities and will have identical voting, dividend, liquidation, and other rights, preferences, powers, restrictions, limitations, qualifications, designations, terms, and conditions, except that: (a) each class will have a different designation; (b) each class will bear its own Plan Payments and Class Expenses; (c) only shareholders of the affected classes will be entitled to vote on matters pertaining to the 12b–1 Plan and 12b–1 Plan Agreements relating to such class; (d) each class will have different exchange privileges, as described below; and (e) only the class of shares issues in connection with the Deferred Option will have a conversion feature.

13. Dividends paid to all shareholders of a Portfolio, regardless of class, will be declared and paid at the same times and at the same dividend rate. However, because of the Plan Payments and Class Expenses that will be borne by a class of shares, the net income of (and dividends payable to) such class will be somewhat lower than the net income of a different class of shares in the same Portfolio that is not making such Plan Payments or bearing such Class Expenses. As a result, for a Portfolio that does not declare dividends daily (such as a non-money market fund), the net asset value per share attributable to different classes will differ between dividend dates.

14. Each class of shares may be exchanged only for shares of the same class in another Portfolio. Portfolios that have not issued multiple classes and have not adopted a CDSC are deemed to be the same class as any Portfolio or class that is not sold with a CDSC. In all events, the exchange privileges will operate in accordance with rule 11a–3 under the Act.

15. Investors choosing the Deferred Option will purchase shares at net asset value, without the imposition of a sales load at the time of purchase, but subject to a CDSC that decreases over time. A CDSC will not be imposed on redemptions of Deferred Option shares purchased more than a specified period (the "CDSC Period")—typically six years—prior to the redemption, or

[2] In the case of the Comstock Fund, the expenses specified in condition 1 as Class Expenses are deemed to be Fund Expenses. Only expenses incurred pursuant to 12b–1 Plan or Shareholder Services Plan related to a particular class will be allocated directly to such class, consistent with exemptive relief granted to the Comstock Fund. *See* footnote 1 above.

shares derived from reinvestment of dividends and distributions. No CDSC will be imposed on any amount that represents an increase in the value of the Deferred Options shares, resulting from capital appreciation, above the amount paid for such shares. Deferred Option shares will be redeemed in an order that will result in the lowest possible charge.

16. At the end of the CDSC Period, Deferred Option shares of a Portfolio will automatically convert (subject to condition 17) to Front-End Option shares of such Portfolio at the relative net asset values of the two classes, and will thereafter be subject to the Plan Payments, if any, applicable to the Front-End Option shares.

17. Applicants seek the ability to waive the CDSC (a) on redemptions made within one year following a shareholder's death or disability; (b) otherwise payable by employees participating in qualified or non-qualified employee benefit plans or other programs where the employers or affiliated employers maintaining such plans or programs have a minimum of 250 employees eligible for participation in such plans or programs, or such plan's or program's aggregate initial investment in the Dreyfus family or funds or other products made available through the Distributor exceeds one million dollars; (c) in connection with redemptions as a result of a combination of any investment company with a Fund by merger, acquisition of assets, or otherwise; and (d) in connection with a distribution following retirement under a tax-deferred retirement plan or attaining age 70½ in the case of an IRA or Keogh plan or custodial account pursuant to section 403(b) of the Code.

18. If a Fund's directors determine to discontinue one or more waiver categories applicable to a particular Portfolio, any Portfolio shares subject to a CDSC that were purchased prior to the termination of such waiver categories will have the CDSC waived as provided in such Portfolio's prospectus at the time of purchase of such shares.

Applicants' Legal Analysis

1. Applicants are requesting an order pursuant to section 6(c) of the Act to the extent the proposed issuance and sale of multiple classes of shares by a Portfolio might be deemed (a) to result in a "senior security" within the meaning of section 18(g), the sale and issuance of which is prohibited by section 18(f)(1); or (b) to violate the equal voting provisions of section 18(i).

2. The Distribution System does not create the potential for the abuses that section 18 was designed to redress. It does not involve borrowing and does not affect the Portfolios' assets or reserves. It will not increase the speculative character of the Portfolios' shares. No class of shares will have a distribution or liquidation preference with respect to particular assets of a Portfolio and no class will be protected by any reserve or other account. The concerns that complex capital structures may facilitate control without equity or other investment and may make it difficult for investors to value their shares are not present under the proposed Distribution System. The Portfolios' capital structures will not enable insiders to manipulate the expenses and profits among the different classes of shares.

3. Applicants believe that the Distribution System will better enable them to meet the competitive demands of today's financial services industry. By creating multiple classes of shares, the Portfolios will save the organizational and other continuing costs that would be incurred if they were required to establish a separate investment portfolio for each class of shares. To the extent a Portfolio is able, through the Distribution System, to obtain and expand its shareholder base, all investors, irrespective of class, will benefit, since the Portfolio's *pro rata* operating expenses will be lower than they would have been otherwise.

4. Applicants assert that the proposed allocation of expenses and voting rights in the manner proposed herein is equitable and will not discriminate against any group of shareholders. Investors purchasing shares offered in connection with the Rule 12b–1 Plans and Shareholder Services Plans and receiving services provided under those Plans will bear the costs associated with such services and will also enjoy exclusive shareholder voting rights (if any) with respect to matters affecting their respective Plans. Investors purchasing shares that are not covered by such Plans will not be burdened with such expenses and will not possess such voting rights.

5. Applicants also are requesting an exemption pursuant to section 6(c) from sections 2(a)(32), 2(a)(35), 22(c), and 22(d) of the Act, and rule 22c–1 thereunder, to the extent necessary to permit the Portfolios to assess a CDSC on certain redemptions of Deferred Option shares and to waive the CDSC with respect to certain types of redemptions.

6. Applicants believe that the imposition of the CDSC is fair and in the best interests of shareholders. Because they pay no sales load up front, Deferred Option shareholders have the advantage of greater investment dollars working for them from the time of their purchase. Moreover, such shareholders, depending on how long they hold their shares, may pay only a reduced sales charge or no sales charge at all. Finally, applicants believe that it is fair to impose on the Deferred Option shares being redeemed a lump sum reasonably reflecting the expenses incurred by the Distributor or Service Agents that have not been recovered through payments by the Portfolio.

7. The waiver of the CDSC under the circumstances set forth above will not adversely affect a Portfolio's remaining shareholders. Waiver of the CDSC will not result in the loss of any revenue to a Portfolio since proceeds from the CDSC will be paid to the Distributor.

Applicants' Conditions

Applicants agree that the order granting the requested exemptions shall be subject to the following conditions:

1. The classes will each represent interests in the same portfolio of investments of a Portfolio, and be identical in all respects, except for certain differences relating to:

(i) the method of financing certain Class Expenses, which are limited to: (a) transfer agent fees identified by the transfer agent as being attributable to a specific class; (b) printing and postage expenses related to preparing and distributing materials such as shareholder reports, prospectuses and proxies to current shareholders of a specific class; (c) blue sky registration fees incurred by a class of shares; (d) SEC registration fees incurred by a class of shares; (e) the expense of administrative personnel and services required to support the shareholders of a specific class; (f) litigation or other legal expenses relating solely to one class of shares; and (g) directors' fees incurred as a result of issues relating to one class of shares;

(ii) expenses assessed to a class pursuant to a 12b–1 Plan or Shareholder Services Plan;

(iii) voting rights as to matters exclusively affecting one class of shares;

(iv) the requirement that only certain Deferred Option shares will have a conversion feature providing for automatic conversion to Front-End Option shares a stated number of years after issuance;

(v) exchange privileges; and

(vi) class designation.

Any additional incremental expenses not specifically identified above which are subsequently identified and determined to be properly allocable to one class of shares shall not be so allocated until approved by the SEC

pursuant to an amended order or other relief from the SEC.

2. A Fund's directors, including a majority of the non-interested directors, will approve the offering of different classes of shares of a Portfolio prior to the implementation of the Distribution System. The minutes of the directors' meetings regarding their deliberations with respect to the approvals necessary to implement the Distribution System will reflect in detail the reasons for the directors' determination that the proposed Distribution System is in the best interests of both a Fund and its shareholders.

3. The initial determination of the Class Expenses that will be allocated to a particular class and any subsequent changes thereto will be reviewed and approved by a vote of the relevant Fund's directors, including a majority of the non-interested directors. Any person authorized to direct the allocation and disposition of monies paid or payable by a Portfolio to meet Class Expenses shall provide to the directors, and the directors shall review, at least quarterly, a written report of the amounts so expended and the purposes for which such expenditures were made.

4. On an ongoing basis, a Fund's directors, pursuant to their fiduciary responsibilities under the Act and otherwise, will monitor the Fund for the existence of any material conflicts among the interests of the classes of shares. The directors, including a majority of the non-interested directors, shall take such action as is reasonably necessary to eliminate any such conflicts that may develop. The investment adviser, sub-investment adviser (if any), administrator (if separate) and distributor of the Fund will be responsible for reporting any potential or existing conflicts to the directors. If a conflict arises, such entities at their own cost will remedy such conflict up to and including establishing a new registered management investment company.

5. Each Portfolio's investment adviser or distributor will adopt compliance standards as to when each class of shares may be sold to particular investors. Applicants will require all persons selling Portfolio shares to agree to conform to such standards. Such compliance standards will require all investors eligible to purchase Benefit Plan Class shares of a Portfolio offering such shares to invest in Benefit Plan Class shares, rather than any other class of shares offered by the Portfolio.

6. Any Shareholder Services Plan will be adopted and operated in accordance with the procedures set forth in rule 12b–1 (b) through (f) as if the expenditures made thereunder were subject to rule 12b–1, except that shareholders need not enjoy the voting rights specified in rule 12b–1. In evaluating a Shareholder Services Plan, the directors will specifically consider whether: (a) the Shareholder Services Plan is in the best interest of the applicable classes and their respective shareholders; (b) the services to be performed pursuant to the Shareholder Services Plan are required for the operation of the applicable classes; (c) the Service Agents can provide services at least equal in nature and quality to those provided by others, including the Portfolio, providing similar services; and (d) the fees for such services are fair and reasonable in light of the usual and customary charges made by other entities, especially non-affiliated entities, for services of the same nature and quality.

7. Each Shareholder Services Plan Agreement entered into pursuant to a Shareholder Services Plan will contain a representation by the Service Agent that any compensation payable to the Service Agent in connection with the investment of its customers' assets in a Portfolio: (a) will be disclosed by it to its customers; (b) will be authorized by its customers; and (c) will not result in an excessive fee to the Service Agent.

8. Each shareholder Services Plan Agreement entered into pursuant to a Shareholder Services Plan will provide that, in the event an issue pertaining to the Shareholder Services Plan is submitted for shareholder approval, the Service Agent will vote any shares held for its own account in the same proportion as the vote of those shares held for its customers' accounts.

9. Each fund's directors will receive quarterly and annual statements concerning 12b–1 Plan and Shareholder Services Plan expenditures complying with rule 12b–1(b)(3)(ii), as it may be amended from time to time. In the statements, only expenditures properly attributable to the sale or servicing of a particular class will be used to justify any fee charged to that class. Expenditures not related to the sale or servicing of a particular class will not be presented to the directors to justify any fee charged to that class. The statements, including the allocations upon which they are based, will be subject to the review and approval of the non-interested directors in the exercise of their fiduciary duties.

10. Dividends paid by a Portfolio with respect to a class of shares will be calculated in the same manner, at the same time, on the same day, and will be paid at the same dividend rate as dividends paid by the Portfolio with respect to each other class of shares of the same Portfolio, except that Class Expenses and payments made pursuant to a 12b–1 Plan or Shareholder Services Plan will be borne exclusively by the affected class.

11. The methodology and procedures for calculating the net asset value and dividend distributions of the various classes and the proper allocation of expenses among the classes have been reviewed by an expert (the "Expert") who has rendered a report to the applicants, which has been provided to the staff of the SEC, that such methodology and procedures are adequate to ensure that such calculations and allocations will be made in an appropriate manner. On an ongoing basis, the Expert, or an appropriate substitute Expert, will monitor the manner in which the calculations and allocations are being made and, based upon such review, will render at least annually a report to each Fund that the calculations and allocations are being made properly. The Expert's reports shall be filed as part of the periodic reports filed with the SEC pursuant to sections 30(a) and 30(b)(1) of the Act. The Expert's work papers with respect to such reports, following request by any Fund (which each such Fund agrees to provide), will be available for inspection by the SEC staff upon the written request to a Fund for such work papers by a senior member of the Division of Investment Management, limited to the Director, an Associate Director, the Chief Accountant, the Chief Financial Analyst, an Assistant Director, and any Regional Administrators or Associate and Assistant Administrators. The initial report of the Expert will be a "Special Purpose" report on the "Design of a System" and ongoing reports will be "Special Purpose" reports on the "Design of a System and Certain Compliance Tests" as defined and described in Statement of Auditing Standards No. 44 of the American Institute of Certified Public Accountants ("AICPA"), as it may be amended from time to time, or in similar auditing standards as may be adopted by the AICPA from time to time.

12. Applicants have adequate facilities in place to ensure implementation of the methodology and procedures for calculating the net asset value and dividend/distributions of the various classes and the proper allocation of expenses among the classes and this representation has been concurred with by the Expert in the initial report referred to in condition 11 above and will be concurred with by the Expert or an appropriate substitute

Expert on an ongoing basis at least annually in the ongoing reports referred to in that condition. Applicants will take immediate corrective action if the Expert, or appropriate substitute Expert, does not so concur in the ongoing reports.

13. Each prospectus will contain a statement to the effect that any person entitled to receive compensation for selling or servicing Portfolio shares may receive different levels of compensation with respect to one particular class of shares over another in the Portfolio.

14. The conditions pursuant to which the exemptive order requested by the application is granted and the duties and responsibilities of the directors with respect to the multi-class Distribution System described in the application will be set forth in guidelines which will be furnished to the directors.

15. Each Portfolio will disclose in each of its prospectuses the respective expenses, performance data, distribution arrangements, services, fees, initial sales loads, CDSCs, conversion features and exchange privileges applicable to each class of shares other than the Benefit Plan Class, regardless of whether all such classes of shares are offered through such prospectus. A Portfolio's Benefit Plan Class will be offered solely pursuant to a separate prospectus and the prospectus for such Portfolio's other classes will disclose the existence of the Fund's Benefit Plan Class and will identify the entities eligible to purchase shares of such class, and the Benefit Plan Class prospectus will disclose the existence of the Portfolio's other classes Each Portfolio will disclose the respective expenses and performance data applicable to all classes of shares in every shareholder report pertaining to such Portfolio. The shareholder reports will contain, in the statement of assets and liabilities and statement of operations, information related to the Portfolio as a whole generally and not on a per class basis. Each Portfolio's per share data, however, will be prepared on a per class basis with respect to all classes of shares of such Portfolio. To the extent any advertisement or sales literature describes the expenses or performance data applicable to any class of shares of a Portfolio, it will also disclose the expenses and/or performance data applicable to all classes of shares of such Portfolio, except the Benefit Plan Class. Advertising materials reflecting the expenses or performance data for a Portfolio's Benefit Plan Class will be available only to those persons eligible to purchase shares of the Benefit Plan Class. The information provided by applicants for publication in any newspaper or similar listing of a Portfolio's net asset value and public offering price will present each class of shares, except the Benefit Plan Class, separately.

16. Deferred Option shares will convert to Front-End Option shares on the basis of the relative net asset values of the two classes without the imposition of any sales load, fee or other charge.

17. With regard to those Portfolios that offer Deferred Option shares that automatically convert to Front-End Option shares, if a Portfolio implements any amendment to its 12b–1 Plan (or, if presented to shareholders, adopts or implements any amendment of a Shareholder Services Plan) that would increase materially the amount that may be borne by the Front-End Option shares under the plan, existing Deferred Option shares will stop converting into Front-End Option shares unless the Deferred Option Shareholders, voting separately as a class, approve the proposal. The Directors shall take such action as is necessary to ensure that existing Deferred Option shares are exchanged or converted into a new class of shares ("New Front-End Option"), identical in all material respects to the Front-End Option class as it existed prior to implementation of the proposal, no later than the date such shares previously were scheduled to convert into Front-End Option shares. If deemed advisable by the Directors to implement the foregoing, such action may include the exchange of all existing Deferred Option shares for a new class of shares ("New Deferred Option"), identical to existing Deferred Option shares in all material respects except that New Deferred Option shares will convert into New Front-End Option shares. A New Front-End Option class or New Deferred Option class may be formed without further exemptive relief. Exchanges or conversions described in this condition shall be effected in a manner that the Directors reasonably believe will not be subject to Federal taxation. In accordance with condition 4, any additional cost associated with the creation, exchange or conversion of New Front-End Option shares or New Deferred Option shares shall be borne solely by the Adviser and the Distributor. Deferred Option shares sold after the implementation of the proposal may convert into Front-End Option shares subject to the higher maximum payment, provided that the material features of the Front-End Option plan and the relationship of such plan to the Deferred Option shares are disclosed in an effective registration statement.

18. Applicants acknowledge that the grant of the exemptive order requested by the application will not imply SEC approval, authorization or acquiescence in any particular level of payments that a Portfolio may make pursuant to 12b–1 Plans or Shareholder Services Plans in reliance on the exemptive order.

19. Applicants will comply with the provisions of proposed rule 6c–10 under the Act, as such rule is currently proposed and as it may be reproposed, adopted or amended.

For the SEC, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 92–31585 Filed 12–28–92; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–19169; File No. 812–8188]

December 21, 1992.

AGENCY: Securities and Exchange Commission ("Commission" or "SEC").

ACTION: Notice of Application for Order under the Investment Company Act of 1940 (the "Act").

Applicants: General American Life Insurance Company ("General American"), General American Separate Accounts Twenty-Eight and Twenty-Nine (the "Separate Accounts"), and G.T. Global Financial Services, Inc. ("GT Global"), (collectively, "Applicants").

Relevant 1940 Act Section: Order requested pursuant to Section 6(c) of the Investment Company Act of 1940 exempting proposed transactions from the provisions of Sections 26(a)(2) and 27(c)(2) of the Act.

Summary of Application: Applicants seek an order permitting the assessment of a charge for mortality and expense risks in connection with the offering of certain flexible premium variable deferred annuity contracts (the "Contracts") through the Separate Accounts.

Filing Date: The application was filed on November 19, 1992.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving the Applicants with copies of the request, personally or by mail. Hearing requests must be received by the SEC by 5:30 p.m. on January 15, 1993, and should be accompanied by proof of service on the Applicant in the form of an affidavit, or, for lawyers, by certificate of service. Hearing requests should state the nature

of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Secretary of the Commission.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 5th Street, N.W., Washington, D.C. 20549. Applicants, Matthew P. McCauley, Esq., Associate General Counsel, General American Life Insurance Company, 700 Market Street, St. Louis, Missouri 63101; Peter R. Guarino, Esq., G.T. Global Financial Services, Inc., 50 California Street, San Francisco, California 94111.

FOR FURTHER INFORMATION CONTACT: Cindy J. Rose, Staff Accountant or Wendell M. Faria, Deputy Chief at (202) 272–2060, Office of Insurance Products, Division of Investment Management.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application is available for a fee from the Commission's Public Reference Branch.

Applicants' Representations

1. General American is a mutual life insurance company chartered in 1933 under the laws of Missouri. It is principally engaged in the sale of life insurance, annuities, and health and accident insurance. General American is licensed to do business in forty-nine states, The District of Columbia, Puerto Rico, and is also registered and licensed to do business in several Canadian provinces.

2. The Separate Accounts were established by General American under the laws of the State of Missouri on May 28, 1992. The Separate Accounts have been registered under the Act as unit investment trusts.

3. Each Separate Account is subdivided into several investment Divisions ("Divisions"). Each of the Divisions will invest solely in the shares of G.T. Global Variable Investment Series ("G.T. Series") or G.T. Global Variable Investment Trust ("G.T. Global Trust"). Separate Account Twenty-Eight currently has three Divisions and Separate Account Twenty-Nine currently has eleven Divisions.

4. G.T. Series and G.T. Trust are both Massachusetts business trusts organized in 1992. Each is registered with the Commission as an open-end management investment company under the Act.

5. G.T. Global will serve as the distributor and principal underwriter of the Contracts. G.T. Global is registered under the Securities Exchange Act of 1934 (the "1934 Act") as a broker-dealer and is a member of the National Association of Securities Dealers, Inc.

6. The Contract is a combination fixed and variable flexible premium annuity contract designed for use as a non-qualified retirement vehicle and as an Individual Retirement Annuity ("IRA") or for use as a retirement vehicle in connection with retirement plans receiving favorable tax treatment under sections 401, 403, 408 or 457 of the Internal Revenue Code of 1986. The Contract may be purchased with a minimum initial purchase payment of $2,000. Subsequent purchase payments must be at least $500 for non-qualified contracts and $100 for qualified contracts.

7. The Contract Owner may allocate purchase payments among one or more Divisions of the Separate Accounts, and/or one or more Fixed Account options (*i.e.*, fixed interest allocations in General American's general account). The Fixed Account options are called "Guaranteed Interest Options" and are available for certain pre-established periods of time (never shorter than one year) over which fixed rates of interest will be credited. Transfers of accumulated values under the Contracts also may be made among the Divisions and Guaranteed Interest Options.

8. The Contract provides for a series of annuity payments beginning on a date selected by the Contract Owner (the "annuity date"). The Contract Owner may select from four annuity payment options which are available on a fixed or variable basis or a combination of both.

9. The Contract Owner may elect to surrender the Contract or withdraw a portion of the accumulated value prior to the annuity date. Partial withdrawals may be from the Divisions or the Guaranteed Interest Options within the Fixed Account. All partial withdrawals and full surrenders may be subject to contingent deferred sales charges and full surrenders also may be subject to the deduction of an administrative charge. In addition, partial withdrawals and full surrenders from Guaranteed Interest Options may also be subject to an interest change adjustment. There is currently no limit on the frequency or timing of surrenders and withdrawals, but a partial withdrawal must be in a minimum amount of at least $500 or, if less, the entire balance in a Division or Guaranteed Interest Option.

10. General American will deduct an annual account administration fee (the "account fee") on accumulated values of $20,000 or less. Revenues from the account fee will partially compensate General American for the cost of providing administrative services relating to the issue and maintenance of the Contract and the Contract Owner's records. In contract years ending prior to December 31, 1999, the account fee is the lesser of $30 or 2% of the Accumulated Value. Thereafter, the account fee may be changed annually but will not exceed an amount that reflects the change in the Consumer Price Index since December 31, 1992 or $50.00. Applicants represent that this charge will be deducted in reliance on Rule 26a–1 under the Act and that the fee applicable during contract years ending prior to December 31, 1999 represents reimbursement only for administrative costs expected to be incurred over these contract years and the fee applicable in any contract year thereafter represents reimbursement only for administrative costs expected to be incurred over that year.

11. General American also will deduct a daily administration fee when calculating the net investment factor for each Division at the end of each valuation period. The fee is deducted both before and after the annuity date. The fee, at an effective annual rate of .15% of the average daily net assets of each Division, is designed to reimburse General American for those administrative expenses attributable to the Contracts, Contract Owner Accounts and Records, and the Separate Accounts which exceed the revenues received from the account fee. The administration fee is guaranteed not to increase for the life of the Contracts. Applicants represent that the fee will be deducted in reliance upon Rule 26a–1 under the Act and that the fee has been set at such a level that it and the account fee will recover no more than the actual costs associated with administering the Contracts over the life of the Contracts.

12. A contingent deferred sales charge ("Surrender Charge") may be assessed by General American if any part of a Contract Owner's accumulated value is withdrawn or if the Contract is surrendered. This Surrender Charge, calculated as a percentage of any net purchase payments, will apply to net purchase payments for six years from the date the net purchase payment is received. Net purchase payments received more than six years prior to the date of withdrawal and accumulated value in excess of accumulated net purchase payments may be withdrawn without incurring a Surrender Charge. The Surrender Charge ranges from 6% to 1% of a net purchase payment. Notwithstanding the Surrender Charge, an amount equal to 10% of a Contract's accumulated value may be withdrawn each year (calculated as of the date of

the first such withdrawal in that year) without incurring the Surrender Charge.

The Surrender Charge schedule is as follows:

Years Since Receipt of Payment	Surrender Charge as Percentage of Each Purchase Payment
0	6
1	5
2	4
3	3
4	2
5	1
6+	0

General American does not currently anticipate that the Surrender Charges will generate sufficient funds to pay the cost of distributing the Contracts. If the revenues from Surrender Charges are insufficient to cover the expenses, the deficiency will be met from General American's general account, which may include amounts derived from the charge for mortality and expense risks. Conversely, in the event that revenues from Surrender Charges exceed such expenses, General American will retain the excess.

13. General American imposes a daily charge during both the accumulation period and the annuity period to compensate it for bearing certain mortality and expense risks in connection with the Contracts. This charge will be at an annual rate of 1.25% of the average daily net assets in the Separate Accounts. Of that amount, approximately 1.00% is attributable to mortality risks, and approximately 0.25% is attributable to expense risks. General American guarantees that this charge will never exceed 1.25%. If the mortality and expense risk charge is insufficient to cover actual costs and assumed risks, the loss will fall on General American. Conversely, if the charge is more than sufficient to cover costs, any excess will be profit to General American.

Applicants' Legal Analysis and Conditions

1. Applicants request that the Commission, pursuant to Section 6(c) of the Act, grant the exemptions set forth below in connection with General American's assessment of the daily charge for mortality and expense risks. Section 26(a)(2)(C) provides that no payment to the depositor of, or principal underwriter for, a registered unit investment trust shall be allowed the trustee or custodian as an expense except compensation, not exceeding such reasonable amount as the Commission may prescribe, for performing bookkeeping and other administrative duties normally performed by the trustee or custodian. Section 27(c)(2) prohibits a registered investment company, or a depositor or underwriter for such company, from selling periodic payment plan certificates unless the proceeds of all payments on such certificates, other than sales loads, are deposited with a trustee or custodian having the qualifications prescribed in Section 26(a)(1), and held by such trustee or custodian under an agreement containing substantially the provisions required by Sections 26(a)(2) and 26(a)(3) of the Act.

2. Applicants submit that General American is entitled to reasonable compensation for its assumption of mortality and expense risks. Applicants represent that the 1.25% mortality and expense risk charge under the Contracts is consistent with the protection of investors because it is a reasonable and proper insurance charge. As described above, in return for this amount General American guarantees certain annuity rates and assumes certain risks under the Contracts. The mortality and expense risk charge is a reasonable charge to compensate General American for the risk that Annuitants under the Contracts will live longer than has been anticipated in setting the annuity rates guaranteed in the Contracts; for the risk that the Accumulated Value under a Contract, less any otherwise applicable charges, will be less than the death benefit; and for the risk that administrative expenses will be greater than amounts derived from the account fee, daily administration fee and other administrative charges. General American represents that the 1.25% charge for mortality and expense risks assumed by General American is within the range of industry practice with respect to comparable annuity products. This representation is based upon General American's analysis of publicly available information about similar industry products, taking into consideration such factors as current charge levels, the existence of charge level guarantees, and guaranteed annuity rates. General American will maintain at its home office, available to the Commission, a memorandum setting forth in detail the products analyzed in the course of, and the methodology and results of, its comparative survey.

3. Applicants acknowledge that the proceeds from the Surrender Charge may be insufficient to cover all costs relating to the distribution of the Contracts. Applicants also acknowledge that if a profit is realized from the mortality and expense risk charge, all or a portion of such profit may be viewed by the Commission as being offset by distribution expenses not reimbursed by revenues from the Surrender Charge. General American has concluded that there is a reasonable likelihood that the proposed distribution financing arrangements will benefit the Separate Accounts and the Contract Owners. The basis for such conclusion is set forth in a memorandum which will be maintained by General American at its home office and will be available to the Commission.

4. General American also represents that the Separate Accounts will only invest in management investment companies which undertake, in the event such company adopts a plan under Rule 12b–1 to finance distribution expenses, to have a board of directors, a majority of whom are not interested persons of the company, formulate and approve any such plan under Rule 12b–1.

Conclusion

Applicants assert that for the reasons and upon the facts set forth above, the requested exemptions from Sections 26(a)(2)(C) and 27(c)(2) are necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 92–31581 Filed 12–28–92; 8:45 am]

BILLING CODE 8010–01–M

Issuer Delisting; Application to Withdraw From Listing and Registration; (Nu Horizons Electronics Corp., Common Stock, $.01 Par Value) File No. 1–8798

December 22, 1992.

Nu Horizons Electronics Corp. ("Company") has filed an application with the Securities and Exchange Commission ("Commission"), pursuant to section 12(d) of the Securities Exchange Act of 1934 ("Act") and Rule 12d2–2(d) promulgated thereunder, to withdraw the above specified security from listing and registration on the American Stock Exchange, Inc. ("Amex").

The reasons alleged in the application for withdrawing this security from listing and registration include the following:

According to the Company, its Board of Directors (the "Board") unanimously approved resolutions on December 1, 1992, to withdraw the Company's

Common Stock from listing on the American Stock Exchange ("Amex") and, instead, list such Common Stock on the National Association of Securities Dealers Automated Quotations/National Market Systems ("NASDAQ/NMS"). According to the Company, the decision of the Board followed a lengthy study of the matter, and was based upon the belief that listing of the Common Stock on NASDAQ/NMS will be more beneficial to its stockholders than the present listing on the Amex because:

(1) The Company believes that the NASDAQ/NMS system of competing market-makers will result in increased visibility and sponsorship for the Common Stock than is presently the case with the single specialist assigned to the stock on the Amex;

(2) The Company believes that the NASDAQ/NMS system will offer the Company's stockholders more liquidity than that presently available on the Amex and less volatility in quoted prices per share when trading volume is slight. On NASDAQ/NMS the Company will have an opportunity to secure its own group of market-makers and, in doing so, expand the capital base available for trading in its Common Stock; and

(3) The Company believes that firms making a market in the Company's Common Stock will be inclined to issue research reports concerning the Company, thereby increasing the number of firms providing institutional research and advisory reports.

Any interested person may, on or before January 14, 1993 submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, facts bearing upon whether the application has been made in accordance with the rules of the exchanges and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 92-31483 Filed 12-28-92; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 35-25711]

Filings Under the Public Utility Holding Company Act of 1935 ("Act")

December 18, 1992.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated thereunder. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendments thereto is/are available for public inspection through the Commission's Office of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by January 11, 1993 to the Secretary, Securities and Exchange Commission, Washington, DC 20549, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After said date, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

West Penn Power Company (70-6505)

West Penn Power Company ("West Penn"), 800 Cabin Hill Drive, Greensburg, Pennsylvania 15601, an electric public-utility subsidiary company of Allegheny Power System, Inc., a registered holding company has filed a post-effective amendment to its declaration under Sections 6(a) and 7 of the Act and Rule 50(a)(5) thereunder.

By orders dated February 9, 1983 (HCAR No. 22849) and March 28, 1983 (HCAR No. 22894), West Penn was authorized, among other things, to issue long-term promissory notes in connection with the issuance of pollution control revenue bonds series B and series C ("Series B Bonds" and "Series C Bonds") by the Washington County Development Authority ("County") in the aggregate principal amount of $30 million and $31.5 million, respectively.

Due to changes in interest rates, the County proposes to refund the Series B Bonds and the Series C Bonds by issuing a new series of pollution control revenue bonds ("Series F Bonds") at a lower interest rate. The County proposes to issue $61.5 million aggregate principal amount of Series F Bonds maturing on the corresponding day in the year 2003 that they are issued in 1993. The proceeds from the sale of the Series F Bonds will be used to refund Series B Bonds and Series C Bonds. The Series F Bonds will be issued under a supplemental trust indenture with a corporate trustee ("Trustee"), approved by West Penn, and will be sold at such time, interest rate and price as approved by West Penn pursuant to market conditions.

West Penn proposes to issue concurrently with the issuance of the Series F Bonds, its non-negotiable Pollution Control Note ("Note"), at any time on or before December 31, 1994, under an exception from the competitive bidding requirements of Rule 50 under subsection (a)(5), with terms and conditions corresponding to the Series F Bonds in respect to principal amount, interest rates and redemption provisions and having installments of principal corresponding to any mandatory sinking fund payments and stated maturities. Market conditions prevailing at the time of the offering may warrant the issuance of the Series F Bonds with floating interest rates during all or a portion of the stated life of the Series F Bonds based on a specified index as well as provisions permitting the bondholders to require the redemption or repurchase of the Series F Bonds at stated intervals. West Penn will file an appropriate amendment if it is determined to include such terms in the Note and Series F Bonds.

The Note will be secured by a second lien on the equipment and facilities at West Penn's Mitchell Power Station in Washington County ("Facilities") and certain other properties, pursuant to the Mortgage and Security Agreement delivered by West Penn to the Trustee creating a mortgage security interest in the Facilities and certain other property Payment on the Note will be made to the Trustee under an indenture and applied by the Trustee to pay the maturing principal and redemption price of and interest and other costs on the Series F Bonds as they become due. West Penn proposes to pay any Trustees' fees or other expenses incurred by the County.

West Penn will not enter into the proposed refunding transaction unless the estimated present value savings derived from the net difference between interest payments on the new issue of comparable securities and on the

securities to be refunded is, on an after tax basis, greater than the present value of all redemption and issuing costs, assuming an appropriate discount rate. The discount rater used shall be the estimated after tax interest rate on the Series F Bonds to be issued.

Central and South West Corporation (70–8087)

Central and South West Corporations ("CSW"), 1616 Woodall Rodgers Freeway, Dallas, Texas 75266–0164, a registered holding company, has filed an application-declaration under Sections 6(a), 7, 9(a), 10 and 12(c) of the Act and Rules 42 and 50(a)(5) thereunder.

CSW currently has in a place a Dividend Reinvestment and Stock Purchase Plan ("Old Plan") pursuant to which shares of CSW's common stock, $3.50 par value per share ("Common Stock"), are purchased in the open market with reinvested dividends and optional cash payments made by holders of Common Stock who are participants in the Old Plan.

CSW now proposes to terminate the Old Plan and create a new Dividend Reinvestment and Stock Purchase Plan ("New Plan"). Shareholders who are currently enrolled in the Old Plan will be automatically enrolled in the New Plan. Pursuant to the New Plan, CSW proposes to issue and sell from time to time, through December 31, 1996, up to 5 million shares of Common Stock ("Additional Common Stock") to and on behalf of participants in the New Plan ("Participants").

The New Plan will be open to registered shareholders of CSW, employees and retirees of CSW and its subsidiary companies, and non-shareholders of legal age who are residents of the States of Arkansas, Louisiana, Oklahoma and Texas ("Four-state Area"), the states in which the service territories of CSW's public-utility subsidiary companies are located. Eligible residents of the Four-state Area include but are not limited to retail electric customers of CSW's public-utility subsidiary companies.

The New Plan will include full, partial or no reinvestment of dividends and the ability to make optional cash purchases of at least $25 per investment and not more than $150,000 annually. There is an initial purchase requirement of $100 in order to enroll in the New Plan. Employees and retirees will be able to participate in the New Plan through payroll/pension deductions with a $10 minimum per pay period.

Pursuant to the New Plan, the shares of Additional Common Stock purchased with the initial cash investments, optional cash purchase payments and reinvested dividends, if any, may be, in the discretion of CSW, authorized but previously unissued Common Stock or shares of Common Stock purchased on the open market by the independent agent of the New Plan ("Independent Agent"). To the extent that shares are purchased in the open market by the Independent Agent, CSW will not receive any proceeds. CSW proposes to use the proceeds from the sale of the newly issued shares of Additional Common Stock, if any, for repayment of long term or short-term indebtedness, for working capital or for other general corporate purposes. Purchases will be made twice a month on the first business day and the 16th of each month. The exact timing and manner of purchases and sales on the open market will be determined solely by the Independent Agent. The price of newly issued Additional Common Stock will be the average of the daily high and low prices of the Common Stock on the New York Stock Exchange on the applicable investment date. The price of the shares of Additional Common Stock purchased on the open market by the Independent Agent with respect to any investment period will be the average price of all such shares of Common Stock purchased during such investment period.

By order dated December 23, 1991 (HCAR No. 25440), the Commission authorized CSW, among other things, to repurchase from time to time in open market and/or negotiated transactions through December 31, 1993 up to 8,713,651 shares of Common Stock. CSW requests authority, in the event it should implement such a repurchase program, to purchase shares submitted by Participants through the New Plan. In such event, CSW would not offer to purchase or solicit offers to sell shares of Common Stock, but would simply purchase and retire shares submitted for sale in the ordinary course by Participants. The sale price for such shares would be the average of the daily high and low sale prices of the Common Stock on the New York Stock Exchange on the applicable investment date.

A Participant may sell or withdraw all or a portion of his/her shares at any time. Sales will be made weekly by the Independent Agent and the price will be the weighted average cost of shares sold.

CSW's Shareholder Services Department will share the administration of the New Plan with the Independent Agent. The Independent Agent will make open market purchases and sales under the New Plan and CSW will handle the other elements of the New Plan administration. Participants will receive quarterly statements of activity in their account.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 92–31586 Filed 12–28–92; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–19170; 812–8074]

Schwartz Investment Trust, et al.; Notice of Application

December 21, 1992.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the "Act").

APPLICANTS: Schwartz Investment Trust (the "Trust"); RCM Partners Limited Partnership (the "Partnership"); Schwartz Investment Counsel, Inc. (the "Adviser"); and Schwartz Management Company (the "General Partner").

RELEVANT ACT SECTIONS: Order requested under section 17(b) granting an exemption from section 17(a).

SUMMARY OF APPLICATION: Applicants seek an order to permit an exchange of shares of The RCM Fund, a series of the Trust, for portfolio securities of the Partnership.

FILING DATE: The application was filed on September 1, 1992, and was amended on November 30, 1992.

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 applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 15, 1993, 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, 3707 West Maple Road, Bloomfield Hills, Michigan 48301.

FOR FURTHER INFORMATION CONTACT: John V. O'Hanlon, Staff Attorney, at (202) 272–3922, or Elizabeth G. Osterman, Branch Chief, at (202) 272–3016 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. The Trust is an Ohio business trust registered under the Act as an open-end diversified management investment company. A Notification of Registration under the Act on Form N–8A and a Registration Statement under the Act and the Securities Act of 1933 (the "1933 Act") on Form N–1A were filed on behalf of the Trust on August 31, 1992. The Form N–1A Registration Statement is not yet effective, and no offering of shares has commenced. The Trust initially will offer one series of shares, the RCM Fund.

2. The Partnership is a limited partnership organized under the law of Michigan. The Partnership is not registered under the Act in reliance on section 3(c)(1) of the Act. The General Partner is the sole general partner of the Partnership. The General Partner has maintained an investment in the Partnership equal to not less than 1% of the net assets of the Partnership and is allocated net income, gains, and losses of the Partnership in proportion to its investment.

3. The Adviser acts as investment adviser to the Partnership, and will serve as investment adviser of the RCM Fund. The investment objective of both the Partnership and The RCM Fund is long-term capital appreciation.

4. Applicants propose that The RCM Fund would exchange shares of beneficial interest in The RCM Fund (the "Shares") for portfolio securities of the Partnership prior to the offering of Shares to the public. The Shares would be issued at an offering price equal to net asset value. Thereafter, the Partnership would dissolve and distribute Shares received by it *pro rata* to its partners (including the General Partner), along with cash received from the sale of portfolio securities, if any, of the Partnership not acquired by The RCM Fund. Following the exchange transaction (the "Exchange"), the Partnership's partners, including the General Partner, will constitute all of the holders of Shares, except for Shares representing seed capital contributed to The RCM Fund by the Adviser or one of its affiliates pursuant to section 14(a) of the Act.

5. The Exchange will be effected pursuant to an agreement and plan of reorganization (the "Plan") to be approved by the limited partners of the Partnership (the "Limited Partners"), in accordance with Michigan law and the terms of the limited partnership agreement. Solicitation of Limited Partner approval of the Plan will be made by means of a prospectus/information statement that forms part of the Trust's Registration Statement under the 1933 Act on Form N–14, and which will describe the nature of and reasons for the Exchange, the tax and other consequences to the partners of the Partnership, and other relevant matters, including comparisons of The RCM Fund and the Partnership in terms of their investment objectives and policies, fee structures, management structures, and other aspects of their operations.

6. The Exchange will not be effected unless and until each of the following has occurred: (a) the Trust's Registration Statement on Form N–1A and its Registration Statement on Form N–14 have been declared effective: (b) the Plan has been approved by the Limited Partners; (c) the Commission has issued an order relating to the application; (d) the Trust has received an opinion of counsel that the Exchange will have certain specified tax consequences to the Limited Partners; and (e) the Trust's Board of Trustees (the "Board") has approved the Exchange.

7. If the conditions set forth above are satisfied, the Exchange would be effected in accordance with the following terms: (a) securities of the Partnership would be acquired and valued by The RCM Fund at the time of acquisition in accordance with the pricing mechanism adopted by the Board and set forth in the Registration Statement on Form N–1A, which is equivalent to the independent "current market price" of the securities as defined in rule 17a–7 under the Act; (b) The RCM Fund would not acquire portfolio securities from the Partnership if, in the opinion of the Adviser, the acquisition of the securities would result in a violation of The RCM Fund's investment objective, policies or restrictions; and (c) the General Partner would assume all costs of the Exchange, including the cost of transferring the Partnership's portfolio securities to the account of The RCM Fund and the cost of issuing Shares in the Exchange, as well as the legal fees and expenses relating to the application and to requests for rulings on certain tax matters from the Internal Revenue Service. In addition, The RCM Fund will have the authority to pay proceeds of a redemption of the Shares of a former partner of the Partnership in-kind, rather than in cash, in order to avoid the incurrence of excessive brokerage costs by The RCM Fund after the Exchange. The General Partner does not expect to pay proceeds of a redemption of Shares in-kind to any former partners who are affiliated persons of the Trust, the Adviser, or the General Partner.

8. The Exchange has been proposed primarily for two reasons. First, the Exchange will permit Limited Partners to pursue as shareholders of The RCM Fund substantially the same investment objective and policies in a larger fund, without being subject to the limitation on the number of shareholders applicable to the Partnership. Second, operation as a registered investment company would eliminate certain administrative burdens and filing requirements currently faced by the Partnership.

9. The General Partner has considered the desirability of the Exchange from the point of view of the Partnership, and has concluded that (a) the Exchange is in the best interest of the Partnership and the Limited Partners; and (b) the Exchange will not dilute the financial interests of the partners when their Partnership interests are converted to shares of The RCM Fund.

10. The Board will consider the desirability of the Exchange from the point of view of both The RCM Fund and the Partnership prior to the solicitation of the approval of the Plan by the Limited Partners. The Plan will not be submitted to the Limited Partners unless a majority of the Board, including a majority of the non-interested members, conclude that (a) the Exchange is in the best interests of The RCM Fund, the Partnership, and the Limited Partners; (b) The Exchange will not dilute the financial interests of The RCM Fund's sole shareholder or of the partners of the Partnership when their interests are converted to shares of The RCM Fund; and (c) the terms of the Exchange, as reflected in the Plan, have been designed to meet the criteria contained in section 17(b), *i.e.*, that the Exchange be reasonable and fair, not involve overreaching, and be consistent with the policies of The RCM Fund.

Applicants' Legal Analysis

1. Applicants seek an exemption from the provisions of section 17(a) to the extent necessary to permit the Exchange. Section 17(a), in pertinent part, prohibits an affiliated person of a registered investment company, or any affiliated person of such a person, acting as principal, from selling to or purchasing from such registered company any security or other property. Applicants state that under section 2(a)(3) of the Act, the Partnership, the Adviser, the General Partner, and certain Limited Partners any be affiliated persons of the Trust, or

affiliated persons of an affiliated person of the Trust. Thus, unless the requested relief is granted, the proposed Exchange may be deemed to be prohibited under section 17(a) if the Exchange is viewed either as principal transactions (a) between the Trust and the partners of the Partnership, or (b) between the Trust and the Partnership.

2. Section 17(b) provides that the Commission may exempt any person from the provisions of section 17(a) if evidence establishes that (a) the terms of the proposed transaction, including the consideration to be paid, are reasonable and fair and do not involve overreaching on the part of any person concerned, and (b) the proposed transaction is consistent with the policy of the registered investment company concerned and with the general purposes of the Act.

3. Applicants submit that, because the investment objective and policies of The RCM Fund and the Partnership are substantially similar, it is consistent with the policies of The RCM Fund to acquire securities that the Adviser has previously purchased on the basis of substantially similar objectives and policies. Further, the Exchange would provide The RCM Fund with the opportunity to purchase the portfolio securities of the Partnership at the current market price and with lower transaction costs than would have been possible purchasing such securities in the open market.

4. Applicants assert that the proposed Exchange does not give rise to the abuses that section 17(a) was designed to prevent. Applicants state that a primary purpose underlying section 17(a) was to prevent a person with a pecuniary interest as a seller of securities from using his position with a registered investment company to benefit himself to the detriment of the company's shareholders. Applicants state that The RCM Fund will not have commenced operations prior to the Exchange and will have no assets to dissipate or shareholders to dilute. After the Exchange, Limited Partners will hold substantially the same assets as shareholders of The RCM Fund as they had previously held as Limited Partners. In this sense, applicants assert that the Exchange can be viewed as a change in the form in which assets are held, rather than as a disposition giving rise to section 17(a) concerns.

5. Finally, applicants assert that the terms of the Exchange are reasonable and fair to The RCM Fund, the Limited Partners, and future shareholders of The RCM Fund, and do not involve overreaching on the part of any applicant.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 92-31580 Filed 12-28-92; 8:45 am]

BILLING CODE 8010-01-M

[Investment Company Act Release No. 19166; 812-8120]

WNC California Housing Tax Credits III, L.P., et al.

December 18, 1992

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the "Act").

APPLICANT: WNC California Housing Tax Credits III, L.P., a California limited partnership (the "Partnership") and its general partner, WNC California Tax Credit Partners III, L.P., a California limited partnership (the "General Partner").

RELEVANT ACT SECTIONS: Exemption requested under section 6(c) of the Act from all provisions of the Act.

SUMMARY OF APPLICATION: Applicants seek an order exempting the Partnership from all provisions of the Act and the rules thereunder to permit the Partnership to invest in other limited partnerships that in turn will engage in the ownership and operation of housing for low and moderate income persons.

FILING DATE: The application was filed on October 15, 1992.

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 applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 12, 1993, and should be accompanied by proof of service on 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 5th Street, NW., Washington, D.C. 20549. Applicants, c/o WNC California Tax Credit Partners III, L.P., 3158 Redhill Avenue, suite 120, Costa Mesa, California 92626-3416.

FOR FURTHER INFORMATION CONTACT: James J. Dwyer, Staff Attorney, at (202) 504-2920, or Nancy M. Rappa, Branch Chief, at (202) 272-3030 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicants' Representations:

1. The Partnership was formed under the California Revised Limited Partnership Act on October 5, 1992. The Partnership will operate as a "two-tier" entity, *i.e.*, the Partnership, as a limited partner, will invest in other limited partnerships ("Local Limited Partnerships") that in turn will engage in the development, rehabilitation, ownership, and operation of apartment complexes in accordance with the purposes and criteria set forth in Investment Company Act Release No. 8456 (August 9, 1974) ("Release No. 8456"). The ownership of such apartment complexes is expected to generate certain credits allowable under the Internal Revenue Code of 1986 for investments in low-income housing projects. Ownership of certain of the apartment complexes also will be expected to qualify for the low-income housing tax credit allowable under the California Revenue and Taxation Code.

2. The Partnership's investment objectives are (a) to provide current tax benefits in the form of tax credits which qualified investors, as defined in the Partnership's prospectus (the "Prospectus"), may use to offset their Federal and California income tax liabilities, (b) to preserve and protect the Partnership's capital, and (c) to provide cash distributions from sale or refinancing transactions.

3. On October 14, 1992, the Partnership filed a registration statement under the Securities Act of 1933, pursuant to which the Partnership intends to offer publicly 30,000 Units of limited partnership interest ("Units") at $1,000 per Unit, with a minimum investment of $5,000 per investor. Purchasers of units will become limited partners ("Limited Partners") of the Partnership.

4. The Partnership will not accept any subscriptions for Units until the exemptive order requested is granted or the Partnership receives an opinion of counsel that it is exempt from registration under the Act. Any subscriptions for Units must be approved by the General Partner, which approval shall be conditioned upon representations as to suitability of the investment for each subscriber. Such investor suitability standards provide,

among other things, that investment in that Partnership is suitable only for an investor who either (a) has a net worth (exclusive of home, furnishings and automobiles) of at least $65,000 and an annual gross income of at least $50,000 or (b) irrespective of annual income, has a net worth (exclusive of home, furnishings and automobiles) of at least $200,000 or is purchasing in a fiduciary capacity for a person or entity having such net worth and annual gross income as set forth in clause (a) or such net worth as set forth in clause (b). Units will be sold only to investors who meet such suitability standards. Transfers of Units will be permitted only if the transferee meets the same suitability standards as had been imposed upon the transferor Limited Partner.

5. Although the Partnership's direct control over the management of each apartment complex will be limited, the Partnership's ownership of interests in Local Limited Partnerships shall, in an economic sense, the tantamount to direct ownership of the apartment complexes themselves. The Partnership will normally acquire at least a 90% interest in the profits, losses and tax credits of the Local Limited Partnerships. However, in certain cases, at the discretion of the General Partner, the Partnership may acquire a lesser interest. In such cases, the Partnership will normally acquire at least a 50% interest in the profits, losses, and tax credits of the Local Limited Partnership. The local general partners or their affiliates generally will receive as management fees and/or participations a portion of the cash flow from operations of an apartment complex and reimbursements payable from cash flow. The Local Limited Partnership agreement normally will provide that distributions of proceeds from a sale or refinancing of the apartment complex will be paid entirely to the Partnership until it has received a full return of that portion of the net proceeds invested in the Local Limited Partnership (which may be reduced by any cash flow distributions previously received) as well as providing the Partnership with a share of any remaining sale or refinancing proceeds, which share may range from 10% to 90%.

6. Each Local Limited Partnership agreement will provide the Partnership with certain voting rights, including the right to replace the local general partner on the basis of performance and discharge the local general partner's obligations, to approve or disapprove a sale or refinancing of the apartment complex owned by such Local Limited Partnership, to approve or disapprove the dissolution of the Local Limited Partnership, and to approve or disapprove amendments to the Local Limited Partnership agreement materially and adversely affecting the Partnership's investment.

7. The Partnership will be controlled by the General Partner, pursuant to the Partnership's partnership agreement (the "Partnership Agreement"). The Limited Partners, consistent with their limited liability status, will not be entitled to participate in the control of the business of the Partnership. However, a majority-in-interest of the Limited Partners will have the right to amend the Partnership Agreement (subject to certain limitations), to remove any General Partner and elect a replacement therefor, and to dissolve the Partnership. In addition, under the Partnership Agreement, each Limited Partner is entitled to review all books and records of the Partnership at any and all reasonable times.

8. The Partnership Agreement and Prospectus contain numerous provisions designed to ensure fair dealing by the General Partner with the Limited Partners. All compensation to be paid to the General Partner and its affiliates is specified in the Partnership Agreement and Prospectus and no compensation will be payable to the General Partner or any of its affiliates unless so specified. The fees and other forms of compensation that will be paid to the General Partner and its affiliates will not have been negotiated at arm's length; however, all such compensation is believed to be fair and on terms no less favorable to the Partnership than would be the case if such arrangements had been made with independent third parties. Further, the Partnership believes that such compensation meets all applicable guidelines necessary to permit the Units to be offered and sold in the State of California and in states that adhere to the guidelines comprising the statement of policy adopted by the North American Securities Administrators Association, Inc. applicable to real estate programs in the form of limited partnerships.

9. During the offering and organizational phase, the General Partner and its affiliates will receive a nonaccountable expense reimbursement equal to 2% of capital contributions and also will be reimbursed by the Partnership for the actual amount of expenses incurred in connection with organizing the Partnership and conducting the offering. However, the General Partner has agreed to pay any organizational and offering expenses of the Partnership (including selling commissions and the nonaccountable expense reimbursement) in excess of 15% of capital contributions.

10. During the acquisition phase, the Partnership shall pay the General Partner or its affiliates a selection fee for analyzing and evaluating potential investments in Local Limited Partnerships, negotiating terms of the Partnership's investment in Local Limited Partnerships and related matters, such fee not to exceed 9% of capital contributions. The General Partner and its affiliates will be reimbursed by the Partnership for the actual amount of any partnership acquisition expenses advanced by them, provided that acquisition expenses shall not exceed 2% of the first $3 million of capital contributions and 1.5% of any additional capital contributions. During the operating phase, the General Partner will receive 1% of any cash available for distribution and the Partnership will or may pay certain fees and reimbursements to the General Partner or its affiliates. In addition to the foregoing fees and interests, the General Partner and its affiliates will be allocated generally 1% of profits and losses of the Partnership for tax purposes and tax credits.

11. All proceeds of the public offering of Units initially will be placed in an escrow account with National Bank of Southern California, Newport Beach, California ("Escrow Agent"). Pending release of offering proceeds to the Partnership, the Escrow Agent will deposit escrowed funds in accordance with instructions from the General Partner in short-term United States Government securities, securities issued or guaranteed by the United States Government, and certificates of deposit or time or demand deposits in commercial banks. Unless at least $1.2 million of capital contributions are received within one year from the registration date, no Units will be sold and funds paid by subscribers will be returned promptly, together with a *pro rata* share of any interest earned thereon. Upon receipt of a prescribed minimum amount of capital contributions, funds in escrow will be released to the Partnership and held by it pending investment in Local Limited Partnerships.

Applicants' Legal Analysis

1. Applicants seek an exemption under section 6(c) exempting the Partnership from all provisions of the Act. Section 6(c) provides that the SEC may exempt any person, security, or transaction from any provision of the Act and any rule thereunder, if, and to the extent that, such exemption is necessary or appropriate in the public

interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

2. Applicants assert, among other things, that the exemption requested is both necessary and appropriate in the public interest because investment in low and moderate income housing in accordance with the national policy expressed in Title IX of the Housing and Urban Development Act of 1968 is not economically suitable for private investors without the tax and organizational advantages of the limited partnership form.

3. The Partnership will operate in accordance with the purposes and criteria set forth in Release No. 8456. The release lists two conditions, designed for the protection of investors, which must be satisfied in order to qualify for such an exemption: (a) "interests in the issuer should be sold only to persons for whom investments in limited profit, essentially tax-shelter, investments would not be unsuitable . . ."; and (b) "requirements for fair dealing by the general partner of the issuer with the limited partners of the issuer should be included in the basic organizational documents of the company."

4. Applicants assert that the suitability standards set forth in the application, the requirements for fair dealing provided by the Partnership Agreement, and pertinent governmental regulations imposed on each Local Limited Partnership by various Federal, state, and local agencies provide protection to investors in Units comparable to that provided by the Act.

For the SEC, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 92–31587 Filed 12–28–92; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA Technical Management Committee; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act Public Law 92–463, 5 U.S.C., appendix I) notice is hereby given for the RTCA Technical Management Committee meeting to be held January 14, 1993, at the RTCA conference room, 1140 Connecticut Avenue, NW., suite 1020, Washington, DC 20036 commencing at 9 a.m.

The agenda for this meeting is as follows: (1) Approve summary of December 16 meeting; (2) Consider/approve Change 1 to DO 181A; (3) Consider/approve radome MOPS; (4) Review Special Committee status; (5) Consider/approve Special Committee action on runway stop bar sensors and standards for software used control airport lighting and signage; (6) Status report on revising Special Committee policies and procedures; (7) Other business.

Attendance is open to the interested public but limited to space available. With the approval of the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present oral statements or obtain information should contact the RTCA Secretariat, 1140 Connecticut Avenue, NW., suite 1020, Washington, DC 20036; (202) 833–9339. Any member of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 21, 1992.

Joyce J. Gillen,

Designated Officer.

[FR Doc. 92–31422 Filed 12–28–92; 8:45 am]

BILLING CODE 4910–13–M

Revised Noise Exposure Map Notice; Receipt of Noise Compatibility Program and Request for Review, Chicago Midway Airport, Chicago, IL

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the revised noise exposure map submitted by the City of Chicago for Chicago Midway Airport under the provisions of title I of the Aviation Safety and Noise Abatement Act of 1979 (Pub. L. 96–193) and 14 CFR part 150 is in compliance with applicable requirements. The FAA also announces that it is reviewing a proposed noise compatibility program that was submitted for Chicago Midway Airport under part 150 in conjunction with the noise exposure maps, and that this program will be approved or disapproved on or before June 14, 1993.

EFFECTIVE DATE: The effective date of the FAA's determination on the noise exposure map and of the start of its review of the associated noise compatibility program is December 16, 1992. The public comment period ends February 15, 1993.

FOR FURTHER INFORMATION CONTACT: Jerry Mork, Federal Aviation Administration, Chicago Airports District Office, CHI–ADO, 2300 East Devon Avenue, room 268, Des Plaines, Illinois 60018, (312) 694–7522.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the revised noise exposure map submitted for Chicago Midway Airport is in compliance with applicable requirements of part 150, effective December 16, 1992. Further, FAA is reviewing a proposed noise compatibility program for that airport which will be approved or disapproved on or before June 14, 1993. This notice also announces the availability of this program for public review and comment.

Under section 103 of title I of the Aviation Safety and Noise Abatement Act of 1979 (hereinafter referred to as "the Act"), an airport operator may submit to the FAA noise exposure maps which meet applicable regulations and which depict noncompatible land uses as of the date of submission of such maps, a description of projected aircraft operations, and the ways in which such operations will affect such maps. The Act requires such maps to be developed in consultation with interested and affected parties in the local community, government agencies, and persons using the airport.

An airport operator who has submitted noise exposure maps that are found by FAA to be in compliance with the requirements of Federal Aviation Regulations (FAR) part 150, promulgated pursuant to title I of the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken or proposes for the reduction of existing noncompatible uses and for the prevention of the introduction of additional noncompatible uses.

The City of Chicago submitted to the FAA on November 5, 1992, noise exposure maps, descriptions and other documentation which were produced during the Airport Noise Compatibility Planning (Part 150) Study at Chicago Midway Airport from September 1988 to November 1992. It was requested that the FAA review this material as the noise exposure maps, as described in section 103(a)(1) of the Act, and that the noise mitigation measures, to be implemented jointly by the airport and surrounding communities, be approved as a noise compatibility program under section 104(b) of the Act.

The FAA has completed its review of the revised noise exposure map and related descriptions submitted by the City of Chicago. The specific map under consideration is Exhibit 3, Future (1995)

Noise Compatibility Plan Noise Exposure Map. It is found on page xix of the Part 150 Study submission, along with supporting documentation. It replaces the Forecast (1995) Noise Exposure Map, page 6 in the 1990 Part 150 submission, accepted by FAA on March 22, 1991. The FAA has determined that the revised map for Chicago Midway Airport is in compliance with applicable requirements. This determination is effective on December 16, 1992. FAA's determination on an airport operator's noise exposure maps is limited to a finding that the maps were developed in accordance with the procedures contained in appendix A of FAR part 150. Such determination does not constitute approval of the applicant's data, information or plans, or a commitment to approve a noise compatibility program or to fund the implementation of that program.

If questions arise concerning the precise relationship of specific properties to noise exposure contours depicted on a noise exposure map submitted under section 103 of the Act, it should be noted that the FAA is not involved in any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the noise exposure maps to resolve questions concerning, for example, which properties should be covered by the provisions of section 107 of the Act. These functions are inseparable from the ultimate land use control and planning responsibilities of local government. These local responsibilities are not changed in any way under part 150 or through FAA's review of noise exposure maps. Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the map depicting properties on the surface rests exclusively with the airport operator which submitted those maps, or with those public agencies and planning agencies with which consultation is required under section 103 of the Act. The FAA has relied on the certification by the airport operator, under section 150.21 of FAR part 150, that the statutorily required consultation has been accomplished. The FAA has formally received the noise compatibility program for Chicago Midway Airport, also effective on December 16, 1992. Preliminary review of the submitted material indicates that it conforms to the requirements for the submittal of noise compatibility programs, but that further review will be necessary prior to approval or disapproval of the program. The formal review period, limited by law to a maximum of 180 days, will be completed on or before June 14, 1993.

The FAA's detailed evaluation will be conducted under the provisions of 14 CFR part 150, § 150.33. The primary considerations in the evaluation process are whether the proposed measures may reduce the level of aviation safety, create an undue burden on interstate or foreign commerce, or be reasonably consistent with obtaining the goal of reducing existing noncompatible land uses and preventing the introduction of additional noncompatible land uses.

Interested persons are invited to comment on the proposed program with specific reference to these factors. All comments, other than those properly addressed to local land use authorities, will be considered by the FAA to the extent practicable. Copies of the noise exposure maps, the FAA's evaluation of the maps, and the proposed noise compatibility program are available for examination at the following locations:

Federal Aviation Administration, 800 Independence Avenue, SW., room 617, Washington, DC 20591

Federal Aviation Administration, Great Lakes Region, 2300 East Devon Avenue, room 261, Des Plaines, Illinois 60018

Federal Aviation Administration, Chicago Airports District Office, 2300 East Devon Avenue, room 268, Des Plaines, Illinois 60018

Illinois Department of Transportation, Division of Aeronautics, Capital Airport, Springfield, Illinois 62706

Department of Aviation, City of Chicago, 20 North Clark Street, suite 3000, Chicago, Illinois 60602

Department of Aviation, City of Chicago, Midway Airport, 5700 South Cicero Avenue, Chicago, Illinois 60638

Questions may be directed to the individual named above under the heading, **FOR FURTHER INFORMATION CONTACT.**

Issued in Des Plaines, Illinois, on December 16, 1993.

Louis H. Yates,

Manager, Chicago Airports District Office, Great Lakes Region.

[FR Doc. 92-31424 Filed 12-28-92; 8:45 am]

BILLING CODE 4910-13-M

Revised Noise Exposure Map Notice; Receipt of Noise Compatibility Program and Request for Review, Detroit Metropolitan Wayne County Airport, Detroit, MI

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the revised noise exposure maps submitted by Wayne County for Detroit Metropolitan Wayne County Airport under the provisions of title I of the Aviation Safety and Noise Abatement Act of 1979 (Public Law 96-193) and 14 CFR part 150 are in compliance with applicable requirements. The FAA also announces that it is reviewing a proposed noise compatibility program that was submitted for Detroit Metropolitan Wayne County Airport under part 150 in conjunction with the noise exposure maps, and that this program will be approved or disapproved on or before June 14, 1993.

EFFECTIVE DATE: The effective date of the FAA's determination on the noise exposure maps and of the start of its review of the associated noise compatibility program is December 16, 1992. The public comment period ends February 15, 1993.

FOR FURTHER INFORMATION CONTACT: Ernest Gubry, Federal Aviation Administration, Detroit Airports District Office. DET-ADO, Willow Run Airport, East, 8820 Beck Road, Belleville, Michigan 48111, (313) 487-7280.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the revised noise exposure maps submitted for Detroit Metropolitan Wayne County Airport are in compliance with applicable requirements of part 150, effective December 16, 1992. Further, the FAA is reviewing a proposed noise compatibility program for that airport which will be approved or disapproved on or before June 14, 1993. This notice also announces the availability of this program for public review and comment.

Under section 103 of title I of the Aviation Safety and Noise Abatement Act of 1979 (hereinafter referred to as "the Act"), an airport operator may submit to the FAA noise exposure maps which meet applicable regulations and which depict noncompatible land uses as of the date of submission of such maps, a description of projected aircraft operations, and the ways in which such operations will affect such maps. The Act requires such maps to be developed in consultation with interested and affected parties in the local community, government agencies, and persons using the airport.

An airport operator who has submitted noise exposure maps that are found by the FAA to be in compliance with the requirements of Federal Aviation Regulations (FAR) part 150,

promulgated pursuant to title I of the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken or proposes for the reduction of existing noncompatible uses and for the prevention of the introduction of additional noncompatible uses.

Wayne County submitted to the FAA on December 14, 1992, noise exposure maps, descriptions, and other documentation which were produced during the Airport Noise Compatibility Planning (Part 150) Study at Detroit Metropolitan Wayne County Airport from February 1987 to December 1992. It was requested that the FAA review this material as the noise exposure maps, as described in section 103(a)(1) of the Act, and that the noise mitigation measures, to be implemented jointly by the airport and surrounding communities, be approved as a noise compatibility program under section 104(b) of the Act.

The FAA has completed its review of the noise exposure maps and related descriptions submitted by Wayne County. The specific maps under consideration are Noise Exposure Maps: Exhibit 1, Existing (1992) Noise Exposure Map, and Exhibit 4, Future (1997) Noise Compatibility Plan Noise Exposure Map. They are found on pages xxvii and xxx of the Part 150 Study submission, along with supporting documentation. They replace the Noise Exposure Maps: Existing (1988) Noise Exposure Map, page 7, and Forecast (1993) Noise Exposure Map, page 8 (both showing unabated contours in the 1989 Part 150 submission, accepted by the FAA on July 24, 1989). The FAA has determined that the revised maps for Detroit Metropolitan Wayne County Airport are in compliance with applicable requirements. This determination is effective on December 16, 1992. The FAA's determination on an airport operator's noise exposure maps is limited to a finding that the maps were developed in accordance with the procedures contained in appendix A of FAR part 150. Such determination does not constitute an approval of the applicant's data, information, or plans, or a commitment to approve a noise compatibility program or to fund the implementation of that program.

If questions arise concerning the precise relationship of specific properties to noise exposure contours depicted on a noise exposure map submitted under section 103 of the Act, it should be noted that the FAA is not involved in any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the noise exposure maps to resolve questions concerning, for example, which properties should be covered by the provisions of section 107 of the Act. These functions are inseparable from the ultimate land use control and planning responsibilities of local government. These local responsibilities are not changed in any way under part 150 or through the FAA's review of noise exposure maps. Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the map depicting properties on the surface rests exclusively with the airport operator that submitted those maps or with those public agencies and planning agencies with which consultation is required under section 103 of the Act. The FAA has relied on the certification by the airport operator, under § 150.21 of FAR part 150, that the statutorily required consultation has been accomplished.

The FAA has formally received the noise compatibility program for Detroit Metropolitan Wayne County Airport, also effective on December 16, 1992. Preliminary review of the submitted material indicates that it conforms to the requirements for the submittal of noise compatibility programs, but that further review will be necessary prior to approval or disapproval of the program. The formal review period, limited by law to a maximum of 180 days, will be completed on or before June 14, 1993.

The FAA's detailed evaluation will be conducted under the provisions of 14 CFR part 150, § 150.33. The primary considerations in the evaluation process are whether the proposed measures may reduce the level of aviation safety, create an undue burden on interstate or foreign commerce, or be reasonably consistent with obtaining the goal of reducing existing noncompatible land uses and preventing the introduction of additional noncompatible land uses.

Interest persons are invited to comment on the proposed program with specific reference to these factors. All comments, other than those properly addressed to local land use authorities, will be considered by the FAA to the extent practicable. Copies of the noise exposure maps, the FAA's evaluation of the maps, and the proposed noise compatibility program are available for examination at the following locations:

Federal Aviation Administration, 800 Independence Avenue, SW., room 617, Washington, DC 20591.

Federal Aviation Administration, Great Lakes Region, 2300 East Devon Avenue, room 261, Des Plaines, Illinois 60018.

Federal Aviation Administration, Detroit Airports District Office, Willow Run Airport, East, 8820 Beck Road, Belleville, Michigan 48111.

Wayne County Department of Public Services, Division of Airports, Detroit Metropolitan Wayne County Airport, L.C. Smith Terminal, Mezzanine, Detroit, Michigan 48242.

Questions may be directed to the individual named above under the heading, **FOR FURTHER INFORMATION CONTACT.**

Issued in Belleville, Michigan, December 16, 1992.

Dean C. Nitz,

Acting Manager, Detroit Airports Districts Office, Great Lakes Region.

[FR Doc. 92-31423 Filed 12-28-92; 8:45 am]

BILLING CODE 4910-13-M

Federal Aviation Administration

Joint Environmental Impact Report/ Environmental Impact Statement; the 2002 Airport Development Program, Metropolitan Oakland International Airport, Oakland, CA

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of intent.

SUMMARY: The Federal Aviation Administration (FAA) is issuing this notice to advise the public that a joint Environmental Impact Report (EIR)/ Environmental Impact Statement (EIS) will be prepared and considered for an airport development program including: terminal expansion, landside access, the Airport Roadway Project (cross-airport roadway), airline and airfield support, air cargo relocation/facility development, airfield improvements, and wetland restoration at Metropolitan Oakland International Airport, Oakland, California.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph R. Rodriguez, Supervisor, Planning and Programming Section, Federal Aviation Administration, Airports District Office, 831 Mitten Road, room 210, Burlingame, CA 94010-1303, Telephone: (415) 876-2805.

SUPPLEMENTARY INFORMATION: The FAA, in cooperation with the Port of Oakland will prepare a joint EIR/EIS for development scheduled to occur at Metropolitan Oakland International Airport over the next 10 years. The U.S. Army Corps of Engineers will serve as a cooperating agency, with responsibilities limited to participating in the National Environmental Policy Act of 1969 (NEPA) process;

participating in the scoping process; and, review and comment on the Draft and Final EIR/EIS. The FAA is the lead federal agency. The primary components of the proposed action, described as "The 2002 Airport Development Program," consist of the following items: Terminal expansion (12 gates), the Airport Roadway Project (including construction and improvements from I-880 to Harbor Bay Parkway), airline and airfield support (including airline maintenance facility expansion), air cargo relocation/facility development, airfield improvements (including extension to Runway 11/29, remote aircraft parking, hold pad expansion and angled taxiway exit for Runway 11), and wetland restoration. Although the extension to runway 11/29 is contained in the 2002 Program, planning is not currently of sufficient detail to support an environmental finding.

The purpose of the wetland restoration project is to resolve an issue regarding fill placed at the Airport in 1986 under U.S. Army Corps of Engineers' section 404 Permit number 14003E78B. This permit and the associated wetland mitigation was rescinded in 1988 by court order. The wetland restoration project is to mitigate impacts caused by the placement of 33 acres of fill in 1986.

On April 15, 1992, the Port of Oakland issued a Notice of Preparation of a joint EIR/EIS for "The 2002 Airport Development Program" in accordance with section 15222 of the California Environmental Quality Act. The FAA intends to cooperate with state and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable state and local requirements. When the State document is complete, the FAA intends to jointly consult and coordinate with federal, state, and local agencies which have jurisdiction by law or have special expertise with respect to any environmental impacts associated with the proposed projects.

Scoping for the processing of a joint EIR/EIS is anticipated to include both an agency scoping meeting and a public scoping meeting concerning the range of actions, alternatives, and impacts to be considered. They will be held in a workshop format to facilitate maximum input.

The scoping meeting for Federal, State and local agencies is scheduled to be held on January 27, 1993, between 1 p.m. and 3 p.m. at the Port of Oakland, 2nd Floor Board Room, 530 Water Street, Oakland, California 94607.

A scoping meeting for the general public will also be held on January 27, 1993, between 7 p.m. and 9 p.m. at the Clarion Hotel, Main Ballroom, 455 Hegenberger Road, Oakland, California 94621. The location is adjacent to the Airport and Interstate 880.

The FAA invites interested parties to submit written comments to the FAA contact listed above.

Issued in Hawthorne, California, on December 7, 1992.

Herman C. Bliss,

Manager, Airports Division, Western-Pacific Region.

[FR Doc. 92-31536 Filed 12-23-92; 2:40 pm]

BILLING CODE 4910-13-M

[Summary Notice No. PE-92-38]

Petitions 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.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before January 19, 1993.

ADDRESSES: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rule Docket (AGC-10), Petition Docket No. _____, 800 Independence Avenue, SW., Washington, DC 20591.

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), 900 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3132.

FOR FURTHER INFORMATION CONTACT: Mrs. Jeanne Trapani, Office of Rulemaking (ARM-1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-7624.

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, D.C., on December 21, 1992.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Petitions for Exemption

Docket No.: 27018
Petitioner: Arnautical, Inc.
Sections of the FAR Affected: 14 CFR 61.45(a)
Description of Relief Sought: To allow Arnautical, Inc., to allow its applicants for a flight instructor certificate and flight instructor ratings for airplane single-engine, airplane multiengine, and instrument airplane to use a flight simulator instead of an airplane for the practical test specified in § 61.183(e).

Docket No.: 27029
Petitioner: Northern Crossings Aviation
Sections of the FAR Affected: 14 CFR 43.3(g)
Description of Relief Sought: To allow Mr. Tiberio DeSousa, pilot for Northern Crossings Aviation, to remove and reinstall passenger seats of company aircraft used in Part 135 operations.

Docket No.: 27037
Petitioner: Mr. Randy H. Avery
Sections of the FAR Affected: 14 CFR 65.91(c)(2)
Description of Relief Sought: To allow Mr. Avery to qualify for an Inspection Authorization without having met the minimum eligibility requirements for maintenance of civil aircraft.

Dispositions of Petitions

Docket No.: 25974
Petitioner: Air Transport Association
Sections of the FAR Affected: 14 CFR 47.49 and 91.27
Description of Relief Sought/Disposition: To amend Condition 6 of Exemption No. 5318 to include aircraft that are operated totally within the State of Hawaii.
GRANT, December 9, 1992, Exemption No. 5318B

Docket No.: 26255
Petitioner: Air Transport International, Inc.
Sections of the FAR Affected: 14 CFR 121.613, 121.623, and 121.625
Description of Relief Sought/Disposition: To allow Air Transport International, Inc., (ATI) to release its domestic flights operating under instrument flight rules (IFR) to airports

at which the weather forecasts include an "occasionally," a "briefly," an "intermittently," or a "chance of" condition that does not meet the flight release requirements of the regulations. Relief is sought to also permit ATI to release a flight in which either or both the destination airport and the alternate airport are subject to the described weather forecast conditions.

DENIAL, October 26, 1992, Exemption No. 5540

Docket No.: 26590

Petitioner: Simcom Training Centers

Sections of the FAR Affected: 14 CFR 61.56(b)(1)

Description of Relief Sought/ Disposition: To allow Simcom Training Centers to use a training device to meet certain training and testing requirements.

DENIAL, December 3, 1992, Exemption No. 5561

Docket No.: 26914

Petitioner: Air Transport Association of America

Sections of the FAR Affected: 14 CFR 121.583(a)

Description of Relief Sought/ Disposition: To allow air traffic controllers and technical representatives to be added to the list of persons authorized to ride in the cockpit observer's seat of all-cargo aircraft operating under part 121 without complying with the passenger carrying requirements of part 121.

GRANT, November 30, 1992, Exemption No. 5562

Docket No.: 26992

Petitioner: Continental Airlines, Inc.

Sections of the FAR Affected: 14 CFR 61.55(b)(2); 61.56(b)(1); 61.57(c) and (d); 61.58(c)(1) and (d); 61.63(d)(2) and (3); 61.67(d)(2); 61.157(d)(1) and (2) and (e)(1) and (2); and Appendix A of Part 61.

Description of Relief Sought/ Disposition: To allow Continental Airlines, Inc., to use FAA-approved simulators to meet certain training and testing requirements of 14 CFR 61.

GRANT, December 3, 1992, Exemption 5557

Docket No.: 27011

Petitioner: United Airlines, Inc.

Sections of the FAR Affected: 14 CFR 61.55(b)(2); 61.56(b)(1); 61.57(c) and (d); 61.58(c)(1) and (d); 61.63(d)(2) and (3); 61.67(d)(2); 61.157(d)(1) and (2) and (e)(1) and (2); and Appendix A of Part 61.

Description of Relief Sought/ Disposition: To allow United Airlines, Inc., to use FAA-approved simulators to meet certain training and testing requirements of 14 CFR 61.

GRANT, December 10, 1992, Exemption 5572

Docket No.: 27040

Petitioner: Delta Air Lines, Inc.

Sections of the FAR Affected: 14 CFR 121.310(f)(3)(iii)

Description of Relief Sought/ Disposition: To allow Delta Air Lines, Inc., to operate until January 15, 1993, airplanes having Type III exits that have not been shown to comply with the placarding requirements of § 25.813(c)(3).

GRANT, December 3, 1992, Exemption No. 5569

Docket No: 27041

Petitioner: Continental Airlines, Inc.

Sections of the FAR Affected: 14 CFR 121.310(f)(3)(iii)

Description of Relief Sought/ Disposition: To allow Continental Airlines, Inc., to operate until January 29, 1993, airplanes having Type III exits that have not been shown to comply with the placarding requirements of § 25.813(c)(3).

PARTIAL GRANT, December 3, 1992, Exemption No. 5570

Docket No: 27071

Petitioner: American Trans Air

Sections of the FAR Affected: 14 CFR 121.310(f)(3)(iii)

Description of Relief Sought/ Disposition: To allow American Trans Air to operate until December 29, 1992, airplanes having Type III exits that have not been shown to comply with the placarding requirements of § 25.813(c)(3).

PARTIAL GRANT, December 3, 1992, Exemption No. 5567

Docket No: 27072

Petitioner: Trans World Airlines, Inc.

Sections of the FAR Affected: 14 CFR 121.310(f)(3)(iii)

Description of Relief Sought/ Disposition: To allow Trans World Airlines, Inc., to operate until February 1, 1993, airplanes having Type III exits that have not been shown to comply with the placarding requirements of § 25.813(c)(3).

PARTIAL GRANT, December 3, 1992, Exemption No. 5568

Docket No: 109CE

Petitioner: Fairchild Aircraft Corporation

Sections of the FAR Affected: 14 CFR 23.201(e), (f)(4), and (f)(5); 23.203(c)(4) and (c)(5); and 23.1545(b)(5) and (b)(6)

Description of Relief Sought/ Disposition: To allow type certification of the SA227–CC, SA227–DC, and all subsequent commuter category airplanes approved on type certificate A18SW, with certain stall characteristics and airspeed indicator markings that are appropriate to this category of aircraft.

GRANT, December 2, 1992, Exemption No. 5573

Good Cause

Docket No.: 25617

Petitioner: Japan Airlines Company, Ltd.

Sections of the FAR Affected: 14 CFR 91.203(c), 91.417(c) and (d), 45.11, and Part 43 Appendix B(a) and (d)

Description of Relief Sought: To extend the termination date of Exemption No. 5006, which expires December 31, 1992, and which allows Japan Airlines Company, Ltd. (JAL) to operate its U.S.-registered aircraft that have been modified by installation of fuel tanks in the passenger or baggage compartment without keeping an FAA Form 337 on board the aircraft. Exemption 5006 also allows JAL to operate its U.S.-registered aircraft without having an identification plate secured to the fuselage exterior, and, with respect to JAL's U.S.-registered aircraft manufactured before March 7, 1988, this exemption allows operation without displaying the aircraft model designation and builder's serial number on the aircraft exterior.

Docket No.: 25653

Petitioner: Singapore Airlines, Ltd.

Sections of the FAR Affected: 14 CFR 91.203(c), 91.417(c) and (d), 45.11, and Part 43 Appendix B(a) and (d)

Description of Relief Sought: To extend the termination date of Exemption No. 5008, which expires December 31, 1992, and which allows Singapore Airlines, Ltd. (SIA) to operate its U.S.-registered aircraft that have been modified by installation of fuel tanks in the passenger or baggage compartment without keeping an FAA Form 337 on board the aircraft. Exemption 5008 also allows SIA to operate its U.S.-registered aircraft without having an identification plate secured to the fuselage exterior, and, with respect to SIA's U.S.-registered aircraft manufactured before March 7, 1988, this exemption allows operation without displaying the aircraft model designation and builder's serial number on the aircraft exterior.

[FR Doc. 92–31537 Filed 12–28–92; 8:45 am]

BILLING CODE 4910–13–M

Notice of Intent to Rule on Application to Impose and Use the Revenue from a Passenger Facility Charge (PFC) at Fort Wayne International Airport, Fort Wayne, Indiana

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the

application to impose and use the revenue from a PFC at Fort Wayne International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before January 28, 1993.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address:

Federal Aviation Administration, Chicago Airports District Office, 2300 East Devon Avenue, room 258, Des Plaines, Illinois 60018.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Lester P. Coffman, Jr., Executive Director of Airports, of the Fort Wayne-Allen County Airport Authority at the following address: Fort Wayne-Allen County Airport Authority, Lt. Paul Baer Terminal Building, suite 209, Fort Wayne, Indiana 46809.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Fort Wayne-Allen County Airport Authority under § 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Mr. Louis H. Yates, Manager, Chicago Airports District Office, 2300 East Devon Avenue, room 258, Des Plaines, Illinois 60018, (312) 694–7335. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Fort Wayne International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On December 15, 1992, the FAA determined that the application to impose and use the revenue from a PFC submitted by Fort Wayne-Allen County Airport Authority was substantially complete within the requirements of § 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than April 3, 1993.

The following is a brief overview of the application. Level of the proposed PFC: $3.00; Proposed charge effective date: January 1, 1993; proposed charge expiration date: December 31, 2014; Total estimated PFC revenue: $26,563,457; Brief description of proposed project(s):

a. Terminal Expansion and Renovation;

b. Loop Access Roadway and Parking Improvements Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Air taxi/commercial operators that (1) by Federal regulation are not required to report passenger statistics to the Federal Government and (2) enplane fewer than 1,000 passengers annually.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT.**

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Fort Wayne-Allen County Airport Authority.

Issued in Des Plaines, Illinois on December 21, 1992.

W. Robert Billingsley,

Manager, Airports Division, Great Lakes Region.

[FR Doc. 92–31535 Filed 12–28–92; 8:45 am]

BILLING CODE 4910–13–M

Maritime Administration

Approval of Applicant as Trustee

Notice is hereby given that Manufacturers and Traders Trust Company, with offices at One M&T Plaza, Buffalo, New York 14203–2399, has been approved as Trustee pursuant to Public Law 100–710 and 46 CFR part 221.

Dated: December 22, 1992.

By Order of the Maritime Administrator.

James E. Saari,

Secretary.

[FR Doc. 92–31419 Filed 12–28–92; 8:45 am]

BILLING CODE 4910–81–M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

Dated: December 22, 1992.

The Department of the 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 3171 Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Internanl Revenue Service

OMB Number: New.

Form Number: IRS Form 8835(FY).

Type of Review: New collection.

Title: Renewable Electricity Production Credit.

Description: Filers claiming the general business credit electricity produced from certain renewable resources under code sections 38 and 45 must file Form 8835(FY).

Respondents: Individuals or households, Businesses or other for-profit, Small businesses or organizations.

Estimated Number of Respondents/ Recordkeepers: 20.

Estimated Burden Hours Per Respondent/Recordkeeper

Recordkeeping, 7 hours, 39 minutes.

Learning about the law or the form, 6 minutes.

Preparing and sending the form to the IRS, 14 minutes.

Frequency of Response: Annually.

Estimated Total Reporting/ Recordkeeping Burden: 160 hours.

Clearance Officer

Garrick Shear, (202) 622–3869, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.

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. 92–31621 Filed 12–28–92; 8:45 am]

BILLING CODE 4830–01–M

DEPARTMENT OF TREASURY

Public Information Collection Requirements Submitted to OMB for Review

Dated: December 22, 1992.

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 3171, Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Departmental Offices

OMB Number: 1505–0024.
Form Number: Treasury International Capital Forms CQ–1 and CQ–2.
Type of Review: Extension.
Title: Financial and Commercial Liabilities to, and Claims on, Foreigners.
Description: These reports are required by law and are designed to collect timely and accurate information on international capital movements, including data on financial and commercial liabilities to, and claims on, unaffiliated foreigners held by U.S. nonbanking enterprises.
Respondents: Businesses or other for-profit.
Estimated Number of Respondents: 600
Estimated Burden Hours Per Response: 4 hours
Frequency of Response: Quarterly
Estimated Total Reporting Burden: 9,600 hours
Clearance Officer: Lois K. Holland (202) 622–1563, Departmental Offices, Room 3171, Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.
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. 92–31563 Filed 12–28–92; 8:45 am]
BILLING CODE 4810–25–M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

Dated: December 23, 1992.

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 3171 Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Bureau of Alcohol, Tobacco and Firearms

OMB Number: 1512–0059.
Form Number: ATF F 5120.29.
Type of Review: Extension.
Title: Bonded Wineries—Formula and Process for Wine, Letterhead Applications and Notices Relating to Formula Wine.
Description: ATF F 5120.29 is completed by proprietors of bonded wineries who intend to produce wine, to ensure that the formulas and processes used in the production of the wine are in accordance with the regulations of the Federal Alcohol Administration Act and the Internal Revenue Code.
Respondents: Businesses or other for-profit, Small businesses or organizations.
Estimated Number of Respondents: 600.
Estimated Burden Hours Per Respondent: 2 hours.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 1,200 hours.
OMB Number: 1512–0078.
Form Number: ATF F 1533 (5000.18).
Type of Review: Extension.
Title: Consent of Surety.
Description: A consent of surety is executed by both the bonding company and a proprietor and acts as a binding legal agreement between the two parties to extend the terms of a bond. A bond is necessary to cover the specific liabilities on the revenue produced from untaxpaid commodities. The consent of surety is filed with ATF and a copy is retained by ATF as long as it remains current and in force.
Respondents: Businesses or other for-profit, Small businesses or organizations.
Estimated Number of Respondents: 2,000.
Estimated Burden Hours Per Respondent: 1 hour.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 2,000 hours.
Clearance Officer: Robert N. Hogarth (202) 927–8930, Bureau of Alcohol, Tobacco and Firearms, Room 3200, 650 Massachusetts 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. 92–31622 Filed 12–28–92; 8:45 am]
BILLING CODE 4810–31–M

Public Information Collection Requirements Submitted to OMB for Review

December 21, 1992.

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 3171 Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Bureau of the Public Debt

OMB Number: 1535–0070.
Form Number: PD F 5192.
Type of Review: Reinstatement.
Title: Stop Payment/Replacement Check Request.
Description: This form is used by the payee or the representative of the payee (attorney-in-fact, executors, etc.) to report a lost, stolen, destroyed or not received fiscal agency check and request a replacement check. The checks are issued in connection with the payment of proceeds due on Treasury securities under the TREASURY DIRECT Book-entry Securities System.
Respondents: Individuals or households, Businesses or other for-profit, Non-profit institutions, Small businesses or organizations.
Estimated Number of Respondents: 500.
Estimated Burden Hours Per Response: 15 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 500 hours.
Clearance Officer: Vicki S. Ott, (304) 420–6553, Bureau of the Public Debt, 200 Third Street, Parkersburg, WV 26106–1328.
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. 92–31426 Filed 12–28–92; 8:45 am]
BILLING CODE 4810–40–M

[Directive Number 16–34]

Surities and Surety Bonds

December 21, 1992

1. *Delegation.* By virtue of the authority vested in the Secretary under 31 U.S.C. 321(b), and by virtue of the authority delegated to the Fiscal Assistant Secretary by Treasury Order (TO) 101–05, the authority of the Secretary of the Treasury under Chapter 93 of Title 31, United States Code (31 U.S.C. 9301 *et seq.*), "Sureties and Surety Bonds," is hereby delegated to the Commissioner, Financial Management Service, together with the authority to issue regulations to carry out those responsibilities. Any regulations shall be issued in accordance with the procedures set forth in Treasury Directive (TD) 28–01, "Preparation and Review of Regulations."

2. *Reference.* 31 CFR parts 223, 224, and 225.

3. *Authority.* TO 101–05, "Reporting Relationships and Supervision of Officials, Offices and Bureaus, Delegation of Certain Authority, and Order of Succession in the Department of the Treasury."

4. *Cancellation.* TD 16–34, "Sureties and Surety Bonds," dated September 22, 1986, is superseded.

5. *Office of Primary Interest.* Office of the Fiscal Assistant Secretary.

Gerald Murphy,

Fiscal Assistant Secretary.

[FR Doc. 92–31477 Filed 12–28–92; 8:45 am]

BILLING CODE 4810–25–M

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported for Exhibition; Determination

Notice is hereby given of the following determination: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation order No. 85–5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, "Napoleon" (see list [1]), imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. These objects are imported pursuant to a loan agreement with the foreign lenders. I also determine that the temporary exhibition or display of the listed exhibit objects at the City of Memphis', Memphis International Cultural Series Grand Exhibition Hall from on or about April 22, 1993 to on or about September 22, 1993, is in the national interest.

Public notice of this determination is ordered to be published in the **Federal Register.**

Dated: December 22, 1992.

Alberto J. Mora,

General Counsel.

[FR Doc. 92–31562 Filed 12–28–92; 8:45 am]

BILLING CODE 8230–01–M

[1] A copy of this list may be obtained by contacting Mr. Paul W. Manning of the Office of the General Counsel of USIA. The telephone number is 202/619–6827, and the address is room 700, U.S. Information Agency, 301 Fourth Street, SW., Washington, DC 20547.

Sunshine Act Meetings

Federal Register
Vol. 57, No. 250
Tuesday, December 29, 1992

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

AGENCY HOLDING THE MEETING: Equal Employment Opportunity Commission.

DATE AND TIME: 2:00 P.M. (Eastern Time) Tuesday, January 12, 1993.

PLACE: Conference Room on the Ninth Floor of the EEOC Office Building, 1801 "L" Street, NW., Washington, DC. 20507.

STATUS: Part of the Meeting will be open to the public and part of the Meeting will be closed.

MATTERS TO BE CONSIDERED:

Open Session

1. Announcement of Notation Vote(s).
2. New Local FEPA Funding.
3. Proposal to Cancel the EEO–6 Reporting Requirements.
4. Waiver of 1992 EEO–3 Reporting Requirements.
5. Washington Field Office Reorganization.

Closed Session

1. Litigation Authorization: General Counsel Recommendations.

Note: Any matter not discussed or concluded may be carried over to a later meeting. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides a recorded announcement a full week in advance on future Commission sessions. Please telephone (202) 663–7100 (voice) and (202) 663–4494 (TTD) at any time for information on these meetings. Contact Person for More Information: Frances M. Hart, Executive Officer on (202) 663–7100.

Dated: December 23, 1992

Frances M. Hart

Executive Officer, Executive Secretariat.

[FR Doc. 92–31620 Filed 12–23–92; 4:15 pm]

BILLING CODE 6750–06–M

FEDERAL RESERVE SYSTEM

First Linden Bancshares, Inc.; Formation of, Acquisition by, or Merger of Bank Holding Companies

The company listed in this notice has 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)).

The 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 indicated for that application 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.

Comments regarding this application must be received not later than January 22, 1993.

A. Federal Reserve Bank of Atlanta (Zane R. Kelley, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. First Linden Bancshares, Inc., Linden, Alabama; to become a bank holding company by acquiring 100 percent of the voting shares of First Bank of Linden, Linden, Alabama, a *de novo* bank.

Board of Governors of the Federal Reserve System, December 22, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92-31547 Filed 12-28-92; 8:45 am]

BILLING CODE 6210-01-F

William P. Stafford; Change in Bank Control Notice

Acquisition of Shares of Banks or Bank Holding Companies

The notificant listed below has 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 notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notice is available for immediate inspection at the Federal Reserve Bank indicated. Once the notice 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 indicated for the notice or to the offices of the Board of Governors. Comments must be received not later than January 19, 1993.

A. Federal Reserve Bank of Richmond (Lloyd W. Bostian, Jr., Senior Vice President) 701 East Byrd Street, Richmond, Virginia 23261:

1. William P. Stafford, Princeton, West Virginia; to acquire an additional 0.18 percent, for a total of 14.2 percent, of the voting shares of FCFT, Inc., Princeton, West Virginia, and thereby indirectly acquire First Community Bank, Inc., Princeton, West Virginia, The Flat Top National Bank of Bluefield, Bluefield, West Virginia, and Peoples Bank of Bluewell, Bluewell, West Virginia.

Board of Governors of the Federal Reserve System, December 22, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92-31548 Filed 12-28-92; 8:45 am]

BILLING CODE 6210-01-F

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: 11:00 a.m., Monday, January 4, 1993.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT 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.

Open Session

Dated: December 23, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92–31681 Filed 1–4–93; 11:00 am]

BILLING CODE 6210–01–M

Corrections

Federal Register
Vol. 57, No. 250
Tuesday, December 29, 1992

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No. 921074-2274]

RIN 0693-AB11

Two Proposed Federal Information Processing Standards; Integration Definition for Function Modeling; Integration Definition Information Modeling

Correction

In notice document 92-30312 beginning on page 59081 in the issue of Monday, December 14, 1992, on page 59082, in the first column, under **DATES**, in the third line, "March 15, 1992" should read "March 15, 1993".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 92N-0486]

Pfizer Pharmaceuticals Inc., et al.; Withdrawal of Approval of 45 Abbreviated Antibiotic Drug Applications

Correction

In notice document 92-30491 beginning on page 59840 in the issue of Wednesday, December 16, 1992, make the following corrections:

1. On page 59840, in the third column, the **EFFECTIVE DATE** should read "January 15, 1993".

2. On page 59841, in the first column, in the last line of the paragraph, "January 15, 1992" should read "January 15, 1993".

BILLING CODE 1505-01-D

NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Part 826

Equal Access to Justice Act Fees

Correction

In proposed rule document 92-30940 beginning on page 60785 in the issue of Tuesday, December 22, 1992, in the first column, under **DATES**, the comment date should read "January 21, 1993".

BILLING CODE 1505-01-D

NUCLEAR REGULATORY COMMISSION

Final Memorandum of Understanding Between the U.S. Nuclear Regulatory Commission and the State of Alabama

Correction

In notice document 92-26627 beginning on page 49725 in the issue of Tuesday, November 3, 1992, make the following corrections:

1. On page 49726, in the second column, in the second full paragraph, in the sixth line "Development" should read "Department".

2. On page 49727, in the first column, in the first partial paragraph, in the eighth line "poser" should read "power".

BILLING CODE 1505-01-D

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 530

RIN 3206-AE22

Pay Rates and Systems (General); Special Salary Rate Schedules for Recruitment and Retention

Correction

In rule document 92-30414 beginning on page 59275 in the issue of Tuesday, December 15, 1992, make the following corrections:

1. On page 59275, in the second column, under **EFFECTIVE DATE**, "January 14, 1992" should read "January 14, 1993".

2. On page 59276, in the first column, in the next to last line of the incomplete paragraph, "agencies again" should read "agencies gain".

BILLING CODE 1505-01-D

federal register

Tuesday
December 29, 1992

Part II

Environmental Protection Agency

40 CFR Part 63

National Emission Standards for Hazardous Air Pollutants; Compliance Extensions for Early Reductions; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[AD-FRL-4534-3]

National Emission Standards for Hazardous Air Pollutants; Compliance Extensions for Early Reductions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Regulations governing compliance extensions for early reductions of hazardous air pollutants (HAP's) were proposed in the **Federal Register** on June 13, 1991. This action promulgates these regulations and implements the provisions of section 112(i)(5) of the Clean Air Act (CAA) (as amended in 1990). This rule establishes requirements and procedures for source owners or operators to obtain compliance extensions from section 112(d) standards and for reviewing agencies to follow in evaluating requests for extensions.

DATES: *Effective Date.* December 29, 1992.

Judicial Review. Under section 307(b)(1) of the CAA, judicial review of the actions taken by this notice is available only by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of today's publication of this rule. Under section 307(b)(2) of the CAA, the requirements that are the subject of today's notice may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

ADDRESSES: *Background Information Document.* The background information document (BID) for the promulgated standards may be obtained from the U.S. EPA Library (MD-35), Research Triangle Park, North Carolina 27711, telephone number (919) 541-2777. Please refer to "National Emissions Standards for Hazardous Air Pollutants: Compliance Extensions for Early Reductions—Background Information for Promulgated Standards" (EPA-450/3-92-006b). The BID contains (1) a summary of all the public comments made on the proposed standards and EPA's responses to the comments; and (2) a summary of the changes made to the standards since proposal. Also available from the EPA Library are three additional supporting documents. These documents are:

(a) "Enabling Document for Regulations Governing Compliance Extensions for Early Reductions of Hazardous Air Pollutants" (EPA-450/3-91-013, July 1991);

(b) "Questions and Answers about the Early Reductions Program" (EPA-450/3-92-005, January 1992); and

(c) "Procedures for Establishing Emissions for Early Reduction Compliance Extensions" (EPA-450/3-91-012a, February 1992).

Docket. Docket No. A-90-47, containing supporting information used in developing the promulgated standards, is available for public inspection and copying between 8:30 a.m. and 3:30 p.m., Monday through Friday, at EPA's Air Docket Section, Waterside Mall, room M-1500, 1st Floor, 401 M Street SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: For information concerning the Early Reductions Program regulations, contact Mr. David Beck, telephone (919) 541-5421, or Mr. Richard Colyer, telephone (919) 541-5262. The address for both is Emission Standards Division (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina, 27711. For information concerning Method 301, contact Mr. Tony Wayne, telephone (919) 541-3576, Emission Measurement Branch, Technical Support Division (MD-19), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION: The information presented in this preamble is organized as follows:

I. General Requirements
II. Summary of Changes and Impacts of the Final Rule
III. Supporting Documents
IV. Public Participation
V. Significant Comments and Changes to the Proposed Rule
A. Definition of Source
B. Base Year Emissions
C. Enforceable Commitments
D. Allowable Emission Reductions
E. Demonstration of Early Reductions
F. High-Risk Pollutants
G. State Authority
H. Interface With Title V Permits
I. Interface With Section 112(g) Modifications
J. Interface With Title I Provisions
K. Test Methods and Procedures
L. Other Changes to the Proposed Regulation
VI. Administrative Requirements
A. Docket
B. Paperwork Reductions Act
C. Executive Order 12291
D. Regulatory Flexibility Act

I. General Requirements

Today's rule applies to any existing source that seeks a 6-year compliance extension from an applicable section 112(d) standard by achieving early emission reductions of HAP's. The compliance extension would be obtained and authorized in accordance with section 112(i)(5) of the CAA.

Section 112(i)(5) allows an existing source to be granted a 6-year extension of compliance with otherwise applicable section 112(d) standards upon demonstration by the owner or operator of the source that a 90 percent reduction in HAP's (95 percent or more in the case of particulates) has been achieved. An enforceable alternative emission limitation reflecting the reduction will be established for the source by a permit issued under Title V of the CAA.

The 90 (95) percent emission reduction must be achieved before proposal of an applicable section 112(d) standard in most cases. However, a source achieving the reduction after proposal of a standard but before January 1, 1994, may qualify for a compliance extension from section 112(d) standards by making an enforceable commitment before proposal of the standard to achieve such a reduction.

State or local air pollution control agencies with Title V permitting authority will review Title V operating permit applications for compliance extensions. They will issue permits containing alternative emission limitations applicable to sources achieving early reductions in lieu of section 112(d) standards in accordance with approved permit programs under Title V of the CAA. The EPA Regional Offices will review permit applications and issue Title V permits for sources located in States that do not have approved Title V permit programs. States will assume the review and permitting activities upon approval of their Title V permit programs, or may be granted delegation of the Early Reductions Program prior to approval of their Title V permit program.

II. Summary of Changes and Impacts of the Final Rule

Based on comments received during the comment period on the proposed rule, few significant changes have been made to the regulation. The significant changes are listed below.

The most significant change to the rule has been to the high-risk list of pollutants. Seventeen pollutants have been added to the list and five pollutants have been deleted. Weighting factors for seven pollutants have been adjusted. A provision was added to ensure that there are no increases in radionuclides as a result of the emission reduction demonstration. Another

provision was added that would "grandfather" sources that already had approved enforceable commitments or alternative emission limits specified by permit from having to revise their post-reduction demonstration if a new pollutant is added to the high-risk list.

Part of the proposed definition of source, which allowed a combination of sources to be considered an Early Reductions source (§ 63.73(a)(4)) has been removed.

The rule has been revised to restrict the combined percent reduction method in demonstrations involving sources with both gaseous and particulate HAP emissions. This provision now only applies to emission points that emit both gases and particulates; emission points that emit only gaseous HAP or only particulate HAP cannot be used in a combined percent reduction demonstration.

Another change to the rule allows the use of EPA average emission factors for equipment leaks to determine base year emissions only if no reductions in equipment leak emissions are claimed as part of the reduction demonstration. The equipment leak source in appendix B has been clarified to be specific to the individual process equipment component types.

There have also been several less significant changes. The definition of "actual emissions" has been clarified to exclude startup and shutdown emissions due to malfunctions. Requiring evidence that curtailments or shutdowns are permanent for the post-reduction demonstration has been removed; evidence is unnecessary, as such reductions will become permit conditions. The suggested statement of commitment in the enforceable commitment has been revised to be consistent with wording in the demonstration requirements section of the regulation. The length of time allowed to provide source test results to support the post-reduction demonstration has been increased to 120 days from 90 after the permit submittal deadline. The term "post-control" has been changed to "post-reduction" throughout the rule to recognize that reductions can be achieved through means other than control technology. Corrections and changes have been made to Method 301, including a broadening of applicability of the method to other media.

The Early Reductions Program is a voluntary program. The primary goal of the Program is to provide a positive impact to the environment by encouraging early reductions of HAP's prior to mandatory regulatory action. As discussed in the proposal preamble, significant environmental benefits can be achieved through early reduction of emissions (56 FR 27338). The environmental benefits accrue because over time the total emission reductions achieved by participants exceed those emission reductions which would be achieved by section 112(d) standards imposed at a later date even if the later standards are more stringent.

There are also potential benefits to companies participating in the Program. The compliance extension will give a company an opportunity to design cost-effective emission reduction approaches for their sources and may reduce the cost of compliance over the long term. The Program allows flexible compliance options and encourages pollution prevention solutions. Companies achieving early reductions of HAP's may also be viewed more favorably by the affected public.

III. Supporting Documents

In addition to the background information document, information pertaining to the development and implementation of the Early Reductions Program can be found in other publications developed by EPA. The preamble to the proposed rule (56 FR 27338) includes a detailed discussion of all the provisions of the rule and presents EPA's decision-making process in developing the Program.

The EPA has published three additional documents to assist industries interested in participating in the Program and also to assist regulatory agencies responsible for implementing the Program. The first document, entitled "Enabling Document for Regulations Governing Compliance Extensions for Early Reductions of Hazardous Air Pollutants" (EPA–450/3–91–013, July 1991), presents a more detailed description of the Early Reductions Rule. The enabling document includes information useful in both preparing and reviewing Early Reductions submittals.

The second document is titled "Questions and Answers About the Early Reductions Program" (EPA–450/3–92–005, January 1992), and is a compendium of questions dealing primarily with implementation of the Program. The questions were generated by industry, State and local regulatory agencies, trade associations, and other interested parties.

Finally, EPA has produced a procedures document for establishing base year and post-reduction emissions. This document is titled "Procedures for Establishing Emissions for Early Reduction Compliance Extensions" (EPA–450/3–91–012a, February 1992) and provides guidance for establishing emissions from specific source categories for which section 112(d) standards will be developed. Source categories included in this document are: The synthetic organic chemical manufacturing industry, ethylene oxide sterilizers, and chrome electroplaters.

IV. Public Participation

In developing the Early Reductions rule, EPA solicited input from representatives of industry, environmental groups, and State and local air pollution control agencies. Options for the rule's major provisions were presented and discussed with these and other interested parties at a meeting of the National Air Pollution Control Techniques Advisory Committee on January 29, 1991, and at four "roundtable" discussions held in January, February, and March 1991.

In addition, EPA solicited public comments on the proposed rule that was published in the **Federal Register** on June 13, 1991 (56 FR 27338). Sixty-seven comment letters were received, with most of the letters containing multiple comments. The EPA's responses to these comments can be found in the Background Information Document referenced in the "ADDRESSES" listing above. The major comments received by EPA and the responses thereto are also addressed in this preamble.

The EPA is strongly committed to the success of the Early Reductions Program. Accordingly, EPA has been actively promoting the Program and been disseminating information to public and private organizations. Since proposal of the rule, EPA has conducted a number of workshops to inform interested parties about the Program. In addition, EPA has met with industries and individual companies interested in participating in the Program and with regulatory agencies who will be involved with the implementation of the rule. These workshops and meetings have served as a forum for EPA to field questions on the proposed rule and to better understand the comments and issues of potentially affected parties.

V. Significant Comments and Changes to the Proposed Rule

Individual companies, trade associations, State and local regulatory agencies, and citizens groups all commented on the proposed rule. The most significant comments and EPA's responses to those comments are discussed below. These comments are grouped under the following headings: Definition of Source, Base Year Emissions, Enforceable Commitments,

Allowable Emission Reductions, Demonstration of Early Reduction, High-Risk Pollutants, State Authority, Interface with Title V Permits, Interface with Section 112(g) Modifications, Interface with Title I Provisions, Test Methods and Procedures, and Other Changes to the Proposed Regulations.

A. Definition of Source

Many comments addressed the source definition. Several commenters contended that the proposed definition was far too broad. They argued that the sources receiving a compliance extension under the Early Reductions Program should be the same sources for which section 112(d) standards are developed.

The commenters' conclusion that EPA should change the definition of source to match that of a section 112(d) source proceeds from an incorrect assumption. The commenter assumes that at the time an owner or operator undertakes to make an early reduction, or enters into an enforceable commitment to do so, he can determine the "source" for purposes of "the otherwise applicable section 112(d) standard."

However, in most instances this will not be possible because of the structure of section 112(i)(5). The Early Reductions provision requires a source owner or operator to make the reductions prior to proposal of a section 112(d) standard, or enter into an enforceable commitment to do so before proposal provided the reductions are demonstrated before January 1, 1994. If the otherwise applicable section 112(d) standard has not yet been proposed and "source" defined for that standard, it would be impossible for an owner or operator to know whether the necessary reductions had been made or could be made to achieve the 90 (95) percent reduction. The only exception is for the equipment leak portion of the upcoming section 112(d) standards for synthetic organic chemical manufacturing plants, discussed below.

As recognized by Senator Durenberger and others, EPA will have broad discretion in defining source for any particular section 112(d) standard. In some cases, a source will be a process unit, in others it will be an entire plant. See 126 Cong. Rec. S16927 (3rd col. daily ed. Oct. 27, 1990). Congress could not have meant to so restrict participation in the Early Reductions Program to those companies who owned or operated emission points that EPA had clearly defined as a source before proposal of a particular section 112(d) standard. Moreover, because it would be impossible at this time to identify all possible sources that may be subject to section 112(d) standards, it is impossible for EPA to list each and every type of source for the Early Reductions Program. The EPA's definition of "source" recognizes the flexibility set forth in the statute. The EPA, or the State authority if operating under a delegated program, must review the applicant's Early Reductions submittal to ensure that it is consistent with one of the regulatory definitions under the Early Reductions Program. Given the limitation described above, EPA developed a definition of source for this provisions designed to encompass the broad definition of source contained in section 112(a), which incorporates the broad definition of section 111(a).

One commenter contended that EPA's definition of source in § 63.73(a)(1) proceeds from an error in equating "source" and "source category", and interprets sources listed in appendix B as "source categories."

The commenter fundamentally misunderstands EPA's definition of source and how it relates to the "source category." As the commenter suggests, EPA is to identify source categories which emit HAP's. The EPA is not saying, however, that it must know each category before it can make the linkage to section 112(i)(5). A "source category" for the purpose of defining industry types to be regulated and the "source" to which a standard specifically applies may be quite different (e.g., in the new source performance standard for electric utilities the applicable "source" is the steam boiler).

The single "source" listed in appendix B also exemplifies this distinction; this source, equipment leaks, is contained within a source category—the synthetic organic chemical manufacturing industry. Furthermore, equipment leaks are a special situation that EPA believes should be addressed separately, as equipment leak emissions arise from the nearly ubiquitous pumps, valves, connectors, and other equipment integrally associated with more traditional "sources", i.e., building, structure, facility or installation. The outcome of a regulatory negotiation involving equipment leaks published by EPA designated equipment leaks as a separate source (56 FR 9318; March 6, 1991). The EPA indicated that it would propose the rule as part of the hazardous organic NESHAP (HON) which will be promulgated under section 112(d). While this standard has not yet been proposed, the publication of the outcome of the regulatory negotiation sufficiently identifies equipment leaks as a distinct source to separate them for the purposes of Early Reductions. The EPA will determine the definition of source for the HON in that rule.

The EPA is allowing the option of including equipment leaks as part of a designated source, leaving the equipment leaks out of the source, or identifying equipment leaks solely as the source.

Indeed, once EPA defines a source category, the issue of the source definition may still remain. In some instances, individual facilities within a source category may constitute an entire source, in other instances each "source" subject to a section 112(d) standard may only constitute a portion of the facility within a source category. Thus, it is the regulated "source" that it is important for purposes of determining otherwise applicable section 112(d) standards, not the source category. Because EPA has not defined source for particular section 112(d) standards (except in one instance), EPA's definition reflects the range of possibilities contemplated by the definition of source in the statute.

Several commenters objected to proposed § 63.73(a)(2) and one argued that a plantwide definition of source was expressly prohibited, citing a floor statement by Senator Durenberger.

Section 111(a)(1) (incorporated into the definition of "existing source" in section 112) defines a "stationary source" as "any building, structure, facility, or installation which emits or may emit any hazardous air pollutant." This term is obviously broad enough to encompass an entire plant or facility. In some instances, a section 112(d) standard may encompass an entire "facility," which certainly includes the concept of a plantwide source.

Moreover, the definition of major source, which covers an entire contiguous area under common ownership or control, may consist of a single stationary source. "Major source" is defined as "* * * any stationary source or group of stationary sources * * *" See CAA section 112(a)(1). Thus, contrary to the commenters assertions, the definition of source under section 112 expressly encompasses a plantwide definition of source, among other configurations. The proposed and final regulations reflect the statutory language.

One commenter also cites a floor statement of Senator Durenberger's as the authoritative basis for the conclusion that a source cannot include an entire plant. However, closer reading of the complete referenced statement also expressly confirms that the source to which a section 112(d) standard might apply could be a specific portion of a facility or encompass an entire

contiguous facility. See 126 Cong. Rec. S 16927 (3rd. col.). If EPA has the discretion to establish a section 112(d) standard for a source that encompasses an entire contiguous facility, then it follows that an entire contiguous facility may be a source under section 112(i)(5).

One commenter objected to the proposed § 63.73(a)(3) because it allows an applicant to define a grouping of points that constitutes a building, structure, facility, or installation as a source. The commenter cites proposal preamble language that explains that emission points having a functional geographical relationship could be defined as a source under this part of the definition and concludes that there is no statutory basis for this type of grouping.

Subparagraph 63.73(a)(3) also directly follows the definition of source in the statute. As noted, a "stationary source" is any "building, structure, facility or installation which emits, or may emit, any hazardous air pollutant." See CAA section 111(a)(3). The phrase "functional or geographical relationship" merely gives meaning to the statutory terms. For example, a "building" suggests a geographical grouping of emission points (it may also have a functional relationship). Likewise, an "installation" suggests some type of unit that undertakes a particular function, such as a wastewater treatment system. As EPA develops section 112(d) standards, it will define "source" for particular standards considering these types of logical groupings of emission points. However, because EPA has not yet defined what will constitute a "source" for any particular section 112(d) standard (with the single exception noted earlier), the language of this rule reflects the range of options available within the statutory definition.

Several commenters contended that subparagraphs (a)(4) and (a)(5) of the proposed definition are contrary to the statute because they allow "bubbling" across two or more separate sources. One commenter noted that previous guidance from EPA precluded the use of "bubbling" to avoid section 112(d) standards.

As discussed in the proposed rule, EPA believes that the provisions of § 63.73(a) (4) and (5) are consistent with the statute and the underlying purposes of the Early Reductions provisions. However, EPA is deleting subparagraph (a)(4) because (a)(4) is redundant with the provisions of (a)(5) as any combination of emission points that would meet the requirement of proposed paragraph (a)(4) would also fit with the language of (a)(5).

The EPA has concluded that unrelated emission points may be considered as a single "source" for purposes of the Early Reductions Program, provided that the emission points are all under common ownership or control, are located "within a contiguous area," such as a common plant site, and constitute a significant level of emissions. The individual emission points to be aggregated do not have to be located next to one another or be functionally related in order to be grouped as a source provided that they are all located within the same contiguous facility.

The conclusion that aggregating unrelated emission points is permissible for purposes of the Early Reductions Program is confirmed not only by the statutory language and case law discussed above, but also by the statutory policies and legislative history of the Early Reductions Program. In section 112(i)(5)(E), Congress authorized a form of emissions trading, i.e., by allowing offsetting reductions of one HAP against reductions of other HAP's for purposes of the Early Reductions Program. Aggregation of emission points is merely another form of emissions trading.[1]

Nevertheless, the rule is not inconsistent with the general emissions trading policy referenced by the commenter (51 FR 43814; December 4, 1986), i.e., that "bubbling" may not be used to avoid a section 112(d) standard. The Early Reductions provision does not provide a mechanism for a source to avoid applicability of a section 112(d) standard. Rather, it provides for a compliance extension in the form of an alternative emission limit for the source for a period of six years in exchange for the source having achieved a certain emissions reduction level by a specified date (either by January 1, 1994 or before proposal of an otherwise applicable section 112(d) standard). The source must meet the section 112(d) standards when the compliance extension has expired.

Moreover, the legislative history indicates that Congress wanted EPA to encourage participation in the Program. See H.R. Rep. No. 101–490, 101st. Cong., 2d Sess. 332 (May 17, 1990) ("In the administration of this provision EPA thus should strive to encourage companies to take advantage of this incentive to reduce emissions early.") In addition, the significance threshold (i.e., 10 tons per year, or 5 tons per year at a contiguous plant site less than or equal to 25 tons per year) is designed to ensure that substantial real reductions are achieved and that the Program is not trivialized. The flexibility afforded through aggregating emission points offers greater incentive to participate in the Early Reductions Program. Greater overall participation in the Program combined with the minimum threshold for early reductions achieved will help ensure that the reductions achieved under the Program are both real and substantial and the concomitant environmental benefits maximized.

The commenter argues further that the random pooling approach that allows for credits undertaken in the past demonstrates that subparagraph (a)(5) is inconsistent with the purposes of the statute. The commenter argues that the justification for random pooling—to encourage greater participation in the Program and thereby reduce air toxics emissions—is not present if a source can include past reductions in the pool. The commenter concludes that any pollution reduction measure undertaken prior to the enactment of the law cannot have been dependent on the incentive of pooling. The commenter acknowledges that past reductions can be credited, but that they should not be pooled with unrelated, uncontrolled emission points to demonstrate an early reduction.

The statute affords a six year extension for those sources that achieve a 90 (95) percent reduction in emissions by a specified time. Those emission reductions may have occurred at any time back to 1987, and in limited instances 1985 or 1986. The commenter assumes that the only time applicants will use the grouping of emissions points under proposed paragraphs (a)(4) and (a)(5) is to get credit for past actions, make no additional reductions, and obtain a 6-year extension for remaining uncontrolled emission points within the Early Reductions source. This will not be the case. The EPA has discussed tentative Early Reduction plans with many companies and has received several enforceable commitments which indicate that the flexible definition of source is encouraging prospective emission reduction projects. In many instances, EPA expects that an applicant will group some recently well-controlled emission points with others, some or all of which may have controls installed on them. The ability to apply credits in excess of 90 (95) percent reduction from

[1] This conclusion is limited to the context of the Early Reductions Program for several reasons. In particular, Congress specifically contemplated netting one hazardous pollutant against another for purposes of this program. Congress indicated in the legislative history that it wishes EPA to encourage participation in this program to obtain early reductions (see discussions below); and the statutory requirement for 90 percent reductions raises quite different factual and policy issues than might be applicable elsewhere.

one point to a point unable to achieve 90 (95) percent by itself, provides an incentive to control the second point enough to cover the shortfall where it would not have otherwise.

For example, suppose the applicant previously controlled a 100 ton emission point "A" to a 98 percent control level, i.e., it now emits 2 tons of HAP's. The applicant also has a second 100 ton uncontrolled emission point "B." Existing control measures for point B indicate that MACT will likely require at least 90 percent reduction. However, a much less expensive technology can reduce those emissions from point B by 85 percent, i.e., to 15 tons. Furthermore, the owner has determined that he would realize a net savings if he could implement 85 percent control now and 10 years later implement MACT, compared with meeting MACT in four years. The extra time gained from a compliance extension would also allow development of process modifications that would completely eliminate HAP emissions from his source. Without proposed paragraph (a)(5), the applicant will have no incentive to install any controls on point B prior to a section 112(d) standard because that point by itself will not be reduced by 90 (95) percent, short of installing MACT controls anyway. However, if it can "credit" an additional five tons from emission point A, it will have an incentive to participate in the Program for both points A and B, and thereby substantially reduce overall air toxics emissions from that source. Without the option of proposed paragraph (a)(5), the source would not seek a compliance extension for point B and would have no incentive to enter the Program, and the emissions from the two points will be 102 tons; by entering both points in the Program using proposed paragraph (a)(5), the source's emissions will be 17 tons, which is greater than a 90 (95) percent reduction from the original 200 tons being emitted by the two points. Moreover, there is no basis in the law for penalizing those that made reductions between 1987 and the passage of the CAA Amendments in defining a source.

The same commenter also objects to pooling emissions that would have occurred anyway, especially shutdowns, to shield points that otherwise would have had to comply with a section 112(d) standard.

There is no basis to require, as the commenter urges, that an applicant certify that any reductions (in particular any shutdowns) would not have occurred but for the Early Reductions provisions of the law. This comment and others are addressed more fully in the section entitled "Allowable Emission Reductions" below.

A number of commenters felt the definition of source should be consistent with the source definition proposed in Title V of the CAA, and therefore be consistent with other sections of the CAA.

The definition of source for purposes of section 112(i)(5) is consistent with the definition of source under section 112 of the CAA. Nothing precludes different definitions or interpretations of the term "source" in other parts of the CAA. The Title V permitting authority will be required to establish permit limits for a facility during the permit process required by the Title V permit program. It may well be that one permit for a contiguous facility may contain permit limits for multiple section 112(d) sources. Whether part of the Early Reductions Program or not, many industrial facilities will be subject to more than one section 112(d) standard and thus may have more than one section 112(d) "source" as part of its permit.

One commenter suggested that the source definition be expanded to cover all sources for which EPA is currently developing standards. Similarly, a second commenter requested that the source definition be revised so that it is linked to the list of categories and subcategories for which section 112(d) standards will be developed.

As noted earlier, EPA has not yet determined what groups of emission points will constitute a source for any particular section 112(d) standard.

The definition of source is set forth in a manner consistent with the broad statutory definition. Section 112 will establish standards for hundreds of different types of industrial processes and other sources that emit HAP's. It is impossible to determine at this time how "source" might be defined for any particular source category to be regulated by a section 112(d) standard. As noted above, the list of potential source categories to be subject to regulation does not necessarily aid in the definition of source. In some instances, an industrial source category (e.g., a particular type of manufacturing process) may have one "source" for purposes of a section 112(d) emission limit. In other instances, multiple sources may be included within any source category, e.g., tanks in a process could be one source and wastewater emissions from the same process may constitute another source within the same source category. The EPA has not yet developed any specific definitions of source to all of the categories listed in 56 FR 28548 (preliminary source category listing).

Included in the source definition is a significance threshold (discussed above) to ensure that application of the flexible source definition results in meaningful reductions of emissions. A number of comments were received regarding the significance threshold.

One commenter believed that § 63.74(b) of the regulation that defines significant emissions unnecessarily restricts participation in the Program by smaller stationary sources. Another commenter agreed that the Early Reductions Program should focus only on major emitters (i.e., 10 tons/yr or 5 tons/yr at less than 25 tons/yr facilities). Another commenter felt that the definition of significant should include only 10 ton/year sources; allowing smaller sources to participate would waste resources on such small sources.

The EPA's definition of source is designed to provide broad flexibility in defining source for purposes of the Early Reduction provisions. The goal is to encourage widespread participation in this Program to achieve early reductions of air toxics emissions. The significance threshold included in 63.73(b) is designed to ensure that significant reductions occur. It is important to point out, however, that the 5/10-ton threshold of significant emissions applies to only subparagraph (a)(4) (formerly (a)(5) in the proposed rule; proposed paragraph (a)(4) has been deleted in the final rule). Thus, any process unit or other entity that meets any definition in (a)(1) through (a)(3) is eligible for an Early Reduction extension, even if it emits less than the 5- or 10-ton threshold. Thus, EPA anticipates that in most instances, even smaller facilities will be able to participate in the Program.

While EPA could have considered other thresholds, such as 3 tons/25 tons per year or 20 percent of any plant's emissions, as suggested by some commenters, the levels chosen are a reasonable attempt to balance the various factors involved, including allowing participation and assuring significant reductions.

One commenter requested clarification of the source definition as it relates to a source that services more than one production unit, such as a wastewater system.

Under § 63.73(a)(3), it is possible to define a unit such as a wastewater treatment system, that serves multiple parts of an entire plant, as a single source.

Given the flexibility of the source definition, one commenter wanted assurance that the source defined for

early reductions would remain constant throughout the compliance extension, regardless of how an applicable section 112(d) standard defined a source. The commenter questioned what would happen if the source defined by an applicable section 112(d) standard is different from the source defined under the Early Reductions Program.

Once an individual source is defined and accepted by EPA as part of the Early Reductions Program, the Early Reduction source will not change as a result of a section 112(d) standard. Any particular section 112(d) standard may apply to the entire Early Reduction source or to a subset of emission points within that source. All emission points included in the defined Early Reduction source are entitled to a 6-year extension from all otherwise applicable section 112(d) standards. At the end of the 6-year period, emission points affected by the earliest applicable section 112(d) standard must meet those standards. Emission points not affected by the earliest section 112(d) standard must continue to meet the alternative emission limitation until 6 years after the compliance date of any section 112(d) standard applicable to the emission point. Any emission points not included in the Early Reduction source definition, but included in the source definition for a section 112(d) standard must achieve reductions according to the compliance schedule in the applicable standard.

Another commenter felt that owners or operators should have the flexibility to redefine sources if significant process changes or production increases were made during the extension period, or if portions of a plant which were shut down restarted.

Once an individual source is defined and accepted by EPA as part of the Early Reductions Program and the source has been granted a 6-year extension by permit, the source cannot be redefined. If a portion of the original source restarts or expands, those emissions must be accounted for in the post-reduction emissions. If part of a source shuts down or curtails production and production capacity is increased at another unit or is replaced by a new unit at the plant site not included as part of the original source, the HAP emissions from the increased production outside of the Early Reduction source must be accounted for as well. This is to ensure that emissions from the source are not simply moved elsewhere in the plant. Owners or operators must give careful consideration to the designation of "source" when applying for the Early Reductions Program in light of potential future expansions.

If a source anticipates increased production in certain areas of its facility, the owner or operator has several options. The flexibility of the source definition allows the applicant to define a source that does not include the portion of the facility that may expand. The applicant may also reduce emissions from the base year by greater than 90 (95) percent, thereby allowing for subsequent increases in emissions that would still meet the required reduction. If owners or operators can anticipate what changes will be made to the source, they may coordinate with the State in determining the most appropriate type of alternative emission limitation (i.e., a numerical emissions limitation for each emission point or other requirement) that may allow more flexibility for expanding one portion of the source. The EPA recognizes that process changes are necessary, but to participate in this Program, overall source emissions must remain at a level that is 90 (95) percent of the base year emissions. The permitting authority may revise or adjust alternative emission limits through permit modifications as appropriate, provided that the overall 90 (95) percent reduction for the source is maintained during the extension.

Finally, one commenter asked for clarification regarding a situation in which a defined source adds a new line identical to that already included in the source definition.

In most cases, new emission points will not be able to participate in the Early Reductions Program. The CAA specifies that a compliance extension may be granted only to an existing source, e.g., those emission points existing in the selected base year. New emission points (those built after the base year) would thus be outside the scope of the previously defined Early Reduction source, and therefore would be subject to section 112(d) standards, if previously proposed.

The only exception occurs when the entire plant site or an entire enclosed building is defined as the source by the applicant and a "new" process unit is constructed within the plant site or building, respectively, and emits less than 10 tons/yr of a single HAP and 25 tons/yr of total HAP's. The new unit must then be included as part of the Early Reduction source and the source must maintain the original 90 (95) percent emission reduction from base year emissions. Emissions from the existing points in the original source must therefore be reduced to compensate for the additional emissions from the new points. If, however, emissions from the new unit exceed 10 tons/yr of a single HAP or 25 tons/yr of total HAP's, the new unit is considered, for the purposes of Early Reductions only, a source by itself and thus would not be part of the original Early Reduction source, regardless of the source definition. The EPA will distinguish between existing sources and new sources in other rules. However, early reductions occur before proposal of section 112(d) standards and before other rules that will distinguish between existing and new sources are finalized. Furthermore, the Early Reductions Program applies only to existing sources. Therefore, EPA had to make an administrative determination for the purposes of Early Reductions that new units emitting greater than 10 tons/yr of a single HAP and 25 tons/yr of total HAP's are new sources. The EPA may distinguish between new sources and existing sources differently in other rulemakings.

B. Base Year Emissions

Two commenters suggested that the base year be different than 1987. One commenter wanted 1984 to be an acceptable base year if data had been submitted to EPA during that year. Another commenter suggested that 1990 would be a more relevant base year since 1990 would be consistent with Title I requirements.

The CAA specifically states that the base year not be earlier than 1987 except that the source may choose 1985 or 1986 as the base year only if the source owner or operator can demonstrate that supporting data pursuant to an information request under section 114 of the CAA were received by EPA prior to November 15, 1990. To provide maximum flexibility to sources, EPA is allowing any base year after 1986 that the owner or operator chooses. However, emission data developed during years other than the base year, including years prior to 1985, can be used for determining base year emissions if the data are representative of operating conditions in the base year. Owners or operators will have to demonstrate the applicability of these data to base year conditions.

Two commenters suggested allowing base year emissions that are substantially greater than previous years as long as the emissions were within permit levels.

The CAA specifically states that base year emissions cannot be "artificially or substantially greater than emissions in other years prior to implementation of emissions reduction measures." Permit levels are simply a maximum acceptable

emission limit and may not reflect "actual and verifiable" emission levels as required by the CAA. Therefore, comparison of base year emissions to permit levels does not determine the relationship of base year emissions to emissions in other years. Even emissions well within permit levels, but substantially greater than other years would not be allowable. For example, a permit may be written to allow 100 tons per year, but if the source were emitting 30 tons per year in years other than the base year, base year emissions of 60 tons from the source would not be allowable. It is clearly the intent of the CAA to avoid the use of unusually high emission levels to count toward the base year, which would lead to overstating reductions achieved and minimize the benefits to the environment achieved by the Early Reductions Program.

One commenter requested that the term "substantially greater" be clarified.

The determination of "substantially greater" is necessarily subjective. "Substantially greater" will be determined in large part by historical emissions variations of the source and the reasons for the variations. If an application is denied because base year emissions are found to be "substantially greater" than other surrounding years, the reviewer will provide rationale for this determination. Each base year review will be judged on a case-by-case basis. The enabling document ("Enabling Document for Regulations Governing Compliance for Early Reductions of Hazardous Air Pollutants," EPA–450/3–91–013, July 1991) provides guidance to reviewers and submitters to better understand what is "substantially greater." To avoid later problems with this issue, it is recommended that the applicant request a preapplication conference to discuss the specific details surrounding its base year emissions. The preapplication meeting should be held with the appropriate EPA Regional Office and State.

One commenter questioned EPA's requirements for establishing base year emissions. Specifically, the commenter felt applicants should not be required to submit evidence that base year emissions are not artificially high or that emissions reductions due to lower production rates or shutdowns are permanent. The commenter contended that the seriousness of violating section 114 requirements and the threat of enforcement would make it unnecessary to show this type of evidence.

Early reduction applicants will be required to submit evidence demonstrating that base year emissions are not artificially high. Submission of this information provides reasonable assurance desired by the applicant that base year emissions will be acceptable for an Early Reductions demonstration, except in the case of error or submittal of fraudulent information. Prior approval of base year emissions facilitates the Title V review process, where the actual reduction demonstration is made.

The regulation has been changed with regard to providing evidence of lower production rates and shutdowns. Sources will not be required to show evidence that lower production rates or shutdowns are permanent for the extension duration. This will be accomplished by making the shutdown or lower production rate conditions of the Title V permit.

Two commenters also requested guidance in assessing the presence of trace quantities of HAP's. They suggested that there should be a minimum quantity of HAP's present before having to account for these emissions in the base year.

Trace pollutants and impurities will be handled on a case-by-case basis. General policy would be difficult to develop for all pollutants. For example, small quantities of dioxin may be considered significant while the same quantity of another non high-risk pollutant would be considered an inconsequential trace amount. Based on process and product knowledge, owners or operators should be aware of the possible presence of HAP's in their emissions. If trace quantities of HAP's are expected or known to be emitted, owners or operators should account for their presence.

The actual determination of the quantity of emissions may be similar to the determination of small, insignificant emission points. Generally, testing will not be required. The source owner or operator may make conservative assumptions in his calculations to determine the quantity that may be emitted. If trace HAP's are neither expected nor known to be present, then there is no need to make an assessment. The EPA expects participants in the Program to quantify all HAP's reasonably expected to be present.

A number of commenters requested that Toxics Release Inventory (TRI) data be acceptable for base year emissions.

The TRI data alone are not sufficient to support base year emissions. The Early Reductions Program requires more rigorous support for emissions data than is required by the TRI. If the supporting information for the TRI data meets all the requirements of the Early Reductions Program, then that information will be acceptable. Supporting documentation for the Early Reductions Program must stand on its own merit.

Various commenters representing industry asked that EPA allow the use of average emission factors when estimating base year emissions from equipment leaks.

Average EPA equipment leak emission factors generally may not be used in establishing base year emissions. Use of EPA average emission factors for base year emissions would artificially inflate the base year estimate. Subsequent use of a more source-specific method for the post-reduction demonstration would result in lower estimated emissions, but in fact would only be a "paper" reduction. As mentioned in the preamble to the proposed regulation, source owners or operators can establish emission levels for equipment leaks using any procedure except for average emission factors established in the document entitled "Protocols for Generating Unit Specific Emission Estimates for Equipment Leaks of VOC and VHAP," EPA–450/3–88–010, October 1988.

The EPA has reconsidered disallowing use of average emission factors to establish equipment leak emissions only in the case where no equipment leak emission reduction will be claimed; i.e., equipment leak emissions are the same in the base year and the post-reduction year.

The EPA is allowing this exception because it will result in greater actual emission reductions from the source. The source will have to control non-equipment leak emission points to a greater extent to compensate for the over-estimate of the post-reduction equipment leak emissions. In addition, it is noted that equipment leaks must be less than 10 percent of base year source emissions, or the source could not achieve a 90 percent overall reduction.

Appendix B has also been clarified to better describe the equipment leak "source." The negotiated regulation for equipment leaks (56 FR 9315, March 6, 1991) will require that certain equipment in HAP service within a process unit to which the equipment leak standards are applicable must be viewed as a whole. This is the case for valves, pumps, and connectors within a process unit, which must be considered together, as the regulation is written in terms of percent leaking components across a process unit. That is, valves, pumps, and connectors cannot be split up such that some of the valves in a process unit have an Early Reduction alternative emission limitation and the rest meet the section 112(d) standard. For example, it must be that either all

valves within a process unit are in the Early Reduction Program or none are.

The logic for requiring inclusion of all the valves, pumps, or connectors from a process unit, does not extend to the other equipment covered by the equipment leak rule, such as pressure relief devices or product accumulator vessels, which will be subject to individual standards applicable to each device or vessel, and not all devices or vessels as a group. Equipment subject to such "piece-specific" standards could individually be assigned alternative emission limits as part of an Early Reductions source or meet the section 112(d) standard, and are not constrained by the process unit coverage.

Two commenters were concerned that the review process would result in delays and suggested that base year emissions by accepted if EPA did not complete the review in a specified time frame.

It is EPA's goal to review all enforceable commitments and submittals within the times identified in the rule. However, EPA intends to adequately review all submittals, and will take whatever time is necessary to ensure that the applications are complete and verifiable. The EPA will not automatically accept base year emissions that have not been reviewed due to time constraints. The purpose of reviewing base year emissions early is to provide some assurance to the submitter that the base year emissions for Early Reductions will be approved at permit review.

Finally, a number of commenters suggested that once base year emissions are accepted by EPA, there should be no further review or auditing of the data.

Acceptance of base year emissions data does not provide an absolute shield against revision should the data later be found incorrect. Reviewers and commenters are urged to present any criticisms during the early review period regarding base year data. Applicants can make appropriate modifications at that point and proceed with reasonable confidence that their emissions are acceptable. Base year emissions that have been reviewed and approved are still subject to additional review if errors or fraud are discovered at a later date. Discovery of incorrect or fraudulent information in the emission data or supporting materials after initial approval could potentially invalidate the base year and/or require the applicant to make revisions.

C. Enforceable Commitments

Two commenters suggested that there be no penalty for failure to meet an enforceable commitment. They proposed that sources failing to meet the commitment simply be allowed to revert back to the requirements of an applicable section 112(d) standard.

Sources that make an enforceable commitment to achieve early reductions can revoke the commitment without penalty up to December 1, 1993. These sources would thus be subject only to the applicable section 112(d) standard. This allows the source a considerable amount of time to attempt to achieve the promised reductions. But, if the source is unable to achieve these reductions, they may terminate their participation in the Early Reductions Program without sanction, provided they do so by the required deadline. Other participants in the discussions leading up to proposal of this rule expressed the concern that Congress intended that commitments are to be kept, and that once made, they could never be revoked. To give any meaning to the "enforceable" part of enforceable commitment, there must be something that is enforceable. The EPA believes that if after given every opportunity to revoke the commitment if necessary, the unrevoked commitment is enforceable. The EPA feels that the suggested compromise between the competing positions is reasonable.

If those who achieve the committed reductions prior to January 1, 1994 subsequently increase emissions in violation of their Title V permit conditions (or in violation of the enforceable commitment if the permit has not yet been issued), they would not have to revert to meeting the section 112(d) standard. They would be subject to an appropriate penalty, but would continue to maintain the considerable benefits of continuing in the Early Reductions Program. Likewise, those who indicate that they are continuing in the Program by not revoking their commitment prior to December 1, 1993, but who fail in their performance by not achieving the reductions committed to prior to January 1, 1994, will likewise be subject to an appropriate penalty. The EPA will use enforcement discretion to determine the severity of penalties, based on the efforts made to achieve the reductions.

One commenter recommended that a grace period be allowed for sources that cannot make their enforceable commitments on time due to external forces such as delays in test results.

The CAA requires that the reductions specified in the commitment must be achieved by January 1, 1994 to receive a section 112(d) compliance extension. The Early Reductions regulation allows test data to be received as late as March 31, 1994 to demonstrate that the reductions have been achieved. The reductions, however, must have been achieved by the date specified by the CAA. If a source cannot achieve the reductions required by the enforceable commitment, the applicant may rescind the commitment as late as December 1, 1993 without penalty. Therefore, the applicant should have adequate time to assess whether or not the source can achieve the reductions and to take whatever action he deems appropriate.

Another commenter suggested that the rule should assure that companies that make good faith efforts to comply with the requirements of the Early Reductions Program not be subject to enforcement action if errors or mistakes are discovered in the enforceable commitment either by EPA or the company.

The EPA will use its enforcement discretion for cases where companies make an honest mistake in their estimation of the base year emission data or supporting materials. In such instances, companies may be required to revise their base year and make additional reductions in order to achieve 90 (95) percent emission reductions. Alternatively, they may rescind their commitment without penalty prior to December 1, 1993. Sources found submitting false or fraudulent information in their commitment for early reductions, even after initial approval of their base year submission, shall be subject to enforcement action under section 113 of the CAA or other Federal statutes.

One commenter questioned the authority of the reviewing agency to challenge the control plan proposed as part of an enforceable commitment.

The control plan outlined in the enforceable commitment is a general, nonbinding strategy that the source will implement to reduce emissions and is not enforceable. The owner or operator develops the plan with the goal of reducing emissions by 90 (95) percent. As the owner or operator implements the plan, however, he may discover that the emission reduction can be better met with another control strategy. The control plan presented in the enforceable commitment must, therefore, remain somewhat flexible. The general plan is required to assure the reviewing authority that the reductions can be achieved and that the source owner has given serious consideration to achieving early reductions. The control plan will not likely be questioned or the cause for denial unless it indicates that the required reductions will not be met or the plan does not appear reasonable. The ultimate test will not be whether or

not the described control plan will be followed, but a demonstration that the reductions have actually occurred.

One commenter requested clarification of the time limit given for submitting revised data for an enforceable commitment.

Within 90 days of receiving comments indicating deficiencies in a submittal, a source owner or operator must either revise and resubmit the submittal or notify the permitting authority that a revised submittal eventually will be sent; otherwise the submittal will be considered by EPA to be withdrawn. This allows the reviewing agency to recognize in a timely fashion which commitments will be revised and which will be rescinded. Because of the large number of applications expected to be received by EPA, a deadline for resubmittal or notification of intent to continue in the program is necessary to expedite the review process and to identify those sources that do not wish to pursue their reduction demonstration. A withdrawal alerts the reviewing agency not to pursue penalties after January 1, 1994 if the source fails to meet the required reductions. Base year emissions that are submitted for early review and not as part of an enforceable commitment do not have a deadline for resubmittal. The regulation has been clarified to distinguish the difference between resubmittal schedules.

D. Allowable Emission Reductions

Several regulatory agencies and citizens groups felt that only voluntary reductions should be credited toward demonstration of early reductions.

It is clearly the intent of the CAA to credit sources for emissions reductions accomplished by any means, as long as the emission reductions are actual and verifiable and made prior to proposal of an applicable standard or, in the case of an enforceable commitment, by January 1, 1994. According to the legislative history of the CAA, the Early Reductions Program initially was limited to voluntary reductions. Some commenters on the draft legislation suggested that limiting qualified reductions was unfair. For example, facilities located in States with extensive air toxics programs would not be able to benefit from early reductions. After considering this and other comments there was a deliberate change to the CAA Amendments to allow any reductions in emissions after the base year. The EPA interprets this change as the intent of Congress to expand the Program to allow all early reductions, regardless of how they are achieved.

One commenter felt that HAP emission reductions resulting from State or Federal regulatory programs designed to control VOC (such as New Source Performance Standards or PSD) should not be credited towards Early Reduction demonstrations. The commenter suggested that only reductions achieved to control air toxics should be used for this Program, not reductions achieved to reduce non-toxic VOC. Another commenter asked for clarification as to whether offsets used in New Source Review are creditable for the Early Reductions Program.

The statute provides that the Administrator shall issue a permit to a source that achieves a 90 (95) percent reduction in emissions of HAP's that allows the source to meet an alternative emission limit reflecting the 90 (95) percent reduction in lieu of the otherwise applicable standard issued under section 112(d) if the reduction is made before the proposal of a section 112(d) standard or if the source enters into an enforceable commitment before proposal of the standard and makes such reductions before January 1, 1994. The statute further provides the reduction will be determined with respect to verifiable and actual emissions in a base year not earlier than calendar year 1987. There is no limitation in the statute as to the reasons those reductions were made.

There were also comments pertaining to the definition of "malfunction," particularly with regard to how startups and shutdowns will be credited towards base year emissions.

Scheduled startups and shutdowns are considered routine. Emissions created by these routine operations can be counted toward base year emissions. However, startups and shutdowns associated with malfunctions are not routine and cannot be included with base year emissions. "Actual emissions" as defined in the proposed rule do not include excess emissions from a malfunction. Likewise, other emissions from startups and shutdowns directly attributed to the malfunction should not be included. In order to clarify this exclusion, the definition of actual emissions in the Early Reduction regulation has been modified to read "* * * does not include excess emissions from a malfunction or any startups and shutdowns associated with a malfunction."

Another commenter contended that the definition of malfunction would allow sources to earn credit for poor maintenance. Since the definition states that failures caused by poor maintenance shall not be considered malfunctions, the commenter felt sources could inflate base year emissions and also obtain reductions by performing maintenance on neglected process units.

Sources will not be allowed to credit emission reductions if the base year emissions were in violation of emission standards. However, emissions that result from poor maintenance, careless operation, or any other preventable upset conditions or preventable equipment breakdown that are not in violation of any emission standard are not considered malfunctions and can be credited toward base year emissions. Thus, the Early Reductions Program provides an incentive for sources to improve their maintenance and operation practices (which would not otherwise be required), resulting in a net benefit to the environment.

E. Demonstration of Early Reductions

Sources will be granted compliance extensions if they demonstrate reductions of HAP's of 90 (95) percent. A number of comments were received on how that demonstration should be made.

One commenter suggested that sources be granted compliance extensions if they achieve 90 (95) percent reduction of one or more specific HAP's.

The CAA specifies that 90 (95) percent reduction of all HAP's from the defined source must be achieved. Selective HAP reduction is not allowed. The Early Reductions Program allows flexibility in defining the source, but that flexibility cannot be extended to specific pollutants within the source, with the exclusion of others.

Two commenters recommended that emissions be expressed as emissions/pound of product rather than a specific quantity per year. They felt that this would overcome problems with fluctuating production rates, particularly when establishing the base year emission level.

The statute requires 90 (95) percent reduction from base year emissions. Thus, the Early Reductions Program is concerned with absolute reductions from base year emissions, not a percent reduction from what current emissions would have been. The alternative emission limit will reflect a specific emission level that is 90 (95) percent less than base year. Sources with fluctuating production must consider future increases in emissions, and make adjustments accordingly.

Several commenters urged EPA to require particulates to be controlled to 95 percent, and not allow averaging with gaseous pollutants. Other commenters supported the weighted

average approach for gaseous and particulate mixtures.

At proposal EPA recognized that there may be sources that have already achieved 95 to 99 percent reduction in particulates through control measures employed prior to the earliest allowable base year, but that have significant potential reductions from relatively uncontrolled gaseous HAP emissions. If, for an Early Reductions demonstration, such sources were required to reduce gaseous HAP's by 90 percent as well as reduce the remaining particulate emissions by another 95 percent, the source may find it impossible to reduce particulate emissions further or find that further reductions likely would exceed requirements of an applicable section 112(d) standard for the particulate emissions. In either case the source would not seek a compliance extension and thus would not make early reductions of the gaseous HAP's.

A telephone query from a potential applicant exemplified this problem. This source coats metal parts and has vents that release both gases and particulates. In this case particulates are very tightly controlled (prior to the earliest possible base year) but gases are not. The source was interested in making early reductions by reducing the gases by 90 percent, but if it also had to achieve an additional 95 percent reduction in the already tightly controlled particulates, it would not be able to enter the Program.

The EPA recognized that it would be beneficial from an environmental standpoint to allow a reduction in the gases without requiring an additional 95 percent for the particulates; i.e., without some allowance for this situation, the source would not enter the Program and no reductions would be achieved in the gaseous HAP's until required by a section 112(d) standard. The EPA therefore proposed to allow a source to average the required reductions for gases and particulates; particulates could be reduced by less than 95 percent as long as compensating reductions were achieved in gaseous HAP's. The overall target reduction to be achieved would be between 90 and 95 percent and would be determined by the relative amounts of gases and particulates emitted from the source in the base year. This averaging method still would require the same amount of overall HAP emission reduction as would the separate 90 and 95 percent requirements.

The proposed averaging method could have been used at any source, whether the gases and particulates were emitted from different emission points or the same emission point. However, based on commenters' concerns, EPA has reconsidered the applicability of the averaging method, and has narrowed the scope.

The statutory language, in section 112(i)(5), explicitly requires 95 percent reduction of particulate HAP's and 90 percent of gaseous HAP's. The EPA, however, feels that Congress did not consider or was not aware of emission points that emitted both gases and particulates and that different controls are required for each, and therefore did not provide for this situation. Furthermore, EPA believes that it would be beneficial to allow a weighted average for gases and particulates, when emitted from the same points, especially where only small quantities of one are emitted with respect to the other, in light of the alternative of no early emission reduction.

Therefore, the final rule allows the use of averaging at sources in which the gases and particulates are emitted from the same points. For example, if 3 emission points at the source emit both gases and particulates, these emission points could be aggregated to establish a combined percent reduction between 90 and 95 percent, e.g., the 3 points could achieve 94 percent reduction overall. The combined percent reduction would depend on the relative amounts of gases and particulates emitted by the points. By restricting the use of averaging gaseous and particulate emission reductions, EPA notes that some sources emitting either gases or particulates from different vents may now be unable to achieve the required early reduction if averaging were not allowed. In these cases, because emissions are emitted from different points, the source should be defined to exclude those points that create the difficulty in emission reduction. However, the source must still conform to one of the allowable definitions in the regulation.

One commenter stated that EPA should not expect emissions testing as the basis for demonstrating post-reduction emissions.

Sources will be required to adequately document post-reduction emissions before being granted an alternative emission limit. The EPA requires the best available data to demonstrate emissions. Direct measurement of emissions is the presumed best demonstration for many cases. However, test data will not be required to demonstrate all emissions. Calculations based on engineering principles, emission factors, or material balances may be acceptable if the applicant demonstrates to the satisfaction of the permitting authority that: (1) No test method exists; (2) it is not technologically or economically feasible to perform source tests; (3) it can be demonstrated that the accuracy of a calculated estimate is comparable to source testing; or (4) emissions from one or more set of points are insignificantly small compared to total source emissions. The EPA agrees that in some situations (e.g., storage tank emissions or batch operations using solvent HAP's) calculations or mass balances generally will be acceptable and may be the preferred method of establishing emissions.

Another commenter opposed any efforts by EPA to require continuous emissions monitoring to document early reductions.

Continuous emission monitoring (CEM) is not a general requirement of the Early Reductions Program to document that the source has achieved sufficient reductions. General monitoring requirements for permit provisions, including, but not specifically, alternative emission limitations established for the Early Reductions Program, will be established according to the requirements of Title V of the CAA. Section 504 of Title V states that continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance. Therefore, if other acceptable means for determining compliance are available, CEM will not be required. Nothing in the CAA, however, prevents the requirement of CEM for the Early Reductions Program and if no other acceptable methods are available, CEM may be required.

Two commenters requested clarification of the term "sufficiently variable" used in § 63.78(b)(4) as the basis for denial. The commenters were concerned that batch processes would not be able to qualify for compliance extensions because of the inherent variability of batch systems.

The term "sufficiently variable" has been removed from the language of the regulation. The EPA recognizes that batch processes are inherently variable, and that variability alone should not be a reason for denial. The reason for denial will now read: "The emission of hazardous air pollutants or the performance of emission control measures is unreliable so as to preclude determination that the required reductions have been achieved or will continue to be achieved during the extension period."

F. High-Risk Pollutants

1. Summary

Section 112(i)(5)(E) specifies that with respect to pollutants for which high risks of adverse public health effects may be associated with exposure to small quantities, the Administrator shall limit the use of offsetting reductions in emissions of other HAP's from the source as counting towards the 90 (95) percent reduction in such high-risk pollutants. In the final rule, the number of pollutants on the high-risk list is 47, rather than 35 as proposed. The additional pollutants are listed in Table 1.

TABLE 1. LIST OF POLLUTANTS ADDED TO HIGH-RISK LIST

CAS No.	Chemical	Weighting factor
53963	2-Acetylaminofluorene	100
532274	2-Chloroacetophenone	100
334883	Diazomethane	10
96128	1,2-Dibromo-3-chloropropane	10
79447	Dimethylcarbamoyl chloride	100
122667	1,2-Diphenylhydrazine	10
151564	Ethylene imine (Aziridine)	100
77474	Hexachlorocyclopentadiene	10
0	Manganese compounds	10
60344	Methyl hydrazine	10
0	Nickel compounds	10
684935	N-Nitroso-N-methylurea	1000
62759	N-Nitrosodimethylamine	100
56382	Parathion	10
7803512	Phosphine	10
7723140	Phosphorus	10
8001352	Toxaphene	100

These pollutants have been added to the list since proposal for a number of reasons including changes to the methodology EPA used to select the pollutants and updated health effects information. Five pollutants which were proposed for the high-risk list have been deleted. These are benzotrichloride; chloroprene; 1,1,2,2-tetrachloroethane; 2,4-toluene diisocyanate; and vinylidene chloride. The final list of high-risk pollutants and their weighting factors are shown in Table 2.

TABLE 2. LIST OF HIGH-RISK POLLUTANTS

CAS No.	Chemical	Weighting factor
53963	2-Acetylaminofluorene	100
107028	Acrolein	100
79061	Acrylamide	10
79107	Acrylic acid	10
107131	Acrylonitrile	10
0	Arsenic compounds	100
1332214	Asbestos	100
71432	Benzene	10
92875	Benzidine	1000
0	Beryllium compounds	10
542881	Bis(chloromethyl) ether	1000
106990	1,3-Butadiene	10
0	Cadmium compounds	10
57749	Chlordane	100
532274	2-Chloroacetophenone	100
0	Chromium compounds	100
107302	Chloromethyl methyl ether.	10
0	Coke oven emissions	10
334883	Diazomethane	10
132649	Dibenzofuran	10
96128	1,2-Dibromo-3-chloropropane.	10
111444	Dichloroethyl ether (Bis(2-chloroethyl)ether).	10
79447	Dimethylcarbamoyl chloride.	100

TABLE 2. LIST OF HIGH-RISK POLLUTANTS—Continued

CAS No.	Chemical	Weighting factor
122667	1,2-Diphenylhydrazine	10
106934	Ethylene dibromide	10
151564	Ethylenimine (Aziridine)	100
75218	Ethylene oxide	10
76448	Heptachlor	100
118741	Hexachlorobenzene	100
77474	Hexachlorocyclopentadiene.	10
302012	Hydrazine	100
0	Manganese compounds	10
0	Mercury compounds	100
101688	Methylene diphenyl diisocyanate (MDI).	10
60344	Methyl hydrazine	10
624839	Methyl isocyanate	10
0	Nickel compounds	10
62759	N-Nitrosodimethylamine	100
684935	N-Nitroso-N-methylurea	1000
56382	Parathion	10
75445	Phosgene	10
7803512	Phosphine	10
7723140	Phosphorus	10
75558	1,2-Propylenimine	100
1746016	2,3,7,8-Tetrachlorodibenzo-p-dioxin.	100,000
8001352	Toxaphene (chlorinated camphene).	100
75014	Vinyl chloride	10

The specific changes made to the methodology and the rationale for specific pollutants being added to or deleted from the list are described below.

2. Methodology for Selecting Pollutants for the High-Risk List

The methodology used to formulate the list of high-risk pollutants, the list itself, and the weighted offsetting scheme are a direct response to the mandate in section 112(i)(5)(E) of the Act. The high-risk list and the weighted offsetting scheme may not be applicable to, or appropriate for, other sections in Title III of the Act. Other provisions of section 112, such as establishing lesser quantity emission rates under section 112(a) and identifying the relative hazards to human health from emissions of each of the listed hazardous air pollutants under 112(g) may also require the ranking of pollutants. The approach for identifying the high-risk pollutants may or may not be found to be appropriate for these or other provisions. The selection of today's approach for the purposes of section 112(i)(5)(E) is not intended to establish a precedent for other provisions or preclude the consideration of other alternative methodologies.

As presented in the preamble to the proposed rule, EPA used a number of criteria for selecting pollutants for the high-risk list. First, as specified by the CAA, chlorinated dioxins and furans (as listed in section 112(b)) were included on the high-risk list. Second, pollutants classified by EPA as Group A carcinogens (known human carcinogens) were judged to be of sufficient concern to be listed as high-risk. Third, as a way to systematically screen the remaining HAP's listed in section 112(b), EPA employed a three-tiered screening analysis for selecting high-risk pollutants.

In the first tier, health effects data were examined to rank pollutants based solely on health effects. The health

endpoints considered were carcinogenicity, reproductive and developmental toxicity, acute lethality, and systemic effects other than acute lethality (e.g., neurologic disorders). Consideration of health effects alone, however, was judged insufficient to address section 112(i)(5)(E) which describes high-risk pollutants as those for which high risks of adverse public health effects may be associated with exposure to small quantities. Accordingly, tier 2 of the analysis was exposure modeling using EPA's Human Exposure Model (HEM). The HEM provided an estimate of the ambient concentration 500 meters from a source emitting 10 tons per year at an average height of 10 meters under median meteorological conditions. As described in the preamble to the proposed rule, the ambient concentration predicted by the HEM was compared to selected risk levels to screen for pollutants likely to have an adverse effect at the exposure level that was modeled. For carcinogens, the modeled ambient concentration was compared to the concentration of each carcinogen that would result in an increase in cancer risk of one in ten thousand to the most exposed individual. For noncarcinogens, the modeled ambient concentration was compared to either (1) a level one order of magnitude greater than a verified inhalation reference concentration or oral reference dose, (2) a lowest observed effect level (LOEL) divided by an uncertainty factor of 100, or (3) the dose or concentration of a chemical that causes death in 50 percent of the exposed population (LD_{50} or LC_{50}) divided by an uncertainty factor of 1000.

Tier 3, which considered actual pollutant emissions as reported to the TRI, was intended to determine whether the pollutants were actually emitted at levels that could reasonably be expected to adversely affect public health. Pollutants with a low exposure potential were consequently eliminated from the high-risk list.

Several commenters stated that it was inappropriate to eliminate pollutants from the high-risk list based on emissions data. The commenters contended that use of the TRI is inappropriate because not all pollutants are reported, only large facilities in the manufacturing sector report to the inventory, and not all types of source categories are covered. The commenters felt that EPA should not eliminate substances because they are not currently in common use and that the tier 3 screen should be dropped from the analysis.

The EPA agrees with the commenters' concerns regarding use of the TRI and has consequently dropped tier 3 from the analysis. The EPA also agrees that chemicals not currently in common use should still be listed as high risk in case production of that chemical is resumed at a later date. The EPA now believes that tiers 1 and 2 adequately identify those pollutants that could reasonably be expected to adversely affect public health and thus limited the offsetting of these pollutants in the Early Reductions Program. The impact of dropping tier 3 is that the following pollutants have been added to the high-risk list: 2-acetylaminofluorene; 1,2 diphenyl hydrazine; toxaphene; nickel compounds; N-nitrosodimethylamine; ethylene imine (aziridine); dimethylcarbamoyl chloride; phosphorus and diazomethane.

Many commenters recommended changes to the parameters chosen for the tier 2 exposure analysis. Several commenters felt that the exposure assumptions were not conservative for several reasons including the meteorological data, the stack parameters, and the limitations of the HEM. One commenter stated that one year of meteorological data is not representative and that downwash was not considered. Two commenters suggested a shorter stack height of 3.5 meters and a 20 meter distance to the nearest residence. Another commenter recommended that the modeling use more realistic assumptions about the pollutants and emission sources. One commenter contended that the HEM is too simplistic because it does not consider actual exposure, short-term exposures or population activity patterns. Other commenters made suggestions which would make the analysis less conservative. Two commenters felt that the 500 meter distance to the nearest residence was too close. One of these commenters suggested a distance of 3000 meters and a 10 year population residence time (rather than the 70 year lifetime exposure associated with the cancer potency factor).

The second tier of the screening analysis to select the high-risk pollutants was a generic exposure modeling exercise. The EPA intended that the modeling results be used to determine which pollutants merited further analysis based on exposure potential. The EPA did not use the modeling results to estimate actual risk levels, but did use the modeling results to differentiate between pollutants. The EPA still considers the use of generic modeling parameters appropriate for this analysis because a wide range of emission release and exposure scenarios across many varied source categories are anticipated under the Early Reductions Program.

The HEM was used to estimate a theoretical downwind concentration of a typical HAP. Because the pollutants are released from various types of sources with variable stack parameters (stack height, emission velocity, distance to nearest residence, etc.) there was no attempt made to model site-specific conditions. Meteorological data used were representative of between 2 and 10 years of data from the selected meteorological station. A 10 meter stack height was chosen to represent a chemical plant. For the proposed rule, the modeling parameters also assumed a 70-year continuous exposure and a 500 meter distance to the nearest residence. Upon re-evaluation, EPA has made changes to these two parameters.

First, the assumption that exposure to a pollutant occurs continuously over a 70-year period has been changed to 33 years for the purposes of this rulemaking. Thirty-three years is a duration representative of the 95th percentile for the number of years an individual would remain at the same residence, based on data on population mobility and mortality. The 33-year duration was selected for use in this analysis as representative of a reasonable worst case approach to assessing exposure duration. Second, EPA reconsidered the choice of 500 meters to the nearest residence and has revised the analysis using a 200 meter distance. The 200 meter distance to the nearest residence is the distance that has been most often used by EPA for analyses estimating exposure to emissions from point sources. This distance represents a reasonable worst case for point source and is judged to represent a reasonable worst case for facilities that are anticipated to participate in the Early Reductions Program. The net impact of these changes was the addition of hexachlorocyclopentadiene, phosphine, parathion, and manganese compounds to the list.

Four commenters disagreed with the one in ten thousand presumptive risk benchmark for carcinogens, stating that it was not conservative enough. One commenter recommended that EPA include every carcinogen with a potency factor greater than 1.35×10^{-8} $(\mu g/m^3)^{-1}$ based on modeling a 3.5 meter stack. Another commenter argued that Congress intended that sources with risk levels of one in one million be controlled. In contrast, one commenter recommended the benchmark be lowered to one in one thousand. This

commenter believes that the one in ten thousand risk benchmark is inconsistent with the "Savings Provision" in section 112(q)(1), where standards promulgated under section 112 in effect prior to the 1990 amendments are to remain in force unless revised by EPA.

The exposure modeling exercise conducted as part of tier 2 of the screening analysis was used as a tool to identify pollutants that could potentially cause a high risk to public health (under the exposure scenario that was modeled). The EPA has decided that for carcinogens a one in ten thousand presumptive risk level is appropriate for this analysis. This decision is based primarily on guidance concerning acceptable risk discussed in the benzene NESHAP promulgated on September 14, 1989 (54 FR 38044). In the preamble to the benzene decision, the use of the one in ten thousand benchmark is described—"EPA will consider the extent of the estimated risk were an individual exposed to the maximum level of pollutant for a lifetime. The EPA will generally presume that if the risk to that individual is no higher than approximately one in ten thousand, that risk level is considered acceptable and EPA then considers the other health and risk factors to complete an overall judgment on acceptability. The presumptive level provides a benchmark for judging the acceptability of maximum individual risk, but does not constitute a rigid line for making that determination." In the case of the screening analysis for high-risk pollutants under the Early Reductions provisions, EPA believes the one in ten thousand presumptive risk level has been used appropriately. The commenters are reminded that the generic exposure analysis was not meant to estimate the actual risk from any one type of source category, but rather was used to differentiate between pollutants based on relative toxicities.

The EPA recognizes that other modeling assumptions could have been used that would have resulted in either more or fewer pollutants exceeding the presumptive risk level. However, EPA does not agree with the commenter's suggestion that every carcinogen with a potency factor greater than 1.35×10^{-8} $(\mu g/m^3)^{-1}$ should be considered high risk.

With respect to the comment that Congress intended that sources posing risks of one in one million be controlled, the commenter is referring to section 112(f)(A), the so-called "residual risk" provisions. In this provision it is stipulated that additional emission standards must be promulgated if a source's emissions pose a risk greater than one in one million after application of control technology (as stipulated in section 112(d)). The commenter is reminded that the Early Reductions Program provides an extension of the compliance time for applying control technology that is stipulated by standards promulgated under section 112(d). After the compliance time extension, facilities participating in the Early Reductions Program must still apply the required technology if their emissions exceed specified levels. In addition, facilities that participate in the Early Reductions Program are not exempted from a residual risk test under section 112(f), so the commenter's concern that the intent of Congress is not being fulfilled is unwarranted.

With respect to the Savings Provision of section 112(q)(1) the commenter is reminded that today's rule is not an emission standard, but procedures for obtaining an Early Reductions compliance extension. The use of the presumptive risk benchmark of one in ten thousand in the screening analysis for selecting high-risk pollutants has no bearing on NESHAP that have already been promulgated.

Two commenters questioned the benchmarks chosen for health effects other than cancer. These commenters felt that neither the LOEL divided by a safety factor of 100 nor the LD_{50} divided by a safety factor of 1000 were conservative enough. The commenters also thought that using a value one order of magnitude above the reference concentration was not conservative enough.

As stated in the preamble to the proposed rule, uncertainty factors were applied to the health effects benchmarks since the LOEL and LD_{50} values represent levels at which health effects are known to occur. These uncertainty factors were meant to account for variables such as interspecies variations and sensitive subpopulations, but do not incorporate all the factors typically used in developing reference concentrations. The uncertainty factors used to develop an inhalation reference concentration are typically applied to a lowest observed adverse effect level (LOAEL) or no observed adverse effects level (NOAEL). The resulting reference concentration represents a level at which the potential for adverse public health effects is considered to be negligible. However, the purpose of this analysis was to identify pollutants whose emissions could potentially present a high risk, not a de minimis risk. Therefore, the uncertainty factors used in this analysis were not meant to account for all the factors typically used in developing an inhalation reference concentration. For this analysis, EPA made a judgment that if a source's emissions were such that a LOEL or LD_{50} could potentially be exceeded (after application of the uncertainty factors and under the modeling scenario used) then the pollutant could be considered high risk. In this application, EPA believes uncertainty factors of 100 and 1000 to be appropriate. Similarly, with respect to using a value one order of magnitude above the reference concentration, EPA believes this to be an appropriate estimate of a level at which health effects could potentially be significant enough to be regarded as high risk.

Two commenters strongly urged EPA to confine the selection of carcinogens for the high-risk list to consideration of carcinogenic potency and not make use of the weight-of-evidence classification. Three commenters objected to the addition of four Group A carcinogens to the list after the pollutants had been excluded by the 3-tiered process. On the other hand, two other commenters recommended that EPA prioritize the high-risk list using a qualitative rather than quantitative approach (i.e., use weight-of-evidence reviews for identifying substances rather than potency factors).

The EPA believes it appropriate for identification of high-risk pollutants to consider both the weight of evidence and carcinogenic potency of a pollutant. The EPA stands by the decision to list Group A carcinogens as high risk based on the fact that these are known human carcinogens. The EPA judged that emissions of known human carcinogens are of sufficient concern that use of offsetting reductions in other less hazardous pollutants under an Early Reduction demonstration should be limited. Three of the pollutants (benzidine, bis(chloromethyl)ether, and chloromethyl methyl ether) are extremely potent carcinogens and were excluded from the 3-tiered process at tier 3. This means that, according to the 1989 TRI, these pollutants were not emitted by any reporting facility in quantities sufficient to exceed the risk benchmark level proposed by EPA. In spite of this, EPA felt it prudent to list them as high risk in case a source's emissions changed in the future. As discussed above, since proposal of the high-risk list, EPA has decided to eliminate tier 3 from the screening analysis. As a result, even if EPA had decided not to use weight of evidence as a criterion, these carcinogens would still be listed as high-risk pollutants. Benzene was also included on the list even though the risk benchmark level

was not exceeded when a 10 tons per year emission rate was modeled. The rationale for this decision was that in addition to being a known human carcinogen, benzene is a very high volume chemical and emissions in excess of 10 tons per year are not uncommon. The EPA believes that offsetting emissions of this known human carcinogen with less hazardous pollutants should also be limited.

Two commenters suggested that EPA revise the selection criteria to include only known human carcinogens (Group A), probable human carcinogens (Group B1), and noncarcinogens for which chronic human health effects can be expected to occur at extremely low levels of exposure.

In selecting pollutants for the high-risk list, EPA considered weight-of-evidence, potency and exposure potential of the pollutant. As described above, a weight-of-evidence classification of Group A (known human carcinogen) was deemed sufficient to list a pollutant as high-risk. The EPA does not agree with the commenters suggestion that Group B2 and Group C carcinogens should not be considered for or included on the high-risk list. In order to be listed, however, carcinogens other than Group A had to pass tier 2 of the analysis which considered potency and exposure potential.

The EPA also disagrees with the commenters suggestion that only chronic human health effects should be considered. Section 112(b) of the CAA describes HAP's as those pollutants which present, or may present, a threat of adverse human health effects including substances which are carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic. Thus, EPA believed it appropriate to assess (and include on the high-risk list, where appropriate) pollutants that are acutely as well as chronically toxic.

3. Weighted Index for High-Risk Pollutants

In the proposed rule, EPA described an indexed offsetting system based on the toxicity of the high-risk pollutants relative to each other.

Several commenters believe that the weighted index system conflicts with the CAA because it allows offsetting of high-risk pollutants with non-high risk pollutants. The commenters state that high-risk pollutants should not be allowed to be offset by non-high risk pollutants, or only be allowed when high-risk pollutants are emitted in trace amounts. Other commenters agreed with the weighting factor concept and the ability to offset high-risk pollutants.

In the final rule, a number of weighting factors have been adjusted as described below, but the weighting factor system as a whole is essentially unchanged. Contrary to several commenters contentions, the high-risk pollutant strategy does not conflict with section 112(i)(5)(E). That provision requires the Administrator to limit, by regulation, the use of offsetting reductions of other HAP's in counting towards the 90 (95) per cent reduction of high-risk pollutants. The statute does not say or even imply that the regulation must prohibit such offsetting reductions.

In response to the comment that these offsets should only be allowed when these pollutants are emitted in trace amounts, EPA notes that the weighting system effectively restricts the offsetting of emissions of the high-risk pollutants. Such a large reduction of a non-high risk pollutant is needed to offset a high-risk pollutant (up to 100,000 to 1) that only relatively trace amounts could be traded. Even in situations where the pollutant concentrations are relatively large (i.e., not trace amounts), it is appropriate to allow offsetting as long as the weighting factor system is followed. If one ton of a HAP with a weighting factor of 100 is offset with a 10 ton reduction in a pollutant with a weighting factor of 10, the offset generally should provide a similar degree of risk reduction. Consequently, EPA believes such offsets should not be prohibited. Note that these relative trades deal with decreases in the high-risk pollutants. It is not envisioned that any successful Early Reduction submittal will include any increase in high-risk pollutants other than incidental trace amounts.

Several commenters stated that trading among pollutants with different types of health effects is inappropriate. The commenters recommend using critical health effects and toxic potency information to place the listed pollutants into categories, with trading allowed within a category. Trading across categories would be allowed only for categories based on similar health effects. Weighting factors based on relative potencies would be used in such tradeoffs.

The development of the weighting system and the decision to allow trading between carcinogens and noncarcinogens is intended to provide flexibility to the participating facilities in achieving their emission reduction goals. As such, it is a policy decision and not one based purely on scientific grounds. If trading between pollutants with different health endpoints was restricted, this could potentially exclude some facilities from participating in the Early Reductions Program. The EPA feels that such restrictions would not benefit the goals of the Program as a whole.

Several comment letters made reference to the development of weighting factors for the high-risk pollutants. One commenter recommended the weighting factors be based on weight of evidence classification. On the other hand, three commenters recommended the weighting factors be based only on potency as described by the cancer potency factor. Another commenter further suggested that the cancer potency factor be multiplied by one million to arrive at the weighting factor. Finally, one commenter suggested a combination approach where both weight-of-evidence and potency would be considered. In this approach, pollutants with the same weight-of-evidence classification and having potency factors within an order of magnitude would be grouped together.

The weighting factor system has been revised slightly since the high-risk list was proposed. In the final rule, carcinogens, with a Group C classification (possible human carcinogens) have been assigned a lower weight. Greater uncertainty exists regarding the evidence for a Group C classification than that existing for chemicals classified as Group A (known human carcinogen) or B (probably carcinogenic to humans). A Group C classification is defined by positive carcinogenicity in a single experiment, a tumor response of marginal statistical significance, or finding benign tumors only. A Group B classification, whereas, is defined by carcinogenicity in two or more animal species, strains, or experiments, either with or without limited human evidence. Group A is reserved for known human carcinogens. The greater uncertainty regarding a Group C classification is reflected in a lower weighting factor. As a result, two Group C carcinogens (1,1,2,2-tetrachloroethane and vinylidene chloride) have been assigned weighting factors of 1 rather than 10 as proposed. The EPA does not feel, however, that chemicals classified in Group B should necessarily be weighted lower than those classified as Group A. With respect to Group B chemicals, a sound foundation exists regarding carcinogenicity in animals, but the human data are either inconclusive or of limited value, most likely reflecting the difficulty of obtaining quality epidemiologic data. For this weighting

system then, chemicals classified as Group A or B are combined and ranked by potency.

For carcinogens, the actual weighting factors are based on the potency of the high-risk carcinogens relative to carcinogens not on the high-risk list. This approach is the same as was proposed. Multiplying the potency factors by one million as one commenter suggested to calculate weighting factors would result in the same relative ranking of the pollutants, but higher weighting factors. The EPA believes that basing the weighting factors on the differences between the potency of the high-risk carcinogens and the geometric mean potency of the group of carcinogens not on the high-risk list is more justifiable.

Three commenters questioned EPA's policy decision concerning the weighting factors for noncarcinogens. The commenters believe that EPA must assess many additional factors when ranking the hazards of noncarcinogens. These factors include the severity of effect, its reversibility, and chemical properties such as the half-life of volatile compounds in air, vapor pressure, persistence, and bioaccumulation potential.

In assigning weighting factors to the high-risk pollutants, EPA attempted to base the factors on the relative toxicity of the compounds. For the carcinogens, the cancer potency factor is a straightforward measure of relative toxicity and was used in conjunction with the weight of evidence classification to develop the weighting factors. For the noncarcinogens, however, there is not a comparable measure of toxicity that can be used consistently for pollutants with different health effects. In the absence of such a measure, EPA proposed to assign a weighting factor of 10 to the noncarcinogens on the high-risk list. Many of the carcinogens were also assigned a weighting factor of 10. The EPA chose a weighting factor of 10 for the noncarcinongens in recognition that noncancer health effects can be as seriously debilitating as cancer. Another alternative would have been to assign these pollutants a weighting factor of 1 because other indices were not available. The EPA rejected this option because only by assigning a weighting factor greater than 1 is offsetting limited between these noncarcinogens and other pollutants not on the high-risk list. In the final rule, three noncarcinogens were assigned weighting factors greater than 10. The rationale for increasing the weighting factor from 10 to 100 for mercury is based on consideration of persistence in the environment and bioaccumulation, as discussed below. After a review of the scientific data, two other noncarcinogens (acrolein and 2-chloroacetophenone) have been assigned weighting factors of 100 rather than 10 in the final rule to provide an adequate margin of safety from adverse health effects. This decision is explained fully in a memorandum to the docket entitled "Need for Additional Weighting of Two Chemicals".

Four commenters believe EPA should establish more weighting factor categories to reflect more accurately the different toxicity levels of the various pollutants. On the other hand, two commenters believe more pollutants should be grouped together so that there is not such a wide range in weighting factors.

The EPA has reviewed the weighting factor categories and still finds four separate categories to be appropriate. As described in the comment above concerning weighting factors there were some adjustments made to the placement of certain pollutants. However, the general categories with weighting factors of 100,000; 1000; 100; and 10 are still believed to be appropriate. The difference between the most toxic carcinogen and the least toxic carcinogen with a weighting factor of 10 is about a factor of 35 (with the exception of one pollutant). Given the uncertainties inherent in the health data, EPA does not feel that this is enough of a difference to warrant another weighting factor category.

Another commenter suggested that the weighting factor could be customized for each facility by relating the weighting factor to the degree to which a reference concentration is exceeded. The commenter believed that this approach would emphasize reductions in cases where reference concentrations may be exceeded and assigns less weight to high-risk pollutants in cases where the reference concentrations are not likely to be exceeded.

There are several reasons why EPA prefers that weighting factors not be customized for each participating facility. The primary reason is that the weighting factors reflect the differences in the toxicity of the pollutants regardless of emission rates. For example, if facility X emits 50 tons of benzidine, a 1000 to 1 trade is necessary with a HAP not on the high-risk list. If facility Y emits 1 ton of benzidine, a 1000 to 1 offset is also required. The EPA believes this will emphasize reductions in the high-risk pollutants even if these emissions are small. In addition, participation in the Early Reductions Program is available to all facilities throughout the Nation. The EPA prefers that for consistency in program implementation the weighting factors for the high-risk pollutants not be customized for each participating facility. In addition, such customizing can greatly complicate the application preparation and review process; facilities and reviewing agencies may not have the expertise or resources to either perform or review site-specific modeling analyses and determine appropriate weighting factors.

Four commenters discussed pollutants that persist in the environment and/or bioaccumulate. These commenters recommended that any pollutants identified as persistent or bioaccumulative be added to the list. The commenters further suggested that an additional weighting factor of 10 be applied to these pollutants. After consideration of public comments, EPA has decided to adjust the weighting factors for chlordane, heptachlor, hexachlorobenzene, mercury compounds, and toxaphene from 10 to 100 based on persistence in the environment and bioaccumulation. The weighting factors for these particular pollutants were increased based on persistence and bioaccumulation data compiled for EPA in support of the CAA Great Waters Study.

4. Additions/Deletions to the High-Risk List

In addition to the changes to the high-risk list described above, EPA added four pollutants to the list and deleted three pollutants on the basis of health effects data. Methyl hydrazine, 2-chloroacetophenone, and 1,2-dibromo-3-chloropropane were added based on newly available or revised RfCs. N-nitroso-N-methlyurea was added because a unit risk estimate is available in a health assessment document. Benzotrichloride was deleted from the list because an inhalation potency factor was unavailable. Further review of the studies supporting the listing of chloroprene led to the determination that the primary study was not acceptable and, therefore, chloroprene was removed from the list. The RfC for 2,4-toluene diisocyanate is undergoing review based on new data and, therefore, 2,4-toluene diisocyanate was removed from the list.

Two commenters stated that when pollutants are added to the list, a source should not be exempt from further reducing those pollutants, but the source should be given up to three years to adjust its emissions to continue to qualify for the Early Reduction extension or else comply with the emissions standard under section

112(d). Other commenters believe the changes to the high-risk pollutant list should not affect the status of a previously submitted commitment or application.

The EPA has decided that sources with an approved enforceable commitment, or an approved permit specifying an alternative emission limit, will not be affected when a HAP is either added to the list in section 112(b), or is newly designated as a high-risk pollutant. The EPA expects to update the list of high-risk pollutants as the science requires. It is conceivable that a source would have to revise a post-reduction demonstration with each revision of the list. This requirement could add significantly to administrative burden for both the source and the reviewing agency. Given that the source will be in full compliance with the emission standards under section 112(d) at the end of the six year extension, EPA feels this additional administrative burden is unnecessary.

5. Comments on Specific High-Risk Pollutants

The EPA received one comment asking why lead was not listed as a high-risk pollutant.

Airborne lead emissions are currently regulated by a National Ambient Air Quality Standard (NAAQS). The EPA is currently reviewing the data the NAAQS is based on and expects to make a decision on revising the standard in the near future. Given this, and other policy considerations regarding identifying a criteria pollutant as high risk, at this time EPA believes it is appropriate to leave lead compounds off the high-risk list.

One commenter urged EPA to add radionuclides to the high-risk list.

The EPA did not add radionuclides to the high-risk list because radionuclide emissions are measured in terms of activity rather than mass and it would be extremely difficult to equate the two for the purpose of offsetting. The EPA recognizes however, that radionuclides could potentially be present in trace amounts from some combustion sources. To account for this, language has been added to the final rule that stipulates that if a radionuclide source is included in the emissions pool, EPA will not allow increases in radionuclide emissions under any post-reduction scenario.

Numerous commenters requested that specific pollutants be removed from the high-risk list. Most of the commenters took issue with the scientific basis of EPA potency factors or other specifics of the scientific studies that document the health effects. As stated above, three chemicals were deleted from the list because of health effects data and two were assigned weighting factors of one because of their Group C cancer classification. All other requests to delete pollutants from the list were denied. The rationale supporting the specific determinations are addressed in the BID.

G. State Authority

A number of commenters recommended that States be delegated authority for implementing the Early Reductions Program even before States are given permitting authority under title V of the CAA.

The EPA specifically solicited comment on whether this Program should be delegated to the States. Based on the comments received, EPA is proceeding to establish the criteria for delegating the Early Reductions Program to those States that seek delegation in advance of having a title V operating permit program. Section 112(l) of the CAA authorizes the Administrator to approve a State program for the implementation and enforcement of the emission standards and other requirements of the section, including partial delegation of the Program. That is, EPA anticipates that it will, if a state so desires, delegate to a State the authority to develop and implement the Early Reductions Program. The EPA anticipates that it will publish delegation guidance in the near future that will be useful to the States in developing programs for submittal.

Of course, until such time as a State has an approved State program under title V, it cannot issue a title V permit. See CAA section 112(1)(9). Therefore, the Administrator cannot delegate his authority to issue a permit establishing an alternative emission limit under section 112(i)(5) until such time as the state has an approved title V permit program.

Various comments were received pertaining to a State's authority to impose stricter requirements for compliance extensions than those specified in the rule.

The CAA states in section 112(i)(5)(A) that "Nothing in this paragraph shall preclude a State from requiring reductions in excess of those specified in this subparagraph as a condition of granting the extension * * *. Although not specifically stated, it is implied that the excess reductions can only be required as a condition of the State granting the extension. The CAA, therefore, implies that when the State is the permitting authority, the State may require greater than 90 (95) percent reduction as a condition for granting the extension. As long as EPA (administered through the Region) remains the permitting authority, the CAA specifies 90 (95) percent reduction.

Finally, two commenters contended that States should have the option of not allowing facilities in their States to participate in the Program or denying alternative emission limits.

The Early Reductions Program is a national program mandated by Congress through the CAA and as such, States do not have the authority to disallow participation. However, States do have the power to impose additional or stricter State standards or require greater than 90 (95) percent reduction as a condition of granting an Early Reductions compliance extension under their title V State permitting program.

H. Interface With Title V Permits

One commenter was concerned that the Early Reductions rule required compliance extensions to be in the form of a title V permit. Since there is a chance that the regulations for operating permits will not be finalized until after the first set of section 112(d) standards are proposed, the commenter believed that it may be too late to apply for a compliance extension for all sources covered by the section 112(d) standards.

The regulation allows sources covered by standards proposed prior to January 1, 1994, to submit an enforceable commitment prior to proposal of the standard. The source is then allowed until January 1, 1994, to achieve the reductions and may submit a permit application as late as December 1, 1993. Sources which have already achieved the required reduction prior to proposal of an applicable section 112(d) standard must submit a permit application containing the reduction demonstration prior to such proposal; or if a Federal or State permitting program is not yet in place, the permit application for the Early Reductions source may be submitted up to 120 days after the permitting authority has established a permitting program under title V. In the latter situation, even though the permit application would have to be submitted after proposal, the source owner or operator must still document that the required early reductions were achieved prior to proposal of the applicable section 112(d) standard. In the event that such documentation cannot be provided, the source's Early Reductions demonstration would be disallowed and the source would have to meet the section 112(d) standard.

It has become apparent recently that no comprehensive title V permitting mechanism, either a federal rule for

issuing title V permits or an approved State program, will be available in time to process permit applications for enforceable commitments which are due by December 1, 1993. In addition, it may be some time before any source achieving reductions prior to proposal of an early section 112(d) standard could submit a permit application. In both cases the owner or operator may not know if he would be granted a compliance extension in time enough to meet the section 112(d) standard if his Early Reductions demonstration were disapproved. Therefore, EPA is considering options to deal with this developing problem.

One option is for EPA to promulgate quickly a rule for interim federal issuance of title V specialty permits. The rule would apply only to Early Reductions permit applications that could not be processed due to lack of an applicable comprehensive title V program. Permits issued under the specialty program would encompass only the Early Reductions source at a facility and only the hazardous air pollutant emissions from that source. All other Act requirements applicable to the Early Reductions source would be handled through the comprehensive title V permitting process as it becomes available. A future **Federal Register** notice will describe EPA's proposed action on this matter.

Another commenter noted that there may be a gap between the time a permit application is approved and when a title V permit is issued. They suggested that alternative emission limitations be enforceable once permit applications are approved.

Permits do not have separate approval and issuance dates. When the proposed permit completes review, including federal oversight, the permit is considered valid at that time. Therefore, the date of approval and date of issuance are the same and there is no time gap.

One commenter suggested that EPA establish a policy for applications under review during the time that States receive final approval of a State title V program. The commenter felt that the reviewing agency should remain the same throughout the review and issuance of a permit.

The EPA generally agrees with the commenter that title V permit applications undergoing review by EPA for an Early Reductions demonstration and alternative emission limits should not have to be processed twice—once by EPA and then by the State. In most cases, this should not occur. However, there may be some situations where a State has received approval of its comprehensive title V permitting program during the time that EPA is reviewing a permit application submitted by a source to EPA for an Early Reductions demonstration. The EPA will address this situation in the upcoming **Federal Register** proposal described above to deal with the permit mechanism for Early Reductions demonstrations.

Briefly, the EPA does not believe that permit issuance should be substantially delayed as a result of the transition to State responsibility for permitting. Owners or operators must know in a timely fashion whether their sources will be granted a compliance extension. If an extension denial occurs, the source will have to meet the applicable section 112(d) standard on schedule, and if substantial delays occur, it will mean less time for the source to prepare to meet the 112(d) standard.

The anticipated Early Reductions specialty permit rule will address when EPA will retain permit issuance even after a State receives approval for its comprehensive title V permit program, as well as when such review and specialty permit issuance will be transferred to the State after submittal to EPA by the source owner or operator. It is envisioned that in the event of such transfer, the State will adhere as closely as possible to the original review timetable established by EPA.

Several commenters expressed additional concerns with the timing of State title V programs. Commenters wanted assurances that any Early Reduction permit application approved by EPA (vs. the State) would be included in any future State title V operating permit without further negotiation.

Alternative emission limitations for Early Reductions sources remain in effect for the duration of the 6-year compliance extension. Because permits must be renewed after 5 years, the State would be the reviewing agency at that point. However, the alternative emission limitations, once granted, continue to be permit conditions until the compliance extension expires, in which case, applicable section 112(d) standards then take effect.

One commenter suggested that base-year review should be eliminated because it could potentially stress the reviewing capabilities of EPA and the States. In the opinion of the commenter, permit issuance was more important since the permit would enforce the early reductions.

Base year review will expedite the permit review and assist industry in making "acceptable" reductions. Early review of base year emissions is essential before a source commits the resources to reduce emissions. This review will provide assurance of acceptable base year emissions prior to major expenditures.

Finally, one commenter felt that Early Reduction permits should not be revoked for any reason prior to the end of the 6-year extension, even pursuant to section 112(f) of the CAA.

Permits issued during the 6-year compliance extension may be revoked only in those circumstances that warrant permit revocation under the title V permit regulations. If the compliance extension were revoked, then the source would have to achieve timely compliance with any applicable section 112 standard. Section 112(i)(5) does not shield a source from standards issued under section 112(f).

I. Interface With Section 112(g) Modifications

One commenter requested clarification of the netting provisions of section 112(g) of the CAA, and how these provisions will be impacted by the Early Reductions Program.

The EPA recognizes that the availability of Early Reduction credits for use as offsets for emission increases under section 112(g) is an important issue. The EPA is currently developing regulations to implement section 112(g) of the CAA. The issue of offsetting emission increases with Early Reductions credits has not been resolved and will be addressed in the upcoming regulations governing section 112(g) modifications. However, EPA recognizes that there are disadvantages of allowing Early Reduction credits to be used to offset section 112(g) emission increases.

Section 112(i)(5) was designed to bring about a substantial reduction in air toxic emissions from sources prior to the actual issuance of standards governing such sources. In exchange, those sources would receive a limited compliance extension from the emission limitations established pursuant to section 112(d) of the CAA. Section 112(g) is a mechanism to allow owners or operators of facilities to make physical or operational changes to their facilities without triggering MACT requirements. A "major source" is considered not to have undergone a modification if any increase (greater than a de minimis increase) as a result of physical or operational changes is offset by an equal or greater decrease in the quantity of emissions of another hazardous air pollutant (or pollutants) from such source which is deemed more hazardous. The EPA believes that the intent of section 112(i)(5) would be

undermined by allowing the Early Reduction credits to be used under section 112(g).

This is best illustrated by example. If Company A submits an enforceable commitment to reduce its emissions by 90 percent at one-half of its facility (and that portion of the facility meets the definition of source in § 63.73) it will achieve those reductions (for example, from 100 tons/yr to 10 tons/yr) in exchange for an alternative emission limit for the first six years beyond the otherwise applicable compliance date. Later the company wants to undertake a physical change at the other half of the facility which would result in an increase in emissions of 90 tons/yr of a HAP. If, under section 112(g), the owner or operator is allowed to use as an offset credit those 90 tons/yr of reductions from the Early Reductions Program, the major source overall will emit the exact same level of HAP's as it did prior to making early reductions (i.e., 100 tons/yr), MACT requirements will be avoided on one half the facility, and the other half of the facility will have received a six year extension from an otherwise applicable section 112(d) standard.

J. Interface With Title I Provisions

One commenter suggested that facilities that reduce emissions for purposes of the Early Reductions Program should be able to use those reductions for offsetting and netting.

Most of the HAP's emitted by sources participating in the Early Reductions Program also are either volatile organic compounds (VOC) or particulate matter and, may therefore, be subject to other requirements under the CAA. For such situations, questions have surfaced over the interaction between the Early Reductions Program and the other CAA requirements. Specifically, a frequent question from interested companies concerns whether reductions made under the Early Reductions Program can be considered creditable reductions for purposes of New Source Review (NSR) permitting under parts C and D of title I of the CAA. The preamble to the proposed Early Reductions rule described the way Early Reductions would be treated in situations involving "offsets" under part D NSR requirements but did not discuss "netting" transactions. Today's preamble reiterates the proposal preamble discussion regarding use of Early Reductions as offsets and adds EPA's policy regarding netting transactions.

a. Offsets. Emission reductions of HAP's for the purpose of obtaining an alternative emission limitation under section 112(i)(5) of the CAA are not creditable for the purpose of meeting an offset requirement under section 173(a)(1) of the CAA. A source in a nonattainment area (an area where a national ambient air quality standard is exceeded) or an ozone transport region may need to obtain offsets for emission increases from planned new construction or modification of existing facilities. The HAP reductions are not allowed as offsets in this instance because section 173(c)(2) of the CAA states that emission reductions otherwise required by this Act shall not be creditable as emissions reductions for purposes of any such offset requirement. A source successfully participating in the Early Reductions Program will be granted an alternative emissions limitation (for the duration of the compliance extension period) in lieu of a section 112(d) emission standard. Therefore, the reduction of HAP emissions under the Early Reductions Program is a substitute for the reduction of HAP emissions that would otherwise be required of the source under section 112(d).

However, a source owner or operator may use as offsets any reductions in HAP emissions in excess of those required to qualify for an extension under the Early Reductions Program or reductions in non-HAP emissions which are coincidentally obtained through use of the HAP reduction measures, if such reductions are not required by any other provision of the CAA and meet any other requirements for offsets under NSR rules. These reductions are allowed as offsets pursuant to section 173(c)(2) of the CAA which further states that incidental emission reductions which are not otherwise required by the Act shall be creditable as emission reductions for such purposes.

b. Netting. In general, an owner or operator considering a physical or operational change at a major stationary source (as defined in the NSR rules) will be subject to (1) the requirements of section 173(a) (e.g., offsets, application of LAER) in nonattainment areas or ozone transport regions or (2) the requirements for Prevention of Significant Deterioration (PSD) (e.g., application of BACT) in attainment or unclassifiable areas, unless the changes will not cause a "significant net emissions increase" in pollutants subject to NSR. To determine the net emissions increase for NSR purposes, the owner or operator is allowed to sum the emissions increase from the proposed change with any creditable increases and decreases elsewhere at the plant.

The New Source Review rules and EPA's "Emissions Trading Policy Statement (ETPS)" (51 FR 43823, December 4, 1986) limit the creditability of some decreases in emissions for this "netting" procedure. For example, the NSR rules for nonattainment areas state that a decrease in emissions is creditable only to the extent that "* * * the reviewing authority has not relied on it in issuing any permit under regulations approved pursuant to 40 CFR part 51 subpart I or the State has not relied on it in demonstrating attainment or reasonable further progress; * * *" (40 CFR 51.165(a)(1)(vi)(E)). The PSD rules contain similar language. Essentially what this restriction does is prevent sources from obtaining two credits for one reduction, where the credits are related to the same air quality objective (which in this case is the attainment/maintenance of national ambient air quality standards). Thus, as an example, a source cannot use an emissions reduction to meet reasonable further progress requirements and as a reduction credit in netting calculations.

However, under the ETPS, HAP decreases credited under the Early Reductions Program also may be credited for purposes of determining the net emissions increase for a plant change proposed at a later time for new source review purposes, provided of course that the reduced HAP's also are pollutants subject to the NSR rules and that the decreases meet all other requirements for netting. In such situations, the HAP decreases produce benefits for two different air quality objectives and one credit can be given toward each; the HAP credit is associated with the air toxics reduction objectives of section 112 of the CAA and the NSR credit is associated with the attainment/maintenance of national ambient air quality standards and PSD. However, the amount of the HAP reduction creditable in these situations will be limited if the netting calculations involve HAP emissions increases. Specifically, the creditable HAP reductions from the Early Reductions Program will be reduced by the amount of any increase in HAP emissions involved in the netting calculations. If no HAP increases are involved, the entire HAP reduction is creditable.

The principle behind this policy limitation is similar to that behind the netting restriction in the NSR rule mentioned above, namely that a reduction should not receive two benefits or credits (double counting) for the same air pollution control objective. The objective of the Early Reductions Program under section 112 of the CAA is to achieve significant reductions of

HAP's at existing facilities. Sources that achieve such HAP reductions in accordance with the rules promulgated today receive credit for the reductions in the form of a six-year compliance extension from applicable section 112(d) standards. If the reductions also were allowed to be used as netting reduction credits for physical or operational changes involving increases in HAP's, then the reductions in effect would be promoting HAP increases elsewhere at the plant site by helping such facilities net out of NSR control requirements. Under such a scenario, an owner or operator could receive a six-year compliance extension to section 112(d) standards for some portion of the plant, net out of NSR control requirements, and have overall HAP emissions equal to preexisting levels. Clearly this is not a result consistent with the objectives of the CAA.

To illustrate the effect of this policy, consider a plant site in which a portion of the facility (e.g., a process unit) participates in the Early Reductions Program and achieves a 50 tons per year reduction of HAP's, which also are particulate matter. Later, the owner or operator proposes a physical or operational change at another section of the plant which would increase particulate emissions by 75 tons per year, and none of the emissions increase would be HAP's. In this case, the owner or operator can use all of the HAP reductions from the Early Reductions Program to net against the particulate emissions increase because no HAP increases are involved. However, if 30 tons per year of the proposed 75 ton increase are HAP's, then only 20 tons per year of the HAP reductions under the Early Reductions Program could be used as reduction credits in any netting calculations (20 tons per year is the amount by which the HAP reduction exceeds the proposed HAP increase). Finally, if 50 or more tons per year of the proposed 75 ton increase would be HAP emissions, then none of the HAP reductions from the Early Reductions Program could be used to net against the particulate emissions increase (because the HAP increase from the proposed modification is equal to or greater than the HAP reductions from the Early Reductions Program).

It should be noted that this netting policy for HAP reductions is applicable only for NSR programs. Under section 112(g) of the CAA, EPA must promulgate separate requirements for modification of HAP sources. The provisions to implement section 112(g) are under development but will not become effective in a State until the State has obtained approval of a Title V permitting program.

Another commenter felt that a source that achieves a 90 (95) percent reduction from base year should be granted the same 6-year extension from complying with reasonably available control technology (RACT) requirements under Title I as received from section 112(d) standards under Title III.

Section 112(i)(5) of the CAA authorizes the Administrator (or a State operating pursuant to an authorized Title V permit program) to grant a 6-year extension from compliance with an emission standard promulgated under section 112(d) that would otherwise be applicable to that source, provided the source satisfies certain conditions. Nothing in section 112(i)(5) or any other provision of the CAA authorizes the Administrator to grant extension of any RACT requirement that might be required under other sections of the CAA. As a practical matter however, EPA anticipates that many of the methods or technologies adopted to reduce a source's HAP's by 90 (95) percent for purposes of obtaining a compliance extension from a section 112(d) standard may also constitute compliance with RACT requirements under other provisions of the CAA.

Although sources successfully participating in the Early Reductions Program will be granted an alternative emission limitation in lieu of meeting an applicable section 112(d) standard, the source still is responsible for complying with other applicable requirements of the CAA. For example, sources located in areas designated nonattainment for the criteria pollutant ozone are subject to other emission reduction requirements. State implementation plans (SIP's) for these nonattainment areas (plans for attaining the criteria pollutant ambient air quality standards) must contain requirements for application of RACT requirements for stationary sources of volatile organic compounds (VOC). The RACT is required for sources: (a) For which EPA has published, or will publish, a control techniques guideline document; and (b) that are "major" as defined in the CAA.

State implementation plans also must provide for other emission reductions sufficient to demonstrate attainment by specified deadlines and meet interim reasonable further progress requirements. States may obtain reductions from any VOC emission sources in the inventory, which means that they may eventually require additional emission reductions from sources participating in the Early Reductions Program. (It should be noted that VOC emission reductions resulting from compliance with HAP rules, including those under the Early Reductions Program, are creditable toward the Program requirements to the extent that they were not required prior to enactment of the CAA Amendments of 1990 and are consistent with creditability requirements under the CAA.)

The interaction between the Early Reductions Program and other requirements for the attainment of national ambient air quality standards causes concern in that the prospect of later application of additional requirements to sources that make early reductions would effectively limit the attractiveness of, and therefore participation in, the Program. Therefore, with respect to the percentage reduction requirements, reasonable further progress and attainment demonstration requirements, EPA has established a policy to reduce the amount of uncertainty for sources that choose to participate in the Early Reductions Program. This guidance should further encourage possible applicants to participate in the Early Reductions Program. Briefly, the policy regarding RACT and reasonable further progress requirements for sources making early reductions provides that:

(1) The source must meet any applicable existing RACT requirements (including RACT which is required but has not been adopted by the State, i.e., RACT fixups);

(2) EPA encourages States to favorably consider the reductions made under the Early Reductions Program in its analysis of any future RACT requirements for the source; and

(3) EPA encourages States to seek any additional reductions (beyond those under the Early Reductions Program) needed to make reasonable further progress first from sources not participating in the Early Reductions Program.

The intent of the policy is to require compliance with existing RACT requirements, but potentially give sources some breathing room with respect to future RACT or reasonable further progress requirements, in recognition of the fact that substantial 90 (95) percent reductions already have been made at the source. This policy is appropriate because, in most cases, a 90 (95) percent reduction of HAP's from the sources will produce comparable reductions in criteria pollutants or criteria pollutant precursors (i.e., VOC). For example, nearly all HAP's emitted as gases also are VOC's.

However, it is possible that an Early Reduction demonstration will not produce a criteria pollutant reduction. A

creditable HAP emission reduction may be achieved by substituting a non-HAP compound for the HAP. If, for example, both compounds are VOC, then there is no VOC reduction although the HAP has been eliminated. In such cases it would not be appropriate to apply this policy.

K. Test Methods and Procedures

A variety of comments were received regarding Method 301. One commenter suggested that Method 301 should be made applicable to other waste media in addition to gaseous measurements (the language in the proposal package contained references to sampling trains, sampling probes, etc., specific to measurement of gases). The EPA concurs with this comment; an intent of the method and the rule is its applicability to all types of sources. Thus the language in Method 301 has been modified to be more generic as to source media. This modification does not change the requirements of the method nor does it affect the stringency or applicability of the method.

Three commenters suggested that EPA establish a de minimis concentration for all HAP's for Method 301. The de minimis concentration would be the lowest concentration for which the test methods would have to be validated.

It is beyond the scope of Method 301 to specify de minimis levels. Method 301 does provide specific procedure for the determination of the limit of quantitation. In addition, Method 301 requires that the data and the proposed method be validated for the concentration(s) of HAP's in the waste stream(s).

One commenter recommended that Method 301 contain a procedure for calculating the concentration range for which a method would be considered validated.

Method 301 advocates that the proposed test methodology be validated over the range of expected HAP concentrations, in the field or through laboratory testing utilizing the ruggedness test procedures. In addition, a procedure is offered for determining the limit of quantitation. Such procedures would establish the concentration range.

One commenter noted that Method 301 does not specify the process conditions under which the validation testing should be conducted.

The choice of operating conditions depends upon the end use(s) of the data. Considerations in structuring the validation test should include: Sample matrix complexity in regard to future applicability of the proposed method, sample analyte concentration(s) in the sample waste stream and of the applicable emission standard, and representativeness of the process conditions in regard to establishing actual annual emissions.

Two commenters noted that the validation protocol in Method 301 will increase the cost of testing and the time required to test. In order to minimize the costs, they suggest that EPA not require pre-review of the validation report before the test method can be used.

The EPA agrees that the validation of data obtained by the proposed method can be conducted concurrently with other testing in order to combine the validation step with the source test. This is encouraged, where appropriate, and was an intent of Method 301. Note that the source owner or operator incurs some risk that the proposed method may not meet the Method 301 validation criteria and the emissions data may not be applicable for compliance determination. Well-substantiated validation reporting should keep this risk to a minimum.

Another commenter suggested that Method 301 should provide a less rigorous validation procedure for the early stages of method development so that these methods may be used to provide a data base for screening, ranking, and regional planning without the expectation of a high degree of knowledge about accuracy and precision.

The EPA agrees that an overall test method development program will be more extensive than a single application of Method 301. Method 301 is specifically a field validation protocol. Responsible method development and evaluation should provide an indication that the proposed method has a sufficient probability of performing within the criteria of Method 301 during field validating testing.

One commenter was concerned that Method 301 would adversely affect State toxic screening programs which have incorporated less precise emission measurement techniques.

Method 301 is applicable to source owners or operators wishing to comply with a Federal requirement using a test method which has not yet been validated. Because a source emission screening and ranking process for use in the development of a State toxics strategy is not subject to specific Federal requirements, Method 301 should not affect this type of program.

One commenter noted that Method 301 does not address the direct interface or dilution interface sampling options of Method 18.

Method 301 may be applied to the direct and dilution interface sampling options of Method 18. However, the validation cannot be conducted without quadruplicate sampling and analytical systems, which EPA considered excessively burdensome. For the other sampling options of Method 18, such as container and absorption tube sampling, validation field testing should be conducted using Method 301.

One commenter felt that Method 301 requires an excessive number of samples for determining bias and precision. They suggested that reducing the number of test runs by half would only result in a difference of the t-statistic at an 80 percent confidence level by less than 11 percent, but cut the time, effort, and cost in half.

The decision level specified in the comment is incorrect and should be 0.05. The difference in the t-statistic resulting from reducing the number of samples by 50 percent is 17 rather than 11 percent. This difference is not acceptable to EPA.

One commenter raised questions about section 6.1.5 of the proposed method. The commenter noted that this section does not indicate the acceptance criteria for the correction factor calculated in Equation 301–5, and also contended that this correction factor may be inappropriate for methods which employ isotopic spiking (e.g., EPA Method 23 surrogate standards) where values are not corrected as long as the recovery is within 30 percent.

The acceptance criteria for the correction factor calculated in Equation 301–5 is specified in section 1.2.1 of the Method. Isotopic spiking with surrogate standards as specified in Method 23 is conducted as a quality assurance check of breakthrough of the analytes on the sorbent. The isotopic spiking specified in Method 301 is used to assess method bias. The two are not mutually exclusive. Where a significant bias is identified (section 6.1.4) using the spike, the correction factor (section 6.1.5) is calculated. The correction factor is evaluated by the criteria in section 1.2.1 and the data are either corrected or the data and procedure to obtain the data are rejected.

One commenter expressed concerns about the reasonableness of requiring reference materials at concentrations below a proposed method's detection limit or in concentrations in multiple ranges representative of several emission points at the same facility.

Validation of a proposed method requires that the method be capable of measuring in the applicable range of emission concentrations. A method with a detection limit above the emission concentration at a particular emission source could not be validated for that

source. Method 301 does provide for ruggedness testing which allows a proposed method to be validated for testing at multiple concentrations without requiring multiple field validation tests. Whether ruggedness testing or field validation is used to validate the method for the appropriate concentrations, it will be necessary to obtain reference materials in the applicable ranges.

One commenter was concerned that the limit for precision specified in Method 301 of 50 percent relative standard deviation was too high, even though 9 sampling runs are needed to show compliance. The commenter suggested that the relative standard deviation be reduced to 15 percent or less so that only three sampling periods are needed to show compliance.

The method criteria for precision and followup testing provide maximum flexibility in method development and application while achieving high quality results. They also serve indirectly as an incentive in method development; that is, the better the method precision, the less effort is required during followup testing using the validated method.

One commenter recommended that more explicit terminology be used in sections 6.2.1.3 and 6.2.2.3 of the rule pertaining to the F-test which tests the significance of the proposed method variance to that of the validated method.

The intent of the sections is to perform a comparison of the variances of the two methods. Method 301 has been revised to include both the F-test and simple comparison of variances, demonstrating that the variance of the proposed method is less than or equal to that of the validated method, as suggested by the commenter.

One commenter suggested that a hierarchy be established for identifying which validation procedures to use.

The EPA agrees that such guidance would be appropriate in Method 301 and has reworded sections 5.1 through 5.3 to define this hierarchy.

One commenter suggested that "documented" methods (section 12.1.2 of Method 301) such as National Institute of Occupational Safety and Health, American Society for Testing and Materials, and Occupational Safety and Health Administration methods should be considered validated methods.

The application for a waiver under section 12.2 should demonstrate the applicability of the "documented" method to the particular source to be measured. The validation procedure and documentation for that particular source would be reviewed with respect to Method 301 requirements.

Another commenter felt the Method 301 requirements in section 12.1.1 for extending applicability of a method to "similar" sources were burdensome. They suggested there be a more reasonable requirement than conducting a ruggedness test and applying to EPA for a waiver.

Section 12.1.1 states applicability to other sources may be demonstrated by conducting ruggedness testing. The EPA agrees with the commenter that ruggedness testing is not always necessary depending upon the similarity of the sample matrices. In addition, validation of the proposed method on a complex sample matrix may be sufficient to demonstrate that the method is applicable to a similar source with an emission matrix of less complexity. In every case, the requester must apply for a waiver to extend the applicability.

One commenter noted that Method 301 does not specify acceptable deviations in method procedures after validation.

Once validation of a method has been completed and the data used to meet a Federal or State requirement, modifications to the method can not be made without approval of the responsible agency or validation through application of Method 301. Any modification must be fully explained and documented with supporting data such as that from a ruggedness test. The primary consideration in acceptance of a modification will be its effect upon the results obtained by the previously validated method.

Finally, one State was concerned that the validation method at one source would be inappropriately interpreted as a validation for all applications.

The field validation procedure of Method 301 is appropriate for validating emissions data from the source and at the levels only for which the method was validated. Optional procedures are provided and must be applied to extend applicability of the methodology beyond the specific emission source and concentration levels at which the validation was conducted.

Various comments were received pertaining to other topics related to test methods and procedures. One commenter recommended that Method 25A be accepted for determining base year and post-reduction emissions. The commenter provided an example of where this method would be appropriate: When the gas stream is principally comprised of one HAP and the HAP contribution to the total hydrocarbon concentration can be documented. The commenter further suggested that continuous measurements would be more appropriate for batch processes.

The EPA believes that application of Method 25A to a single HAP in a sample matrix containing no other hydrocarbons would prove acceptable, assuming the detector is calibrated using that HAP. Total emissions of the HAP would then be determined using the emission value integrated for the entire test run. Application of Method 25A to more complex gas streams would need to be examined on a case-by-case basis. Use of continuous mass spectrometric techniques where the HAP could be speciated may be more likely to succeed. Method 301 addresses composite sampling techniques and EPA believes that procedures similar to those specified for a composite sampling test method could be applied to the measurement of emissions from a batch process.

One commenter requested that the final rule include a definition of "particulate."

The definition of particulate matter is dependent upon the test method involved. The requirements of the applicable regulation, SIP, or Federal regulation should be reviewed first for applicable definition(s). The problem exists for emissions that can be in either a particulate or gaseous phase. If there is a question, the applicant should consult with EPA to arrive at a resolution.

One commenter raised an important consideration in preparing a field validation involving comparison of the proposed method against a validated method described in section 5.2 of appendix A of the proposed rule. The commenter stated that if emission concentrations are highly variable over time such as in the case with a batch process like coking operations, the method precision calculated using Equation 301–7 would be disproportionately influenced by large absolute differences.

If paired, rather than quadruplet samples are used for procedures under section 56.2, each test run of the validation testing should be conducted over the entire process cycle.

One commenter felt that the bias criterion for validation of the data obtained by a proposal method compared to a validated method is too restrictive.

For pollutants and sources for which validated method(s) are available, Method 301 requires alternative methods to have a similar precision and a reasonable bias (±10) compared to the validated method(s). The EPA believes that these criteria are not too restrictive

and allow for innovative method development.

The EPA has made some minor changes to the proposed rule as a result of comments pertaining to test methods and procedures. One commenter suggested that revisions should be made in sections 6.1.2.4 and 6.2.2.4 to calculate the "standard deviation of the differences" rather than the "standard deviation of the mean of the differences." The EPA agrees with this suggestion and has made the appropriate changes in the rule.

Another commenter noted that section 6.3.2 did not specify calculation of the relative standard deviation for the spiked samples as was specified for the unspiked samples in section 6.3.6. It was not clear to the commenter which relative standard deviation is needed to meet the plus or minus 50 percent criterion in section 1.2.2.

Section 6.3.2 has been revised to parallel section 6.3.6. The method has also been revised to specify the 50 percent relative standard deviation criterion for both the spiked and unspiked samples.

One commenter suggested that section 8.2.4 specify that half the samples analyzed at the minimum and maximum storage times be from the validated method and half from the proposed method. It should also address procedures for samples which require extraction or digestion.

As a result of this comment, several wording changes have been made. Section 8.2.4 has been revised to specify that equal numbers of samples from the proposed and validated methods be analyzed. The procedures for samples requiring extraction or digestion parallel those described in section 8.2.2.

Finally, one commenter urged EPA to publish a guidance document outlining source testing methods.

The EPA has prepared an initial list of validated methods. This list may be obtained from the Emission Measurement Technical Information Center (EMTIC), U.S. Environmental Protection Agency (MD–19), Research Triangle Park, North Carolina 27711. Updates to the list of validated methods will be made available on a periodic basis. The EMTIC may be contacted at any time to review the current list at (919) 541–0200.

L. Other Changes to the Proposed Regulation

A number of commenters noted inconsistencies or ambiguities in the language used in the proposed regulation. Where appropriate, EPA has made changes to address or clarify these comments. One commenter suggested that in § 63.72, the words "permitting authority" be used instead of "state acting pursuant to a permitting * * *." The wording in the proposed regulation implied that only the State had permitting authority.

The regulation has been changed to incorporate this comment. Section 63.72 of the regulation describes the general provisions of the Early Reductions Program. During the course of the Program, the authority to review and issue permits will shift from EPA to the States. The wording in the proposed regulation limited the provisions to States. The term "permitting authority" refers to States or EPA and is, therefore, the more appropriate term in this context.

Another commenter noted that the deadlines for submittal of late test data were different in §§ 63.75(d) and 63.77(f). They requested clarification of this inconsistency.

The test data referred to under § 63.75(d) supports base year data for enforceable commitments. Sources making enforceable commitments may need to act quickly to submit the commitment prior to the proposal of a section 112(d) standard. In this instance, sources will have very little time to obtain accurate test data. Therefore, EPA has granted a reasonable time period of 180 days after proposal of an applicable section 112(d) standard for sources to conduct necessary testing to support enforceable commitments.

The test data referred to under § 63.77(f) (now § 63.77(e)) supports post-reduction emissions for permit applications. In this case, EPA proposed allowing only 90 days for submission of test data. Since sources planning to submit a permit application will have sufficient lead time before applying, less additional time is needed than for submittal of supporting data for the enforceable commitment to produce necessary test data.

The EPA has modified the Early Reduction regulation to make consistent the deadlines for post-reduction emissions test data to support the reduction demonstration for enforceable commitments and permit applications. Section 63.77(f) of the proposed rule allowed sources with enforceable commitments 120 days (i.e., from December 1, 1993, until March 31, 1994) after the permit application deadline to submit test data but required other permit applicants to submit the same type data within 90 days. The 90-day deadline has now been changed to require test data within 120 days after the deadline for submittal of the permit application.

Two commenters noted that the proposed regulation used the term "post-control" when discussing emission reductions.

The EPA recognizes that there are many methods to reduce emissions other than applying a control device. Any emphasis on using a control device versus other methods of emission reduction was unintentional and, in fact, EPA encourages pollution prevention and recycling methods in preference to add-on controls. All references in the proposed regulation to "post-control" emissions have been replaced with "post-reduction" emissions.

The wording in the suggested commitment language in § 63.75(b) has been revised to be consistent with the requirement in § 63.75(a)(ii); that the base year emissions "* * * constitute the best available data for base year emissions * * * and are correct * * *" Language has also been added to clarify that the source owner or operator has not included in the base year emissions that exceed allowable emission levels specified by law, regulation or permit.

The wording in § 63.74(k) has been clarified to be consistent with the intent as described in the proposal preamble. Emissions in excess of allowable levels cannot be used to establish emissions, not "emission points." Emission points in violation of any rule, regulation, or law can be included in the source, but only allowable emissions from those points can be used to establish emissions.

The addresses in §§ 63.75 and 63.76 in the final rule to which enforceable commitments and base year reviews are sent has been revised by replacing the Office of General Counsel (LE–132A) with the Stationary Source Compliance Division (EN–341W).

VI. Administrative Requirements

A. Docket

The docket is an organized and complete file of all the information considered by EPA in the development of this rulemaking. The docket is a dynamic file, since material is added throughout the rulemaking development. The docketing system is intended to allow members of the public and industries involved to readily identify and locate documents so that they can effectively participate in the rulemaking process. Along with the statement of basis and purpose of the proposed and promulgated standards and EPA responses to significant comments, the contents of the docket, except for interagency review materials,

will serve as the record in case of judicial review (section 307(d)(7)(A)).

B. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0222. Public reporting burden for this collection of information is estimated to average 213 hours per response, including 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 the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Information Policy Branch (PM–223Y); U.S. Environmental Protection Agency; 401 M St., SW.; Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA."

C. Executive Order 12291

Under Executive Order 12291, OMB is required to judge whether a regulation is "major" and therefore subject to the requirements of a Regulatory Impact Analysis. The criteria set forth in Section 1 of the Order for determining whether a regulation is a major rule are as follows:

(1) Is likely to have an annual effect on the economy of $100 million or more;

(2) Is likely to cause a major increase in costs or prices for consumers, individual industries, geographic regions, or Federal, State, or local governments; or

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

The EPA has determined that this regulation would result in none of the adverse economic effect set forth in section 1 of the Order as grounds for finding a regulation to be a "major rule." This is a voluntary program, open to sources that seek an alternative to meeting a section 112(d) standard. The program is attractive to sources because of the potential savings that can be realized in obtaining a compliance extension. Although EPA believes that significant savings will be realized by industries that participate in this Program, it is not likely that savings will have an impact on the economy of $100 million per year. The EPA estimates that 50 to 100 sources per year may participate in the Program, and thus each source would have to save over $1 million to affect the economy by $100 million per year. Based on the enforceable commitments received so far from the chemical industry, this does not seem to be the case. However, further quantification of the economic impact of this regulation is impossible without knowing what sources and how many will apply, how they will actually achieve the 90 (95) percent reductions, and what the otherwise applicable section 122(d) standards will be. Consequently, the EPA has concluded that this regulation is not a "major rule" under Executive Order 12291. The final rule was submitted to OMB for review as required by the Order.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires the identification of potentially adverse impacts of Federal regulations upon small business entities. The CAA specifically requires the completion of a Regulatory Flexibility Analysis in those instances where small business impacts are possible. Because these standards impose no adverse economic impacts, a Regulatory Flexibility Analysis has not been prepared.

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

List of Subjects in 40 CFR Part 63

Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

Dated: October 29, 1992.

William K. Reilly,

Administrator.

Part 63 of 40 CFR chapter I is added to read as follows:

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

Subpart A—General Provisions [Reserved]

Subpart B—[Reserved]

Subpart C—List of Hazardous Air Pollutants, Petition Process, Lesser Quantity Designations, Source Category List [Reserved]

Subpart D—Regulations Governing Compliance Extensions for Early Reductions of Hazardous Air Pollutants

Sec.
63.70 Applicability.
63.71 Definitions.
63.72 General provisions for compliance extensions.
63.73 Source.
63.74 Demonstration of early reduction.
63.75 Enforceable commitments.
63.76 Review of base year emissions.
63.77 Application procedures.
63.78 Early reduction demonstration evaluation.
63.79 Approval of applications.
63.80 Enforcement.
63.81 Rule for special situations.

Appendix A to Part 63—Test Methods

Appendix B to Part 63—Sources Defined for Early Reduction Provisions Authority: 42 U.S.C. 7401 et seq.

Subpart A—General Provisions [Reserved]

Subpart B—[Reserved]

Subpart C—List of Hazardous Air Pollutants, Petitions Process, Lesser Quantity Designations, Source Category List [Reserved]

Subpart D—Regulations Governing Compliance Extensions for Early Reductions of Hazardous Air Pollutants

§ 63.70 Applicability.

The provisions of this subpart apply to an owner or operator of an existing source who wishes to obtain a compliance extension from a standard issued under section 112(d) of the Act. The provisions of this subpart also apply to a State or local agency acting pursuant to a permit program approved under Title V of the Act. The Administrator will carry out the provisions of this subpart for any State that does not have an approved permit program.

§ 63.71 Definitions.

All terms used in this subpart not defined in this section are given the same meaning as in the Act.

Act means the Clean Air Act as amended.

Actual emissions means the actual rate of emissions of a pollutant, but does not include excess emissions from a malfunction, or startups and shutdowns associated with a malfunction. Actual emissions shall be calculated using the source's actual operating rates, and types of materials processed, stored, or combusted during the selected time period.

Artificially or substantially greater emissions means abnormally high emissions such as could be caused by equipment malfunctions, accidents, unusually high production or operating rates compared to historical rates, or other unusual circumstances.

EPA conditional method means any method of sampling and analyzing for air pollutants that has been validated by the Administrator but that has not been published as an EPA Reference Method.

EPA reference method means any method of sampling and analyzing for an air pollutant as described in appendix A of part 60 of this chapter, appendix B of part 61 of this chapter, or appendix A of part 63.

Equipment leaks means leaks from pumps, compressors, pressure relief devices, sampling connection systems, open-ended valves or lines, valves, connectors, agitators, accumulator vessels, and instrumentation systems in hazardous air pollutant service.

Existing source means any source as defined in § 63.72, the construction or reconstruction of which commenced prior to proposal of an applicable section 112(d) standard.

Hazardous air pollutant (HAP) means any air pollutant listed pursuant to section 112(b) of the Act.

High-risk pollutant means a hazardous air pollutant listed in Table 1 of § 63.74.

Malfunction means any sudden failure of air pollution control equipment or process equipment or of a process to operate in a normal or usual manner. Failures that are caused entirely or in part by poor maintenance, careless operation, or any other preventable upset condition or preventable equipment breakdown shall not be considered malfunctions.

Not feasible to prescribe or enforce a numerical emission limitation means a situation in which the Administrator or a State determines that a pollutant (or stream of pollutants) listed pursuant to section 112(b) of the Act cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal law; or the application of measurement technology to a particular source is not practicable due to technological or economic limitations.

Permitting authority means either a State agency with an approved permitting program under Title V of the Act or the Administrator in cases where the State does not have an approved permitting program.

Responsible official means one of the following:

(1) For a corporation, a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation; or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(i) The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(ii) The delegation of authority to such representative is approved in advance by the permitting authority.

(2) For a partnership or sole proprietorship, a general partner or the proprietor, respectively.

(3) For a municipality, State, Federal, or other public agency, either a principal executive officer or ranking elected official. For the purposes of this part, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., Regional Administrators of EPA).

Reviewing agency means a State agency with an approved permitting program under Title V of the Act. An EPA Regional Office is the reviewing agency where the State does not have such an approved permitting program.

State means a State or local air pollution control agency.

§ 63.72 General provisions for compliance extensions

(a) Except as provided in paragraph (f) of this section, a permitting authority acting pursuant to a permitting program approved under Title V of the Act shall by permit allow an existing source to meet an alternative emission limitation in lieu of an emission limitation promulgated under section 112(d) of the Act for a period of 6 years from the compliance date of the otherwise applicable standard provided the source owner or operator demonstrates:

(1) According to the requirements of § 63.74 that the source has achieved a reduction of 90 percent (95 percent or more in the case of hazardous air pollutants which are particulates) in emissions of:

(i) Total hazardous air pollutants from the source;

(ii) Total hazardous air pollutants from the source as adjusted for high-risk pollutant weighting factors, if applicable.

(2) That such reduction was achieved before proposal of an applicable standard or, for sources eligible to qualify for an alternative emission limitation as specified in paragraph (c) of this section, before January 1, 1994.

(b) A source granted an alternative emission limitation shall comply with an applicable standard issued under section 112(d) of the Act immediately upon expiration of the six year compliance extension period specified in paragraph (a) of this section.

(c) An existing source that achieves the reduction specified in paragraph (a)(1) of this section after proposal of an applicable section 112(d) standard but before January 1, 1994, may qualify for an alternative emission limitation under paragraph (a) of this section if the source makes an enforceable commitment, prior to proposal of the applicable standard, to achieve such reduction. The enforceable commitment shall be made according to the procedures and requirements of § 63.75.

(d) For each permit issued to a source under paragraph (a) of this section, there shall be established as part of the permit an enforceable alternative emission limitation for hazardous air pollutants reflecting the reduction which qualified the source for the alternative emission limitation.

(e) An alternative emission limitation shall not be available with respect to standards or requirements promulgated to provide an ample margin of safety to protect public health pursuant to section 112(f) of the Act, and the Administrator will, for the purpose of determining whether a standard under section 112(f) of the Act is necessary, review emissions from sources granted an alternative emission limitation under this subpart at the same time that other sources in the category or subcategory are reviewed.

(f) Nothing in this subpart shall preclude a State from requiring hazardous air pollutant reductions in excess of 90 percent (95 percent in the case of particulate hazardous air pollutants) as a condition of such State granting an alternative emission limitation authorized in paragraph (a) of this section.

§ 63.73 Source.

(a) An alternative emission limitation may be granted under this subpart to an existing source. For the purposes of this subpart only, a source is defined as follows:

(1) A building structure, facility, or installation identified as a source by the EPA in appendix B of this part;

(2) All portions of an entire contiguous plant site under common ownership or control that emit hazardous air pollutants;

(3) Any portion of an entire contiguous plant site under common ownership or control that emits hazardous air pollutants and can be identified as a facility, building, structure, or installation for the purposes of establishing standards under section 112(d) of the Act; or

(4) Any individual emission point or combination of emission points within a contiguous plant site under common control, provided that emission reduction from such point or aggregation of points constitutes a significant reduction of hazardous air pollutant emissions of the entire contiguous plant site.

(b) For purposes of paragraph (a)(4) of this section, emissions reductions are considered significant if they are made from base year emissions of not less than:

(1) A total of 10 tons per year of hazardous air pollutants where the total emissions of hazardous air pollutants in the base year from the entire contiguous plant site is greater than 25 tons per; or

(2) A total of 5 tons per year of hazardous air pollutants where the total emissions of hazardous air pollutants in the base year from the entire contiguous plant site is less than or equal to 25 tons per year.

§ 63.74 Demonstration of early reduction.

(a) An owner or operator applying for an alternative emission limitation shall demonstrate achieving early reductions as required by § 63.72(a)(1) by following the procedures in this section.

(b) An owner or operator shall establish the source for the purposes of this subpart by documenting the following information:

(1) A description of the source including: a site plan of the entire contiguous plant site under common control which contains the source, markings on the site plan locating the parts of the site that constitute the source, and the activity at the source which causes hazardous air pollutant emissions;

(2) A complete list of all emission points of hazardous air pollutants in the source, including identification numbers and short descriptive titles; and

(3) A statement showing that the source conforms to one of the allowable definition options from § 63.73. For a source conforming to the option in § 63.73(a)(4), the total base year emissions from the source, as determined pursuant to this section, shall be demonstrated to be at least:

(i) 5 tons per year, for cases in which total hazardous air pollutant emissions from the entire contiguous plant site under common control are 25 tons per year or less as calculated under paragraph (1) of this section; or

(ii) 10 tons per year in all other cases.

(c) An owner or operator shall establish base year emissions for the source by providing the following information:

(1) The base year chosen, where the base year shall be 1987 or later except that the base year may be 1985 or 1986 if the owner or operator of the source can demonstrate that emission data for the source for 1985 or 1986 was submitted to the Administrator pursuant to an information request issued under section 114 of the Act and was received by the Administrator prior to November 15, 1990;

(2) The best available data accounting for actual emissions, during the base year, of all hazardous air pollutants from each emission point listed in the source in paragraph (b)(2) of this section;

(3) The supporting basis for each emission number provided in paragraph (c)(2) of this section including:

(i) For test results submitted as the supporting basis, a description of the test protocol followed, any problems encountered during the testing, and a discussion of the validity of the method for measuring the subject emissions; and

(ii) For calculations based on emission factors, material balance, or engineering principles and submitted as the supporting basis, a step-by-step description of the calculations, including assumptions used and their bases, and a brief rationale for the validity of the calculation method used; and

(4) Evidence that the emissions provided under paragraph (c)(2) of this section are not artificially or substantially greater than emissions in other years prior to implementation of emission reduction measures.

(d) An owner or operator shall establish post-reduction emissions by providing the following information:

(1) For the emission points listed in the source in paragraph (b)(2) of this section, a description of all control measures employed to achieve the emission reduction required by § 63.72(a)(1);

(2) The best available data on an annual basis accounting for actual emissions, after the base year and following employment of emission reduction measures, of all hazardous air pollutants from each emission point in the source listed in paragraph (b)(2) of this section;

(3) The supporting basis for each emission number provided in paragraph (d)(2) of this section including:

(i) For test results submitted as the supporting basis, a description of the test protocol followed, any problems encountered during the testing, and a discussion of the validity of the method for measuring the subject emissions; and

(ii) For calculations based on emission factors, material balance, or engineering principles and submitted as the supporting basis, a step-by-step description of the calculations, including assumptions used and their bases, and a brief rationale for the validity of the calculation method used;

(4) Evidence that all emission reductions used for the early reductions demonstration were achieved prior to proposal of an applicable standard issued under section 112(d) of the Act or, for sources subject to enforceable commitments, prior to January 1, 1994; and

(5) Evidence that there was no increase in radionuclide emissions from the source.

(e)(1) An owner or operator shall demonstrate that both total base year emissions and total base year emissions adjusted for high-risk pollutants, as applicable, have been reduced by at least 90 percent for gaseous hazardous air pollutants emitted and 95 percent for particulate hazardous air pollutants emitted by determining the following for gaseous and particulate emissions separately:

(i) Total base year emissions, calculated by summing all base year emission data from paragraph (c)(2) of this section;

(ii) Total post-reduction emissions, calculated by summing all post-reduction emission data from paragraph (d)(2) of this section;

(iii) (If applicable) Total base year emissions adjusted for high-risk pollutants, calculated by multiplying each emission number for a pollutant from paragraph (c)(2) of this section by the appropriate weighting factor for the pollutant from Table 1 in paragraph (f) of this section and then summing all weighted emission data;

(iv) (If applicable) Total post-reduction emissions adjusted for high-risk pollutants, calculated by

multiplying each emission number for a pollutant from paragraph (d)(2) of this section by the appropriate weighting factor for the pollutant from Table 1 and then summing all weighted emission data; and

(v) Percent reductions, calculated by dividing the difference between base year and post-reduction emissions by the base year emissions. Separate demonstrations are required for total gaseous and particulate emissions, and total gaseous and particulate emissions adjusted for high-risk pollutants.

(2) If any points in the source emit both particulate and gaseous pollutants, as an alternative to the demonstration required in paragraph (e)(1) of this section, an owner or operator may demonstrate:

(i) A weighted average percent reduction for all points emitting both particulate and gaseous pollutants where the weighted average percent reduction is determined by

$$\%_W = \frac{0.9(\sum M_g) + 0.95(\sum M_p)}{\sum M_g + \sum M_p} X\ 100$$

where $\%_W$=the required weighted percent reduction

ΣM_g=the total mass rate (e.g., kg/yr) of all gaseous emissions

ΣM_p=the total mass rate of all particulate emissions and,

(ii) The reductions required in paragraph (e)(1) of this section for all other points in the source.

(f) If lower rates or hours are used to achieve all or part of the emission reduction, any hazardous air pollutant emissions that occur from a compensating increase in rates or hours from the same activity elsewhere within the plant site which contains the source shall be counted in the post-reduction emissions from the source. If emission reductions are achieved by shutting down process equipment and the shutdown equipment is restarted or replaced anywhere within the plant site, any hazardous air pollutant emissions from the restarted or replacement equipment shall be counted in the post-reduction emissions for the source.

TABLE 1. LIST OF HIGH-RISK POLLUTANTS

CAS No.	Chemical	Weighting factor
53963	2-Acetylaminofluorene	100
107028	Acrolein	100
79061	Acrylamide	10
79107	Acrylic acid	10
107131	Acrylonitrile	10
0	Arsenic compounds	100
1332214	Asbestos	100
71432	Benzene	10
92875	Benzidine	1000

TABLE 1. LIST OF HIGH-RISK POLLUTANTS—Continued

CAS No.	Chemical	Weighting factor
0	Beryllium compounds	10
542881	Bis(chloromethyl) ether	1000
106990	1,3-Butadiene	10
0	Cadmium compounds	10
57749	Chlordane	100
532274	2-Chloroacetophenone	100
0	Chromium compounds	100
107302	Chloromethyl methyl ether.	10
0	Coke oven emissions	10
334883	Diazomethane	10
132649	Dibenzofuran	10
96128	1,2-Dibromo-3-chloropropane.	10
111444	Dichloroethyl ether (Bis(2-chloroethyl) ether).	10
79447	Dimethylcarbamoyl chloride.	100
122667	1,2-Diphenylhydrazine	10
106934	Ethylene dibromide	10
151564	Ethylenimine (Aziridine)	100
75218	Ethylene oxide	10
76448	Heptachlor	100
118741	Hexachlorobenezene	100
77474	Hexachlorocyclopentadiene.	100
302012	Hydrazine	100
0	Manganese compounds	10
0	Mercury compounds	100
101688	Methylene diphenyl diisocyanate (MDI).	10
60344	Methyl hydrazine	10
624839	Methyl isocyanate	10
0	Nickel compounds	10
62759	N-Nitrosodimethylamine	100
684935	N-Nitroso-N-methylurea	1000
56382	Parathion	10
75445	Phosgene	10
7803512	Phosphine	10
7723140	Phosphorus	10
75558	1,2-Propylenimine	100
1746016	2,3,7,8-Tetrachlorodibenzo-p-dioxin.	100,000
8001352	Toxaphene (chlorinated camphene).	100
75014	Vinyl chloride	10

(g) The best available data representing actual emissions for the purpose of establishing base year or post-reduction emissions under this section shall consist of documented results from source tests using an EPA Reference Method, EPA Conditional Method, or the owner's or operator's source test method which has been validated pursuant to Method 301 of appendix A of this part. However, if one of the following conditions exists, an owner or operator may submit, in lieu of results from source tests, calculations based on engineering principles, emission factors, or material balance data as actual emission data for establishing base year or post-reduction emissions:

(1) No applicable EPA Reference Method, EPA Conditional Method, or other source test method exists;

(2) It is not technologically or economically feasible to perform source tests;

(3) It can be demonstrated to the satisfaction of the reviewing agency that the calculations will provide emission estimates of accuracy comparable to that of any applicable source test method;

(4) For base year emission estimates only, the base year conditions no longer exist at an emission point in the source and emission data could not be produced for such an emission point, by performing source tests under currently existing conditions and converting the test results to reflect base year conditions, that is more accurate than an estimate produced by using engineering principles, emission factors, or a material balance; or

(5) The emissions from one or a set of emission points in the source are small compared to total source emissions and potential errors in establishing emissions from such points will not have a significant effect on the accuracy of total emissions established for the source.

(h) For base year or post-reduction emissions established under this section that are not supported by source test data, the source owner or operator shall include the reason source testing was not performed.

(i) In cases where emission control measures have been employed less than a year prior to demonstrating emission reductions under this section, an owner or operator shall extrapolate post-reduction emission rate data to an annual basis and shall describe the extrapolation method as part of the supporting basis required under paragraph (d) of this section.

(j) The EPA average emission factors for equipment leaks cannot be used under this subpart to establish base year emissions for equipment leak sources, unless the base year emission number calculated using the EPA average emission factors for equipment leaks also is used as the post-reduction emission number for equipment leaks from the source.

(k) A source owner or operator shall not establish base year or post-reduction emissions that include any emissions from the source exceeding allowable emission levels specified in any applicable law, regulation, or permit condition.

(l) For sources subject to paragraph (b)(3)(i) of this section, an owner or operator shall document total base year emissions from an entire contiguous plant site under common control by providing the information required pursuant to paragraphs (b)(2), (c)(2), and (e)(1)(i) of this section for all hazardous

air pollutants from all emission points in the contiguous plant site under common control.

(m) If a new pollutant is added to the list of hazardous air pollutants or high-risk pollutants, any source emitting such pollutant will not be required to revise an early reduction demonstration pursuant to this section if:

(1) Alternative emission limits have previously been specified by permit for the source as provided for in § 63.72(a); or

(2) The base year emissions submitted in an enforceable commitment have previously been approved by the reviewing agency.

§ 63.75 Enforceable commitments.

(a) To make an enforceable commitment an owner or operator shall submit a commitment to achieve the early reductions required under § 63.72(a)(1) to the appropriate EPA Regional Office and a copy of the commitment to the appropriate State, except that the commitment shall be submitted to the State and a copy to the EPA Regional Office if the State has an approved permitting program under Title V of the Act. A copy shall also be submitted to both the EPA Stationary Source Compliance Division (EN-341W), 401 M Street, SW., Washington, DC 20460 and the EPA Emission Standards Division (MD-13), Research Triangle Park, NC 27711; attention both to the Early Reductions Officer. The commitment shall contain:

(1) The name and address of the source;

(2) The name and telephone number of the source owner or operator or other responsible official who can be contacted concerning the commitment;

(3) An alternative mailing address if correspondence is to be directed to a location other than that given in paragraph (a)(1) of this section;

(4) All information specified in § 63.74(b), (c) and (e)(1)(i), which defines and describes the source and establishes the base year hazardous air pollutant emissions from the source;

(5) The general plan for achieving the required hazardous air pollutant emissions reductions at the source including descriptions of emission control equipment to be employed, process changes or modifications to be made, and any other emission reduction measures to be used; and

(6) A statement of commitment, signed by a responsible official of the source, containing the following:

(i) A statement providing the post-reduction emission levels for total hazardous air pollutants and high-risk pollutants, as applicable, from the source on an annual basis which reflect a 90 percent (95 percent for particulate pollutants) reduction from base year emissions;

(ii) A statement certifying that the base year emission data submitted as part of the enforceable commitment constitute the best available data for base year emissions from the source, are correct to the best of the responsible official's knowledge, and are within allowable levels specified in any applicable law, regulation, or permit;

(iii) A statement that it is understood by the source owner or operator that submission of base year emissions constitutes a response to an EPA request under the authority of section 114 of the Act and that the commitment is subject to enforcement according to § 63.80; and

(iv) A statement committing the source owner or operator to achieving the emission levels, listed in paragraph (a)(6), (i) of this section, at the source before January 1, 1994.

(b) The following language may be used to satisfy the requirements of paragraphs (a)(6)(ii) through (a)(6)(iv) of this section:

I certify to the best of my knowledge that the base year emissions given above are correct and constitute the best available data for base year emissions from the source, and acknowledge that these estimates are being submitted in response to an EPA request under section 114 of the Act. I further certify that the base year emissions provided for all emission points in the source do not exceed allowable emission levels specified in any applicable law, regulation, or permit condition. I commit to achieve before January 1, 1994, the stated post-reduction emission level(s) at the source, which will provide the 90 (95) percent reduction required to qualify for the compliance extension, and acknowledge that this commitment is enforceable as specified in title 40, part 63, subpart D, of the Code of Federal Regulations.

(c) A commitment for a source shall be submitted prior to proposal of an applicable standard issued under section 112(d) of the Act. Commitments received after the proposal date shall be void.

(d) If test results for one or more emission points in a source are required to support base year emissions in an enforceable commitment but are not available prior to proposal of an applicable standard issued under section 112(d) of the Act, the test results may be submitted after the enforceable commitment is made but no later than 180 days after proposal of an applicable standard. In such cases, the enforceable commitment shall contain the best substitute emission data for the points in the source for which test results will be submitted later.

(e) An owner or operator may rescind such a commitment prior to December 1, 1993 without penalty and forfeit the opportunity to obtain a six year compliance extension under this subpart.

(Approved by the Office of Management and Budget under control number 2060-0222)

§ 63.76 Review of base year emissions.

(a) Pursuant to the procedures of this section, the appropriate reviewing agency shall review and approve or disapprove base year emission data submitted in an enforceable commitment under § 63.75 or in a request letter from an applicant that wishes to participate in the early reduction program but who is not required to submit an enforceable commitment. For review requests submitted to a State agency as the appropriate reviewing agency, a copy of the request also shall be submitted to the applicable EPA Regional Office. For review requests submitted to the EPA Regional Office as the appropriate reviewing agency, a copy of the request also shall be sent to the applicable State agency. Copies also shall be submitted to the EPA Stationary Source Compliance Division (EN-341W), 401 M Street, SW., Washington, DC 20460 and the EPA Emission Standards Division (MD-13), Research Triangle Park, NC 27711; to the attention of the Early Reductions Officer.

(b) Within 30 days of receipt of an enforceable commitment or base year emission data, the reviewing agency shall advise the applicant that:

(1) The base year emission data are complete as submitted; or

(2) The base year emission data are not complete and include a list of deficiencies that must be corrected before review can proceed.

(c) EPA will publish a notice in the **Federal Register** which contains a list, accumulated for the previous month, of the sources for which complete base year emission data have been submitted and which are undergoing review either in the EPA Regional Office or a State agency within the EPA region. The notice will contain the name and location of each source and a contract in the EPA Regional Office for additional information.

(d) Within 60 days of a determination that a base year emission data submission is complete, the reviewing agency shall evaluate the adequacy of the submission with respect to the requirements of § 63.74 (b) and (c) and either:

(1) Determine to approve the submission and publish a notice in a newspaper of general circulation in the

area where the source is located or in a State publication designed to give general public notice, providing the aggregate base year emission data for the source and the rationale for the proposed approval, noting the availability of the nonconfidential information contained in the submission for public inspection in at least one location in the community in which the source is located, providing for a public hearing upon request by an interested party, and establishing a 30 day public comment period that can be extended to 60 days upon request by an interested party; or

(2) Determine to disapprove the base year emission data and give notice to the applicant of the reasons for the disapproval. An applicant may correct disapproved base year data and submit revised data for review in accordance with this subsection, except that the review of a revision shall be accomplished within 30 days.

(e) If no adverse public comments are received by the reviewing agency on proposed base year data for a source, the data shall be considered approved at the close of the public comment period and a notice of the approval shall be sent to the applicant and published by the reviewing agency by advertisement in the area affected.

(f) If adverse comments are received and the reviewing agency agrees that corrections are needed, the reviewing agency shall give notice to the applicant of the disapproval and reasons for the disapproval. An applicant may correct disapproved base year emission data and submit revised emission data. If a revision is submitted by the applicant that, to the satisfaction of the reviewing agency, takes into account the adverse comments, the reviewing agency will publish by advertisement in the area affected a notice containing the approved base year emission data for the source and send notice of the approval to the applicant.

(g) If adverse comments are received and the reviewing agency determines that the comments do not warrant changes to the base year emission data, the reviewing agency will publish by advertisement in the area affected a notice containing the approved base year emission data for the source and the reasons for not accepting the adverse comments. A notice of the approval also shall be sent to the applicant.

(h) If an applicant submits revised emission data under paragraph (d)(2) or (f) of this section for a source subject to an enforceable commitment, the applicant also shall submit an amended enforceable commitment which takes into account the revised base year emissions.

(i) If revised base year emission data are not submitted or notice of intent to submit revised data is not provided to the permitting authority by an applicant within 90 days of receiving adverse comments or a notice of disapproved base year emission data for a source that is subject to an enforceable commitment, the enforceable commitment shall be considered withdrawn and a notice to that effect shall be sent by the reviewing agency to the applicant.

§ 63.77 Application procedures.

(a) To apply for an alternative emission limitation under § 63.72, an owner or operator of the source shall file a permit application with the appropriate permitting authority.

(b) The permit application shall contain a demonstration of early reduction for the source as prescribed in § 63.74 and the additional information required for a complete permit application as specified by the State's permitting program approved under title V of the Act.

(c) Permit applications under this section for sources not subject to enforceable commitments shall be submitted by the later of the following dates:

(1) The date of proposal of an otherwise applicable standard issued under section 112(d) of the Act; or

(2) 120 days after approval of a State permit program under title V of the Act.

(d) Permit applications for sources subject to enforceable commitments pursuant to § 63.75 shall be submitted no later than December 1, 1993.

(e) If a source test is the supporting basis for establishing post-reduction emissions for one or more emission points in the source but the test results are not available by the deadline for submittal of a permit application according to paragraph (c) of this section, the owner or operator shall provide the supporting basis no later than 120 days after the applicable deadline for submittal of the permit application or no later than March 31, 1994 for sources subject to an enforceable commitment.

(f) Review and disposition of permit applications submitted under this section will be accomplished according to regulations in 40 CFR part 70.

§ 63.78 Early reduction demonstration evaluation.

(a) The permitting authority will evaluate an early reduction demonstration submitted by the source owner or operator in a permit application with respect to the requirements of § 63.74.

(b) An application for a compliance extension may be denied if, in the judgement of the permitting authority, the owner or operator has failed to demonstrate that the requirements of § 63.74 have been met. Specific reasons for denial include, but are not limited to:

(1) The information supplied by the owner or operator is incomplete;

(2) The required 90 percent reduction (95 percent in cases where the hazardous air pollutant is particulate matter) has not been demonstrated;

(3) The base year or post-reduction emissions are incorrect, based on methods or assumptions that are not valid, or not sufficiently reliable or well documented to determine with reasonable certainty that required reductions have been achieved; or

(4) The emission of hazardous air pollutants or the performance of emission control measures is unreliable so as to preclude determination that the required reductions have been achieved or will continue to be achieved during the extension period.

§ 63.79 Approval of applications.

(a) If an early reduction demonstration is approved and other requirements for a complete permit application are met, the permitting authority shall establish by a permit issued pursuant to title V of the Act enforceable alternative emissions limitations for the source reflecting the reduction which qualified the source for the extension. However, if it is not feasible to prescribe a numerical emissions limitation for one or more emission points in the source, the permitting authority shall establish such other requirements, reflecting the reduction which qualified the source for an extension, in order to assure the source achieves the 90 percent or 95 percent reduction, as applicable.

(b) An alternative emissions limitation or other requirement prescribed pursuant to paragraph (a) of this section shall be effective and enforceable immediately upon issuance of the permit for the source and shall expire exactly six years after the compliance date of an otherwise applicable standard issued pursuant to section 112(d) of the Act.

§ 63.80 Enforcement.

(a) All base year or post-reduction emissions information described in § 63.74 and required to be submitted as part of a permit application under § 63.77 or an enforceable commitment under § 63.75 shall be considered to

have been requested by the Administrator under the authority of section 114 of the Act.

(b) Fraudulent statements contained in any base year or post-reduction emissions submitted to a State or EPA Regional Office under this subpart shall be considered violations of section 114 of the Act and of this subpart and, thus, actionable under section 113 of the Act and can be considered, in appropriate cases, violations of 18 U.S.C. 1001, the general false swearing provision of the United States Code.

(c) If a source subject to an enforceable commitment fails to achieve reductions before January 1, 1994, sufficient to qualify the source for an extension under this subpart, the source shall be considered to be in violation of the commitment and shall be subject to enforcement action under section 113 of the Act.

(d) If an early reduction demonstration in a permit application filed under § 63.77 is disapproved for a source not subject to an enforceable commitment, the owner or operator shall comply with an applicable standard issued under section 112(d) of the Act by the compliance date specified in such standard.

(e) If an early reduction demonstration in a permit application filed under § 63.77 is disapproved for a source that is subject to an enforceable commitment, the owner or operator shall comply with an applicable standard issued under section 112(d) of the Act by the compliance date specified in such standard and will be subject to enforcement action under section 113 of the Act.

(f) A violation of an alternative emission limitation or other requirement established by permit under § 63.79 (a) or (b) for the source is enforceable pursuant to the authority of section 113 of the Act notwithstanding any demonstration of continuing 90 percent (95 percent for hazardous air pollutants which are particulates) emission reduction over the entire source.

§ 63.81 Rules for special situations.

(a) If more than one standard issued under section 112(d) of the Act would be applicable to a source as defined under § 63.73, then the date of proposal referred to in § § 63.72(a)(2), 63.72(c), 63.74(d)(4), 63.75(c), and 63.77(c) is the date the first applicable standard is proposed.

(b) Sources emitting radionuclides are not required to reduce radionuclides by 90 (95) percent. Radionuclides may not be increased from the source as a result of the early reductions demonstration.

Appendix A to Part 63—Test Methods

Method 301—Field Validation of Pollutant Measurement Methods from Various Waste Media

1. Applicability and principle

1.1 *Applicability.* This method, as specified in the applicable subpart, is to be used whenever a source owner or operator (hereafter referred to as an "analyst") proposes a test method to meet a U.S. Environmental Protection Agency (EPA) requirement in the absence of a validated method. This Method includes procedures for determining and documenting the quality, i.e., systematic error (bias) and random error (precision), of the measured concentrations from an effected source. This method is applicable to various waste media (i.e., exhaust gas, wastewater, sludge, etc.).

1.1.1 If EPA currently recognizes an appropriate test method or considers the analyst's test method to be satisfactory for a particular source, the Administrator may waive the use of this protocol or may specify a less rigorous validation procedure. A list of validated methods may be obtained by contacting the Emission Measurement Technical Information Center (EMTIC), Mail Drop 19, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, (919) 541–0200. Procedures for obtaining a waiver are in Section 12.0.

1.1.2 This method includes optional procedures that may be used to expand the applicability of the proposed method. Section 7.0 involves ruggedness testing (Laboratory Evaluation), which demonstrates the sensitivity of the method to various parameters. Section 8.0 involves a procedure for including sample stability in bias and precision for assessing sample recovery and analysis times; Section 9.0 involves a procedure for the determination of the practical limit of quantitation for determining the lower limit of the method. These optional procedures are required for the waiver consideration outlined in Section 12.0.

1.2 *Principle.* The purpose of these procedures is to determine bias and precision of a test method at the level of the applicable standard. The procedures involve (a) introducing known concentrations of an analyte or comparing the test method against a validated test method to determine the method's bias and (b) collecting multiple or collocated simultaneous samples to determine the method's precision.

1.2.1 *Bias.* Bias is established by comparing the method's results against a reference value and may be eliminated by employing a correction factor established from the data obtained during the validation test. An offset bias may be handled accordingly. Methods that have bias correction factors outside 0.7 to 1.3 are unacceptable. Validated method to proposed method comparisons, section 6.2, requires a more restrictive test of central tendency and a lower correction factor allowance of 0.90 to 1.10.

1.2.2 *Precision.* At the minimum, paired sampling systems shall be used to establish precision. The precision of the method at the level of the standard shall not be greater than 50 percent relative standard deviation. For a validated method to proposed method equivalency comparisons, section 6.2, the analyst must demonstrate that the precision of the proposed test method is as precise as the validated method for acceptance.

2. Definitions

2.1 *Negative bias.* Bias resulting when the measured result is less than the "true" value.

2.2 *Paired sampling system.* A sampling system capable of obtaining two replicate samples that were collected as closely as possible in sampling time and sampling location.

2.3 *Positive bias.* Bias resulting when the measured result is greater than the "true" value.

2.4 *Proposed method.* The sampling and analytical methodology selected for field validation using the method described herein.

2.5 *Quadruplet sampling system.* A sampling system capable of obtaining four replicate samples that were collected as closely as possible in sampling time and sampling location.

2.6 *Surrogate compound.* A compound that serves as a model for the types of compounds being analyzed (i.e., similar chemical structure, properties, behavior). The model can be distinguished by the method from the compounds being analyzed.

3. Reference Material

The reference materials shall be obtained or prepared at the level of the standard. Additional runs with higher and lower reference material concentrations may be made to expand the applicable range of the method, in accordance with the ruggedness test procedures.

3.1 *Exhaust Gas Tests.* The analyst shall obtain a known concentration of the reference material (i.e., analyte of concern) from an independent source such as a specialty gas manufacturer, specialty chemical company, or commercial laboratory. A list of vendors may be obtained from EMTIC (see Section 1.1.1). The analyst should obtain the manufacturer's stability data of the analyte concentration and recommendations for recertification.

3.2 *Other Waste Media Tests.* The analyst shall obtain pure liquid components of the reference materials (i.e., analytes of concern) from an independent manufacturer and dilute them in the same type matrix as the source waste. The pure reference materials shall be certified by the manufacturer as to purity and shelf life. The accuracy of all diluted reference material concentrations shall be verified by comparing their response to independently-prepared materials (independently prepared in this case means prepared from pure components by a different analyst).

3.3 *Surrogate Reference Materials.* The analyst may use surrogate compounds, e.g., for highly toxic or reactive organic compounds, provided the analyst can demonstrate to the Administrator's satisfaction that the surrogate compound behaves as the analyte. A surrogate may be an isotope or one that contains a unique element (e.g., chlorine) that is not present in the source or a derivation of the toxic or reactive compound, if the derivative formation is part of the method's procedure.

Laboratory experiments or literature data may be used to show behavioral acceptability.

3.4 *Isotopically Labeled Materials.* Isotope mixtures may contain the isotope and the natural analyte. For best results, the isotope labeled analyte concentration should be more than five times the natural concentration of the analyte.

4. EPA Performance Audit Material

4.1 To assess the method bias independently, the analyst shall use (in addition to the reference material) an EPA performance audit material, if it is available. The analyst may contact EMTIC (see section 1.1.1) to receive a list of currently available EPA audit materials. If the analyte is listed, the analyst should request the audit material at least 30 days before the validation test. If an EPA audit material is not available, request documentation from the validation report reviewing authority that the audit material is currently not available from EPA. Include this documentation with the field validation report.

4.2 The analyst shall sample and analyze the performance audit sample three times according to the instructions provided with the audit sample. The analyst shall submit the three results with the field validation report. Although no acceptance criteria are set for these performance audit results, the analyst and reviewing authority may use them to assess the relative error of sample recovery, sample preparation, and analytical procedures and then consider the relative error in evaluating the measured emissions.

5. Procedure for Determination of Bias and Precision in the Field

The analyst shall select one of the sampling approaches below to determine the bias and precision of the data. After analyzing the samples, the analyst shall calculate the bias and precision according to the procedure described in section 6.0. When sampling a stationary source, follow the probe placement procedures in section 5.4.

5.1 *Isotopic Spiking.* This approach shall be used only for methods that require mass spectrometry (MS) analysis. Bias and precision are calculated by procedures described in section 6.1.

5.1.1 *Number of Samples and Sampling Runs.* Collect a total of 12 replicate samples by either obtaining six sets of paired samples or three sets of quadruplet samples.

5.1.2 *Spiking Procedure.* Spike all 12 samples with the reference material at the level of the standard. Follow the appropriate spiking procedures listed below for the applicable waste medium.

5.1.2.1 *Exhaust Gas Testing.* The spike shall be introduced as close to the tip of the sampling probe as possible.

5.1.2.1.1 *Gaseous Reference Material with Sorbent or Impinger Sampling Trains.* Sample the reference material (in the laboratory or in the field) at a concentration which is close to the allowable concentration standard for the time required by the method, and then sample the gas stream for an equal amount of time. The time for sampling both the reference material and gas stream should be equal; however, the time should be adjusted to avoid sorbent breakthrough.

5.1.2.1.2 *Gaseous Reference Material with Sample Container (Bag or Canister).* Spike the sample containers after completion of each test run with an amount equal to the allowable concentration standard of the emission point. The final concentration of the reference material shall approximate the level of the emission concentration in the stack. The volume amount of reference material shall be less than 10 percent of the sample volume.

5.1.2.1.3 *Liquid and Solid Reference Material with Sorbent or Impinger Trains.* Spike the trains with an amount equal to the allowable concentration standard before sampling the stack gas. The spiking should be done in the field; however, it may be done in the laboratory.

5.1.2.1.4 *Liquid and Solid Reference Material with Sample Container (Bag or Canister).* Spike the containers at the completion of each test run with an amount equal to the level of the emission standard.

5.1.2.2 *Other Waste Media.* Spike the 12 replicate samples with the reference material either before or directly after sampling in the field.

5.2 *Comparison Against a Validated Test Method.* Bias and precision are calculated using the procedures described in section 6.2. This approach shall be used when a validated method is available and an alternative method is being proposed.

5.2.1 *Number of Samples and Sampling Runs.* Collect nine sets of replicate samples using a paired sampling system (a total of 18 samples) or four sets of replicate samples using a quadruplet sampling system (a total of 16 samples). In each sample set, the validated test method shall be used to collect and analyze half of the samples.

5.2.2 *Performance Audit Exception.* Conduct the performance audit as required in section 4.0 for the validated test method. Conducting a performance audit on the test method being evaluated is recommended.

5.3 *Analyte Spiking.* This approach shall be used when sections 5.1 and 5.2 are not applicable. Bias and precision are calculated using the procedures described in Section 6.3.

5.3.1 *Number of Samples and Sampling Runs.* Collect a total of 24 samples using the quadruplet sampling system (a total of 6 sets of replicate samples).

5.3.2 In each quadruplet set, spike half of the samples (two out of the four) with the reference material according to the applicable procedure in section 5.1.2.1 or 5.1.2.2.

5.4 *Probe Placement and Arrangement for Stationary Source Stack or Duct Sampling.* The probes shall be placed in the same horizontal plane. For paired sample probes the arrangement should be that the probe tip is 2.5 cm from the outside edge of the other with a pitot tube on the outside of each probe. Other paired arrangements for the pitot tube may be acceptable. For quadruplet sampling probes, the tips should be in a 6.0 cm × 6.0 cm square area measured from the center line of the opening of the probe tip with a single pitot tube in the center or two pitot tubes with their location on either side of the probe tip configuration. An alternative arrangement should be proposed whenever the cross-sectional area of the probe tip configuration is approximately 5 percent of the stack or duct cross-sectional area.

6 Calculations

Data resulting from the procedures specified in section 5.0 shall be treated as follows to determine bias, correction factors, relative standard deviations, precision, and data acceptance.

6.1 *Isotopic Spiking.* Analyze the data for isotopic spiking tests as outlined in sections 6.1.1 through 6.1.6.

6.1.1 Calculate the numerical value of the bias using the results from the analysis of the isotopically spiked field samples and the calculated value of the isotopically labeled spike:

$B = CS - S_m$ Eq. 301=1

where:

B=Bias at the spike level.

S_m=Mean of the measured values of the isotopically spiked samples.

CS=Calculated value of the isotopically labeled spike.

6.1.2 Calculate the standard deviation of the S_i values as follows:

$$SD = \sqrt{\frac{\sum (S_i - S_m)^2}{(n-1)}}$$

Eq. 301–2

where:

S_i=Measured value of the isotopically labeled analyte in the ith field sample.

n=Number of isotopically spiked samples, 12.

6.1.3. Calculate the standard deviation of the mean (SDM) as follows:

$$SDM = \frac{SD}{\sqrt{n}}$$

Eq. 301–3

$$t = \frac{|B|}{SDM}$$

6.1.4 Test the bias for statistical significance by calculating the t-statistic, Eq. 301–4

and compare it with the critical value of the two-sided t-distribution at the 95-percent confidence level and n–1 degrees of freedom. This critical value is 2.201 for the eleven degrees of freedom when the procedure specified in section 5.1.2 is followed. If the calculated t-value is greater than the critical value the bias is statistically significant and the analyst should proceed to evaluate the correction factor.

6.1.5 *Calculation of a Correction Factor.* If the t-test does not show that the bias is statistically significant, use all analytical results without correction and proceed to the precision evaluation. If the method's bias is

statistically significant, calculate the correction factor, CF, using the following equation:

$$CF = \frac{1}{1 + \frac{B}{CS}}$$

Eq. 301–5

If the CF is outside the range of 0.70 to 1.30, the data and method are considered unacceptable. For correction factors within the range, multiply all analytical results by the CF to obtain the final values.

6.1.6 *Calculation of the Relative Standard Deviation (Precision).* Calculate the relative standard deviation as follows:

$$RSD = \left(\frac{SD}{S_m}\right) \times 100$$

Eq. 301–6

where S_m is the measured mean of the isotopically labeled spiked samples.

6.2 *Comparison with Validated Method.* Analyze the data for comparison with a validated method as outlined in sections 6.2.1 or 6.2.2, as appropriate. Conduct these procedures in order to determine if a proposed method produces results equivalent to a validated method. Make all necessary bias corrections for the validated method, as appropriate. If the proposed method fails either test, the method results are unacceptable, and conclude that the proposed method is not as precise or accurate as the validated method. For highly variable sources, additional precision checks may be necessary. The analyst should consult with the Administrator if a highly variable source is suspected.

6.2.1 *Paired Sampling Systems.*

6.2.1.1. *Precision.* Determine the acceptance of the proposed method's variance with respect to the variability of the validated method results. If a significant difference is determined, the proposed method and the results are rejected. Proposed methods demonstrating F-values equal to or less than the critical value have acceptable precision.

6.2.1.2 Calculate the variance of the proposed method, S_p^2, and the variance of the validated method, S_v^2, using the following equation:

$S_{(p \text{ or } v)}^2 = SD^2$ Eq. 301–7

where:

SD_v=Standard deviation provided with the validated method,

SD_p=Standard deviation of the proposed method calculated using Equation 301–9a.

6.2.1.3 *The F-test.* Determine if the variance of the proposed method is significantly different from that of the validated method by calculating the F-value using the following equation:

$$F = \frac{S_p^2}{S_v^2}$$

Eq. 301–8

Compare the experimental F value with the critical value of F. The critical value is 1.0 when the procedure specified in section 5.2.1 for paired trains is followed. If the calculated F is greater than the critical value, the difference in precision is significant and the data and proposed method are unacceptable.

6.2.1.4 *Bias Analysis.* Test the bias for statistical significance by calculating the t-statistic and determine if the mean of the differences between the proposed method and the validated method is significant at the 80-percent confidence level. This procedure requires the standard deviation of the validated method, SD_v, to be known. Employ the value furnished with the method. If the standard deviation of the validated method is not available, the paired replicate sampling procedure may not be used. Determine the mean of the paired sample differences, d_m, and the standard deviation, SD_d, of the differences, d_i's, using Equation 301–2 where: d_i replaces S_i, d_m replaces S_m. Calculate the standard deviation of the proposed method, SD_p, as follows:

$SD_p = SD_d - SD_v$ Eq. 301–9a

(If $SD_v > SD_d$, let $SD = SD_d/1.414$).

Calculate the value of the t-statistic using the following equation:

$$t = \frac{d_m}{\left(\frac{SD_p}{\sqrt{n}}\right)}$$

Eq. 301–9

where n is the total number of paired samples. For the procedure in section 5.2.1, n equals nine. Compare the calculated t-statistic with the corresponding value from the table of the t-statistic. When nine runs are conducted, as specified in section 5.2.1, the critical value of the t-statistic is 1.397 for eight degrees of freedom. If the calculated t-value is greater than the critical value the bias is statistically significant and the analyst should proceed to evaluate the correction factor.

6.2.1.5 *Calculation of a Correction Factor.* If the statistical test cited above does not show a significant bias with respect to the reference method, assume that the proposed method is unbiased and use all analytical results without correction. If the method's bias is statistically significant, calculate the correction factor, CF, as follows:

$$CF = \frac{1}{1 + \frac{d_m}{V_m}}$$

Eq. 301–10

where V_m is the mean of the validated method's values.

Multiply all analytical results by CF to obtain the final values. The method results, and the method, are unacceptable if the correction factor is outside the range of 0.9 to 1.10.

6.2.2 *Quadruplet Replicate Sampling Systems.*

6.2.2.1 *Precision.* Determine the acceptance of the proposed method's variance with respect to the variability of the validated method results. If a significant difference is determined the proposed method and the results are rejected.

6.2.2.2 Calculate the variance of the proposed method, S_p^2, using the following equation:

$$S^2 = \frac{\sum d_i^2}{2n}$$

Eq. 301–11

where the d_i's are the differences between the validated method values and the proposed method values.

6.2.2.3 *The F-test.* Determine if the variance of the proposed method is more variable than that of the validated method by calculating the F-value using Equation 301–8. Compare the experimental F value with the critical value of F. The critical value is 1.0 when the procedure specified in section 5.2.2 for quadruplet trains is followed. The calculated F should be less than or equal to the critical value. If the difference in precision is significant the results and the proposed method are unacceptable.

6.2.2.4 *Bias Analysis.* Test the bias for statistical significance at the 80 percent confidence level by calculating the t-statistic. Determine the bias (mean of the differences between the proposed method and the validated method, d_m) and the standard deviation, SD_d, of the differences. Calculate the standard deviation of the differences, SD_d, using Equation 301–2 and substituting d_i for S_i. The following equation is used to calculate d_i:

$$d_i = \frac{(V_{1_i} + V_{2_i})}{2} - \frac{(P_{1_i} + P_{2_i})}{2}$$

Eq. 301–12

and: V_{1i}=First measured value of the validated method in the ith test sample.

P_{1i}=First measured value of the proposed method in the ith test sample.

Calculate the t-statistic using Equation 301–9 where n is the total number of test sample differences (d_i). For the procedure in section 5.2.2, n equals four. Compare the

calculated t-statistic with the corresponding value from the table of the t-statistic and determine if the mean is significant at the 80-percent confidence level. When four runs are conducted, as specified in section 5.2.2, the critical value of the t-statistic is 1.638 for three degrees of freedom. If the calculated t-value is greater than the critical value the bias is statistically significant and the analyst should proceed to evaluate the correction factor.

6.2.2.5 *Correction Factor Calculation.* If the method's bias is statistically significant, calculate the correction factor, CF, using Equation 301–10. Multiply all analytical results by CF to obtain the final values. The method results, and the method, are unacceptable if the correction factor is outside the range of 0.9 to 1.10.

6.3 *Analyte Spiking.* Analyze the data for analyte spike testing as outlined in Sections 6.3.1 through 6.3.3.

6.3.1 *Precision.*

6.3.1.1 *Spiked Samples.* Calculate the difference, d_i, between the pairs of the spiked proposed method measurements for each replicate sample set. Determine the standard deviation (SD_s) of the spiked values using the following equation:

$$SD_s = \sqrt{\frac{\sum d_i^2}{2n}}$$

Eq. 301–13

where: n = Number of runs.

Calculate the relative standard deviation of the proposed spiked method using Equation 301–6 where S_m is the measured mean of the analyte spiked samples. The proposed method is unacceptable if the RSD is greater than 50 percent.

6.3.1.2 *Unspiked Samples.* Calculate the standard deviation of the unspiked values using Equation 301–13 and the relative standard deviation of the proposed unspiked method using Equation 301–6 where S_m is the measured mean of the analyte spiked samples. The RSD must be less than 50 percent.

6.3.2 *Bias.* Calculate the numerical value of the bias using the results from the analysis of the spiked field samples, the unspiked field samples, and the calculated value of the spike:

$B = S_m - M_m - CS$

Eq. 301–14

where: B = Bias at the spike level.
S_m = Mean of the spiked samples.
M_m = Mean of the unspiked samples.
CS = Calculated value of the spiked level.

6.3.2.1 Calculate the standard deviation of the mean using the following equation where SD_s and SD_u are the standard deviations of the spiked and unspiked sample values respectively as calculated using Equation 301–13.

$$SD = \sqrt{SD_s^2 + SD_u^2}$$

Eq. 301–15

6.3.2.2 Test the bias for statistical significance by calculating the t-statistic using Equation 301–4 and comparing it with the critical value of the two-sided t-distribution at the 95-percent confidence level and n-1 degrees of freedom. This critical value is 2.201 for the eleven degrees of freedom.

6.3.3 *Calculation of a Correction Factor.* If the t-test shows that the bias is not statistically significant, use all analytical results without correction. If the method's bias is statistically significant, calculate the correction factor using Equation 301–5. Multiply all analytical results by CF to obtain the final values.

7. Ruggedness Testing (Optional)

7.1 *Laboratory Evaluation.*

7.1.1 Ruggedness testing is a useful and cost-effective laboratory study to determine the sensitivity of a method to certain parameters such as sample collection rate, interferant concentration, collecting medium temperature, or sample recovery temperature. This Section generally discusses the principle of the ruggedness test. A more detailed description is presented in citation 10 of Section 13.0.

7.1.2 In a ruggedness test, several variables are changed simultaneously rather than one variable at a time. This reduces the number of experiments required to evaluate the effect of a variable. For example, the effect of seven variables can be determined in eight experiments rather than 128 (W.J. Youden, Statistical Manual of the Association of Official Analytical Chemists, Association of Official Analytical Chemists, Washington, DC, 1975, pp. 33–36).

7.1.3 Data from ruggedness tests are helpful in extending the applicability of a test method to different source concentrations or source categories.

8. Procedure for Including Sample Stability in Bias and Precision Evaluations

8.1 *Sample Stability.*

8.1.1 The test method being evaluated must include procedures for sample storage and the time within which the collected samples shall be analyzed.

8.1.2 This section identifies the procedures for including the effect of storage time in bias and precision evaluations. The evaluation may be deleted if the test method specifies a time for sample storage.

8.2 *Stability Test Design.* The following procedures shall be conducted to identify the effect of storage times on analyte samples. Store the samples according to the procedure specified in the test method. When using the analyte spiking procedures (section 5.3), the study should include equal numbers of spiked and unspiked samples.

8.2.1 Stack Emission Testing.

8.2.1.1 For sample container (bag or canister) and impinger sampling systems, sections 5.1 and 5.3, analyze six of the samples at the minimum storage time. Then analyze the same six samples at the maximum storage time.

8.2.1.2 For sorbent and impinger sampling systems, sections 5.1 and 5.3, that require extraction or digestion, extract or digest six of the samples at the minimum storage time and extract or digest six other samples at the maximum storage time. Analyze an aliquot of the first six extracts (digestates) at both the minimum and maximum storage times. This will provide some freedom to analyze extract storage impacts.

8.2.1.3 For sorbent sampling systems, sections 5.1 and 5.3, that require thermal desorption, analyze six samples at the minimum storage time. Analyze another set of six samples at the maximum storage time.

8.2.1.4 For systems set up in accordance with section 5.2, the number of samples analyzed at the minimum and maximum storage times shall be half those collected (8 or 9). The procedures for samples requiring extraction or digestion should parallel those in section 8.2.1.

8.2.2 *Other Waste Media Testing.* Analyze half of the replicate samples at the minimum storage time and the other half at the maximum storage time in order to identify the effect of storage times on analyte samples.

9. Procedure for Determination of Practical Limit of Quantitation (Optional)

9.1 *Practical Limit of Quantitation.*

9.1.1 The practical limit of quantitation (PLQ) is the lowest level above which quantitative results may be obtained with an acceptable degree of confidence. For this protocol, the PLQ is defined as 10 times the standard deviation, s_o, at the blank level. This PLQ corresponds to an uncertainty of ±30 percent at the 99-percent confidence level.

9.1.2 The PLQ will be used to establish the lower limit of the test method.

9.2 *Procedure I for Estimating s_o.* This procedure is acceptable if the estimated PLQ is no more than twice the calculated PLQ. If the PLQ is greater than twice the calculated PLQ use Procedure II.

9.2.1 Estimate the PLQ and prepare a test standard at this level. The test standard could consist of a dilution of the reference material described in section 3.0.

9.2.2 Using the normal sampling and analytical procedures for the method, sample and analyze this standard at least seven times in the laboratory.

9.2.3 Calculate the standard deviation, s_o, of the measured values.

9.2.4 Calculate the PLQ as 10 times s_o.

9.3 *Procedure II for Estimating s_o.* This procedure is to be used if the estimated PLQ is more than twice the calculated PLQ.

9.3.1 Prepare two additional standards at concentration levels lower than the standard used in Procedure I.

9.3.2 Sample and analyze each of these standards at least seven times.

9.3.3 Calculate the standard deviation for each concentration level.

9.3.4 Plot the standard deviations of the three test standards as a function of the standard concentrations.

9.3.5 Draw a best-fit straight line through the data points and extrapolate to zero concentration. The standard deviation at zero concentration is S_0.

9.3.6 Calculate the PLQ as 10 times S_0.

10.0 Field Validation Report Requirements

The field validation report shall include a discussion of the regulatory objectives for the

testing which describe the reasons for the test, applicable emission limits, and a description of the source. In addition, validation results shall include:

10.1 Summary of the results and calculations shown in section 6.0.

10.2 Reference material certification and value(s).

10.3 Performance audit results or letter from the reviewing authority stating the audit material is currently not available.

10.4 Laboratory demonstration of the quality of the spiking system.

10.5 Discussion of laboratory evaluations.

10.6 Discussion of field sampling.

10.7 Discussion of sample preparations and analysis.

10.8 Storage times of samples (and extracts, if applicable).

10.9 Reasons for eliminating any results.

11. Followup Testing

The correction factor calculated in section 6.0 shall be used to adjust the sample concentrations in all followup tests conducted at the same source. These tests shall consist of at least three replicate samples, and the average shall be used to determine the pollutant concentration. The number of samples to be collected and analyzed shall be as follows, depending on the validated method precision level:

11.1 Validated relative standard deviation (RSD) ≤ ±15 Percent. Three replicate samples.

11.2 Validated RSD ≤ ±30 Percent. Six replicate samples.

11.3 Validated RSD ≤ ±50 Percent. Nine replicate samples.

11.4 Equivalent method. Three replicate samples.

12. Procedure for Obtaining a Waiver

12.1 *Waivers.* These procedures may be waived or a less rigorous protocol may be granted for site-specific applications. The following are three example situations for which a waiver may be considered.

12.1.1 *"Similar" Sources.* If the test method has been validated previously at a "similar" source, the procedures may be waived provided the requester can demonstrate to the satisfaction of the Administrator that the sources are "similar." The methods's applicability to the "similar" source may be demonstrated by conducting a ruggedness test as described in section 6.0.

12.1.2 *"Documented" Methods.* In some cases, bias and precision may have been documented through laboratory tests or protocols different from this method. If the analyst can demonstrate to the satisfaction of the Administrator that the bias and precision apply to a particular application, the Administrator may waive these procedures or parts of the procedures.

12.1.3 *"Conditional" Test Methods.* When the method has been demonstrated to be valid at several sources, the analyst may seek a "conditional" method designation from the Administrator. "Conditional" method status provides an automatic waiver from the procedures provided the test method is used within the stated applicability.

12.2 *Application for Waiver.* In general, the requester shall provide a thorough description of the test method, the intended application, and results of any validation or other supporting documents. Because of the many potential situations in which the Administrator may grant a waiver, it is neither possible nor desirable to prescribe the exact criteria for a waiver. At a minimum, the requester is responsible for providing the following.

12.2.1 A clearly written test method, preferably in the format of 40 CFR part 60, appendix A Test Methods. The method must include an applicability statement, concentration range, precision, bias (accuracy), and time in which samples must be analyzed.

12.2.2.2 Summaries (see section 10.0) of previous validation tests or other supporting documents. If a different procedure from that described in this method was used, the requester shall provide appropriate documents substantiating (to the satisfaction of the Administrator) the bias and precision values.

12.2.2.3 Results of testing conducted with respect to sections 7.0, 8.0, and 9.0.

12.2.3 Discussion of the applicability statement and arguments for approval of the waiver. This discussion should address as applicable the following: Applicable regulation, emission standards, effluent characteristics, and process operations.

12.3 *Requests for Waiver.* Each request shall be in writing and signed by the analyst. Submit requests to the Director, OAQPS, Technical Support Division, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711.

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APPENDIX B TO PART 63—SOURCES DEFINED FOR EARLY REDUCTION PROVISIONS

Source	Location of definition
1. Organic Process Equipment in Volatile Hazardous Air Pollutant Service at Chemical Plants and Other Designated Facilities.	56 FR 9315, March 6, 1991, Announcement of Negotiated Rulemaking
a. All valves in gas or light liquid service within a process unit	
b. All pumps in light liquid service within a process unit	
c. All connectors in gas or light liquid service within a process unit	
d. Each compressor	
e. Each product accumulator vessel	
f. Each agitator	
g. Each pressure relief device	
Each open-ended valve or line	
i. Each sampling connection system	
j. Each instrumentation system	
k. Each pump, valve, or connector in heavy liquid service	
l. Each closed vent system and control device	

[FR Doc. 92–28515 Filed 12–28–92; 8:45 am]

BILLING CODE 6560–50–M

federal register

Tuesday
December 29, 1992

Part III

Department of Labor

Employment and Training Administration

20 CFR Part 626, et al.
Job Training Partnership Act; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 626, 627, 628, 629, 630, 631, 637

RIN 1205—AA-95

Job Training Partnership Act

AGENCY: Employment and Training Administration, Labor.

ACTION: Interim final rule.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor amends the Job Training Partnership Act (JTPA) regulations to implement the Job Training Reform Amendments of 1992. As a result of these interim final regulations, the Department intends for the direction and focus of the JTPA training and employment programs to be on improving the targeting of JTPA services to those facing serious barriers to employment, enhancing the quality of services provided and program outcomes, strengthening fiscal and program accountability and the linkage between the services provided and local labor market needs, and fostering a comprehensive and coherent system of human resource services.

EFFECTIVE DATES: The effective date for this interim final rule is December 18, 1992 through June 1, 1993. The Department will issue a final rule on or before the last effective date of this interim rule and after it has reviewed public comments.

Comments: Written comments are invited on this interim final rule. Such comments will be considered at any time up to the publication of the final rule. Whenever possible, commenters are requested to specifically identify the topic or section(s) of the rule that are subject to comment. To be most useful in the development of the final rule, however, comments in response to this notice should be received on or before February 12, 1993.

ADDRESSES: Written comments shall be mailed to the Assistant Secretary for Employment and Training, Department of Labor, room N–4703, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Mr. Hugh Davies, Acting Director, Office of Employment and Training Programs. Commenters wishing acknowledgment of receipt of their comments shall submit them by certified mail, return receipt requested.

Comments received will be available for public inspection during normal business hours at the Office of Employment and Training Programs, U.S. Department of Labor, 200 Constitution Avenue NW., room N–4469, Washington, DC 20210. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. To schedule an appointment, call (202) 219–6825 (VOICE) or (202) 326–2577 (TDD).

Copies of this notice of interim final rulemaking are available in the following formats: Electronic file on computer disk; and audio tape. They may be obtained at the above address.

FOR FURTHER INFORMATION CONTACT: Mr. Hugh Davies, Acting Director, Office of Employment and Training Programs. Telephone: (202) 219–5580 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The JTPA was enacted in 1982 principally to establish a new program and delivery system for training and related assistance for economically disadvantaged youth and adults leading to permanent, private sector employment. Since the original enactment, the essential structure and design of programs and activities under titles I and II of JTPA have remained substantially the same. These programs have an impressive record of placing participants in jobs.

Over the past few years, the JTPA program has been the subject of extensive review and discussions. This process was largely initiated with an examination of the JTPA and its future by a JTPA Advisory Committee to the Secretary of Labor, has included a multi-year national impact study, and extensive deliberations by the Congress. Throughout this review process there have been constructive comments and suggestions from a wide variety of parties, including business leaders, States, service delivery areas (SDA's), labor organizations, community-based organizations (CBO's), the Department of Labor Office of the Inspector General (OIG), the General Accounting Office, and others with an interest in improving JTPA. Important topics of interest included how to identify and to enroll those most in need of JTPA services, an emphasis on ways in which the program can maximize the delivery and effectiveness of training resources, and the broad areas of program administration improvements and program and fiscal integrity.

The culmination of this activity was the enactment of the Job Training Reform Amendments of 1992 on September 7, 1992, Public Law 102–367 (hereinafter the "Job Training Amendments of 1992", or the "Amendments"). Through these changes, the direction of JTPA will be focused on the provision of quality training and assistance to the most needy by a well-administered and fiscally sound program. With cooperation among the Federal, State, and local government levels, the partners in the private sector, education, labor, and community agencies, the JTPA system will be better able to respond to the nation's changing workforce needs.

Background

On October 13, 1982, the President signed into law the Job Training Partnership Act, Public Law 97–300 (JTPA or the Act).

The stated purpose of the Act was to establish programs to prepare youth and unskilled adults for entry into the labor force and to afford job training to those economically disadvantaged individuals and others facing serious barriers to employment who are in special need of such training to obtain productive employment.

Title I of the Act sets forth general requirements for programs, as well as some requirements for State and local operation of programs. Title II provides requirements for State and local operation of adult and youth programs for the economically disadvantaged. Title III of the Act provides for operation of State and substate programs of employment and training assistance for dislocated workers. Title IV provides requirements for special programs for targeted groups, such as Native Americans, migrant and seasonal farmworkers and veterans, as well as for the Job Corps and other specialized programs. Title V provides incentives to States to reduce welfare dependency and increase self sufficiency for absent parents of children receiving aid to families with dependent children and blind or disabled individuals receiving supplemental security income under Title XVI of the Social Security Act.

Prior Actions

The Department is conducting the development of the final rule in an open and public manner. Since the enactment of the Amendments, Department officials have responded to numerous invitations to discuss the Amendments with organizations interested in the Amendments and proposed regulatory action. Additionally, a group of technical experts has offered suggestions to the Department on the proposed areas for regulatory action.

On September 10, 1992, the Department published an Advance Notice of Proposed Rulemaking (ANPR) in the **Federal Register** inviting

comments from interested parties regarding proposed or recommended regulatory actions to be taken by the Department.

A total of 162 letters were received by the end of the ANPR comment period. A total of 277 have been received to date and the Department continues to receive comments. In general, the comments received after the official comment period are consistent with those discussed in the text below. Sources were as follows: State JTPA Liaisons and officials (48); private contractors (44); service delivery areas (27); private industry councils (30); public interest groups (20); community-based organizations (13); State education agencies (10); Federal agencies (4); State job training coordinating councils (2); unions (3); service providers (3); private citizens (8); Congress (4); and others (3). Additionally, 54 comments were received from JTPA Section 401 and 402 organizations (Indians and Native Americans and migrant and seasonal farmworkers).

The Department fully considered these comments and addresses the issues they raised in the following discussion.

Approach to Rulemaking

It is the Department's intent in developing these regulations to continue to provide substantial responsibility and discretion to States and local areas in developing policy and in implementing procedures for JTPA programs. This State responsibility is key to the overall success of JTPA. Thus, in many instances in these interim final regulations, responsibility for certain decisions is vested in the State, and through the State, in the SDA's. For example, where definitions of terms are not included, it is intended that the State or SDA administrative entity will define such terms. The Department intends to limit regulations only to those areas in which they are specifically required by the Act or identified by the Department or the public as necessary to provide guidance and clarification, or essential to further the purposes of the Act. Additionally, the Department fully intends to provide strong oversight and monitoring of JTPA programs, in conjunction with strengthened State and local oversight and monitoring. It is through the monitoring of the implementation of the Amendments and these regulations, rather than through promulgation of prescriptive regulations, that the Department, working with the States and service delivery and substate areas, will ensure effective program operations.

The Department has sought to strike a balance in these interim final regulations in terms of depth and breadth. Of all consultations and comments the Department has received, about half express interest in having the Department be more detailed in the regulations, and the other half prefer that the Department provide minimal guidance. The Department intends that the regulations be sufficiently clear so that all parties with an interest in JTPA understand both the requirements and the areas of flexibility provided under in the program.

This interim final rule is not a stand-alone document; the companion document is the JTPA, as amended. In several instances, however, portions of the Act are repeated to make the interim final rule user-friendly and to facilitate its use as a reference tool.

In addition to the 1992 JTPA Amendments, Section 4467 of the National Defense Authorization Act for Fiscal Year 1993 (Defense Authorization Act) amends certain provisions of title III of JTPA. The interim final regulations in 20 CFR part 631 provide for limited modifications to existing title III regulations as required by these amendments.

It is the Department's plan to separately issue reporting instructions and instructions for establishing and adjusting title II performance standards. Both sets of instructions will be published as notices for comment in the **Federal Register**. Copies will be made available to States by issuance of Training and Employment Information Notices (TEINS).

The Department also plans to separately issue proposed revisions to the regulations for title IV, part A, the Employment and Training Programs for Native Americans and Migrant and Seasonal Farmworkers, and for title IV, part B, the Job Corps. When it does, the contents of the regulations as reflected herein may change.

The Department plans to issue Solicitations for Grant Applications (SGAs) for the Youth Fair Chance, Replication, and MicroEnterprise grants authorized by the Amendments at title IV, parts D, H, and I, respectively. The SGAs will elaborate on the requirements of these programs.

The Department of Labor is issuing interim final regulations with a request for comments to implement provisions of the Job Training Reform Amendments of 1992, which amends portions of the Job Training Partnership Act (JTPA). These interim final regulations comply with the statutory provision that final regulations be issued not later than December 18, 1992. At the same time they provide the opportunity for comment. Modification of the JTPA regulations is necessary to incorporate the revisions contained in the amended legislation. It is clearly the intent of Congress that these amendments be implemented with the JTPA Program Year that begins on July 1, 1993. Planning and implementation actions which must be undertaken prior to the publication of final regulations shall be consistent with these interim final regulations which provide a legal basis for such actions.

The Department understands that States and SDA's must begin planning as soon as possible to meet the statutory effective date of July 1, 1993, and expects that these interim final regulations will be used for planning. In drafting these interim final regulations, the Department has carefully considered the ANPR comments and has extensively consulted both within and outside of the Department. The Department is providing a full and open comment process on these interim final regulations and will respond to comments and make revisions, as appropriate, in the final rule.

The Department intends to fully consider any comments received on this interim final rule and to issue a final rule in a timely fashion on or before June 1, 1993, the effective date for this interim final rule.

Framework for Implementation of the Amendments

As discussed in the ANPR, the Department believes that certain principles are central to the JTPA and to the implementation of the Amendments. The following principles are central to the Department's efforts to oversee and guide the implementation process, including the development of these interim final and subsequent final regulations.

- An enhanced role for the private sector is key to an effective JTPA program. Building on their significant contributions to date, the Department wants to ensure that private sector leaders participate in JTPA private industry councils (PIC's)—particularly in the design and operation of JTPA programs. This includes participation in setting high standards for the content and acquisition of skills through training and linking training with job opportunities in the local and national labor market. The Department also wishes to ensure that the PIC's are full partners in the JTPA public-private planning and delivery system.
- Training services provided by JTPA should be of the highest quality and responsive to the needs of the

individual participants and the labor market. This is a cornerstone of the Amendments, and is consistent with the findings and recommendations of the JTPA Advisory Committee, the Secretary's Commission on Achieving Necessary Skills (SCANS), and the concepts embodied in the President's Job Training 2000 proposal. In issuing regulations, the Department wants to establish a framework under which the processes used to assess the skill levels and service needs of individuals and under which participants are assigned to and receive training services—especially services required by the Act—will be most effective and efficient. At the same time, the Department recognizes that the JTPA system, within the framework of the Act and regulations, must be flexible and able to design and to deliver programs to meet local job training needs.

- The JTPA performance standards based on program outcomes will be the basic measure of the accomplishments of the JTPA system. In setting performance standards, the Department will encourage interventions, program strategies, and arrangements that provide appropriate services to participants, enhance opportunities for long-term employment, and increase participant earnings potential. The Department will also pursue cost-effective reporting methods that quantify the results of these efforts.
- JTPA programs must meet the highest possible standards for the use of public funds. Substantial attention was given in the Amendments to strengthening program management, procurement, and fiscal and accountability standards for the JTPA system. The Department intends to advance fully these goals and to ensure the implementation of the requirements contained in the Amendments relating to these areas.
- JTPA and other human resource programs must have a workable system of relationships to jointly serve their participants. There are a number of educational and training programs that provide services to disadvantaged individuals in addition to the JTPA program. It is unlikely that any single program will have the capacity to meet all the training, educational, and service needs of a participant. The Department is proposing regulations that foster the development of joint relationships among programs in order to provide high quality comprehensive services to individuals and to increase the capability to JTPA programs in conjunction with other human resource programs to maximize quality services to individuals.

Format of these Interim Final Regulations

The structure, organization, and numbering of the JTPA regulations have been revised to accommodate the Amendments. Throughout this document, JTPA or the Act refers to the Job Training Partnership Act, as amended (29 U.S.C. 1501 *et seq.*); Department or DOL refers to the U.S. Department of Labor; and Secretary refers to the Secretary of the U.S. Department of Labor or the Secretary's designated representative(s). As used in these interim final regulations, the term "title" refers to titles of the Job Training Partnership Act unless the text specifically refers to another statute. The terms "section", "part", and "subpart" refer to sections, parts, and subparts of these interim final regulations unless the text specifically refers to another document.

Program Coordination

Several States have urged ETA to consider whether certain regulatory provisions would inhibit coordination, and whether the Secretary should establish a process to waive such regulatory provisions. The Department believes it must adhere to certain criteria in establishing regulatory provisions, including adhering to the statute, promoting coordination, targeting JTPA services to the hard to serve, and promoting basic and occupational skills training. The Department requests comments to identify particular provisions of the rules which might discourage coordination and actions the Department might take in this regard including the establishment of a waiver procedure.

As specified at Part 626—Introduction to the Regulations Under the Job Training Partnership Act, part 627 applies to all programs under titles I, II, and III of the Act, except where noted, and part 628 generally applies to title II programs. Parts 629 and 630 are reserved for future use. Part 631 continues to apply to title III programs and part 637 has been revised for the Title V Jobs for Employable Dependent Individuals (JEDI) program. Therefore, various sections that previously appeared in parts 627, 628, 629, and 630 have been shifted to parts 627 and 628.

A new § 626.3 has been added to specify the purpose of these interim final regulations and to identify the entities to which these regulations apply.

Definitions

Comments on the ANPR regarding definition of terms were directed to clarifying ambiguities and the need for common definitions applying across JTPA titles and other Federal programs.

In response to these comments, and in addition to new and revised definitions contained in section 4 of the Act, § 626.5 contains definitions of terms used in these regulations as well as the Act. Definitions have been provided for terms such as: Accrued expenditures, awarding agency, capacity building, commercial organizations, commercially available off-the-shelf training package, contractor, family, family income, funding period, Governor, grant, grantee, individual service strategy, obligations, program year, recipient, service provider, State, stand-in costs, subgrant, subgrantee, subrecipient, technical assistance, and vendor.

Commenters requested that the Department clarify what "appropriate grade level" means for purposes of the requirement of section 263(b). The Department has chosen not to define this term because it is properly a matter for the Governor to determine as part of State and local educational policy.

The definition of offender is found in the Act, and is broader than the definition used for reporting. For reporting purposes, offender has been redefined to exclude those arrested or convicted of misdemeanors in order to better represent a true "barrier to employment" for purposes of defining a hard-to-serve group and adjusting performance standards. This is intended to reflect a concern that, for performance standard adjustment purposes, the term connotes a more serious barrier to labor market participation. The Department has chosen to retain the statutory definition for the purpose of identifying hard-to-serve individuals. This is being done in order to include individuals who may not meet the reporting definition such as youthful offenders who may, for instance, be in a pre-trial intervention program and therefore are not felons. The Department seeks comments on whether this approach will cause a problem in the administration and operation of JTPA programs and alternative approaches that may be adopted.

Prior to the JTPA Amendments of 1992, the term "family" was not defined in the statute. The definition of "family" has been the subject of much recent discussion, in particular as that term related to establishing "family-of-one" criteria for the purposes of income eligibility determinations for receipt of JTPA services. The Department issued a policy interpretation on the matter to all Governors via Training and Employment Guidance Letter (TEGL)

No. 5–89 (April 5, 1989) and TEGL No. 5–89, Change 1 (September 5, 1990). The Department's interpretation established a "basic" definition of the term "family", while maintaining the considerable latitude of the Governor to interpret "family" consistent with the "basic" definition, under the provisions of § 627.1. In light of the Department's interpretation, the various States reviewed their policies and, where necessary, revised their policies to conform to the Department's interpretation. With the inclusion of a statutory definition of "family" in the JTPA Amendments of 1992, the Department reviewed its guidance to the States in the development of the interim final rule. We believe that the Department's interpretation is not inconsistent with the statutory definition. With minor exceptions, we do not anticipate that the statutory definition will require any significant revision of current State policies. The interim final rule indicates that the Governor may make interpretations in the context of the definition of "family" concerning how "dependent children" are defined for JTPA programs. The interim final rule also defines the term "living in a single residence" with other family members to differentiate between temporary, voluntary residence elsewhere (which is included), and as opposed to involuntary, temporary residence elsewhere (which is excluded).

In specifying that these regulations flow through to JTPA subrecipients, and in redefining the term "subrecipient" in § 626.5, among other things it is the Department's intent to make clear that the term "subrecipient" as used in these regulations does not apply to entities such as vendors or individuals enrolled in JTPA programs. The Department intends to apply the standard Federal Government-wide distinctions between subrecipients and vendors that already exist in the audit requirements of Office of Management and Budget (OMB) Circulars A–128 and A–133, as well as the distinctions and definitions of the OMB Circular A–102 Common Rule and other Federal Government-wide requirements applicable to grant programs (see 29 CFR parts 93, 96, 97 and 98). Requirements applicable to vendors are those requirements and conditions contained in the individual contract, purchase order, or other payment arrangements.

In a May, 1992 document titled "Questions and Answers on OMB Circular A–133," developed by the President's Council on Integrity and Efficiency and distributed by the Employment and Training Administration (ETA) to State JTPA Liaisons on July 27, 1992, as an attachment to Training and Employment Information Notice No. 2–92, the distinction between subrecipients and vendors is described. That document provides, in part, the following:

A subrecipient is an entity that receives Federal assistance passed through from a prime recipient or another subrecipient to carry out or administer a program. Distinguishing characteristics of a subrecipient include items such as:

—Determining eligibility for assistance;
—Performance measured against meeting the objectives of the program;
—Responsibility for programmatic decisionmaking;
—Responsibility for applicable program compliance requirements; and
—Use of the funds passed through to carry out a program of the subentity as compared to providing goods or services for a program of the prime recipient.

A vendor is an entity responsible for providing generally required goods or services related to the administrative support of the Federal award. These goods or services may be for the recipient's or subrecipient's own use or for the use of participants in the program. Distinguishing characteristics of a vendor include items such as:

—Providing the goods and services within normal business operations;
—Providing similar goods or services to many different purchasers;
—Operating in a competitive environment; and
—Program compliance requirements do not pertain to the goods or services provided.

Similar guidance was also published by OMB in the **Federal Register** on November 13, 1987, "Questions and Answers on OMB Circular A–128," questions 21 and 22.

In making this distinction between a subrecipient and a vendor, the Department has a concern that some JTPA entities may attempt to use the "vendor" label inappropriately to avoid certain JTPA requirements including audits, cost classification, procurement and cost limitations. States, SDA's, and substate grantees (SSG's) are encouraged to review carefully these distinctions, to ensure that such distinctions are clear from an operational standpoint, and ensure the proper application of these terms.

The major changes in Part 627—General Provisions Governing Programs Under the Act are as follows.

Governor/Secretary Agreement

Language has been included in § 627.200 to require the publication of rules, guidelines, interpretations, and definitions adopted by the Governor.

Public Service Employment Prohibition

Section 627.205 remains unchanged except for extending the prohibition to include title II–C funds.

Nondiscrimination and Equal Opportunity

The Job Training Amendments of 1992 amended section 167 of the Act to require the Secretary to issue final regulations which would clarify the application of the nondiscrimination and equal opportunity provisions of the JTPA and provide uniform procedures for implementing these provisions. On October 19, 1992, the Directorate of Civil Rights, the DOL agency responsible for enforcing the various Federal nondiscrimination and equal opportunity statutes applicable to federally assisted programs, issued a notice of proposed rulemaking to implement the nondiscrimination and equal opportunity requirements of the JTPA (29 CFR part 34). Throughout these interim final JTPA regulations, all of the Department's nondiscrimination and equal opportunity regulations (29 CFR parts 31, 32, and proposed 34) are cited since they are all applicable to JTPA federally assisted programs. In order to eliminate the burden of complying with overlapping regulatory requirements, the proposed 29 CFR part 34 would provide that compliance by JTPA recipients with part 34 would constitute compliance with the Department's title VI regulations (29 CFR part 31) and with specified portions of the Department's section 504 federally assisted program regulations. (29 CFR part 32, subparts A, C, and E).

Relocation

Section 141(c) of the Act was substantially revised to prohibit the use of JTPA funds to induce or to encourage the relocation of a company when such relocation results in the loss of employment of any employee of the company at the original site. This subsection also prohibits certain assistance to any relocating company for the first 120 days after the company commences operations at the new or expanded location, if the relocation results in an employee's job loss at the original site. If the Secretary finds that the State, SDA, or SSG has violated either provision, fines are to be levied equal to double the amount expended. If the violator demonstrates that it neither knew nor reasonably could have

known (after an inquiry undertaken with due diligence) that funds it provided were expended in violation of these provisions, only the amount expended is to be repaid.

The comments received on these provisions expressed concern in several areas, including how SDA's may be certain whether a company is relocating. One scenario was cited where a company opens in a new area under a different name with plans to close the original facility after a year, when the second location is fully operational. Another situation was raised where a company is expanding a location at the expense of another.

Section 627.215(d) sets forth a requirement to document a pre-award review which is intended to address the concerns discussed above. The review is to be conducted and documented by the SDA or SSG jointly with the establishment seeking JTPA assistance. This review should include information such as the company official providing the information, other company names, and whether the company is relocating, or expanding, from another area with a resulting loss in employment. In addition, the SDA or SSG should include contract provisions specifically reflecting the statutory prohibition. Although other commenters requested that the terms "encourage" and "induce" be clarified so as not to impact on job development activities, the Department believes that these terms are addressed sufficiently under the prohibition on economic development activities at § 627.225(a), and that the use of pre-award review questions will assist in establishing whether a company's plans to relocate will mean a loss of employment at another location.

Guidance on the Issue of Duplicate and Overlapping Payments Among Federal, State, and Local Programs, Including Pell Grants

Section 627.220 clarifies the interpretation of sections 141(b) and 107(b) of the Act. This section also provides guidance for coordination with title IV of the Higher Education Act, and with the new coordination provisions at sections 205 and 265 of the Act, as amended, which require SDA's to coordinate with other programs to enhance the provision of services.

Several commenters noted that the purpose of the linkages and coordination requirements was to preclude duplicate or overlapping payments among Federal, State, and local programs to participants and training institutions and to ensure that the best mix of programs and funds is available to the JTPA participant.

In response to these comments, § 627.220 assigns responsibility to the SDA's to establish coordination procedures, including provisions for the school's financial aid officer to share information on financial resources for participants with the SDA's, and contractual safeguards to prevent duplication or overlap of services and funding among the programs. The SDA is also to provide to an educational institution's financial aid officer the names of JTPA participants who are to attend the educational institution and for whom JTPA payments will be made.

JTPA program operators should be aware that the use of certain contracting methods, particularly contracts for classroom sized projects and fixed unit performance-based contracts, affect how educational institutions are permitted to calculate the Cost of Attendance (COA) for Pell Grants. An institution can include a tuition and fee charge for calculating the Pell Grant COA only when contracts or agreements specify the tuition and fees which the SDA will pay for each student (*i.e.*, individual referrals). Agreements which do not allow tuition and fees to be included in the Pell COA are:

(A) Blanket agreements which do not specify an individual amount to be paid by the SDA for tuition and fees but may include a number of students to be trained and an amount of compensation to be paid to the school.

(B) Performance-based contracts in which some portion of the tuition payment is contingent upon criteria such as the student's completion of the training, placement in a job, or retention in a job.

Section 627.220 also describes the importance of a coordinated approach in developing the Individual Service Strategy (ISS) so that the financial needs and resources of the participant are adequately addressed. The participant's ISS should ensure the optimum mix and coordination of Federal, State, and local programs and funding resources for the participant. The SDA's assessment of the participant's financial capability for participating in a program, as well as coordination and effective use of information and services among programs, is essential to effective program administration and prudent use of funds.

For purposes of coordinating financial resources, it is suggested, where appropriate, that Pell Grant eligibility be established during the objective assessment process, to the extent practicable, rather than after obligation of JTPA funds. These interim final regulations do not specify the portion of the participant's Pell Grant that should defray tuition costs as opposed to other educational expenses.

Employment Generating, Economic Development, and Other Activities

Section 141(q) of the Act, as amended, prohibits employment generating activities (EGA) with JTPA funds (including both grants and program income). Included in the prohibition are economic development activities, revolving loan funds, capitalization of businesses, contract bidding resource centers, and similar activities. However, as several commenters pointed out, JTPA's role in assisting participants is intimately tied to economic development, including economic development agency representation on the PIC. JTPA programs provide trained workers to new and expanding businesses and, in this capacity, a partnership with local economic development efforts is helpful.

Section 627.225(b) indicates that SDA staff may work with economic development agencies and participate on economic development boards and commissions to provide information about JTPA. Such participation may also assist SDA staff make informed decisions about community job training needs and the future direction of local JTPA training. In addition, the prohibition on EGA should not be taken to prohibit ordinary employer outreach and job development activities.

Displacement

The provisions in the regulations have not been substantially changed from the prior § 629.4 and closely reflect the provisions of section 143(b) of the Act.

On-the-Job Training (OJT)

Over 30 comments were received on OJT. Comments focused on extraordinary costs, reverse referrals, and temporary employment. (Youth OJT is discussed in part 628.)

Section 141(g) of the Act was amended to add new requirements for the provisions of on-the-job training (OJT) under the Act. These new regulations are applicable to all programs conducted under JTPA.

OJT is an important training activity in JTPA. Employers provide necessary training for regular jobs through a "hire first, train later" strategy, with participants who successfully complete OJT retained in permanent employment.

Several issues and questions arising from DOL (ETA and the OIG) and the GAO oversight activities are addressed, including practices such as reverse

referrals, temporary employment, and extraordinary training costs.

Each OJT contract is to specify the type and duration of training to be developed and other services to be provided in order to ensure that proposed costs are reasonable.

OJT is a training option meant to be conducted in the highest skill occupations appropriate for the eligible participant. It is not subsidized employment for low-skill occupations which need very little training time. OJT is only appropriate for the length of time necessary to be trained in the specific job. The regulations limit the use of JTPA funds for OJT to not more than 6 months. However, the period of reimbursement may be longer than 6 months for participants with special needs, provided the total training hours reimbursed are less than 500 hours.

Each training opportunity should be structured to meet the specific training needs of a participant. The duration should reflect both training needs that must be met for the job and the experience and the background of the participant. OJT agreements are to specify training content.

Employers who exhibit a pattern of failing to provide participants with continued long-term employment (minimum of 6 months), or who provide wages and benefits not at the same level as other employees similarly employed, both during the OJT period and upon completion, will be ineligible for additional OJT contracts. For example, an employer which has entered into 2 OJT contracts, trains 8 participants under the first and 4 under the second, and then terminates, without cause, 5 at the conclusion of the first contract and another 2 at the conclusion of the second, may be determined to exhibit a pattern of failing to provide continued long-term employment. In addition, an employer which is an OJT contractor and has entered into 3 OJT contracts and trained 15 participants at a starting wage of $6.50 an hour and, subsequent to the conclusion of the OJT contracts, reduces, without cause, the salaries of the all but 3 of the former JTPA participants to $5.50 an hour, may be determined to exhibit a pattern of failing to provide continued employment with wages at the same level as similarly situated employees. Again, these cases are only intended as examples, and not intended to set a standard. The Governor will be expected to set standards.

The Department is developing a technical assistance guide to provide additional guidance on OJT, including such areas as appropriate occupational skill levels for OJT agreements, occupations, ratio of trainees to total staff and to supervisory staff. Guidance will also be provided on how to use available reference materials including, but not limited to, the "Dictionary of Occupational Titles" (DOT) codes and participant histories in determining training lengths.

It is expected that the amended legislation, these interim final regulations, technical assistance, and Department of Labor monitoring will help to eliminate the problems that were identified in OJT during the recent oversight and monitoring activities.

The term "reverse referrals" describes situations where employers refer individuals whom they have already decided to hire to the SDA. The SDA, in turn, refers the individuals back to the employers to receive OJT with the employers receiving payments from JTPA.

"Temporary employment" occurs when the OJT participant is actually employed by a temporary agency and not the worksite employer where on-site training is received. Some worksite employers use the temporary agency for all new employees for a probationary or try-out period.

"Extraordinary training costs" are those costs incurred by the employer as a result of hiring OJT participants which are over and above the costs normally incurred in hiring and training employees without the assistance of JTPA. Extraordinary costs represent the additional burden borne by employers in training JTPA participants, and the lower initial productivity of such participants.

The major comments were on the following areas:

Length of training. Some commenters requested clarification on the 6-month and 499-hour limitations on OJT. Some recommended that the Specific Vocational Preparation (SVP) be used instead of DOT codes. One mentioned that OJT duration for high-tech occupations cannot be limited to 6 months.

Section 627.240(b)(2) encourages OJT for higher-skill occupations requiring long-term training as appropriate for the participant, but clarifies that JTPA funds may only be used to reimburse employers for 6 months. However, the period of reimbursement may be longer than 6 months for participants with special needs (such as the disabled) who participate on a less-than-full-time basis, provided the total OJT training hours reimbursed are less than 500 hours. When other training, such as classroom training, is linked with OJT, the time in such related training is not included within the 6-month limitation unless the participant receives a wage from the employer for such time and the employer is reimbursed a portion of that wage as OJT. Further, the use of allowable recognized reference materials to determine the length of training for an occupation is not limited to DOT codes. The SVP and other recognized sources are acceptable.

Over-regulation/extraordinary costs. The preponderance of comments on OJT urged DOL not to provide excessive regulations or documentation requirements on OJT. They stated that over-regulation would discourage employer participation in JTPA, thereby diminishing OJT as a training option. A few mentioned that this was particularly true for small employers. Many of the above comments on over-regulation were specific to concerns about excessive recordkeeping requirements on employers in tracking extraordinary costs.

The interim final regulations at § 627.240(c)(2) clarify that extraordinary costs do not have to be separately documented. However, it should be noted that, consistent with § 627.240(d), OJT contracts are to include documentation of the type and duration of training services that will be provided. Further, employers are required to maintain acceptable time and attendance, payroll, and other records to support amounts reimbursed under OJT contracts.

Reverse referrals. Several commenters stated that reverse referrals were good for outreach, certification, recruitment, and short-term supportive services where necessary.

Section 627.240(f) requires that referrals from employers may be accepted for OJT only if the participant's assessment and ISS document such OJT as an appropriate training activity. The participant must be a part of the JTPA system before receiving OJT, classroom training, supportive services or any other authorized activity or service based on the ISS.

Temporary employment. For the most part, commenters felt that temporary employment was a positive program aspect; only one said to disallow it.

Since OJT is designed to provide long-term, permanent employment, the interim final regulations at § 627.240(i) only allow temporary employment agencies to serve as the employer of record for purposes of providing OJT to participants when the participants are treated as all other agency employees. The employer providing the on-site training is required to have a contractual relationship with the JTPA program. A "temporary employer" as an

intermediary runs counter to the goal of OJT resulting in long-term, permanent employment with the employer providing the training.

Work Experience

Three commenters called for regulatory guidance on the use of work experience. One commenter asked that work experience be defined and two requested that the conditions under which work experience is suitable be specified. One also requested that limits be set on the length of work experience participation. Section 627.245 generally limits participation in adult work experience activities to no longer than 6 months or 499 hours, if working part time. This activity is to be justified in the ISS, based on the participant's needs. Section 627.245 also defines work experience and provides guidance on individuals for whom work experience is suitable.

Needs-Based Payments

The Amendments emphasize targeting services to the hard to serve. Further, the Amendments recognize the need to provide appropriate supportive services to allow participants to stay in a JTPA program longer. The Amendments also provide for several types of payments, all of which are to be charged to the training-related and supportive services category. Commenters requested that clarification be provided on the requirements and the mechanisms for payments to participants.

Section 627.305 provides clarification on the use of needs-based payments, which are allowable under title II. A commenter suggested allowing needs-based payments to be determined based upon a group characteristic, such as welfare recipient. This, however, would be inconsistent with the section 204(c)(3) of the Act which uses the language "necessary for participation," which can only be determined at the local level by evaluating the needs and circumstances of individual participants. This determination should be based upon the results of the objective assessment and documented in the ISS.

Incentive payments and bonuses to participants based on attendance and performance in a program are allowable only in the year-round youth program. The formula or procedure for such a payment is to be included in the SDA job training plan. Payments are to be reasonable and commensurate with the behavior being rewarded. One commenter requested that payments be viewed as training and, as such, be charged to training. However, consistent with the treatment of other payments, incentive payments are to be charged to the training-related and supportive services category.

To allow for longer term participation, § 627.305(d) provides for wages to be paid for certain title II activities, such as work experience and limited internships. Section 627.305(e) provides for the payment of such wages for participation in other activities, such as classroom training, if the concurrent wage earning activity is for more than 50 percent of the training time.

The Department wants to encourage JTPA programs which provide a combination of work and learning. The statute provides that the work experience activity may not be conducted on a stand-alone basis so it will be conducted in conjunction with some other training activity. Combining a wage-equivalent payment with classroom training is intended to create an incentive for completion of the classroom training activity. The regulation requires that work experience and classroom training be linked as contextual learning as a condition to making such wage payments for adults.

Supportive Services

Supportive services are often critical for serving those most in need. The use of supportive services is encouraged to enable the hard-to-serve population to participate in longer-term interventions. The provision of supportive services must be determined on an individual basis. Comments were received on the need to have supportive services available to eligible applicants. The Department agrees that limited supportive services may be provided to eligible applicants, before they are enrolled as participants, to permit participation in assessment activities.

Section 627.310(a) sets forth the parameters for the provision of supportive services. Section 627.310(a)(3) provides that supportive services may include limited financial assistance. This activity allows for a payment to cover a financial need of a participant that, if unmet, would prevent that participant from attending his or her JTPA training. Financial assistance is to be provided to pay for specific, necessary services at the SDA's discretion, upon description in the Job Training Plan of the procedures for providing such assistance and approval by the Governor. The amount provided to meet a particular need may be predetermined by a formula or procedure; however, any determination of need for the financial assistance must be made by evaluating the needs and circumstances of the individual participant as part of the objective assessment, and development of the ISS.

Grant Agreement and Funding

Section 627.405 establishes a new annual grant agreement process to facilitate the obligation, accounting, and closeout of JTPA funds by year of appropriation.

Reallotment and Reallocation

Section 627.410 has been established to implement the new section 109 of the Act, which requires the Governor to reallocate, among SDA's in the State, unobligated funds in excess of 15 percent of any SDA's program year title II allocation. Section 109(b) of the Act provides that the Secretary is to reallot, to the eligible States, unobligated funds in excess of 15 percent of any State's program year allocation.

Several comments were received on reallotment/reallocation. Most frequently, commenters requested that the term obligated be clearly defined and that the circumstances under which reallotment/reallocation can occur be identified. Two commenters asked that the Governor be allowed to be more restrictive, for example, basing reallocation(s) on expenditures, not obligations. One commenter requested the opposite, i.e., that the regulations clearly omit the use of expenditures for reallocation purposes.

Section 627.410 reflects the mandate of section 109 of the Act. It does not establish additional requirements beyond those established in the Act. The term "obligations" is defined in § 626.5, using the standard Federal grant definition of the term. It should be understood that the Secretary will reallot funds under title II based on the State's obligation of funds and the Governor will reallocate funds based on each SDA's obligation of funds.

Several commenters also questioned whether the Department was going to provide further interpretation of section 109(a)(3) of the Act concerning SDA's that have the highest rates of unemployment for an extended period of time and the highest poverty rates. Comments were split on whether the Department should expand on this criterion or leave it to each Governor. The Department elects not to elaborate further and will leave the interpretation of this section to each Governor, provided such interpretations are objective and applied consistently.

Insurance

Section 627.415 provides a cross reference to the property management section (§ 627.465) and does not provide cost classification guidance, since such

guidance is contained in the cost classification section (§ 627.440).

Procurement

Section 164 of the Act requires the Secretary to establish minimum procurement requirements in regulations, which are to be followed by Governors in prescribing and implementing procurement standards. These standards are to maximize competition, ensure fiscal accountability, and prevent fraud and abuse in JTPA programs. The Amendments require the Secretary to consult with the Inspector General of the Department of Labor and take into consideration relevant aspects of the OMB Circulars in establishing minimum procurement requirements. In response to this mandate, all but 1 of the 9 procurement requirements in the Amendments have been amplified, based on OMB Circular language. (The one exception is the requirement that State or local government transactions be conducted on a cost reimbursable basis.) To facilitate the reader's use of these regulations, parts of these Circulars have been paraphrased extensively within these interim final regulations. In accordance with § 627.420(a), the Governor/State is required to establish specific standards and implementing procedures based on the minimum requirements set forth in the regulation.

Procurements are to be conducted in a manner providing full and open competition, and the use of sole source procurements is to be minimized to the extent practicable. In support of these two requirements, § 627.420(d), based on the OMB Circulars, details the methods of procurement that subrecipients are to use. It is noted that OJT can be sole sourced. JTPA procurements are not to permit either excess program income or excess profit. If profit or program income is included in the price, States and subrecipients are to negotiate the profit or program income as a separate element of the price for each contract in which there is no price competition. The regulations list the conditions that are to be taken into consideration in establishing a fair and reasonable profit or program income. The OIG has recommended that certain clauses be include in JTPA procurements. As a result, requirements have been established for the inclusion of specific clauses in State and subrecipient procurements. The clauses listed are based on OIG recommendations and the OMB Circulars. JTPA contracts are to include a clause that establishes payment conditions and delivery terms. States and subrecipients are encouraged to establish payment conditions that call for the withholding of final payment until all delivery conditions are met. For example, in the case of an OJT contract, it would be reasonable to withhold the final OJT payment until the participant has been retained on the job for a specified period of time after the completion of training. Other requirements are that States and subrecipients establish dispute/protest procedures and retain records of procurements for prescribed periods.

A total of 39 comments were received on procurement issues. Fifteen commenters requested that the regulations not be overly prescriptive. Three requested that the regulations not require separate State systems. Two asked that the OMB Circulars not be adopted in their entirety.

In response to comments, the interim final regulations allow the Governor to establish policies that identify specific types of entities, such as school systems, to which subrecipients may make sole source awards. These regulations will not require separate State JTPA procurement systems to be implemented. Many States are operating their procurement systems in accordance with the OMB Circulars. Although the interim final regulations are based only on portions of the OMB Circulars, these requirements are with most existing State systems.

Section 627.420(c) specifies restrictions on conflict of interest and specifically addresses PIC conflict of interest at paragraph (c)(4). The Act and these regulations very specifically address conflict of interest, including conflict of interest for PIC members; but, these restrictions do not preclude representatives of businesses in the community from being members of the PIC or from employing JTPA participants. The Act requires that business representatives be included on PIC's and anticipates that they be actively involved in the program. That same principle applies to representatives from other organizations involved in job training in the community. Similarly, community based organizations, education agencies, or other service deliverers are expected to be represented on the PIC, and this representation does not disqualify these organizations from participating in the JTPA program as long as appropriate disclosure and recusal rules are followed.

Selection of SDA Grant Recipients and Service Providers

A total of 47 comments were received on this issue. The majority of these comments concerned the desire that competition and an "even playing field" govern the selection of service providers. Nine commenters requested guidance on determining demonstrated effectiveness. Some commenters were concerned that as a result of the Amendments more SDA's/SSG's would be providing JTPA services in-house, rather than contracting out for them. These commenters, for the most part, requested that an SDA/SSG not be permitted to select itself as a service provider unless it meets the Act's procurement requirements applicable to other service providers. Section 627.422 reflects the requirement at section 107 of the Act that the Secretary establish guidelines on the selection of service providers, based on demonstrated performance. Some of the "demonstrated performance" measures contained in the Act and listed in the interim final regulation include: Likelihood of meeting performance goals, cost, quality of training, and characteristics of participants. The Department of Education is currently developing standards under the Higher Education Act (HEA) which will consider the effectiveness of educational institutions participating under the HEA. The process is not sufficiently developed to be of immediate assistance to the JTPA system at this time, but the Department of Labor may consider use of such standards at a later date in connection with the selection of service providers.

Additionally, the selection of service providers is to: be made to the extent practicable on a competitive basis; include a determination of the ability of the service provider to meet program design specifications; and include documentation of compliance with procurement standards established by the Governor. Several of these listed measures are similar to the responsibility measures contained in the "Federal Acquisition Regulation" (FAR). This section is applicable to both the selection of contractors and grantees. This new section is based on the Act and the FAR.

Section 627.422(a), implementing section 107(e)(2) of the Act, requires the Governor to establish standards in making determinations of demonstrated performance, in accordance with the requirements of §§ 627.420 (Procurement) and 627.422 of the regulations and section 164(a)(3) of the Act. Section 627.422(b), implementing section 107(e) of the Act requires States and subrecipients to select service providers on a competitive basis, which addresses commenters' concerns over selecting service providers

competitively. The determinations of demonstrated performance required by this section take various issues and sources into consideration. Of the matters listed in § 627.422(d), four have a basis in the FAR. These are: The requirement of having adequate financial resources; the requirement to be able to meet program design specification at a reasonable cost (also based on section 107 of the Act); the requirement of having the necessary organization, experience, accounting and operational controls (also based on section 104 of the Act); and the requirement of having the technical skills to perform the work. The remainder of this new section lists other service provider requirements that are found throughout the Act.

Regarding selection of CBO's as service providers, the interim final regulations require that consideration is to be given to CBO's that are recognized in the community in which they are to provide services. The Act and the regulations require that appropriate education agencies are to be provided the opportunity to provide educational services, unless it is demonstrated that alternative agencies of organizations would be more effective. Regarding the selection of institutions/organizations to provide training, States and subrecipients are to take into consideration such performance measures as retention in training, training completion, and job placement. Regarding the impact on new CBO's and other new organizations, the requirements for demonstrated past performance do not require that this past performance be JTPA-specific. CBO's and organizations with experience in other training or education venues exclusively should not be eliminated from consideration. Regardless of the types of organizations that are being considered for selection as service providers, the Department expects the selection process to be accomplished in an unbiased manner, and in compliance with the Act and the regulations. All organizations under consideration are to be afforded a "level playing field" in the selection process.

Another issue related to service provider selection concerned SDA's/SSG's providing services themselves. Section 627.422(c) requires SDA's/SSG's to apply to themselves the same criteria which are applied to other service providers, and to document this process in writing.

Funding Restrictions for "High-risk" Recipients and Subrecipients

Section 627.423 establishes the authority and the opportunity for any entity that makes awards or subawards to impose certain funding restrictions on recipients or subrecipients that are responsible entities but have a history of performance problems or system deficiencies. Such funding restrictions are not viewed by the Department of Labor as sanctions but rather as a mechanism to improve performance and/or increase accountability and fiscal integrity, without unduly interrupting the flow of funds.

Prohibition of Subawards to Debarred and Suspended Parties

Section 627.424 applies the Federal government-wide requirements on awards to debarred or suspended parties contained in Executive Orders 12549 and 12689 and implemented for all Department of Labor grant programs in regulations codified at 29 CFR part 98. These requirements were previously issued to JTPA Liaisons in a Grant Officer Notice dated April 30, 1992. As provided in 29 CFR part 98, certifications are not required for the State "pass-through" of JTPA funds to SDA's/SSG's since these are considered "mandatory awards" and are, therefore, exempt from the 29 CFR part 98 requirements. However, any other subaward (contract or subgrant) over $25,000, such as an SDA contract or subgrant with a service provider, must meet the "lower-tier" certification. These "lower-tier" certifications are to remain with the respective awarding agency.

Standards for Financial Management and Participant Data Systems

Section 164(a)(1) of the Act requires that all financial transactions be conducted and records maintained in accordance with generally accepted accounting principles applicable in each State.

Generally accepted accounting principles (GAAP) are accounting rules and procedures established by authoritative bodies or conventions that have evolved through custom and common usage. The application of GAAP results in uniform standards and guidelines for financial accounting and reporting; however, the principles vary depending on the type of entity, e.g., State or local government, not-for-profit entity, or educational institution. Some of the additional requirements necessary for a financial management system to be in compliance with GAAP that may affect JTPA recipients and subrecipients include accrual or modified accrual accounting, financial statement presentation, full financial disclosure, budgetary control and reporting, and accounting for and/or reporting of contingencies, fixed assets, pension funds, and long-term liabilities.

The Department does not view the inclusion of the GAAP requirement as a new JTPA requirement for most of the entities that have previously administered JTPA or other Federal grant funds. The audit requirements that have previously been applicable to JTPA funds, and continue to be applicable, have required, as specified in the "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions" (GAO Yellow Book), a determination of "whether the financial statements of an audited entity present fairly the financial position and the results of financial operations in accordance with generally accepted accounting principles" as part of the audit scope.

Section 627.425 is a redesignation of § 629.35 in the present regulations. Section 627.425(a)(2) has been added to clearly specify the right of a higher tier organization to monitor the financial management systems of an entity awarded a JTPA grant, subgrant, or contract. This right also extends to Department of Labor monitoring activities.

Section 627.425(b) has been revised to reflect the statutory GAAP provision and was further revised to clarify that responsibility for the adequacy of financial management systems of JTPA subrecipients is the responsibility of each subrecipient as well as the responsibility of the State. Additionally, this section specifies that JTPA-related funds, including program income and potential stand-in costs, must also be traceable in the recipient's or subrecipient's financial system.

Section 627.425(c) has been revised to include a requirement that titles II–A, II–C and III records be maintained of applicants for whom an eligibility determination has been made, as well as records of participants.

Finally, the provisions regarding retention of records that previously appeared in paragraphs (e) through (g) of § 629.35 have been redesignated as a new § 627.460 (Retention and access requirements for records) for clarity.

Any additional requirements to be issued by the Department which are covered by the Paperwork Reduction Act (PRA) will not be issued without appropriate notice and comment pursuant to PRA.

Grant Payments

Section 162 of the Act contains a new subsection (f) that provides that when contracting with nonprofit organizations of demonstrated effectiveness, the Secretary, States, SDA's, and SSG's may

advance payments provided that such payments are based on the financial need of such organization and are not in excess of 20 percent of the total contract amount.

Section 627.430 has been expanded, both due to changes necessitated by the Cash Management Improvement Act (CMIA) and its implementing regulations promulgated by the Department of the Treasury and to improve the fiscal integrity of the JTPA program by establishing additional requirements on JTPA cash management.

This section sets standards as to when advances to subrecipients and contractors are appropriate and when the reimbursement method is appropriate. It also makes provision for using the working capital advance payment method and permits such working capital advances of up to 20 percent, consistent with section 162(f) of the Act. This section also requires that cash on hand attributable to JTPA be disbursed before requesting additional cash payments.

While § 627.430 requires compliance with the Treasury Department CMIA regulations at 31 CFR part 205, including effective cash management, this section authorizes an exception to the Treasury Department regulations as they pertain to interest earned by JTPA subrecipients on advances of Federal funds. As provided at section 141(m) of the Act, interest earned on JTPA funds is program income and may be used for program purposes.

For States, as defined at 31 CFR 205.3, the Treasury Department CMIA regulations require selection of either a funding technique that results in no interest earnings on Federal funds or a funding technique that results in an interest liability to the Federal Government. States, including subrecipients that are State entities, that select the latter may use interest earned on JTPA funds to offset any interest liability of the State.

This section also encourages the use of minority-owned banks.

Cost Principles and Allowable Costs

Section 164(a)(2) of the Act, as amended, requires the Secretary to prescribe regulations establishing uniform cost principles substantially equivalent to those generally applicable to recipients of Federal grant funds. In addition, sections 164(a)(1) and 165(f)(1) of the Act require application of GAAP in the accounting and reporting of JTPA costs.

Most commenters discussed the degree to which the OMB Circulars containing cost principles should be adopted as opposed to leaving flexibility with the States to establish requirements in this area. Practically all commenters indicated that uniform cost standards were required to some extent.

Section 627.435(a) has been revised to require that costs to be charged to the JTPA program be consistent with GAAP rather than the previous consistency standard of "like circumstances in nonfederally sponsored activities".

Paragraphs (a) through (h) of § 627.435 establish JTPA cost principles and provide guidance on the allowability and nonallowability of certain items of cost. New guidance is provided on applicable credits, lobbying costs, back pay, clarification of legal expenses, and new prohibitions on contingency reserves and bad debts expense as allowable JTPA costs.

Paragraph (i) contains a listing of selected items of costs for which the Governor will be required to prescribe treatment. This approach contains two significant differences with the Federal cost principles: (1) There is no requirement for recipients to submit Indirect Cost Rate Proposals to the cognizant Federal agency and obtain Federal approval, and (2) Attachment B of A–87 details specific treatment for selected items of cost while the interim final regulation lists items of cost and requires the Governor to determine specific treatment for each item. The Department believes this approach, along with the other provisions in this section discussed above, is consistent with the requirement at section 164(a)(2) of the Act to establish uniform cost principles substantially equivalent to the principles generally applicable to recipients of Federal grant funds, while also maintaining the role and responsibility of the Governor in the administration of JTPA programs. This approach assures that the same items of costs will be treated by all States, while permitting some flexibility for individual State discretion and decisions on individual items, tailored in part, to the JTPA program.

Classification of Costs

Section 108 of the Act requires that funds expended under the Act be charged to the appropriate cost category. The exceptions to this requirement are commercially available training packages purchased competitively for off-the-shelf prices and tuition costs. Section 108(b) also revises the three cost categories from those previously used by JTPA and requires the Secretary to define the cost categories.

Numerous comments were received on this subject, including comments on the potential for community-based and other organizations to incur higher administrative costs as a result of the extensive time and resources required to serve people with "multiple barriers" to employment and on the possible inability of private-for-profit (commercial) entities to continue to play a role in JTPA because of cost allocation constraints. Specific cost items that received the most comments were indirect or overhead costs; classification of profits or fees; cost of initial intake, eligibility determination, or pre-enrollment assessment; and costs of management information system (MIS) functions. Several commenters encouraged the application of charges by function rather than position, particularly in charging the costs of positions such as a project director who is also directly involved in the delivery of services to participants. Other commenters requested definition of the phrase "commercially available training packages purchased competitively for off-the-shelf prices." Comments were also received on fixed-unit price, performance-based contracts and whether they could continue to be charged 100 percent to the direct training category; continuation of administrative cost pooling; and the need for broad definitions of training and training-related costs coupled with a narrow definition of administrative costs.

Most commenters requested as much delineation as possible regarding what items are to be charged to each cost category. All commenters cautioned against defining administrative costs in a manner that would cause effective service providers to leave the JTPA system.

Section 627.440 has been substantially revised to conform to the requirement, at section 108(b)(3) of the Act, that the Secretary define the three title II cost categories of administration, training-related and supportive services, and direct training services. The Secretary's definitions of these categories are contained in § 627.440(d). In addition, § 627.440 (b) and (c) specify all of the title II cost categories (or cost objectives) applicable to the JTPA program.

Section 627.440(a) requires costs to be charged to the benefitting cost category (or objective) to the extent that benefits are received by such cost category or objective.

Provisions covering JTPA administrative cost pools have been moved from the cost limitation section to § 627.440(f) as it is principally a cost classification subject, rather that a cost limitation subject. The language has been changed to state that, for JTPA

reporting purposes, costs must be allocated to the benefitting programs based on the benefits received by each program. The Department recognizes that this language represents a departure from previously established policy on the manner in which pooled administrative costs are to be reported. Commenters are requested to identify the impact, if any, of the revised requirement to allocate pooled administrative costs solely on the basis of "benefits received".

Four commenters raised the question of consolidating the II–A and II–C adult and youth State setasides, for ease of accounting and reporting. Section 627.440(b) provides that these funds may be combined.

Several commenters raised questions about the applicability of cost categories and cost limitations to incentive funds received by an SDA. Section 627.440(c)(2) specifies that the cost categories and cost limitations are not applicable to such funds. Incentive funds must, of course, be used for JTPA title II–A or II–C purposes.

In defining the cost categories in paragraph (d), it is impossible to specify treatment of every conceivable item of cost. The Department has attempted to provide specificity for most items of cost and to apply a basic principle of cost being charged to a cost category in accordance with the benefits received by that category. Within the direct training services category, the Department's definition is linked to the concept of benefits received by or directly benefitting program participants. Major highlights of these definitions are as follows:

—Numerous commenters requested that the classification of costs be tied to functions rather than positions. The Department's definitions are principally written against the items of cost and the function of various positions. Paragraph (e)(1) also provides that the cost of positions or other costs involving multiple functions may be allocated to the benefitting cost categories. It is expected that actual time distribution will be the basis for such allocations of staff costs.

—Numerous commenters raised questions about both costs of tuition and commercially available, off-the-shelf training packages, since both of these items are specified in section 141(d) of the Act. The Department's definition of a commercially available, off-the-shelf training package is included in § 626.5. The Department is not further delineating the term tuition, since it is specifically defined in the Act. However, it is expected that both of these cost items will frequently be for the purchase of such items from vendors and, therefore, are 100 percent chargeable to the category benefitted. The inclusion of tuition and off-the-shelf training packages in the statute makes it clear that subrecipients, as part of the procurement process, cannot require such vendors to break out the individual cost components of their services. In addition, the term "instructional materials * * * used by or for participants" has also been included in the list of cost items within the direct training services category.

—In those instances in which the terms of a subrecipient's award are for the delivery of an off-the-shelf training package consistent with the provisions of paragraph (e)(3). The Department is specifically interested in comments on this approach.

—Many comments were received on the classification of the costs of outreach, intake, eligibility determination and related activities. Paragraph (d)(3) specifically includes these costs in the training-related and supportive services category. The intent of this provision is to allow costs incurred on behalf of an individual prior to becoming (or not becoming) a participant to be charged to the training-related and supportive services category. The costs of objective assessment and related functions, after an applicant becomes a participant, are to be charged to the direct training services cost category.

—In response to comments concerning indirect or overhead costs, this subject is addressed in paragraph (e)(2). It provides that indirect or overhead costs normally are to be charged to administration, except where costs can be identified directly with another cost category. This approach is narrower than that requested by most commenters, but the Department believes that the test of benefits received directly by participants should be met for costs to be charged to direct training services.

—Finally, in response to numerous comments on the classification of profits and fees, paragraph (e)(4) provides that, to the extent allowable in accordance with the Governor's allowable cost guidelines, they may be allocated to all three cost categories based on the proportionate share of actual costs attributable to each category. Such earnings by subrecipients other than commercial organizations become program income, as provided by section 141(m) of the Act.

Limitations on Certain Costs

Section 108 of the Act requires that at least 50 percent of the funds received by an SDA under title II–A and C must be expended for direct training services and establishes a revised limit of 20 percent of funds that may be expended for administration. The third cost category has been revised to include the cost of training-related services as well as supportive services.

In response to a large number of comments received on this subject, paragraph (d) of this section recognizes the provisions made in section 141(d)(3) for excluding administrative costs incurred by community-based organizations and private non-profit service providers from the SDA's administrative cost limitation under certain criteria and conditions specified in the Amendments. Paragraph (d) provides clarity to those criteria and conditions and provides an example of their application. Specifically, 627.445(d) of the regulations addresses provisions in section 141(d)(3)(C) of the Act which provide for certain situations under which funds expended by a CBO or non-profit organization for the costs of administration may be the basis for increasing the administration cost limit applicable to the SDA from 20 percent to up to a maximum of 25 percent. Those situations require that such funds be expended under an agreement under which not less than 90 percent of the funds provided to the service provider are to be expended for the cost or direct training and training-related and supportive services. Further, the expenditures are to be charged to the appropriate cost category, and the SDA is to be in compliance with the direct training cost limitation requirement of 50% under section 108(b)(4)(B) of the Act for the program year, as adjusted consistent with section 141(d)(3) of the Act. These provisions are limited to situations in which the SDA provides funds to a CBO or other non-profit organization, therefore, the administrative entity of an SDA may not include itself under these provisions.

Most of the comments discussed above under cost classification were also applicable to cost limitations as well. Comments were also received on the time period and process for determining compliance with the cost limitations.

Section 627.445 describes cost limitations contained in various sections of the Amendments and clarifies cost limitations applicable to State-administered activities. Paragraph (a) specifies that, for State-administered activities, cost limitations are applicable to (1) II–A funds allotted for section 204(d) activities (older individuals), and (2) the combined total of II–A and II–C funds allotted to carry out activities pursuant to section 123(d)(2)(B) of the Act education services (80 percent of the 8 percent). For cost limitations applicable to funds allocated to SDA's, paragraph (b) provides that the total funds allocated to an SDA include or exclude, as applicable, any transfers of funds made in accordance with sections 206, 256, or 266 of the Act, and funds reallocated by the Governor under the authority of section 109(a) of the Act.

Paragraph (c)(2) provides that States and SDA's have the 3-year period of fund availability, specified at section 161(b) of the Act, to comply with the cost limitations. This provision, coupled with the statutory changes on cost limitations, replaces the policy guidance issued by ETA in 1984 and 1985 on the subject of cost limitations. In addition, while this provision provides that compliance is not finally determined until the end of the third year of availability, States are required to review compliance on a regular basis and implement corrective action before the time limitation expires.

Program Income

Section 141(m) of the Act provides new treatment for the use of program income as well as a description of what constitutes program income, including interest earned on funds received under the Act.

Most comments were directed at the need for the establishment of clear requirements concerning the use and treatment of program income, including the applicability of the cost categories and the cost limitations.

Section 627.450 has significantly expanded the current 20 CFR 629.32, both to implement the new provisions of section 141(m) of the Act and to improve the fiscal integrity of the JTPA program. The section now contains a definition of what is and what is not program income for JTPA purposes, establishes requirements for its use that are consistent with section 141(m) of the Act, and establishes timeframes for the treatment and use of program income. It also provides for the State to determine the disposition of program income not used in accordance with this section or remit it to the Department. Section 627.450(c) specifies that the cost categories and the administrative cost limitations are applicable to program income.

Reports Required

Section 165(f) of the Act requires financial reporting on a quarterly basis and costs to be reported by year of appropriation. Section 627.455 has been revised to include these requirements. In addition, this section now also specifies that:

(1) States may impose different reporting requirements on subrecipients as long as the State can meet the Secretary's reporting requirements;

(2) The Secretary may provide computer printouts to recipients to expedite or contribute to the accuracy of reporting;

(3) The Secretary may accept required information from States in electronically reported format or computer printouts instead of prescribed forms;

(4) States will report program expenditures on an accrual basis; and

(5) A final financial report is required 90 days after the expiration of a funding period.

Retention and Access Requirements for Records

Section 165(e) of the Act requires each Governor to ensure that requirements are established for retention of all records pertinent to all grants awarded, and all contracts and agreements entered into under the Act, for 2 years following the date on which the annual expenditure report containing the final expenditures charged to a program year's allotment is submitted to the Secretary. Records for nonexpendable property are to be retained for a period of 3 years after final disposition of the property.

Section 627.460(a) provides that the State, in establishing record retention requirements for records of subrecipients, may set a starting date for record retention of either the date of (1) the State's submission to the Secretary of the final expenditure report for a program year's allotment, or (2) the subrecipient's submission of a similar final report to the subrecipient's awarding agency. If the former is used, the retention period is 2 years after the report submission. If the latter is used, the retention period is 3 years after submission. It is expected that either approach will result in most JTPA records being maintained for the same total period of time. The latter approach will enable subrecipients to control the starting date of the retention period for their own records, and to maintain and to dispose of JTPA records in the same timeframes that apply to other records of the subrecipient covered by applicable OMB Circulars.

Property Management Standards

Section 141(r) of the Act provides that the Federal requirements governing the title, use, and disposition of real property, equipment, and supplies purchased with JTPA funds will be the Federal requirements generally applicable to Federal grants to States and local governments.

Seventeen comments discussed the provisions of the OMB Circulars in this area, the need for rules to address property that becomes obsolete, depreciation and replacement of property (trade-in), and questions of prior approval.

Section 627.465 reflects the new requirements of section 141(r) of the Act. The Federal requirements generally applicable to Federal grants to States and local governments are codified for Department of Labor grant programs at 29 CFR part 97. Therefore, the provisions of those regulations applicable to property requirements have been incorporated into this section for governmental recipients and subrecipients.

Since the Federal requirements generally applicable to Federal grants to States and local governments provide that subrecipients that are institutions of higher education, hospitals, and other nonprofit organizations will follow the Federal agency regulations that implement OMB Circular A–110, those requirements are incorporated into this section. It is anticipated that this approach will provide administrative relief for such subrecipients since it will prevent an organization administering other Federal grants or subgrants from having to follow two different sets of requirements. In addition, the Federal requirements applicable to intangible personal property have been incorporated into this section.

There are no Federal requirements generally applicable to commercial subrecipients; therefore, § 627.465 provides specific JTPA requirements for these organizations.

It is recognized that these statutory changes in property requirements for the JTPA program may cause some transition issues. To avoid future questions about property acquired prior to the effective date of these changes, the regulations specifically provide that the new rules would apply only to property acquired after July 1, 1993.

In response to comments concerning prior approval requirements, the Department is not imposing any specific prior approval requirements other than on subrecipients that are commercial

organizations. However, in § 627.435, Cost Principles and Allowable Costs, Governors are required to treat this issue in the State's allowable cost guidelines. For commercial subrecipients, the prior approval of the entity that will hold title to the property is required, since this will enable the governmental or non-profit entity that will hold title to be a part of the decision-making process to acquire the property.

Performance Standards

Section 627.470 provides for the establishment of performance standards for older worker programs under section 204(d) of the Act, in addition to adult and youth programs under title II–A and II–C and dislocated workers under title III. These standards for both adults and youth may include standards for employment competencies which are to be based on such factors as entry-level skills and other hiring requirements. The interim final regulations make clear that the Governor is responsible for establishing an incentive awards policy that rewards performance in title II programs, with the exception of the older worker program, and for providing technical assistance to SDA's which fail to meet, as specified by the Secretary, performance standards for a given program year. The regulation also incorporates the requirement in section 106(j) of the Act, for the imposition of a reorganization plan on SDA's failing for 2 consecutive years to meet more than half of the performance standards, with the exception of the older worker programs. The Governor is to notify the Secretary and the SDA of the continued failure and impose a reorganization plan within 90 days of the end of the second program year. If the reorganization plan is not imposed within the 90 days, then the Secretary will develop and impose it. The Secretary will give the Governor and the SDA 30 days in which to comment to the Secretary on the proposed reorganization plan prior to its imposition Further, the Secretary will recapture or withhold up to one-fifth of the State's administration set-aside to provide technical assistance to an SDA where the Secretary has imposed the reorganization plan or where the Governor has not provided appropriate technical assistance.

Oversight and Monitoring

The Department believes that effective monitoring and oversight of JTPA program operators at the Federal, State, and local levels is essential, not only to the maintenance of program integrity, but also to ongoing program evaluation and planning. The Department intends that there be expanded oversight and monitoring activities to ensure the requirements of the Amendments and these regulations are accomplished. Section 627.475 summarizes the roles of each administrative level in a comprehensive monitoring and oversight system.

The Governor is to develop a State monitoring plan which requires that each SDA and SSG be monitored at least once a year. The plan must also require the collection and the review of sufficient information to enable the Governor to determine whether substate entities have demonstrated substantial compliance with the oversight requirement to permit a waiver of the imposition of sanctions authorized under section 164(e) of the Act, or if a job training plan should be disapproved pursuant to section 105 of the Act.

Based on instructions issued by the Governor, the SDA's/SSG's will be required to develop a substate monitoring plan which is to be part of the job training plan. At a minimum, the Governor's instructions are to address the scope and frequency of the monitoring as well as any policy guidance and emphasis provided by the Secretary.

In addition, the Governor is to establish general standards for PIC oversight responsibilities in relation to SDA/SSG performance. These standards are to be included in the GCSSP. Section 103(b)(2) of the Act authorizes the PIC to provide oversight of programs conducted under the job training plan. In strengthening the role of the PIC as the local decisionmaking body, it is important that it gather sufficient information to evaluate and to review the results of its decisions and their implementation.

As a consequence of this additional emphasis on the Federal, State, PIC, and SDA/SSG monitoring role, each administrative level will be expected to take a greater measure of accountability for program operations through appropriate followup action. The outcomes of the monitoring at any level could result in the provision of additional guidance and technical assistance, recommendations regarding continuance of particular training or service strategies or programs, more effective future program planning, and the identification of models of exemplary performance for replication or areas of concern requiring more intensive monitoring attention.

Audits

With the exception of paragraph (a)(3), the changes in § 627.480 from the present regulations are not substantive, but are intended solely to more clearly delineate existing requirements.

Paragraph (a) of § 627.480 reflects the audit requirements that apply to the different types of entities which operate JTPA programs. To ensure appropriate coverage of JTPA programs that are operated by subrecipients which are commercial organizations, § 627.480(a)(3) has been added, specifying audit requirements for such organizations.

Audit Resolution

Section 627.481 sets forth the actual procedures followed by the ETA Grant Officer to resolve audits with recipients. This section differentiates between audits of direct recipients and those procedures applicable to audits of subrecipients. This section addresses the requests of several commenters that the Department more clearly describe its audit resolution process.

Closeout

Sections 627.485, 627.490, and 627.495 replace the previous closeout section that was reserved at § 629.45. Section 627.485 establishes a requirement and a process to close each annual grant award after the 3-year time limitation for expenditure of JTPA has expired. It also establishes a deadline for the State's submission of any revised expenditure reports and a provision for the Secretary to extend the deadline based on a written request from a State, with justification. Sections 627.490 and 627.495 establish post-closeout rights and responsibilities of the Secretary and the State.

Grievances and Sanctions

The regulatory provisions formerly found at 20 CFR part 629, Subpart D—"Grievances, Investigations, and Hearings" have been revised, redesignated, and reordered in these interim final regulations in a new part 627, subparts E, F, G, and H. The interim final regulations more clearly define the various JTPA grievance procedures which are required to be established by section 144 of the Act. The procedures which apply to a particular grievance process level have been consolidated into discrete subparts. In addition, the "Sanctions for violations of the Act" provisions formerly at 20 CFR 629.44 of the regulations have been moved into this part as a separate subpart.

The proposed provisions of the new part 627, subpart E set forth the grievance procedures required at the State and local levels, including State review, that were generally found at 20 CFR 629.52.

The proposed new part 627, subpart F sets forth the provisions which apply to the handling of administrative and civil complaints at the Federal level that were generally set forth at 20 CFR 629.52(d) and 629.54. In addition, § 627.603 of the interim final regulations implements the provisions of section 144 of the Act relating to the Federal handling of labor standards violations under section 143 of the Act. Section 627.604 sets forth the provisions which apply to the alternative procedure (binding arbitration) for handling section 143 labor standards violations provided for at section 144 of the Act.

The proposed new part 627, subpart G consolidates the sanction provisions for violations of the Act into a more logical order, with separate sections addressing: sanctions and corrective actions (§ 627.702), the process for waiver of State liability (§ 627.704), the approval process for contemplated corrective actions (§ 627.706), and the provisions applicable to the use of "offset" for debts established against the State (§ 627.708).

The proposed new part 627, subpart H sets forth the provisions that apply to hearings before the Office of Administrative Law Judges (OALJ) formerly at 20 CFR 629.57 and includes the alternative dispute resolution provisions that appeared at 20 CFR 629.56. The jurisdiction of the OALJ has been expanded, by a conforming amendment to section 166(a) of the Act, to include labor standard violations under section 143 of the Act, and violations of the relocation provisions at section 141(c) of the Act.

Timeframes Regarding Grievances, Complaints and Appeals

There are a number of provisions concerning Federal, State and local timeframes for grievances, complaints, appeals and other matters. There are only a few instances where the timeframes are statutory. The Department has set timeframes, but we would like commenters to provide input on any areas of concern in meeting the timeframes provided in the regulations.

Transition Provisions

In order to assure an orderly transition from the existing JTPA programs to the program requirements mandated by the Amendments, the Department requested comments on "transition" in ANPR. Fifteen comments were received, generally falling into 1 or more of 5 topics.

Several commenters expressed concern about program operation. These issues include a need to "grandparent" participants and current allocated funds in order to achieve an orderly transition to the requirements of the Amendments. Guidance on eligibility, in-school/out-of-school ratios, the reallotment process, tracking of transferred funds, current fixed-unit priced contracts, and the operation of the 1993 Summer Youth Employment and Training Program (SYETP) under current regulations were other issues included in the comments.

The Department agrees that participants enrolled in, and funds obligated for, the title II–A program on or before June 30, 1993, may continue to be used under the provisions of the Act that were in place prior to the enactment of the Amendments. Participants enrolled and funds obligated on or after July 1, 1993, will be administered pursuant to the provisions of the Amendments. The Department intends that the 1993 SYETP be operated under the current regulations. Specific guidance on titles II and III program operations will be issued in field issuances concurrent with the publication of the final rule for the Amendments or as soon thereafter as possible.

Several comments focused on the need to enhance existing data collection systems in order to tract the program experience of participants, as required by the Amendments. The Department agrees and intends that currently available 6 percent funds allotted for Program Year (PY) 1992 and prior years be used for this transitional purpose. States and SDAs may use available 6 percent funds in connection with updating their MIS systems during the period of fund availability.

Another topic addressed by commenters was the need for guidance regarding for the transfer of funds between titles II–A and II–C, and from title II–B to title II–C programs. The Department intends that this transfer be accomplished as specified in sections 206, 256 and 266 of the Act. Reporting requirements and instructions are being developed which will be published in field issuances at a future date.

Commenters indicated that guidance is needed on the PY 1993 planning process. Of specific concern are the Department's expectations regarding modifications to the GCSSP and job training plans. The Department will provide specific guidance for the PY 1993 planning process through field issuances published in January 1993.

Finally, commenters requested one or more transition periods to implement changes in phases beyond July 1, 1993. The Department expects that the requirements of the Amendments and these regulations will be fully implemented by July 1, 1993, except as otherwise provided for in the Amendments. The Department is aware that some difficulties may arise in the initial period related to the appropriate implementation of certain requirements related to program design. Therefore, in determining compliance with the program design requirements of these regulations during PY 1993, the Department will take into consideration whether the States and SDA's have made a good faith effort to properly implement these new regulatory requirements.

PART 628—PROGRAMS UNDER TITLE II OF THE JOB TRAINING PARTNERSHIP ACT

Nontraditional Employment for Women (NEW) Act (Pub. L. 102–235)

NEW's purposes are to provide a wider range of training opportunities for women under existing JTPA programs; to provide incentives for the establishment of programs that train, place, and retain women in nontraditional fields; and to facilitate coordination of JTPA and vocational education resources available for training and placing women in nontraditional employment. Further, the NEW Act is consistent with the overall goal of JTPA programs to increase participants' employment, earnings, educational and occupational skills.

"Nontraditional employment" is defined as occupations or fields or work where women comprise less than 25 percent of the individuals employed in such occupation or field of work. Although nontraditional occupations are usually thought of only as construction or skilled trades, these occupations encompass a much broader spectrum of jobs in technical and other fields.

Nontraditional occupations have the potential for greatly improving the economic status of women, particularly when they are growth occupations with increased wage potential. Nontraditional training for women also provides benefits for the States and the SDA's. The Department believes that this kind of training expands the occupational mix available to all clients, and can enhance coordination with other education and training programs as well as with labor and apprenticeship programs. It helps advance efforts by the States and/or SDA's to be a valuable source of trained individuals for employers and unions. Through the implementation of NEW, it is the Department's intent that changes will occur throughout the job training system so that training in nontraditional

occupations becomes institutionalized in each State.

The GCSSP and the job training plan prepared by each SDA were required to include goals, actions, and accomplishments for the training and placement of women in nontraditional employment for the 2-year period beginning July 1, 1992 and beyond. NEW does not establish specific numerical goals by SDA or State. However, since the number of women currently trained in nontraditional occupations nationwide is estimated at 9 percent, States and SDA's may wish to use this figure as a baseline until they can collect data specific to that State.

The Department expects that the GCSSP and the SDA's plan will reflect specific measurable activities to train and to place women in nontraditional employment and apprenticeships, as required by the statute. As mentioned earlier, SDA's may wish to consider using the national figure of 9 percent as a baseline until geographic-specific data becomes available. Sections 104(b) (6) and (13), 121(b)(3) and 122(b)(5)–(7) of the Act require the States and SDA's to set goals and report on program accomplishments. The Department intends to look closely at these activities to ensure compliance with requirements of NEW.

Further, the Department expects that each State's and SDA's plans and activities will reflect the development of outreach and promotional materials and/or activities aimed at making women aware of the programs and the services available through JTPA, particularly of nontraditional training and placement opportunities. Examples of outreach materials include, but are not limited to, nontraditional career information modules, video and print materials on nontraditional career options (for counselors), recruitment brochures targeted at both the client and the employer, and dissemination of preexisting resource materials and/or model curricula. States may also wish to undertake statewide public education campaigns, similar to those conducted for literacy programs, on nontraditional training and employment opportunities.

The Department expects statewide dissemination of model programs/approaches to serve as a method of encouraging the replication and institutionalization of nontraditional training in the State. The Department encourages the States to disseminate to SDA's and service providers the SJTCC's summary report on promising programs funded by JTPA or the Carl Perkins Vocational Education and Applied Technology Act.

Specific changes in Part 628—Programs under Title II of the Job Training Partnership Act are as follows.

State Planning

Minor changes have been made in § 628.200, which addresses the GCSSP. This section now outlines, in broad terms, the areas which are to be addressed in the plan, and provides the Secretary with 45 days to review the plan.

State Human Resource Investment Council

Section 628.215 provides for the voluntary establishment of a State Human Resource Investment Council (HRIC). The HRIC is responsible for advising the Governor on: Coordination of Federal human resource programs; ways to meet the human investment needs in the State while maximizing the use of Federal funds and avoiding duplication of services; and development and implementation of State and local standards and performance measures. States have the option of constituting the HRIC to carry out the duties and functions of existing State Councils established under applicable Federal law, such as the State Job Training Coordinating Council (SJTCC) and State Council on Vocational Education (SCOVE). If States exercise this option, one Council is to be established, replacing all other State Councils. The HRIC may utilize funds available for other State Councils and administrative funds otherwise available under applicable Federal human resource programs. To achieve the economy and efficiency of the single Council contemplated by these provisions, however, States must conform the HRIC to meet all of the new requirements, assuming all duties and responsibilities of the former Councils.

The interim final regulations emphasize the following areas of concern that were raised by commenters: The HRIC must carry out the responsibilities of the Councils it replaces; the Governor, the head of each agency, and the SCOVE must approve the establishment of the HRIC; and the HRIC and its staff must reflect the necessary expertise to carry out the responsibilities of each of the former Councils.

Education Coordination and Grants

Section 628.315 clarifies the Governor's responsibilities in the selection of the State education agency to be the recipient of funds under section 123 of the Act. The section makes clear that the organizational entity operating JTPA at the State level may not be considered as an education agency for the purpose of receiving section 123 funding, nor can agencies which do not have education as a primary purpose, such as corrections departments.

Allowable activities under this section are specifically directed to support school-to-work programs, literacy and lifelong learning opportunities, and statewide coordinated education and training services to train, place and retain women in nontraditional employment. The intent is that these broad categories will accommodate a wide variety of coordinated education programs, and may include youth apprenticeship programs.

Not less than 80 percent of the funds provided under this section must be used to carry out projects in these areas. Not more than 20 percent of the funds may be used either to facilitate coordination of education and training services for those projects, or to support activities of a State Council that meet one of two criteria. One criteria is that the State council is a HRIC, constituted under title VII of the Act, which includes all seven of the applicable programs listed in section 701(b)(2). The other criteria is that the State Council carries out functions similar to a HRIC and was established prior to July 1, 1992.

Section 628.315 clarifies the circumstances under which the Governor may administer programs pursuant to section 123(e) of the Act. The section also provides guidance on the plan jointly developed by the Governor and the education agency(ies), and the agreements which must be entered into, pursuant to section 123(b) of the Act, to administer the projects through which section 123 funds are expended.

The section clarifies allowable activities and expenditure requirements. It also specifies that federal funds other than those appropriated under JTPA may be used for the match requirement. Undertaking to meet the matching fund requirements through using services provided under other federal job training sources may provide opportunities for constructive coordination arrangements.

Capacity Building and Technical Assistance

The JTPA has been amended to include capacity building and technical assistance as priorities at the national, State and local levels. Section 453 of the Act calls for the creation of a national Capacity Building and Information and Dissemination Network and a

Replication Grant Program. State and local priorities are established through sections 202(c)(3)(A) and 262(c)(3)(A) of the Act which make available up to 33 percent of the 5 percent incentive funds for capacity building and technical assistance activities. Section 121(a)(3) of the Act, as amended, requires that capacity building and technical assistance plans be included in the GCSSP. Greater emphasis is placed on general technical assistance activities for the development and training of State, SDA, and service provider staff.

The Department received comments supporting the use of incentive funds reserved for capacity building for development of computer-based information networks. Commenters also requested that capacity building be given a comprehensive definition, be made a priority in the JTPA system, and that regulations preserve State flexibility in designing and implementing capacity building and technical assistance strategies. Other comments stressed the importance of ensuring that activities using capacity building funds reach and be developed in consultation with SDA's, CBO's, and local service providers. Some commenters expressed concern that the nonduplication provision in section 202(c)(3)(B) could seriously hamper State and local flexibility in developing products and delivering training.

In response to these comments and earlier recommendations from the JTPA Advisory Committee and JTPA system representatives, the Department has developed interim final regulations that emphasize the need for State and local capacity building efforts, provide guidance on the Governor's responsibility concerning use of the funds, and encourage the coordination of capacity building and technical assistance efforts throughout the entire JTPA system. While the State's prerogative to establish priorities is retained, Governors are strongly encouraged to use funds for the development of staff capabilities at all levels, and particularly for front-line staff, through a comprehensive capacity building and technical assistance strategy.

State and local capacity building efforts are to be coordinated and integrated with the national Capacity Building Information Dissemination Network, pursuant to sections 202(c)(3)(B) and 262(c)(3)(B) of the Act. In order to maximize funds available, the Network will build, to the extent possible, on what already exists in the system. Through its clearinghouse, it will make information accessible to the JTPA system on current and planned Network products so that duplication of effort may be avoided as States and SDAs plan their capacity building agendas. States and SDAs are to retain the flexibility to tailor Network products to their own needs and/or to produce and train on similar or related products when local circumstances so dictate.

Section 626.5 provides definitions of capacity building and technical assistance. The definition of capacity building is applicable at the Federal, State, and local levels. Section 628.325(c) establishes State responsibilities and provides for the use of up to 33 percent of the 5 percent incentive funds for capacity building and technical assistance. This section also provides guidance on the use of funds, cost sharing approaches, and SDA use of awarded incentive grants. Section 628.325(c)(2)(iii) provides for the purchase of hardware and/or software if directly related to capacity building and technical assistance activities of the national Capacity Building and Information and Dissemination Network.

Section 628.205 sets forth requirements that capacity building and technical assistance plans be included in the GCSSP. The interim final regulations recognize that a "customer-driven" approach offers the best opportunity for a meaningful capacity building effort. Accordingly, Governors are encouraged to share capacity building and technical assistance plans in advance with SDA's and to include SDA's and local service providers in the development of such plans.

Guidance concerning SDA capacity building responsibilities can be found in § 628.420, the Job training plan.

SDA Designation Process

Section 628.405 clarifies the SDA designation process. SDA designations are to occur every 2 years, consistent with the preparation of the 2-year GCSSP and the SDA job training plan.

In section 101(a)(4)(A) of the Act, Congress established the population threshold of 200,000 for determining the minimum area of a mandatory SDA, which is required to be designated by the Governor. The Department believes that normally this threshold is the minimum necessary to constitute an SDA that can adequately implement the administrative and management requirements set forth for in the Amendments and these regulations.

In past decisions, the Department has deferred to the Governor in the designation of SDA's, particularly with respect to the criteria for what constitutes a substantial part of a labor market, as long as the Governor's criteria were consistently applied and were not inconsistent with the Act. The regulations clarify that when there are competing requests for designation under section 101(a)(4)(A) of the Act the Governor is to designate the entity which has a population closest to 200,000, unless such designation would bring the population of the competing entity to less than 200,000 in which case the Governor has the discretion to choose which request to honor.

At present, the number of SDA's has risen to over 640 and almost one-third of the SDA's have been designated on a discretionary basis by the Governor under the provisions of section 101(a)(4)(B) of the Act and serve populations of less than 200,000. In order to promote the designation of the most effective delivery system, the regulations require the Governor to establish standards by which to evaluate a proposed discretionary SDA prior to granting designation status which, at a minimum, is to include the criteria set forth in § 628.405. It is the Department's intent that the Governor apply these standards to determine whether to waive the 200,000 population criterion for an SDA. Finally, the regulations require, for SDA's designated pursuant to sections 101(a)(4)(A)(ii) or (B) of the Act, that the Governor is to define "substantial part" and "substantial portion", but that these may not be less than 10 percent of a labor market area.

Some commenters requested that DOL not regulate any further in this area. It appears that these comments were addressing unknown actions that the Department might take, and whether these actions would affect existing designations. The interim final regulation closely tracks the law with regard to SDA designation. The regulation requires the Governor to establish policies which, in most cases, will already exist. The transition provisions clarify the Governor's discretion to not apply the new regulatory provisions to the Governor's current discretionary SDA designations made prior to July 1, 1992.

Representation of Private Industry Councils

Many commenters addressed the statutory provision at section 102(a)(2) of the Act requiring that representatives from organized labor and CBO's constitute no less than 15 percent of the PIC membership. One commenter suggested that the regulations establish minimum requirements for the solicitation and appointment of labor representatives by requiring that the local elected official contact the principal officer of the local AFL–CIO

central body in his/her jurisdiction in writing to solicit nominations providing a period of 60 days for response. The commenter also suggested that, where the local AFL–CIO body is unable to nominate a sufficient number of labor representatives, the chief elected official be required to contact the principal officer of the State AFL–CIO in writing to solicit nominations with a 60 day period for response. As provided in the Act, the Department intends that chief elected officials access local and State labor federations to provide nominations for the appointment of the labor representatives to the PIC. For this reason, a description of the nomination process is specifically included in the PIC certification by the Governor. One commenter suggested that regulations should provide that individual workers can be appointed only in cases where the local and State AFL–CIO bodies fail to provide a "sufficient number" of individuals to meet the labor representation requirements. The regulations reflect the statutory provisions in this area.

In developing and nominating that 15 percent component of the PIC, local elected officials may wish to consider the diversity of the population being served. If there is to be systemic change in the job training delivery system, sensitivity to the diverse populations being served should be exhibited by the PIC in its composition. Such changes would provide greater public awareness of the PIC and its role in the delivery of services in the community.

Role of the Private Industry Council

A number of comments were received concerning the need for strengthened PIC capacity and role. These comments were about equally divided between those who recommended giving more direction to PIC's and those who considered the existing law and regulations to provide sufficient guidance. Several comments were received from CBO's and labor unions, which urged increased representation and responsibilities on the PIC's for their constituencies. There were several commenters who recommended the periodic revalidation of the agreement between the PIC and the local elected official(s).

Section 628.410 describes the role of the PIC and establishes ongoing procedures to further the public-private partnership by providing for strengthened PIC capacity. To this end, the Department reviewed the findings of its study of exemplary PIC's and identified several key features that have been incorporated in these interim final regulations to foster more effective PIC's and establish some minimum standards for review of PIC's. These key features included an effective well-planned organizational structure; a membership of high-ranking individuals from businesses and other community agencies who represent a balance among important interests in the community; a positive, harmonious relationship with the chief elected official that is formalized with an agreement; and an active role in monitoring or directly operating programs.

The regulations establish that the PIC is to be recertified biennially 1 year prior to the submittal of the job training plan. This certification by the Governor is to encompass three areas—certification of the membership, review and validation of the PIC/chief elected official agreement, and approval of an organizational plan that describes how the PIC governs itself. The organizational plan is to include a mission statement, committee structure, staffing, budget, policies such as meetings schedule, policies governing conflict of interest, and nomination procedures. The biennial certification schedule being set at the midpoint of the 2-year operational period ensures adequate time for the Governor to address any certification concerns without interrupting the development of the job training plan. In addition, § 628.410 lists the roles assigned to the PIC by statute. It is not intended that this listing limit the role of the PIC but rather that it emphasizes the major role to be played in the program from initial program planning and direction to monitoring and evaluating the implementation of that plan.

The Governor is expected to issue procedures and guidelines for this recertification process. This process affords the Governor a continuing role in ensuring an effective local policy decisionmaking body. The Amendments revise the nominations and recommendations processes for selecting PIC members to represent education and labor. In the recertification instructions, the Governor may require assurance that the nomination and recommendation processes have been duly followed. The Governor shall also monitor compliance with this assurance. In addition, the Governor is expected to provide a procedure for modification of the PIC operating plan.

Conflict of interest restrictions for PIC members is discussed in § 627.420, Procurement.

Job Training Plan

Section 628.420 includes not only the specific items which are statutorily required in the plan, but also to provide guidance on program emphases in accordance with instructions or policies issued by the Secretary. This ensures that the job training plan will address at the local level other national and State concerns important to the program that are not specifically in the statute. The Governor's role is strengthened by language requiring issuance of instructions to the SDA's for use in preparation of the job training plan. The SDA shall be monitored by the Governor on the basis of its implementation of this plan.

Linkages

Sections 205 and 265 of the Act require that SDA's operating adult and year-round youth programs establish appropriate linkages with other Federal human resource programs. Other linkages may also be established with appropriate State and local educational, social service, and public housing agencies, and with CBO's, business and labor organizations, volunteer groups and others to avoid duplication and to enhance the delivery of services. In addition, youth programs are required to establish linkages with appropriate educational agencies which include formal agreements for procedures for referring and serving in-school youth, methods of assessment, notification when students drop out of school, and arrangements with educational agencies for services for in-school and out-of-school youth. These provisions are reflected in § 628.545.

General Program Design Requirements

The Amendments mandate significant changes in the front-end operations for most SDA's. The statute will cause major alterations in the intake structure and will necessitate revisions in the appraisal of each participant's capabilities, needs, and occupational goals. In these interim final regulations, the Department has provided necessary direction based on the Amendments and has clarified and highlighted significant changes from the present statute.

Eligibility Determination and Intake

Two major criteria must be considered in the process of determining which applicants are eligible for JTPA program services. As set forth in § 628.505, the first criterion is age. The second is economic disadvantage. The standard for determining economic disadvantage will be the annual Department of Health and Human Services poverty guidelines. The use of these guidelines provides a standardized income determination across federally funded programs. It

should be noted that these guidelines do include Social Security and Supplemental Security Income in the determination.

The Congressional intent in this area and the approach in the regulations was to minimize the amount of documentation necessary to establish an individual's eligibility for services, while maintaining the necessary safeguards to prevent misuse of program funds.

Fifteen comments were received on eligibility and targeting issues. Most encouraged a streamlining of the eligibility documentation process, including self-attestation. Several questioned what documentation would be required for barriers and requested guidance. Several indicated concern over burdensome paperwork requirements for referral of applicants to other than title II programs. The Secretary intends to issue an eligibility documentation TAG to be used by SDA's in the eligibility determination process. The procedures set forth in this TAG, if followed by the SDA's, will protect them from audit exceptions based on inadequate documentation. The Department solicits comments on whether the provisions of the regulations should be expanded in the area of eligibility and whether the issuance of the TAG on eligibility documentation without additional regulatory guidance is adequate. In addition, the Department will welcome comments on the contents of the TAG when it is issued.

Section 628.510 describes the changes surrounding targeting and referral requirements. During the intake process, personal data on individuals are collected and a preliminary determination regarding suitability for title II services is made. In order to focus program services on harder to serve individuals, not less than 65 percent of participants must have one or more barriers to employment as specified at the amended section 203(b) of the Act. The States and/or SDA's will establish procedures to ensure compliance with the targeting requirements and determining actions to address noncompliance with the requirements.

Objective Assessment

It is the Department's intention that the objective assessment be a smooth, client-centered and flexible process.

Fourteen comments were received on the assessment process. All supported the concept and the intent for individualized program services. Three indicated concern over the presumed lack of testing and evaluation credentials possessed by existing JTPA staff who would be administering the objective assessment. Two indicated that the content of assessment and the development of service strategies should be left to local discretion: However, as many requested guidance in the development of assessment and service strategies. While the Department expects that States and SDAs will retain authority for program design, technical assistance will be provided on assessment and development of the ISS. Most of the specific comments on assessment addressed concern over the determination of how much assessment could be provided at the intake/eligibility stage prior to enrollment of an eligible applicant and to which cost category this would be charged. Costs incurred on behalf of an applicant, including intake, eligibility determination, and assessment necessary to facilitate the eligibility determination, should be charged to the training-related services cost category. Once an applicant is determined to be eligible and the decision made to enroll the applicant, (making the applicant a participant), the objective assessment can be administered and is to be charged to the direct training services category. While the regulations afford an opportunity to charge preliminary assessment functions to the training-related cost category, the Department expects that the entire process to be sensitive to the client and not be unduly disjointed as a result of charging assessment functions to two cost categories.

One commenter requested that the Department define "Generally accepted standardized test". The Department believes that the criteria for what constitutes an acceptable test can be found in the testing measurements literature and is most appropriately disseminated through technical assistance rather than regulations.

Section 628.515 sets forth the requirements of the objective assessment. The objective assessment is to be a client-centered, diagnostic approach to evaluation of the needs of participants without regard to services or training programs already available in an SDA. The phrase "without regard to" is intended to expand the scope of the assessment and services to the participant beyond those only available through the SDA. It is an independent, comprehensive evaluation of an individual designed to identify information vital to the design of a service strategy culminating in gainful employment. The objective assessment is an ongoing process and should not be viewed as a one-time event. It should be a multi-faceted approach which includes a full array of options including items such as structured interviews, paper and pencil tests, performance tests, behavioral observations, interest inventories, career guidance instruments, aptitude tests, and basic skills tests. From these options, and others, assessment staff may select the most appropriate tools for each participant to measure skills, abilities, aptitudes, and interests, and to counsel participants on how their assessment results relate to local labor market demands. SDA's are strongly encouraged to select appropriate measures prudently and to select only those tools which will provide necessary information for the reasonable development of a service strategy leading to a realistic employment goal. The objective assessment and process should be sensitive to the testing and evaluation environment and the comfort and confidence level of the participant. The temptation to over-test or over-evaluate, providing excess information for which there is no immediate application, does not serve the client's best interest, is detrimental to the client/counselor relationship, and costly to the SDA.

The objective assessment, as an ongoing process, is to be revisited regularly and amended, as appropriate, when additional needs are identified or goals achieved.

Assessments recently conducted by other human service programs or schools are viewed as viable options and may be used, where appropriate, rather than requiring the client to undergo additional assessments and duplicating information already obtained.

Individual Service Strategy

Seven comments were received on the development of the ISS. All requested clarification on the specific level of services that SDA's would be required to provide to participants as identified by the objective assessment and documented in the ISS. Each expressed concern not only over the expense of the requirement to provide all services indicated by the assessment, but also over the concern that many services are simply not available in some communities, at any cost.

Section 628.520 establishes the requirements of the ISS, or employability development plan. The ISS is an individual plan that is developed based on information provided by the objective assessment. It is to outline the appropriate mix and sequence of services and justify the decisions for each; indicate any need for supportive services; and develop the

individual continuum of services that will lead to an employment goal. Decisions made in this document are to be made in partnership with the participant and are to be determined in conformance with applicable Civil Rights provisions.

The ISS, to be effective, must be regularly reviewed and adjusted to reflect the progress and to meet the continuing needs of each participant. The ISS will serve as the basis for the entire case management strategy. Case management is an allowable direct training activity and the Department encourages its use as an effective strategy for providing quality services for the participant.

Section 628.520(d) recognizes that every SDA will not be able to provide the full array of services indicated by the objective assessment and documented in the ISS. In arranging for the mix and sequence of appropriate services, it is fully expected that SDA's will refer participants to other programs for certain specified activities. In those cases where services required are indicated on the ISS and not available from any source in the SDA, such information is to be documented in the ISS and an alternative plan developed which may include referral to another program. SDA's are expected to make every reasonable effort to make the recommended training or services available to each participant; however, consistent with § 628.525, it is understood that the ISS does not give legal or entitlement rights to participants for services. JTPA is not an entitlement program and available resources are limited. In some cases, such as cases when an applicant would require excessive supportive service costs for medical and mental health needs, there might be reasons for which an SDA might elect not to enroll an otherwise eligible applicant. The Department does not intend this limitation to relieve the SDA from otherwise providing necessary supportive services such as child care.

Consistent with § 628.520(e), service providers and contractors may conduct objective assessment and develop the ISS; however, SDA's must recognize that the amendments anticipate longer term interventions for participants who are the hardest to serve and, therefore, must ensure that the development of the ISS and the services provided are client-focused, reflecting the most appropriate mix and sequence of services culminating with a realistic employment goal.

The ISS is the framework to record and document decisions about and for individual participants. It is the instrument to justify decisions concerning the appropriate mix and sequence of services, including referral to other programs, development of work experience or OJT assignments, or referral out of title II.

Referrals of Participants to Other Programs

The regulations at § 628.530 specify the requirements for referral of eligible applicants for whom available title II services are not deemed suitable to appropriate human service programs in the community. A significant change in this section allows the SDA to assess eligible applicants before they are enrolled as participants. The purpose of this pre-participation assessment is to enable SDA's to make more precise judgments as to the suitability of the applicant for participation in JTPA and/or additional services. In these cases, the assessment activities may be charged to the training-related activities cost category.

The responsibility of the SDA at this point in the intake process is to assure that eligible applicants not suitable for title II participation are "provided information on the full array of applicable or appropriate services that are available * * *" (section 204(a)(2)(A) of the Act) and make necessary arrangements for individuals to make contact with those services.

In the case of service providers who discover that an eligible individual does not meet program enrollment requirements, § 628.510(e) requires that service providers refer such individuals back to the SDA for further assessment and referral.

Job Search Limitations

Section 628.535 of the interim final regulations codifies the languages contained in the Act at section 204(c)(2)(B) of the Act, as amended, which limits the provision of stand-alone job search assistance, job search skills training, and job club activities to participants. As part of the Amendment's focus to provide more long-term and higher quality services, such activities are allowable using title II funding only when the job search activities are combined with additional services designed to increase the educational level or occupational skills of participants.

Title II funding of job search training without the additional services described above is permissible only when the following two conditions are *both* fulfilled:

(1) The objective assessment and ISS of a participant do not indicate the need for additional services, *and*

(2) There are no job search assistance activities, including job search skills training, and job clubs, available or accessible to the participant through the Employment Service or other public agencies. These interim final regulations deem the services normally available and provided by the Employment Service within the commuting area to meet the job search availability criteria. Therefore, the SDA must document the lack of availability of job search assistance, job search skills training, or job clubs before funds are expended for those purposes. The Department may revisit this approach when performance standards for the employment service are issued.

Title II-A—The Adult Program

Most of the general requirements of title II-A appear in subpart E of the interim final regulations. There are a few specific requirements of title II-A which appear in subpart F. These include sections on eligibility; requirements to assist hard-to-serve individuals; types of training services, counseling and supportive services; and linkages and coordination.

Services to Older Individuals

The State setaside program for older workers was incorporated into section 204(d) of the Amendments. Requirements for the older workers program are set forth in § 628.320 of the regulations. The Governor continues to be responsible for carrying out these programs pursuant to agreements with public agencies, PICs, SDAs, non-profits or private businesses. The Amendments add requirement that, in entering into these agreements, the Governor is to give priority to agencies and organizations which have a record of demonstrated effectiveness in serving older individuals. The Governor is also responsible for ensuring that the program provides services throughout the State on an equitable basis, taking into account the relative share of the eligible older individuals residing in each SDA and their participation in the labor force.

The Amendments also revise the eligibility criteria by allowing up to 10% of the participants to be older individuals who are not economically disadvantaged if such individuals face serious barriers to employment and meet the income eligibility requirements under title V of the Older Americans Act of 1965. Finally, the Amendments provide that, with limited exceptions, the general title II-A requirements are to apply to the older worker program, including requirements for the objective assessment, ISS, the conditions on

services, the cost limitations, and performance standards. The exceptions include the provisions relating to referrals, targeting, reallotment, the job training plan, and performance standards incentive payments and sanctions.

Summer Youth Employment and Training Program

Eleven commenters raised issues related to the SYETP authorized under title II–B. Commenters requested flexibility in the scope of the objective assessment required for summer program participants; requested guidance pertaining to the determination and documentation of eligibility under the National School Lunch Act; cited the 15-percent limitation on administrative costs as the basis for requesting that summer program activities be defined as direct training to the maximum extent possible; asked for a transition provision allowing the 1993 summer program to operate under current requirements; and raised questions concerning the option to transfer 10 percent of summer program funding to the year-round youth program authorized under title II, part C of the Act. An additional commenter viewed separate eligibility requirements for title II parts B and C as being at cross purposes with the statutory provision authorizing concurrent enrollment in the two programs.

Subpart G sets forth the basic requirements for the SDA's operation of the SYETP. While subpart G references the objective assessment and service strategy requirements included in subpart E of the interim final regulations, it is recognized that the achievement objectives and resulting service strategies for youth differ from what might be expected in the adult program and that the corresponding assessment processes would vary accordingly. The interim final regulations clarify that SDA's are not responsible for verifying eligibility determinations made under the National School Lunch Act beyond establishing that such determinations have been made by duly authorized persons. With regard to the 15-percent limitation on administrative costs, that limitation is statutory; further, the classification of administrative and non-administrative costs for the summer youth program must be consistent with the cost classification provisions of part 627. Finally, issues pertaining to concurrent enrollment will be addressed in guidance to be provided by the Secretary as required by the Act.

Year Round Youth Program

The new title II–C program authorizes a variety of activities that may be used to address the needs of in-school and out-of-school youth. This program was developed in response to concerns about the lack of workforce skills in today's youth, both in- and out-of-school. A priority has been placed on youth currently out of any formalized school system, including dropouts. These youth are considered the most disadvantaged and the most difficult to reach and to serve.

Section 628.800 sets forth the program's primary objective of increasing the long-term employability of eligible youth. The regulations establish program design elements, such as objective assessment and other requirements for the SDA's.

At § 628.803 the eligibility criteria are set forth. These include requirements for out-of-school youth and in-school youth. Eligibility may be verified through the local education agency or an assurance that the student is eligible to participate in the free lunch program. The interim final regulations require that at least 65 percent of the in-school and the out-of-school youth are to have at least one additional barrier to employment listed in sections 263(b) and (d) of the Act, respectively. The SDA may identify one additional barrier not listed in the Act. These interim final regulations also require that non-economically disadvantaged individuals (up to 10 percent) served by the title II–C program still must face one or more barriers to employment. Further, non-disadvantaged students may participate if they are enrolled in a schoolwide project for low income schools.

There are two factors the SDA's must consider for the purposes of title II–C eligibility. The first is that at least 50 percent of the total title II–C participants in each SDA are to be out-of-school. The second is that in-school participants who are served under a schoolwide project are *not* to be counted in determining the ratio of in-school to out-of-school youth.

Section 628.804 sets forth authorized services in title II–C. It should be noted that the OJT requirements are in addition to those in part 627, subpart E. Among these is a provision mandating that the participant's wage equals or exceeds the average wage at placement in the preceding program year in the SDA for participants under title II-A. A school dropout under the age of 18 is required to attend a school, course or program. The provision of preemployment and work maturity skills training is to be accompanied by either work experience or other additional services designed to increase the basic skills of the participant. Activities including work experience, job search assistance and job club activities must be accompanied by additional services designed to increase the basic skills of the youth. There are also provisions for the year-round operation of the program, and coordination with local educational agencies, service providers, and other programs. Schools operating on a 9-month schedule are not prohibited from providing title II–C program services.

PART 631—PROGRAMS UNDER TITLE III OF THE JOB TRAINING PARTNERSHIP ACT

In addition to the Job Training Amendments of 1992, amendments to title III were included in the Defense Authorization Act for Fiscal Year 1993. The proposed modifications to the regulations for part 631, Programs under Title III of the Job Training Partnership Act, are being driven by the changes to the legislative provisions made in the amendments. The significant modifications to the current regulations for the title III program are:

(1) The regulations at § 631.2 add an additional definition for "substantial layoff (for rapid response assistance)" which establishes a minimum threshold for the provision of rapid response assistance, as required by section 314(b)(4). This minimum threshold cannot be waived, but a new provision at § 631.30(b)(6) provides the Governor with alternatives for complying with the threshold and providing rapid response assistance in exceptional circumstances.

(2) Broader eligibility criteria are established in § 631.3(b) for the receipt of selected readjustment and retraining services in instances where an employer makes a public announcement of a plant closure, pursuant to section 314(h). The statutory provision that funding for these basic readjustment services, to the extent practicable, is to come from the Governor's reserve funds is reflected at § 631.41(g).

(3) Section 314(f)(2) of the Act defines the eligibility of individuals participating in title III programs to receive unemployment compensation benefits consistent with State policies under the Approved Training Rule to be "participating in training (except on-the-job training)." The language in the regulations at § 631.4 has been revised from participation in " any of the programs" to "any retraining activity, except on-the-job training." Because title III participants who are otherwise eligible for unemployment

compensation benefits and are not in training are generally seeking and available for work, this change is not expected to have a significant impact.

(4) The basis for computing the cost limitations which apply to expenditures of title III funds has been changed from annual expenditures to program year allocation (for substates), or reserved by the Governor from the program year allotment (for States). This change in § 631.14 reflects the amendments to section 315, and recognizes that grantees are permitted to have up to three years in which to spend allotted funds, subject to minimum annual expenditure rates.

(5) A provision has been added to § 631.14(i) to clarify that funds allocated to a substate grantee from the Governor's reserve funds to provide additional basic readjustment or retraining assistance shall be included in the substate grantee's formula allocation for purposes of applying the cost limits, reflecting the provision in section 302(c)(1)(E).

(6) A new provision has been added at § 631.14(h) to allow neighboring substate grantees to combine funds to serve dislocated workers from two or more substate areas, as authorized in section 315(d). To qualify for this provision, consistent with the congressional intent that this provision apply to neighboring substate grantees, the substate grantees must be contiguous or be part of the same labor market area.

(7) A new provision is added at § 631.15 requiring the State to provide a breakout of all administrative expenditures by the dislocated worker unit (DWU), pursuant to section 311(b)(11).

(8) A new provision is added at § 631.17 clarifying the Secretary's authority to oversee the State's provision of rapid response assistance and require corrective action as necessary, as provided for in section 314(b)(3).

(9) An amended provision in section 314(e)(1) regarding eligibility for needs-related payments requires that a participant be unemployed, and this has been incorporated in § 631.20(c).

(10) A provision at § 631.30(a)(8) requires the State to immediately notify the substate grantee of current or projected layoffs and closures in the local area for the purpose of continuing and expanding upon the services initiated by the rapid response team, as required in section 311(b)(3)(D).

(11) Section 311(b)(12) stipulates that accountability for rapid response assistance resides in the DWU, although the DWU may contract with other entities for the provision of these services. This is reflected in the provisions at § 631.30(b).

(12) A provision has been added to § 631.32(b)(2) to clarify that Governors must give consideration to each of the substate allocation formula factors required by section 302(d) of the Act unless the factor is not relevant to economic dislocation conditions in the State.

(13) Pursuant to section 315, § 631.62 stipulates that the cost limitations under part A of title III will apply to projects operated under part B of title III, except when waived or altered by the application guidelines, or by the Grant Officer in the terms of the grant.

(14) A provision is added at § 631.63 enumerating the Federal Reporting requirements for recipients of title III discretionary grants, consistent with section 322(a)(4).

(15) A provision is added at § 631.64 clarifying the administrative requirements under title I of the Act which apply for grantees other than States, including procedures for grievances and procurement.

(16) A new subpart I, to be administered as part of the title III National Reserve Grants program, provides for Disaster Relief Employment Assistance, as authorized by amendments to title IV of the Act.

In addition, technical changes have been made so that the regulations in this part conform to related provisions in the other parts.

Promulgation of rules for the Clean Air Employment Transition Assistance (CAETA) program, and for the Defense Conversion Adjustment (DCA) program are being deferred until finalization of these regulations. Commenters may want to provide comments through this review process on the impact of these regulations on the regulation or operation of the CAETA and DCA programs. See **Federal Register** at 57 FR 4808 (February 7, 1992) for the Clean Air Employment Transition Assistance program; and 57 FR 30536 (July 9, 1992) for the Defense Conversion Adjustment program.

PART 637—JOBS FOR EMPLOYABLE DEPENDENT INDIVIDUALS (JEDI)

The Incentive Bonus Program established under title V by the enactment of the Stewart B. McKinney Homeless Assistance Amendments Act of 1988 on November 7, 1988, was substantially changed with the enactment of the Amendments. As a result, the regulations at part 637 have been revised. Among the significant changes in the Program, which are reflected in the revised regulations, are the new target groups, which are absent parents of children receiving AFDC and recipients of supplementary security income, the simplified eligibility criteria for receipt of bonuses, the simplified application requirements, the simplified review and approval process for applications, the reduction in the administrative monies available to States, the elimination of startup grants, and the elimination of the trigger for the appropriation of funds.

Two States commented on the revised JEDI program. One State requested that recordkeeping requirements be kept to a minimum and the other commenter requested guidance on how to implement this Program without any funds being appropriated by Congress. Regarding the first comment, the Amendments provide that the States are required to have documentation sufficient to support their applications for incentive bonuses. The regulations do not prescribe additional recordkeeping requirements. Regarding the implementation of the Program, there is currently no appropriation for title V and no funds are assured for future fiscal years. Each State will have to make a determination as to whether or not to begin tracking the data necessary for incentive bonus applications without having title V funds to offset these additional costs.

Regulatory Impact

The interim final rule implements Public Law 102–367, 106 Stat. 1021 (September 7, 1992) and the Defense Authorization Act for Fiscal Year 1993, Public Law 102–484, makes technical changes, and clarifies existing regulations to reflect continuing policies. While the programs are modified pursuant to the statutory amendments, the delivery system for the JTPA programs under the interim final rule remains essentially the same as in existing regulations. It does not have the financial or other impact to make it a major rule and, therefore, the preparation of a regulatory impact analysis is not necessary. See Executive Order No. 12291, 3 CFR, 1981 Comp., p. 127, 5 U.S.C. 601 note.

The Department of Labor has certified to the Chief Counsel for Advocacy, Small Business Administration, that, pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), the interim final rule would not have a significant economic impact on a substantial number of small entities. No significant economic impact would be imposed on such entities by the interim final rule.

As discussed above, the Job Training Reform Amendments of 1992 mandate

that these regulations be in effect by December 18, 1992. Modification of the JTPA regulations is necessary to incorporate the statutory amendments. It is clearly the intent of Congress that the statutory and regulatory amendments be implemented for the JTPA Program Year beginning on July 1, 1993. Planning and implementation actions must be undertaken as soon as these regulations are published, to adequately implement the programs on a timely basis. Therefore, the Department of Labor has found good cause, pursuant to 5 U.S.C. 553(b)(B), to publish the interim final regulations without a prior proposed rule, since such a proposed rule is impracticable and contrary to the public interest. For similar grounds, the Department has found that good cause exists, pursuant to 5 U.S.C. 553(d)(3), to make these interim final regulations effective on the date mandated by statute, December 18, 1992. Comments are requested and the final rule is expected to be published on or before June 1, 1993, the expiration date of this interim final rule.

Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act, information collection requirements which would be imposed as a result of the interim final rule are being submitted separately to the Office of Management and Budget.

Catalog of Federal Domestic Assistance Number

These programs are listed in the Catalog of Federal Domestic Assistance at No. 17–246, "Employment and Training Assistance—Dislocated Workers" (JTPA Title III Programs); and No. 17–250, "Job Training Partnership Act (JTPA)" (JTPA titles I, II, and V Programs).

List of Subjects in 20 CFR Parts 626 through 631 and 637

Grant programs, Labor, Manpower training programs, Dislocated worker programs.

Interim Final Rule

Accordingly, chapter V of title 20, Code of Federal Regulations, is amended, as follows:

1. Part 626 is revised to read as follows:

PART 626—INTRODUCTION TO THE REGULATIONS UNDER THE JOB TRAINING PARTNERSHIP ACT

Sec.
626.1 Scope and purpose of the Job Training Partnership Act.
626.2 Format of the Job Training Partnership Act regulations.
626.3 Purpose, scope, and applicability of the Job Training Partnership Act regulations.
626.4 Table of contents for the Job Training Partnership Act regulations.
626.5 Definitions.

Authority: 29 U.S.C. 1579(a); sec. 6305(f), Pub. L. 100–418, 102 Stat. 1107; 29 U.S.C. 179i(e).

§ 626.1 Scope and purpose of the Job Training Partnership Act.

It is the purpose of the Job Training Partnership Act (JTPA or the Act) to establish programs to prepare youth and adults facing serious barriers to employment for participation in the labor force by providing job training and other services that will result in increased employment and earnings, increased educational and occupational skills, and decreased welfare dependency, thereby improving the quality of the work force and enhancing the productivity and competitiveness of the Nation (section 2).

§ 626.2 Format of the Job Training Partnership Act regulations.

(a) Regulations promulgated by the Department of Labor to implement the provisions of the Act are set forth in parts 626 through 638 of title 20, chapter V, of the Code of Federal Regulations, with the exception of the veterans' employment program's chapter IX regulations of the Office of the Assistant Secretary for Veterans' Employment and Training, which are set forth at part 1005 of title 20.

(b) Nondiscrimination and equal opportunity requirements and procedures, including complaint processing and compliance reviews, will be governed by the provisions of 29 CFR parts 31, 32 and 34 and will be administered by the Department of Labor (Department or DOL) Directorate of Civil Rights.

(c) General authority for the JTPA regulations is found at section 169 of the Act. Specific statutory authorities other than section 169 are noted throughout the JTPA regulations.

§ 626.3 Purpose, scope, and applicability of the Job Training Partnership Act regulations.

(a) Parts 626 through 638 of this chapter and part 1005 of chapter IX (Veterans' employment programs under title IV, part C of the Job Training Partnership Act) establish the Federal programmatic and administrative requirements for JTPA grants awarded by the Department of Labor to eligible grant recipients.

(b) Parts 626 through 638 of this chapter and part 1005 of chapter IX apply to recipients and subrecipients of JTPA funds.

§ 626.4 Table of contents for the Job Training Partnership Act regulations.

The table of contents for the regulations under the Job Training Partnership Act, 20 CFR parts 626–638 and 1005, is as follows:

PART 626—INTRODUCTION TO THE REGULATIONS UNDER THE JOB TRAINING PARTNERSHIP ACT

Sec.
626.1 Scope and purpose of the Job Training Partnership Act.
626.2 Format of the Job Training Partnership Act regulations.
626.3 Purpose, scope and applicability of the Job Training Partnership Act regulations
626.4 Table of contents for the Job Training Partnership Act regulations.
626.5 Definitions.

PART 627—GENERAL PROVISIONS GOVERNING PROGRAMS UNDER THE ACT

Subpart A—Scope and Purpose

627.100 Scope and Purpose of Part 627.

Subpart B—Program Requirements

627.200 Governor/Secretary agreement.
627.205 Public service employment prohibition.
627.210 Nondiscrimination and nonsectarian activities.
627.215 Relocation.
627.220 Coordination with programs under title IV of the Higher Education Act including the Pell grant program.
627.225 Employment generating activities.
627.230 Displacement.
627.235 General program requirements.
627.240 On-the-job training.
627.245 Work experience.
627.250 Interstate agreements.

Subpart C—Payments, Benefits and Working Conditions

627.300 Scope and purpose.
627.305 Payments.
627.310 Benefits and working conditions.

Subpart D—Administrative Standards

627.400 Scope and purpose.
627.405 Grant agreement and funding.
627.410 Reallotment and reallocation.
627.415 Insurance.
627.420 Procurement.
627.422 Selection of service providers.
627.423 Funding restrictions for "high-risk" recipients and subrecipients.
627.424 Prohibition of subawards to debarred and suspended parties.
627.425 Standards for financial management and participant data systems.
627.430 Grant payments.
627.435 Cost principles and allowable costs.
627.440 Classification of costs.
627.445 Limitations on certain costs.
627.450 Program income.
627.455 Reports required.
627.460 Requirements for records.

627.463 Public access to records.
627.465 Property management standards.
627.470 Performance standards.
627.471 Reorganization plan appeals.
627.475 Oversight and monitoring.
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627.481 Audit resolution.
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Subpart E—Grievances Procedures at the State and Local Level

627.500 Scope and purpose.
627.501 State grievance and hearing procedures for non-criminal complaints at the recipient level.
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627.503 Recipient-level review.
627.504 Non-criminal grievance procedure at employer level.

Subpart F—Federal Handling of Non-criminal Complaints and Other Allegations

627.600 Scope and purpose.
627.601 Complaints and allegations at the Federal Level.
627.602 Resolution of investigative findings.
627.603 Special handling of labor standards violations under section 143 of the Act.
627.604 Alternative procedure for handling labor standards violations under section 143—Binding arbitration.
627.605 Special Federal review of local level complaints without decision.
627.606 Grant officer resolution.

Subpart G—Sanctions for Violations of the Act

627.700 Scope and purpose.
627.702 Sanctions and corrective actions.
627.703 Failure to comply with procurement provisions.
627.704 Process for waiver of State liability.
627.706 Process for advance approval of a recipient's contemplated corrective actions.
627.708 Offset process.

Subpart H—Hearings by the Office of Administrative Law Judges

627.800 Scope and purpose.
627.801 Procedures for filing request for hearing.
627.802 Rules of procedure.
627.803 Relief.
627.804 Timing of decisions.
627.805 Alternative dispute resolution.
627.806 Other authority.

Subpart I—Transition Provisions

627.900 Scope and purpose.
627.901 Transition period.
627.902 Governor's actions.
627.903 Actions which are at the discretion of the Governor.
627.904 Transition and implementation.
627.905 Guidance on contracts and other agreements.
627.906 Determinations on State and SDA implementation.

PART 628—PROGRAMS UNDER TITLE II OF THE JOB TRAINING PARTNERSHIP ACT

Subpart A—Scope and Purpose

628.100 Scope and purpose of part 628.

Subpart B—State Planning

628.200 Scope and purpose.
628.205 Governor's coordination and special services plan.
628.210 State Job Training Coordinating Council.
628.215 State Human Resource Investment Council.

Subpart C—State Programs

628.300 Scope and purpose.
628.305 State distribution of funds.
628.310 Administration.
628.315 Education coordination and grants.
628.320 Services for older individuals.
628.325 Incentive grants, capacity building and technical assistance.

Subpart D—Local Service Delivery System

628.400 Scope and purpose.
628.405 Service delivery areas.
628.410 Private Industry Council.
628.415 Selection of SDA grant recipient and administrative entity.
628.420 Job training plan.
628.425 Review and approval.
628.426 Disapproval of the plan.
628.430 State SDA submission.

Subpart E—Program Design Requirements for Programs Under Title II of the Job Training Partnership Act

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628.505 Eligibility.
628.510 Intake, referrals, and targeting.
628.515 Objective assessment.
628.520 Individual service strategy.
628.525 Limitations.
628.530 Referrals of participants to non-title II programs.
628.535 Limitations on job search assistance.
628.540 Volunteer program.
628.545 Linkages and coordination.
628.550 Transfer of funds.

Subpart F—The Adult Program

628.600 Scope and purpose.
628.605 Eligibility.
628.610 Authorized services.

Subpart G—The Summer Youth Employment and Training Program

628.700 Scope and purpose.
628.701 Program goals and objectives.
628.702 Eligibility.
628.705 SYETP authorized services.
628.710 Period of program operation.

Subpart H—Youth Training Program

628.800 Scope and purpose.
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PART 629—[RESERVED]

PART 630—[RESERVED]

PART 631—PROGRAMS UNDER TITLE III OF THE JOB TRAINING PARTNERSHIP ACT

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631.1 Scope and purpose.
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631.3 Participant eligibility.
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631.13 Classification of costs at State and substate levels.
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631.16 Complaints, investigations, and penalties.
631.17 Federal monitoring and oversight.
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Subpart C—Needs-Related Payments

631.20 Needs-related payments.

Subpart D—State Administration

631.30 Designation or creation and functions of a State dislocated worker unit or office and rapid response assistance.
631.31 Monitoring and oversight.
631.32 Allocation of funds by the Governor.
631.33 State procedures for identifying funds subject to mandatory federal reallotment.
631.34 Designation of substate areas.
631.35 Designation of substate grantees.
631.36 Biennial State plan.
631.37 Coordination activities.
631.38 State by-pass authority.

Subpart E—State Programs

631.40 State program operational plan.
631.41 Allowable State activities.

Subpart F—Substate Programs

631.50 Substate plan.
631.51 Allowable substate program activities.
631.52 Selection of service providers.
631.53 Certificate of continuing eligibility.

Subpart G—Federal Delivery of Dislocated Worker Services

631.60 General.
631.61 Application for funding and selection criteria.

Subpart H—Transition Provisions

631.70 Special provisions for program startup.

PART 632—INDIAN AND NATIVE AMERICAN EMPLOYMENT AND TRAINING PROGRAMS

Subpart A—Introduction

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632.2 Scope and purpose.
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Subpart B—Designation Procedures for the Native American Grantees

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Subpart C—Program Planning, Application and Modification Procedures

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632.18 Regional and national planning meetings.
632.19 Grant application content.
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Subpart D—Administrative Standards and Procedures

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632.32 Financial management systems.
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632.34 Program income.
632.35 Native American grantee contracts and subgrants.
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632.38 Classification of costs.
632.39 Administrative cost plan.
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632.42 Grant closeout procedures.
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Subpart E—Program Design and Management

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632.76 Program management systems.
632.77 Participant eligibility determination.
632.78 Training activities.
632.79 Employment activities.
632.80 Other activities.
632.81 Payments to participants.
632.82 Benefits and working conditions for participants.
632.83 FICA.
632.84 Non-Federal status of participants.
632.85 Participant limitations.
632.86 Nondiscrimination and nonsectarian activities.
632.87 Equitable provisions of services to the eligible population and significant segments.
632.88 General responsibilities of the Department.
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Subpart F—Prevention of Fraud and Program Abuse

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632.254 Program startup.
632.255 Program planning.
632.256 Submission of applications.
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632.259 Vocational exploration program.
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632.261 Reporting requirements.
632.262 Termination date for the summer program.
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PART 633—MIGRANT AND SEASONAL FARMWORKER PROGRAMS

Subpart A—Introductory Provisions

633.102 Scope and purpose of Title IV, Section 402 programs.
633.103 Format for these regulations.
633.104 Definitions.
633.105 Allocation of funds.
633.106 Eligibility for allocable funds.
633.107 Eligibility for participation in Section 402 programs.

Subpart B—Grant Planning and Application Procedures

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633.318 Nondiscrimination and nonsectarian activities.
633.319 Lobbying, political activities and unionization.
633.320 Nepotism.
633.321 Performance standards for Section 402 programs.
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PART 634—LABOR MARKET INFORMATION PROGRAMS UNDER TITLE IV, PART E OF THE JOB TRAINING PARTNERSHIP ACT

Comprehensive Labor Market Information System

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634.2 Availability of funds.
634.3 Eligible recipients.
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PART 635—[RESERVED]

PART 636—COMPLAINTS, INVESTIGATIONS AND HEARINGS

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PART 637—PROGRAMS UNDER TITLE V OF THE JOB TRAINING PARTNERSHIP ACT

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637.1 Scope and purpose.
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PART 638—JOB CORPS PROGRAM UNDER TITLE IV–B OF THE JOB TRAINING PARTNERSHIP ACT

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638.501 Student handbook.
638.502 Job Corps basic education program.
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638.514 Residential support services.
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638.519 Incentives system.
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PART 1005—VETERANS' EMPLOYMENT PROGRAMS UNDER THE TITLE IV, PART C OF THE JOB TRAINING PARTNERSHIP ACT

Subpart A—General Provisions

1005.1 Scope and purpose.
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1005.11 Availability of funds.
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1005.13 Application for funding.
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1005.25 Monitoring and oversight.
1005.26 Grievance procedures.

§ 626.5 Definitions.

In addition to the definitions contained in section 4 of the Act, the following definitions of terms used in the Act or parts 626–631 of this chapter apply as appropriate to programs under titles I, II, and III of the Act:

Accrued expenditures means charges made to the JTPA program. Expenditures are the sum of actual cash disbursements, the amount of indirect expense incurred, and the net increase (or decrease) in the amounts owed by the recipient for the goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Act means the Job Training Partnership Act.

ALJ means an administrative law judge in the Office of Administrative Law Judges of the U.S. Department of Labor.

Awarding agency means:

(1) With respect to a grant, the Department of Labor; and

(2) With respect to a subgrant or contract, the party that awarded the subgrant or contract.

Capacity building means the systematic improvement of job functions, skills, knowledge, and expertise of the personnel who staff employment and training and other closely related human service systems. Capacity building is designed to enhance the effectiveness, to strengthen the caliber of client services provided under the Act and other Federal, State, and local employment and training programs, and improve coordination among them. Capacity building includes curricula development, appropriate training, technical assistance, staff development, and other related activities.

Chief elected official (CEO) means the official or officials, or their representatives, or the jurisdiction or jurisdictions which requested designation by the Governor as a service delivery area.

Commercial organizations means private for-profit entities.

Commercially available or off-the-shelf training package means a training package sold or traded unmodified, in substantial quantities to the general public in the course of normal business operations, at prices based on established catalog or market prices. To be considered as "sold to the general public", the package must be regularly sold in sufficient quantities to constitute a real commercial market, to buyers which may include JTPA programs but must include other than JTPA programs. The package must include performance criteria.

Contractor means the organization, entity, or individual that is awarded a procurement contract under the recipient's or subrecipient's procurement standards and procedures.

Cost means accrued expenditure.

Department means the U.S. Department of Labor.

DOL means the U.S. Department of Labor.

ETA means the Employment and Training Administration of the U.S. Department of Labor.

Family is defined at section 4(34) of the Act. An "individual with a disability" may, for the purposes of income eligibility determination, be considered to be an unrelated individual who is a family unit of one. The Governor may provide interpretations of the term "family" related to how "dependent children" are defined for programs within a State, consistent with the Act, and all applicable rules and regulations, and State or local law. Such interpretations by the Governor may address the treatment of certain individuals who may need to be viewed discretely in the income eligibility determination process, such as runaways, emancipated youth, and court adjudicated youth separated from the family.

The phrase "living in a single residence" with other family members includes temporary, voluntary residence elsewhere (*e.g.* attending school or college, or visiting relatives). It does not include involuntary temporary residence elsewhere (*e.g.* incarceration, or placement as a result of a court order).

Family income means "income" as defined by the Department of Health and Human Services in connection with the annual poverty guidelines. Such income shall not include unemployment compensation, child support and public assistance, as provided for at section 4(8) of the Act.

Funding period means the period of time when JTPA funds are available for expenditure. Unless a shorter period of time is specified in a title III discretionary award, the JTPA funding period is the 3-year period specified in JTPA section 161(b); the program year in which Federal funds are obligated to the recipient, and the two succeeding program years.

Governor means, in addition to the definition at section 4(9) of the Act, the recipient of JTPA funds awarded to the State under titles I through III.

Grant means an award of JTPA financial assistance by the U.S. Department of Labor to an eligible JTPA recipient. (Also, see §§ 627.405 and 627.430 of these regulations).

Grantee means the recipient.

Individual service strategy (ISS) is defined in § 628.520 of these regulations.

Job search assistance (also including *job search skills training* and *job club activities*) means the provision of instruction and support to a participant to give the participant skills in acquiring full-time employment. The services provided may include, but are not limited to, resume writing, interviewing skills, labor market guidance, telephone techniques, information on job openings, and job acquisition strategies, as well as the provision of office space and supplies for the job search.

Job Training Partnership Act means Public Law (Pub. L.) 97–300, as amended, 29 U.S.C. 1501 et seq.

JTPA means the Job Training Partnership Act.

Nontraditional employment, as applied to women, means occupations or fields of work where women comprise less than 25 percent of the individuals employed in such occupation or field of work. (Pub. L. 102–235, Nontraditional Employment for Women Act).

OALJ means the Office of Administrative Law Judges of the U.S. Department of Labor.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a funding period that will require payment by the recipient or subrecipient during the same or a future period.

OIG means the Office of the Inspector General of the U.S. Department of Labor.

PIC means a private industry council.

Participant is defined in section 4(37) of the Act.

Program year means the 12-month period beginning July 1 of the indicated year.

Recipient means the entity to which a JTPA grant is awarded directly from the Department of Labor to carry out the JTPA program. The recipient is the entire legal entity that received the award and is legally responsible for carrying out the JTPA program, even if only a particular component of the entity is designated in the grant award document. For JTPA grants under titles I, II and III, except for certain discretionary grants awarded under title III, part B, the State is the recipient.

SDA means a service delivery area designated by the Governor pursuant to section 101(a)(4) of the Act. As used in these regulations, SDA may also refer to the entity which administers the JTPA program within the designated area.

SDA grant recipient means the entity that receives JTPA funds for a service delivery area directly from the recipient.

Secretary means the Secretary of Labor.

Section, as used in this chapter, means a section of the Act unless the text specifically indicates otherwise.

Service provider means any subrecipient, including a service delivery area or substate grantee, that is responsible for the delivery of training and/or supportive services directly to JTPA participants. Awards to service providers may be made by subgrant, contract, subcontract, or other legal agreement.

Stand-in costs means costs paid from non-Federal sources which a recipient proposes to substitute for Federal costs which have been disallowed as a result of an audit or other review. In order to be considered as valid substitutions, the costs (1) must have been reported by the grantee as uncharged program costs under the same title and in the same year in which the disallowed costs were incurred and (2) must have been incurred in compliance with laws, regulations, and contractual provisions governing JTPA.

State is defined at section 4(22) of the Act. For cash payment purposes, the definition of "State" contained in the Department of Treasury regulations at 31 CFR 205.3 shall apply to JTPA programs.

State council means the State Job Training Coordinating Council (SJTCC) or, in a State with a Human Resource Investment Council (SHRIC) pursuant to § 628.315 of the chapter, the SHRIC.

Subgrant means an award of JTPA financial assistance in the form of money, or property in lieu of money, made under a grant by a recipient to an eligible subrecipient. It also means a subgrant award of JTPA financial assistance by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement purchases from vendors nor does it include any

form of assistance received by program participants.

Subgrantee mean a subrecipient.

Subrecipient means the legal entity to which a subgrant is awarded and which is accountable to the recipient (or higher tier subrecipient) for the use of the funds provided. For JTPA purposes, distinguishing characteristics of a subrecipient include items such as determining eligibility of applicants, enrollment of participants, performance measured against meeting the objectives of the program, responsibility for programmatic decisionmaking, responsibility for compliance with program requirements, and use of the funds awarded to carry out a JTPA program or project, as compared to providing goods or services for a JTPA program or project (vendor). Depending on local circumstances, the PIC, local elected official, or administrative entity may be a subrecipient. SDA grant recipients and JTPA title III substate grantees are particular types of subrecipients.

Substate grantee (SSG) means that agency or organization selected to administer programs pursuant to section 312(b) of the Act. The substate grantee is the entity that receives JTPA title III funds for a substate area directly from the Governor.

Technical assistance is a facet of capacity building which includes information sharing, dissemination and training on program models and job functions; peer-to-peer networking and problem solving; guides; and interactive communication technologies.

Title, as used in this chapter, means a title of the Act, unless the text of the regulation specifically indicates otherwise.

Vendor means an entity responsible for providing generally required goods or services to be used in the JTPA program. These goods or services may be for the recipient's or subrecipient's own use or for the use of participants in the program. Distinguishing characteristics of a vendor include items such as: Providing the goods and services within normal business operations; providing similar goods or services to many different purchasers, including purchasers outside the JTPA program; and operating in a competitive environment. A vendor is not a subrecipient and does not exhibit the distinguishing characteristics attributable to a subrecipient as defined above. Any entity directly involved in the delivery of program services not available to the general public, with the exception of an employer providing on-the-job-training, shall be considered a subrecipient rather than a vendor.

Wagner-Peyser Act means 29 U.S.C. 49 et seq.

2. Part 627 is revised to read as follows:

PART 627—GENERAL PROVISIONS GOVERNING PROGRAMS UNDER TITLES I, II, AND III OF THE ACT

Subpart A—Scope and purpose

627.100 Scope and Purpose of Part 627.

Subpart B—Program Requirements

627.200 Governor/Secretary agreement.
627.205 Public service employment prohibition.
627.210 Nondiscrimination and nonsectarian activities.
627.215 Relocation.
627.220 Coordination with programs under title IV of the Higher Education Act including the Pell grant program.
627.225 Employment generating activities.
627.230 Displacement.
627.235 General program requirements.
627.240 On-the-job training.
627.245 Work experience.
627.250 Interstate agreements.

Subpart C—Payments, Benefits and Working Conditions

627.300 Scope and purpose.
627.305 Payments.
627.310 Benefits and working conditions.

Subpart D—Administrative Standards

627.400 Scope and purpose.
627.405 Grant agreement and funding.
627.410 Reallotment and reallocation.
627.415 Insurance.
627.420 Procurement.
627.422 Selection of service providers.
627.423 Funding restrictions for "high-risk" recipients and subrecipients.
627.424 Prohibition of subawards to debarred and suspended parties.
627.425 Standards for financial management and participant data systems.
627.430 Grant payments.
627.435 Cost principles and allowable costs.
627.440 Classification of costs.
627.445 Limitations on certain costs.
627.450 Program income.
627.455 Reports required.
627.460 Requirements for records.
627.463 Public access to records.
627.465 Property management standards.
627.470 Performance standards.
627.471 Reorganization plan appeals.
627.475 Oversight and monitoring.
627.480 Audits.
627.481 Audit resolution.
627.485 Closeout.
627.490 Later disallowances and adjustments after closeout.
627.495 Collection of amounts due.

Subpart E—Grievances Procedures at the State and Local Level

627.500 Scope and purpose.
627.501 State grievance and hearing procedures for non-criminal complaints at the recipient level.
627.502 Grievance and hearing procedures for non-criminal complaints at the SDA and SSG levels.
627.503 Recipient-level review.
627.504 Non-criminal grievance procedure at employer level.

Subpart F—Federal Handling of Non-criminal Complaints and Other Allegations

627.600 Scope and purpose.
627.601 Complaints and allegations at the Federal level.
627.602 Resolution of investigative findings.
627.603 Special handling of labor standards violations under section 143 of the Act.
627.604 Alternative procedure for handling labor standards violations under section 143—Binding arbitration.
627.605 Special Federal review of SDA- and SSG-level complaints without decision.
627.606 Grant officer resolution.

Subpart G—Sanctions for Violations of the Act

627.700 Scope and purpose.
627.702 Sanctions and corrective actions.
627.703 Failure to comply with procurement provisions.
627.704 Process for waiver of State liability.
627.706 Process for advance approval of a recipient's contemplated corrective actions.
627.708 Offset process.

Subpart H—Hearings by the Office of Administrative Law Judges

627.800 Scope and purpose.
627.801 Procedures for filing request for hearing.
627.802 Rules of procedure.
627.803 Relief.
627.804 Timing of decisions.
627.805 Alternative dispute resolution.
627.806 Other authority.

Subpart I—Transition Provisions

627.900 Scope and purpose.
627.901 Transition period.
627.902 Governor's actions.
627.903 Actions which are at the discretion of the Governor.
627.904 Transition and implementation.
627.905 Guidance on contracts and other agreements.
627.906 Determinations on state and SDA implementation.

Authority: 29 U.S.C. 1579(a); Sec. 6305(f), Pub. L. 100–418, 102 Stat. 1107; 29 U.S.C. 1791i(e).

Subpart A—Scope and Purpose

§ 627.100 Scope and purpose of part 627

(a) This part sets forth requirements for implementation of programs under titles I, II, and III of the Job Training Partnership Act.

(b) Subpart B provides general program requirements which apply to all programs under the titles I, II, and III of the Act, except as provided elsewhere in the Act or this chapter. These requirements include the Governor/Secretary agreement, the

nondiscrimination and nonsectarian activity provisions, coordination provisions with Higher Education Act programs, and the prohibitions on public service employment, relocation assistance, displacement, and employment generating activities. This subpart also sets forth comprehensive rules for on-the-job training for JTPA participants as well as for work experience.

(c) Subpart C sets forth requirements for allowable payments to JTPA participants.

(d) Subpart D establishes the administrative and financial standards and requirements that apply to funds received under the Act.

(e) Subpart E establishes the procedures which apply to the handling of non-criminal complaints under the Act at the Governor, the SDA, and title III SSG levels.

(f) Subpart F establishes the procedures which apply to the filing, handling, and review of complaints at the Federal level.

(g) Subpart G sets forth the provisions which apply to the sanctions and corrective actions that may be imposed by the Secretary for violations of the Act, regulations, or grant terms and conditions.

(h) Subpart H sets forth procedures which apply to hearing by the Office of the Administrative Law Judges.

Subpart B—Progam Requirements

§ 627.200 Governor/Secretary agreement.

(a)(1) To establish a continuing relationship under the Act, the Governor and the Secretary shall enter into a Governor/Secretary agreement. The agreement shall consist of a statement assuring that the State shall comply with (i) the Job Training Partnership Act and all applicable rules and regulations and (ii) the Wagner-Peyser Act and all applicable rules and regulations. The agreement shall specify that guidelines, interpretations, and definitions adopted and published by the Governor shall, to the extent that they are consistent with the Act and applicable rules and regulations, be accepted by the Secretary.

(2) Either the Governor or the Secretary may seek a modification, revision, or termination of the agreement at any time, to be effective at the end of a program year.

(b) Except as provided at part B of title III of the Act and part 631, subpart G, of this chapter, the State shall be the grant recipient of JTPA funds awarded under titles I, II, and III.

§ 627.205 Public service employment prohibition.

No funds available under titles I, II–A, II–C, or III–A of the Act may be used for public service employment (sections 141(p) and 314(d)(2)).

§ 627.210 Nondiscrimination and nonsectarian activities.

(a)(1) Recipients, SDA grant recipients, title III substate grantees, and other subrecipients shall comply with the nondiscrimination provisions of section 167 of the Act.

(2) Nondiscrimination and equal opportunity requirements and procedures, including complaint processing and compliance reviews, are governed by the provisions of 29 CFR parts 31, 32, and 34 and are administered and enforced by the DOL Directorate of Civil Rights.

(3) Funds may be used to meet a recipient's or subrecipient's obligation to provide physical and programmatic accessibility and reasonable accommodation as required by section 504 of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990.

(b) The employment or training of participants in sectarian activities is prohibited.

§ 627.215 Relocation.

(a) No funds provided under the Act shall be used, or proposed for use, to encourage or to induce the relocation of an establishment, or part thereof, that results in the loss of employment for any employee of such establishment at the original location.

(b) For 120 days after the commencement or the expansion of commercial operations of a relocating establishment, no funds provided under this Act shall be used for customized or skill training, on-the-job training, or company-specific assessments of job applicants or employees, for any relocating establishment or part thereof at a new, or expanded location, if the relocation of such establishment or part thereof results in a loss of employment for any employee of such establishment at the original location.

(c) For the purposes of this section, *relocating establishment* means a business entity, including a successor in interest, which is moving any operations from a facility in one labor market area within the United States and its territories to a new or expanding facility in another labor market area.

(d) Pre-award review. To verify that an establishment which is new or expanding is not, in fact, relocating employment from another area, a standardized pre-award review shall be completed and documented jointly by the service delivery area or substate grantee with the establishment as a prerequisite to JTPA assistance.

(e) Violations and sanctions. The Secretary will promptly review and take appropriate action with regard to alleged violations of the provisions of paragraphs (a) and (b) of this section. Procedures for the investigation and resolution of violations are provided for under subpart F of this part. Sanctions and remedies are provided for under subpart G of this part.

§ 627.220 Coordination with programs under Title IV of the Higher Education Act including the Pell grant program.

(a) When financial assistance programs under title IV of the Higher Education Act (HEA) (the Pell Grant program, the Supplemental Education Opportunity Grant program, the Work-study program, the Perkins loan program, the Family Education Loan program—including Stafford, PLUS and Supplemental Loans for Students programs—and the Direct Loan Demonstration program), which provide student financial aid programs for postsecondary education, are available to JTPA participants, SDA's and title III SSG's shall establish coordination procedures and contractual safeguards to ensure that JTPA funds are in addition to funds otherwise available in the area (sections 141(b), 107(b), 205(b), and 265(b)).

(b)(1) To avoid the possibility of doubling billing and duplication of Federal funds, contracts with title IV-eligible educational institutions shall clearly identify available JTPA and HEA title IV funds, and stipulate that the educational institution's financial aid officer shall inform the SDA's/SSG's of the amounts and disposition of HEA title IV awards and other types of financial aid to each JTPA participant (section 141(b)).

(2) The participant awarded a Pell Grant shall be party to an agreement with the SDA/SSG and the educational institution which indicates the portion of the HEA grant to be applied to the cost of tuition, fees and books. This information shall be verified in program monitoring procedures.

(3) For JTPA contracts where Pell Grants are involved, SDA's/SSG's shall document in the ISS its determination with the educational institution of the participant's training-related financial assistance needs and the proper mix of JTPA and Pell Grant funds, since a Pell Grant may be used for applicable living expenses as well as for tuition, fees, and books. The SDA shall provide to the educational institution's financial aid

officer the names of JTPA participants who are to attend such institution and for whom JTPA payments will be made (sections 141(b) and 107(b)).

(c) In completing the objective assessment and developing the Individual Service Strategy for a title II participant, the SDA shall ensure, to the extent practicable, that available Federal, State, and local resources are coordinated sufficiently to meet the training and education-related costs of services, so that the participant can afford to complete the agreed-upon program successfully (sections 141(b), 107(b), 205(b), and 265(b)).

§ 627.225 Employment generating activities.

(a) No funds available under the Act shall be used for employment generating activities, economic development activities, investment in revolving loan funds, capitalization of businesses, investment in contract bidding resource centers, or similar activities. No funds under titles I, II or III of the Act shall be used for foreign travel.

(b) JTPA funds may be used for normal employer outreach and job development activities including, but not limited to: contacts with potential employers for the purpose of placement of JTPA participants; participation in business associations (such as chambers of commerce); JTPA staff participation on economic development boards and commissions, and work with economic development agencies, to provide information about JTPA and to assist in making informed decisions about community job training needs; subscriptions to relevant publications; general dissemination of information on JTPA programs and activities; labor market surveys; and development of on-the-job training (OJT), as defined in § 627.240; and other allowable JTPA activities in the private sector.

§ 627.230 Displacement.

(a) No currently employed worker shall be displaced by any participant (including partial displacement such as a reduction in the hours of non-overtime work, wages, or employment benefits).

(b) No participant shall be employed or job opening filled:

(1) When any other individual is on layoff from the same or any substantially equivalent job, or

(2) When the employer has terminated any regular employee without cause or otherwise reduced its workforce with the intention of filling the vacancy so created by hiring a participant whose wages are subsidized under the Act.

(c) Violations and sanctions. The Secretary will promptly review and take appropriate action with regard to alleged violations of the provisions of paragraphs (a) and (b) of this section. Procedures for the investigation and resolution of violations are provided for under subpart F of this part. Sanctions and remedies are provided for under subpart G of this part.

§ 627.235 General program requirements.

(a) The requirements set forth in sections 141, 142 and 143 of the Act apply to all programs under titles I, II, and III of the Act, except as provided elsewhere in the Act.

(b) Recipients shall ensure that an individual enrolled in a JTPA program meets the requirements of section 167(a)(5) of the Act, section 3 of the Military Selective Service Act (50 U.S.C. app. 453) and other requirements applicable to programs funded under the specific section or title of the Act under which the participant is enrolling (section 604).

(c) Recipients shall ensure that individuals are enrolled within 45 days of the date of application or a new application shall be taken, except that eligible summer program applicants under title II–B may be enrolled within 45 days into a summer youth enrollee pool, and no subsequent application need be taken prior to participation during the period of that summer program. In addition, the 45-day enrollment requirement shall not apply for individuals who have a valid certificate of continuing eligibility under the title III program, as described in § 631.3 and § 631.53 of this chapter.

(d) Programs operated under titles I, II, and III of the Act are not subject to the provisions of 29 CFR part 97, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments", except as otherwise explicitly provided in this chapter.

(e) If a recipient or SDA imposes a requirement relating to the administration and operation of programs funded by the Act, the recipient or SDA shall identify the requirement as a State- or SDA-imposed requirement (section 124).

§ 627.240 On-the-job training.

(a) General. "On-the-job training (OJT)" means training in the private or public sector given to a participant who, after objective assessment, has been referred to and hired by the employer. OJT which occurs while the participant is engaged in productive work which provides knowledge and skills essential to the full and adequate performance of the job. This does not preclude a participant who has been trained by one employer from ultimately being placed in a comparable, training-related position with another employer. OJT may be sequenced with or accompanied by other types of training such as classroom training or literacy training.

(b) Duration of OJT. (1) OJT authorized for a participant shall be limited to a period not in excess of that generally required for the acquisition of skills needed for the position within a particular occupation, but in no event may reimbursement exceed the later of 6 months or 499 hours, including time spent in related classroom training during which wages are paid by the employer. In determining the period generally needed for the acquisition of necessary skills, consideration shall be given to recognized reference materials, including, but not limited to the "Dictionary of Occupational Titles", employer training plans and content, and the participant's education, prior work experience, and ISS.

(2) OJT is encouraged in higher skill occupations appropriate to the participant's needs and occupational interests and training plans may be developed which reflect the customary duration of training specified in recognized reference materials; but the maximum period for which JTPA funds may be used to reimburse an employer for OJT shall be as specified in paragraph (b)(1) of this section.

(3) Recipients and SDA's/SSG's shall develop policies and procedures for determining training duration. These policies and procedures shall specify the guidelines and reference materials to be used and shall indicate how the specific training content, the participant's prior work experience, and the participant's ISS will be factored into the determination of training length.

(4) The ISS developed for each OJT participant shall document how the training length was determined and shall include a justification in each case where the length of training exceeds that provided for in a recognized reference material adopted by the recipient.

(c) Employer payments. (1) Payments for OJT shall not exceed the average of 50 percent of the total wages paid by the employer to each participant during the period of training.

(2) Payments to employers for OJT are deemed to be in compensation for the extraordinary cost associated with training participants and in compensation for the costs associated with the lower productivity of such participants. Employers are not required to maintain separate records to

document the extraordinary costs actually incurred.

(d) OJT contracts. (1) OJT contracts shall specify the types and duration of OJT and other services to be provided in sufficient detail, as specified in paragraph (d)(2) of this section, to allow for a fair analysis of the reasonableness of proposed costs and otherwise to comply with the applicable requirements of section 164 of the Act.

(2) Each contract with an OJT employer, at a minimum, shall specify the number of participants to be trained, participant wage rates, and the method and maximum amount of reimbursement; and shall provide a job description and brief training outline, including training hours by skill area or task. OJT employers shall maintain adequate time and attendance, payroll and other records to support amounts reimbursed under OJT contracts.

(3) Each contract with an OJT employer that is written by a brokering contractor (not written directly by the SDA/SSG or recipient) shall specify and clearly differentiate the services to be provided by the brokering contractor, the OJT employer, and other agencies and subcontractors, if any, including services provided with or without cost.

(4) OJT employers may also be reimbursed for the actual costs incurred in providing classroom training and training-related and supportive services to JTPA participants, including reimbursement for the cost of participant wages paid by the employer for time spent in such activities during working hours. Any such additional reimbursements shall be only for training and for support over and above that provided to regular employees, and must be documented by the employer.

(e) Labor standards. OJT participants shall be compensated by the employer at the same rates, including periodic increases not related to individual performance, as similarly situated employees or trainees, but in no event less than the highest of the minimum wage prescribed under the Fair Labor Standards Act of 1938, as amended, or applicable State or local minimum wage laws.

(f) Suitability of participants. (1) Only those participants who have been assessed and for whom OJT has been documented as an appropriate activity in the participant's ISS shall be referred to an employer for participation in OJT.

(2) An individual referred to the JTPA program by an employer may be enrolled in an OJT program with such employer only upon completion of an objective assessment and individual service strategy in which OJT with such employer has been determined to be an appropriate activity and the employer has not already hired such individual.

(3) Employment of an OJT participant with the participant's previous employer in the same, a similar, or an upgraded job is not permitted.

(g) Employer eligibility. (1) An OJT contract shall not be entered into with an employer who had two or more previous OJT contracts and exhibited a pattern of failing to provide OJT participants continued long-term employment as regular employees with wages and working conditions at the same level and to the same extent as similarly situated employees.

(2) Governors shall issue procedures and criteria to implement the requirement in paragraph (g)(1) of this section, and which shall specify the duration of the period of loss of eligibility. Such procedures may provide that situations in which OJT participants quit voluntarily or are terminated for cause or are released due to unforeseeable changes in business conditions will not necessarily result in termination of employer eligibility.

(h) Youth training program. OJT conducted under title II–C shall meet the requirements of subpart H of part 628 of this chapter (§ 628.804), as well as the requirements of this section. Where OJT is provided to youth concurrently enrolled under titles II–B and II–C, the source of funding for the OJT shall determine which requirements apply.

(i) A temporary employment agency may serve as the employer of record for purposes of providing OJT to a participant in employment only when such participants are treated as all other agency employees and not when such agency provides probationary seasonal, temporary, or intermittent employment.

(j) Monitoring. (1) Each contract with an OJT employer, whether awarded by the recipient, subrecipient, brokering contractor, or subcontractor, shall be periodically monitored on-site sufficiently to assure the validity and propriety of amounts claimed for reimbursement, that they are substantiated by payroll and time and attendance records, and that training is being provided as specified in the contract.

(2)(i) Brokering contractors shall conduct on-site monitoring of the OJT employers and other subcontractors to verify compliance with subcontract terms before making payments.

(ii) Nothing in this paragraph (j) shall relieve recipients and SDA's from responsibility for monitoring expenditures under the Act.

§ 627.245 Work experience.

(a) General. "Work experience" means a short-term or part-time work assignment with a public or private nonprofit employing agency for a participant who needs assistance in becoming accustomed to basic work requirements. It is prohibited in the private for-profit sector except for limited internships and entry employment experience programs, as provided in section 264(c)(1) (F) and (H).

(b) Suitability. Work experience is designed to promote the development of good work habits and basic work skills for individuals who have never worked or who have been out of the labor force for an extended period of time including, but not limited to, students, summer youth, school dropouts, individuals with disabilities, and older workers.

(c) Duration of work experience. Participation in work experience shall be for a reasonable length of time, based on the needs of the participant, which shall be documented in the participant's ISS. Generally, work experience for adults may not exceed the later of 6 months or 499 hours if working part time. The ISS shall include a justification in each case where work experience is authorized in excess of these limits for adults.

(d) Combination with other services. Work experience conducted under titles II–A and II–C shall be accompanied, either concurrently or sequentially, by other services designed to increase the basic education and/or occupational skills of the participant, as documented in the ISS.

(e) Work experience is not an allowable activity under title III of the Act.

§ 627.250 Interstate agreements.

The Secretary hereby grants authority to the several States to enter into interstate agreements and compacts in accordance with section 127 of the Act and, as specified in § 627.420(g), Procurement, of these regulations.

Subpart C—Payments, Benefits, and Working Conditions

§ 627.300 Scope and purpose.

This subpart sets forth requirements for allowable payments to JTPA participants. These include needs-based payments under title II, incentive and bonus payments, wages, wages for combined activities, and needs-related payments under title III. This subpart also sets forth rules for benefits and working conditions for JTPA participants. These include

requirements for supportive services, workers' compensation coverage or medical and accident insurance where there is no State workers' compensation law, working conditions which are detrimental to the participant's health and safety, and child labor laws.

§ 627.305 Payments.

(a)(1) General. Allowable types of payments to participants are needs-based payments for participants in programs under titles I and II as described in this section, incentive and bonus payments for participants in title II-C programs, wages, wages for combined activities in title II programs, and needs-related payments for participants in title III programs as described in section 631 of this chapter. These payments may be made in accordance with paragraphs (b) through (f) of this section.

(2) A participant shall receive no payments for training activities in which the participant fails to participate without good cause (section 142 (a)(1)).

(b) Needs-based payments. (1) In accordance with a locally developed formula or procedure, needs-based payments may be provided to individual participants where such payments are necessary to enable the individual to participate in training programs under this part. Such formula or procedure shall be included in the job training plan.

(2) Documentation supporting the locally developed formula or procedure shall be maintained in accordance with instructions from the Governor.

(3) The formula or procedure shall provide for the maintenance of an individual record of the determination of the need for, and the amount of, each participant's needs-based payments.

(4) An SDA shall be able to demonstrate that the formula or procedure has been utilized on an individual basis to determine the amount of needs-based payments approved for each participant.

(5) The individual determination of a participant's needs-based payment and the amount of such payment shall be based upon the results of the objective assessment and recorded in the ISS.

(c) Incentive and bonus payments. (1) Participants in programs funded under title II–C may receive incentive and bonus payments based on attendance and/or performance and in accordance with a locally developed formula or procedure. The formula or procedure shall include a specification of the requirements for the receipt of such payments and the level of payments and shall be described in the job training plan approved by the Governor.

(2) Documentation supporting the locally developed formula or procedure shall be maintained in accordance with instructions from the Governor.

(3) The formula or procedure shall provide for the maintenance of an individual record of the determination of the need for, and the amount of, any participant's incentive and bonus payments.

(4) SDA's must be able to demonstrate that the described formula or procedure has been applied on an individual basis to determine the bonus or incentive payment.

(d) Wages. Individuals participating in programs under title II of the Act in work experience, in limited internships in the private sector, in entry employment experience programs or in other activities which would result in an employee-employer relationship if wages were paid by the employer, may be paid wages. Any wage payments shall be at the same rates as similarly situated employees or trainees, but in no event less than the higher of the minimum wage prescribed under the Fair Labor Standards Act of 1938, as amended, or applicable State or local minimum wage laws. The SDA is responsible for meeting applicable Internal Revenue Service requirements.

(e) Wages for combined activities. (1) For title II programs, participants in one of the activities described in paragraph (d) of this section for which wages are payable for more than 50 percent of the participant's scheduled time including classroom training, may also be paid wages for hours of participation in classroom training.

(2) In order to pay wages in combined activities for adults as described in paragraph (e)(1) of this section, the classroom training must have a work-based context and be linked to any occupational skills training provided in the work experience component.

(f) Summer payments. Summer participants may receive wages or wage equivalent payments for participation in activities under title II–B.

(g) Needs-related payments. The requirements pertaining to needs-related payments provided for under section 315(b) of the Act, are described in part 631 of this chapter.

§ 627.310 Benefits and working conditions.

(a) Supportive services. (1) Supportive services may be provided in-kind, through cash assistance, or by arrangement with another human service agency when necessary to enable an individual eligible for training under a JTPA–assisted program, but who cannot afford to pay for such services, to participate in such JTPA-assisted program (section 4).

(2) Necessary supportive services shall be specified in a participant's ISS under title II, or a participant's individual readjustment plan under title III.

(3) Financial assistance shall only be used to pay for specific necessary services and shall be limited to discrete payments which are necessary for participation in a program funded under this Act.

(i) Provision of such financial assistance shall be based on an SDA/SSG procedure which shall be described in the job training plan.

(ii) Documentation supporting the procedure shall be maintained in accordance with instructions from the Governor.

(iii) The individual determination of financial assistance and the amount of such assistance shall be based upon the results of the objective assessment and documented in the participant's ISS.

(b) Where a participant is not covered under a State's workers' compensation law, the participant shall be provided with adequate on-site medical and accident insurance for work-related activities. For work-related activities, income maintenance coverage is not required for the participant (section 143(a)(3)).

(c) Where a participant is engaged in activities not covered under the Occupational Safety and Health Act of 1970, as amended, the participant shall not be required or permitted to work, be trained, or receive services in buildings or surroundings or under working conditions which are unsanitary, hazardous, or dangerous to the participant's health or safety. A participant employed or trained for inherently dangerous occupations, *e.g.*, fire or police jobs, shall be assigned to work in accordance with reasonable safety practices (section 143(a)(2)).

(d) In the development and conduct of programs funded under the Act, SDA's and SSG's shall ensure compliance with applicable child labor laws. (29 CFR part 570)

Subpart D—Administrative Standards

§ 627.400 Scope and purpose.

This subpart establishes the administrative and financial standards and requirements that apply to funds received under the Act.

§ 627.405 Grant agreement and funding.

(a)(1) Pursuant to § 627.200 of this part and the Governor/Secretary agreement, each program year there will be executed a grant agreement signed by

the Governor or the Governor's designated representative and the Secretary or the Secretary's designated representative (Grant Officer).

(2) The grant agreement described in paragraph (a)(1) of this section shall be the basis for Federal obligation of funds for the program year for programs authorized by titles I, II, and III, including any title III discretionary projects awarded to the State, and such other funds as the Secretary may award under the grant.

(b) Funding. The Secretary shall allot funds to the States in accordance with sections 162, 202, 252, 262, and 302 of the Act. The Secretary shall obligate such allotments through Notices of Obligation.

(c) Pursuant to instructions issued by the Secretary, additional funds may be awarded to States for the purpose of carrying out the administrative activities described in section 202(c)(1)(A) when a State receives an amount under such section that is less than $500,000 (section 453(d)).

(d) Termination. Each grant shall terminate when the period of availability for expenditure (funding period), as specified in section 161(b) of the Act, has expired and shall be closed in accordance with § 627.485, of this part, Closeout.

§ 627.410 Reallotment and reallocation.

(a) The Governor shall reallocate title II–A and II–C funds among service delivery areas within the State in accordance with the provisions of section 109(a) of the Act. The amounts to be reallocated, if any, shall be based on SDA obligations of the funds allocated separately to each SDA for title II–A or II–C programs.

(b) The Secretary shall reallot title II–A and II–C funds among the States in accordance with the provisions of section 109(b) of the Act. The amounts to be reallotted, if any, shall be based on State obligations of the funds allotted separately to each State for title II–A or II–C programs, excluding funds allotted under section 202(c)(1)(D) and the State's obligation of such funds.

(c) Title III funds shall be reallotted by the Secretary in accordance with section 303 of the Act.

§ 627.415 Insurance.

(a) General. Each recipient and subrecipient shall follow its normal insurance procedures except as otherwise indicated in this section and § 627.465 of this part, Property Management Standards.

(b) DOL assumes no liability with respect to bodily injury, illness, or any other damages or losses, or with respect to any claims arising out of any activity under a JTPA grant or agreement whether concerning persons or property in the recipient's or any subrecipient's organization or any third party.

(c) Consistent with § 627.310(b) of this part, Benefits and working conditions, recipients and subrecipients shall secure insurance coverage for injuries suffered by participants who are not covered by existing workers' compensation. Contributions to a reserve for a self-insurance program, to the extent that the type and extent of coverage and the rates and premiums would have been allowed had insurance been purchased to cover the risks, are allowable (section 143(a)(3)).

§ 627.420 Procurement.

(a) General. (1) The Governor, in accordance with the minimum requirements established in this section, shall prescribe and implement procurement standards to ensure fiscal accountability and prevent waste, fraud, and abuse in programs administered under this Act.

(2) When procuring property and services, a State shall follow the same policies and procedures it uses for procurements from its non-Federal funds, provided that the State's procurement procedures also comply with the minimum requirements of this section.

(3) Each subrecipient shall use its own procurement procedures which reflect applicable State and local laws and regulations, provided that the subrecipient's procurement procedures also comply with the requirements of this section and the standards established by the Governor, pursuant to paragraph (a)(1) of this section.

(4) States and subrecipients shall not use funds provided under JTPA to duplicate facilities or services available in the area (with or without reimbursement) from Federal, State, or local sources, unless it is demonstrated that the JTPA-funded alternative services or facilities would be more effective or more likely to achieve performance goals (sections 107(b) and 141(h)).

(b) Competition. (1) Each State and subrecipient shall conduct procurements in a manner which provides full and open competition. Some of the situations considered to be restrictive of competition include, but are not limited to:

(i) Placing unreasonable requirements on firms or organizations in order for them to qualify to do business;

(ii) Requiring unnecessary experience and excessive bonding;

(iii) Noncompetitive pricing practices between firms or organizations or between affiliated companies or organizations;

(iv) Noncompetitive awards to consultants that are on retainer contracts;

(v) Organizational conflicts of interest;

(vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement;

(vii) Overly restrictive specifications; and

(viii) Any arbitrary action in the procurement process.

(2) Each State and subrecipient shall have written procedures for procurement transactions. These procedures shall ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(3) Each State and subrecipient shall ensure that all prequalified lists of persons, firms, or other organizations which are used in acquiring goods and services are current and include sufficient numbers of qualified sources to ensure maximum open and free competition.

(c) Conflict of interest. (1) Each recipient and subrecipient shall maintain a written code of standards of conduct governing the performance of persons engaged in the award and administration of JTPA contracts and subgrants.

(2) Each recipient and subrecipient shall ensure that no individual in a decisionmaking capacity including PIC members (whether compensated or not) shall engage in any activity, including participation in the selection, award, or administration of a subgrant or contract supported by JTPA funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The individual,

(ii) Any member of the individual's immediate family,

(iii) The individual's partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm or organization selected for award.

(3) The officers, employees, or agents of the agency making the award will

neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements. States and subrecipients may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.

(4) PIC conflict of interest: (i) A PIC member shall not cast a vote on, nor participate in, any decisionmaking capacity on the provision of services by such member (or any organization which that member directly represents), nor on any matter which would provide any direct financial benefit to that member.

(ii) Neither membership on the PIC nor the receipt of JTPA funds to provide training and related services shall be construed, by themselves, to violate provisions of section 141(f) of the Act or § 627.420 of this chapter.

(5) To the extent permitted by State or local law or regulation, such standards of conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the awarding agency's officers, employees, or agents, or by contractors or their agents.

(d) Methods of procurement. Each State and subrecipient shall use one of the following methods of procurement, as appropriate for each procurement action: (1) *Small purchase procedures*—simple and informal procurement methods for securing services, supplies, or other property that do not cost more than $25,000 in the aggregate. The Governor shall establish standards for small purchase procedures which insure that price or rate quotations will be documented from an adequate number of qualified sources.

(2) *Sealed bids (formal advertising)*—bids are publicly solicited procurement for which a firm-fixed-price contract (lump sum or unit price) or other fixed-price arrangement is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The Governor shall establish standards for sealed bids which include a requirement that invitations for bids be publicly advertised, and bids shall be solicited from an adequate number of organizations.

(3) *Competitive proposals*—normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. The Governor shall establish standards for competitive proposals which include requirements for the establishment of a documented methodology for technical evaluations and award to responsible offeror whose proposals are most advantageous to the program with price, technical, and other factors considered.

(4) *Noncompetitive proposals (sole source)*—procurement through solicitation of a proposal from only one source, the funding of an unsolicited proposal, or, after solicitation of a number of sources, when competition is determined inadequate. Each State and subrecipient shall minimize the use of sole source procurements to the extent practicable, but in every case, the use of sole source procurements shall be justified and documented. Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and one of the following circumstances applies:

(i) The item or service is available only from a single source;

(ii) The public exigency or emergency need for the item or service does not permit a delay resulting from competitive solicitation;

(iii) The awarding agency authorizes noncompetitive proposals;

(iv) After solicitation of a number of sources, competition is determined inadequate;

(v) On-the-job training (OJT) contracts, except OJT brokering contracts which shall be selected competitively; or

(vi) Enrollment of individual participants in classroom training.

(e) Cost or price analysis. (1) Each recipient, in accordance with the minimum requirements established in this section, shall establish standards on the performance of cost or price analysis.

(2) Each recipient and subrecipient shall perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis depends on the facts surrounding the particular procurement and pricing situation, but at a minimum, the awarding agency shall make independent estimates before receiving bids or proposals. A cost analysis is necessary when the offeror is required to submit the elements of the estimated cost, when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. The offeror shall certify that to the best of its knowledge and belief, the cost data are accurate, complete, and current at the time of agreement on price. Contracts or modifications negotiated in reliance on such data should provide the awarding agency a right to a price adjustment to exclude any significant sum by which the price was increased because the contractor had submitted data that were not accurate, complete, or current as certified. A price analysis shall be used in all other instances to determine the reasonableness of the proposed contract price.

(3) JTPA procurements shall not permit excess program income (for nonprofit and governmental entities) or excess profit (for private for-profit entities). If profit or program income is included in the price, the awarding agency shall negotiate profit or program income as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit or program income, consideration shall be given to:

(i) The complexity of the work to be performed;

(ii) The risk borne by the contractor;

(iii) The contractor's investment;

(iv) The amount of subcontracting;

(v) The quality of the contractor's record of past performance;

(vi) Industry profit rates in the surrounding geographical area for similar work; and

(vii) Market conditions in the surrounding geographical area.

(4) Each recipient and subrecipient may charge to the grant or subgrant only those contractor costs which are consistent with the allowable cost provisions of § 627.435 of this part, including the guidelines issued by the Governor, as required at § 627.435(c) of this part.

(5) The cost plus a percentage of cost method of contracting shall not be used.

(f) Oversight. (1) Each recipient and subrecipient shall conduct and document oversight to ensure compliance with the procurement standards, in accordance with the requirements of § 627.475 of this part, Oversight and monitoring.

(2) Each recipient and subrecipient shall maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(g) Transactions between units of government. Procurement transactions between units of State or local governments, and any other entities organized principally as the administrative entity for service

delivery areas or substate areas, shall be conducted on a cost reimbursable basis.

(h) Contract provisions. Each recipient and subrecipient procurement shall:

(1) Clearly specify deliverables and the basis for payment; and

(2) Contain clauses that provide for:

(i) Compliance with the JTPA regulations (subrecipient contracts only);

(ii) For contracts other than small purchases, administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, which shall provide for such sanctions and penalties as may be appropriate;

(iii) Notice of JTPA requirements pertaining to patent rights;

(iv) Notice of JTPA requirements pertaining to copyrights and rights in data;

(v) For all contracts in excess of $10,000, termination for cause and for convenience by the awarding agency, including the manner by which the termination will be effected and the basis for settlement;

(vi) Access by the recipient, the subrecipient, the Department of Labor, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records (including computer records) of the contractor or subcontractor which are directly pertinent to charges to the program, in order to conduct audits and examinations, and make excerpts, transcripts, and photocopies; this right also includes timely and reasonable access to contractor's and subcontractor's personnel for the purpose of interviews and discussions related to such documents (vendor contracts);

(vii) Notice of awarding agency requirements and regulations pertaining to reporting;

(viii) Audit rights and requirements;

(ix) Payment conditions and delivery terms;

(x) Process and authority for contract changes; and

(xi) Provision against assignment.

(xii) The assurance of nondiscrimination and equal opportunity as found in 29 CFR 34.20, Assurance required; duration of obligation; covenants.

(3) The Governor may establish additional clauses, as deemed appropriate, for State and subrecipient procurements.

(i) Disputes. (1) The Governor shall insure that the recipient and each subrecipient have protest procedures to handle and resolve disputes relating to their procurements. A protester shall exhaust all administrative remedies with the subrecipient before pursuing a protest at a higher level.

(2) Violations of law will be referred to the Department of Labor Office of the Inspector General and other appropriate local and State authorities having proper jurisdiction.

(j) Each recipient and subrecipient shall maintain records sufficient to detail the significant history of a procurement. These records shall include, but are not necessarily limited to, the following: Rationale for the method of procurement, the selection of contract type, contractor selection or rejection, and the basis for the contract type.

§ 627.422 Selection of service providers.

(a) Service providers selected under titles I, II, and III of the Act shall be selected in accordance with the provisions of section 107 of the Act, except that section 107(d) shall not apply to training under title III.

(b) Consistent with the requirements of this section, the Governor shall establish standards to be followed by in making determinations of demonstrated performance, prior to the award of all subgrants, contracts, and subcontracts under titles I, II, and III of the Act. These standards shall comply with the requirements of this section, § 627.420, of this part, Procurement, and section 164(a)(3) of the Act. The standards shall require that determinations of demonstrated performance will be in writing, and completed prior to the award of a grant, subgrant, contract or subcontract.

(c) Each recipient and subrecipient, to the extent practicable, shall select service providers on a competitive basis, in accordance with the standards established in § 627.420(b) of this part, Procurement. When a State, SDA, SSG, or administrative entity determines that services will be provided by its own staff, a determination shall be made of the demonstrated performance of the staff to operate the program. This determination shall be in writing and take into consideration the matters listed in paragraph (d) of this section.

(d) Awards are to be made to organizations possessing the demonstrated ability to perform successfully under the terms and conditions of a proposed subgrant or contract. Such determinations shall be in writing, and take into consideration such matters as whether the organization has:

(1) Adequate financial resources or the ability to obtain them;

(2) The ability to meet the program design specifications at a reasonable cost, as well as the ability to meet performance goals;

(3) A satisfactory record of past performance (in job training, basic skills training, or related activities), including demonstrated quality of training; reasonable drop-out rates from past programs; the ability to provide or arrange for appropriate supportive services as specified in the ISS, including child care; retention in employment; and earning rates of participants;

(4) For title II programs, the ability to provide services that can lead to the achievement of competency standards for participants with identified deficiencies;

(5) A satisfactory record of integrity, business ethics, and fiscal accountability;

(6) The necessary organization, experience, accounting and operational controls; and

(7) The technical skills to perform the work.

(e) In selecting service providers to deliver services in an SDA, proper consideration shall be given to community-based organizations (section 107(a)). These community-based organizations shall be organizations, including women's organizations with knowledge about or experience in nontraditional training for women, which are recognized in the community in which they are to provide services.

(f) Appropriate education agencies in the service delivery area/substate area shall be provided the opportunity to provide educational services, unless the administrative entity demonstrates that alternative agency(ies) or organization(s) would be more effective or would have greater potential to enhance the participants' continued educational and career growth. (section 107(c)).

(g) In determining demonstrated performance of institutions/organizations which provide training, such performance measures as retention in training, training completion, job placement, and rates of licensure shall be taken into consideration.

(h) Amounts for service providers. Each SDA/SSG shall ensure that, for all services provided to participants through contracts, grants, or other agreements with a service provider, such contract, grant, or agreement shall include appropriate amounts necessary for administration and supportive services. (section 108(b)(5)).

(i) Service providers under agreements to conduct projects under section 123(a)(2) shall be selected in

accordance with the requirements of this section.

(j) The requirements of section 204(d)(2)(B) shall be followed in entering into agreements to provide services for older individuals funded under title II, part A.

(k) Additional requirements for selection of service providers by substate grantees are described at section 313(b)(6) of the Act and § 631.52 of this chapter.

§ 627.423 Funding restrictions for "high-risk" recipients and subrecipients.

(a) A recipient or subrecipient may be considered "high-risk" if an awarding agency determines that the recipient or subrecipient is otherwise responsible but:

(1) Has a history of unsatisfactory performance;

(2) Is not financially stable;

(3) Has a management system which does not meet the management standards set forth in this part; or

(4) Has not conformed to terms and conditions of a previously awarded grant or subgrant.

(b) If the awarding agency determines that a grant or subgrant will be made to a "high-risk" recipient or subrecipient, then special funding restrictions that address the "high-risk" status may be included in the grant or subgrant. Funding restrictions may include but are not limited to:

(1) Payment on a reimbursement basis;

(2) Requiring additional and/or more detailed financial or performance reports;

(3) Additional monitoring;

(4) Requiring the recipient or subrecipient to obtain specific technical or management assistance; and/or

(5) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such funding restrictions, the awarding official will notify the recipient or subrecipient as early as possible, in writing, of:

(1) The nature of the funding restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions; and

(4) The method of requesting reconsideration of the restrictions imposed.

§ 627.424 Prohibition of subawards to debarred and suspended parties.

(a) No recipient or subrecipient shall make any subgrants or permit any contract or subcontract at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs in accordance with the Department of Labor regulations at 29 CFR part 98.

(b) Recipients and subrecipients shall comply with the applicable requirements of the Department of Labor regulations at 29 CFR part 98.

§ 627.425 Standards for financial management and participant data systems.

(a)(1) *General.* The financial management system and the participant data system of each recipient and subrecipient shall provide federally required records and reports that are uniform in definition, accessible to authorized Federal and State staff, and verifiable for monitoring, reporting, audit, program management, and evaluation purposes (sections 165(a) (1) and (2), and 182).

(2) An awarding agency may review the adequacy of the financial management system and participant data system of any recipient/subrecipient as part of a preaward review or at any time subsequent to award.

(b) *Financial systems.* Recipients and subrecipients shall ensure that their own financial systems as well as those of their subrecipients provide fiscal control and accounting procedures that are:

(1) In accordance with generally accepted accounting principles, financial systems shall include:

(i) Information pertaining to subgrant and contract awards, obligations, unobligated balances, assets, expenditures, and income;

(ii) Effective internal controls to safeguard assets and assure their proper use;

(iii) A comparison of actual expenditures with budgeted amounts for each subgrant and contract;

(iv) Source documentation to support accounting records; and

(v) Proper charging of costs and cost allocation; and

(2) Be sufficient to:

(i) Permit preparation of required reports;

(ii) Permit the tracing of funds to a level of expenditure adequate to establish that funds have not been used in violation of the applicable restrictions on the use of such funds;

(iii) As required by section 165(g), permit the tracing of program income, potential stand-in costs and other funds that are allowable except for funding limitations as defined in § 627.480(g) of this part, Audits; and

(iv) Demonstrate compliance with the matching requirement of section 123(b)(2).

(c) *Applicant and participant data systems.* Each recipient and subrecipient shall ensure that records are maintained:

(1) Of each applicant for whom an application has been completed and a formal determination of eligibility or ineligibility made;

(2) Of each participant's enrollment in a JTPA-funded program in sufficient detail to demonstrate compliance with the relevant eligibility criteria attending a particular activity and with the restrictions on the provision and duration of services and specific activities imposed by the Act; and

(3) Of such participant information as may be necessary to develop and measure the achievement of performance standards established by the Secretary.

§ 627.430 Grant payments.

(a) Except as provided in paragraph (h)(2) of this section, JTPA grant payments shall be made to the Governor in accordance with the Cash Management Improvement Act of 1990 (31 U.S.C. 6501 et seq.), Department of Treasury regulations at 31 CFR part 205, and the State Agreement entered into with the Department of the Treasury.

(b) *Basic standards.* (1) Except as provided in paragraphs (d) and (e) of this section, each recipient and subrecipient shall be paid in advance, provided it maintains or demonstrates the willingness and ability to maintain procedures that are in accordance with Department of Treasury regulations at 31 CFR part 205.

(2) For payments to contractors under a grant or subgrant, reimbursement is the preferred method. However, the awarding agency may provide advances to contractors after determining that:

(i) Reimbursement is not feasible because the contractor lacks sufficient working capital;

(ii) The contractor meets the standards of this section and 31 CFR part 205 governing advances to subrecipients; and

(iii) Advance payment is in the best interest of the awarding agency.

(c) *Advance Payments.* To the maximum extent feasible, each subrecipient shall be provided advance payments via electronic funds transfer, following the procedures of the awarding agency.

(d) *Reimbursement.* (1) Reimbursement is the preferred method when the requirements in paragraph (b)(1) of this section are not met.

(i) Each recipient shall submit requests for reimbursement in

accordance with the provisions at 31 CFR part 205.

(ii) Each subrecipient shall submit requests for reimbursement as authorized by the awarding agency.

(2) Each subrecipient shall be paid as promptly as possible after receipt of a proper request for reimbursement.

(e) *Working capital advance payments.* If a subrecipient or contractor cannot meet the criteria for advance payments described in paragraph (b)(1) of this section, and the awarding agency has determined that reimbursement is not feasible because the subrecipient or contractor lacks sufficient working capital, the awarding agency may provide cash on a working capital advance payment basis. Under this procedure, the awarding agency shall advance cash to the subrecipient or contractor to cover its estimated disbursement needs for an initial period, generally geared to the subrecipient's or contractor's disbursing cycle and in no event may such an advance exceed 20 percent of the award amount. Thereafter, the awarding agency shall reimburse the subrecipient or contractor for its actual cash disbursements. The working capital advance method of payment shall not be used by recipients or subrecipients if the reason for using such method is the unwillingness or inability of the recipient or subrecipient to provide timely advances to the subrecipient to meet the subrecipient's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* Each recipient and subrecipient shall disburse program income, rebates, refunds, contract settlements, audit recoveries, and interest earned on such funds before requesting additional cash payments.

(g) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, each recipient and subrecipient is encouraged to use minority-owned banks (a bank which is owned at least 50 percent by minority group members). Additional information may be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A recipient or subrecipient shall not be required to maintain a separate bank account but shall separately account for Federal funds on deposit.

(h) *Interest earned on advances.* (1) An interest liability shall accrue on advance payments between Federal agencies and State governments as provided by the Cash Management Improvement Act (31 U.S.C. 6501 et seq.) and implementing regulations at 31 CFR part 205.

(2) Each subrecipient other than a State entity shall account for interest earned on advances of Federal funds as program income, as provided at § 627.450 of this part, Program income.

§ 627.435 Cost principles and allowable costs.

(a) General: To be allowable, a cost shall be necessary and reasonable for the proper and efficient administration of the program, be allocable to the program, and, except as provided herein, not be a general expense required to carry out the overall responsibilities of the Governor or a governmental subrecipient. Costs charged to the program shall be accorded consistent treatment through application of generally accepted accounting principles appropriate to the JTPA program, as determined by the Governor.

(b) Whether a cost is charged as a direct cost or as an indirect cost shall be determined in accordance with the descriptions of direct and indirect costs contained in the OMB Circulars identified in DOL's regulations at 29 CFR 97.22(b).

(c) Costs of another Federal grant, JTPA program, or cost category may not be shifted to a JTPA grant, subgrant, program, or cost category to overcome fund deficiencies, avoid restrictions imposed by law or grant agreements, or for other reasons.

(d) Applicable credits such as rebates, discounts, refunds, and overpayment adjustments, as well as interest earned on any of them, shall be credited as a reduction of costs if received during the same funding period that the cost was initially charged. Credits received after the funding period shall be returned to the Department as provided for at § 627.490(b).

(e) The following costs are not allowable charges to the JTPA program:

(1) Costs of fines and penalties resulting from violations of, or failure to comply with, Federal, State, or local laws and regulations;

(2) Back pay, unless it represents additional pay for JTPA services performed for which the individual was underpaid;

(3) Entertainment costs;

(4) Bad debts expense;

(5) Insurance policies offering protection against debts established by the Federal Government;

(6) Contributions to a contingency reserve or any similar provision for unforseen events;

(7) Costs prohibited by 29 CFR part 93 (Lobbying Restrictions) or costs of any salaries or expenses related to any activity designed to influence legislation or appropriations pending before the Congress of the United States; and

(8) Costs of activities prohibited in § 627.205, Public service employment prohibition; § 627.210, Nondiscrimination and nonsectarian activities; § 627.215, Relocation; § 627.225, Employment generating activities; and § 627.230, Displacement, of this part.

(f)(1) The cost of legal expenses required in the administration of grant programs is allowable. Legal expenses includes the expenses incurred by the JTPA system in the establishment and maintenance of a grievance system, including the costs of hearings and appeals, and related expenses such as lawyers' fees. Legal expenses do not include costs resulting from, and after, the grievance process such as fines and penalties, which are not allowable, and settlement costs, which may or may not be allowable.

(2) Legal services furnished by the chief legal officer of a State or local government or staff solely for the purpose of discharging general responsibilities as a legal officer are unallowable.

(3) Legal expenses for the prosecution of claims against the Federal Government, including appeals to an Administrative Law Judge, are unallowable.

(g) Costs of travel and incidental expenses incurred by volunteers are allowable provided such costs are incurred for activities that are generally consistent with section 204(c)(6) of the Act.

(h) Construction costs are not allowable costs except for funds used to:

(1) Purchase equipment, materials, and supplies for use by participants while on the job and for use in the training of such participants (examples of such equipment, materials, and supplies are handtools, workclothes, and other low cost items); and

(2) Cover costs of a training program in a construction occupation, including costs such as instructors' salaries, training tools, books, and needs-based payments, or other financial assistance to participants.

(i) The Governor shall prescribe and implement guidelines on allowable costs for SDA, SSG, and statewide programs that are consistent with the cost principles and allowable costs provisions of paragraphs (a) through (h) of this section and that include, at a minimum, provisions that specify the extent to which the following cost items are allowable or unallowable JTPA costs and, if allowable, guidelines on

conditions and amounts, documentation requirements, and any prior approval requirements applicable to such cost items:

(1) Compensation for personal services of staff, including wages, salaries, supplementary compensation, and fringe benefits;

(2) Costs incurred by the SJTCC, HRIC, PIC's, and other advisory councils or committees;

(3) Advertising costs;

(4) Depreciation and/or use allowances;

(5) Printing and reproduction costs;

(6) Interest expense;

(7) Expenditures for transportation and travel;

(8) Payments to OJT employers, training institutions, and other vendors;

(9) Fees or profits;

(10) Insurance costs, including insurance coverage for injuries suffered by participants who are not covered by existing workers' compensation, and personal liability insurance for PIC members;

(11) Participant supportive services including needs-based payments and, for youth enrolled in title II–C, cash incentives and bonuses, except that needs-based payments shall be determined in accordance with a locally developed formula or procedure;

(12) Acquisitions of capital assets;

(13) Building space costs, including rent, repairs, and alterations;

(14) Pre-agreement costs;

(15) Fund-raising activities;

(16) Professional services, including organizational management studies conducted by outside individuals or firms; and

(17) Taxes.

§ 627.440 Classification of costs.

(a) Allowable costs for programs under title II and title III shall be charged (allocated) to a particular cost objective/category to the extent that benefits are received by such cost objective/category. The classification of costs for programs under title III of the Act are set forth at § 631.13 of this chapter, Classification of costs at State and substate levels.

(b) For State-administered programs under Title II, the State is required to plan, control, and charge expenditures against the following cost objectives/categories:

(1) Titles II–A and II–C (combined)—capacity building technical assistance (sections 202(c)(1)(B) and 262(c)(1)(B) of the Act to carry out activities pursuant to sections 202(c)(3)(A) and 262(c)(3)(A) of the Act);

(2) Titles II–A and II–C (combined)—8 percent coordination (sections 202(c)(1)(C) and 262(c)(1)(C) of the Act to carry out activities pursuant to section 123(d)(2)(A) of the Act);

(3) Titles II–A and II–C (combined)—8 percent services/direct training (sections 202(c)(1)(C) and 262(c)(1)(C) of the Act to carry out activities pursuant to section 123(d)(2)(B) of the Act);

(4) Titles II–A and II–C (combined)—8 percent services/training-related and supportive services (sections 202(c)(1)(C) and 262(c)(1)(C) of the Act to carry out activities pursuant to section 123(d)2)(B) of the Act);

(5) Titles II–A and II–C (combined)—8 percent services/administration (sections 202(c)(1)(C) and 262(c)(1)(C) of the Act to carry out activities pursuant to section 123(d)(2)(B) of the Act);

(6) Titles II–A and II–C (combined)—8 percent services to disadvantaged (section 202(c)(1)(C) and 262(c)(1)(C) of the Act to carry out activities pursuant to section 123(d)(2)(C) of the Act);

(7) Title II–A—older individuals/direct training (section 202(c)(1)(D) of the Act to carry out activities pursuant to section 204(d) of the Act);

(8) Title II–A—older individuals/training-related and supportive services (section 202(c)(1)(D) of the Act to carry out activities pursuant to section 204(d) of the Act);

(9) Title II–A—older individuals/administration (section 202(c)(1)(D) of the Act to carry out activities pursuant to section 204(d) of the Act); and

(10) Titles II–A and II–C (combined)—administration (sections 202(c)(1)(A) and 262(c)(1)(A) of the Act).

(c)(1) SDA grant recipients and their subrecipients shall plan, control, and charge expenditures, excluding incentive funds received pursuant to sections 202(c)(1)(B) and 262(c)(1)(B) of the Act, against the following cost objectives/categories:

(i) Title II–A direct training services;

(ii) Title II–C direct training services;

(iii) Title II–A training-related and supportive services;

(iv) Title II–C training-related and supportive services;

(v) Title II–B training and supportive services;

(vi) Title II–A administration;

(vii) Title II–B administration; and

(viii) Title II–C administration.

(2) Incentive funds received pursuant to sections 202(c)(1)(B) and 262(c)(1)(B) of the Act, may be combined and accounted for in total, without regard to cost categories or cost limitations.

(d) States and subrecipients shall use the following definitions in assigning costs to the cost categories contained in paragraphs (b) and (c) of this section:

(1) *Direct training services—title II–A.* Costs for direct training services that may be charged to the title II–A program are:

(i) The personnel and non-personnel costs directly related to providing those services to participants specified in section 204(b)(1) of the Act and which can be specifically identified with one or more of those services. Generally, such costs are limited to:

(A) Salaries, fringe benefits, equipment, supplies, space, staff training, transportation, and other related costs of personnel directly engaged in providing training; and

(B) Salaries, fringe benefits, and related non-personnel costs of program component supervisors and/or coordinators as well as clerical staff, provided such staff work exclusively on activities or functions specified in section 204(b)(1) of the Act or actual allocations of time and related costs are made;

(ii) Books, instructional materials, and other teaching aids used by or for participants;

(iii) Equipment and materials used in providing training to participants;

(iv) Classroom space and utility costs;

(v) Costs of insurance coverage of participants as specified at § 627.415 of this part, Insurance; and

(vi) Payments to vendors for goods or services procured for the use of benefit of program participants for direct training services, including:

(A) Payments for commercially available training packages purchased competitively pursuant to section 141(d)(3) of the Act;

(B) Tuition charges and entrance fees of an educational institution, as specified at section 141(d)(3)(B) of the Act, when such tuition charges or entrance fees are not more than the educational institution's catalogue price, necessary to receive specific training, charged to the general public to receive the same training, and are for training of participants; and

(C) Payments to OJT employers, but not brokering contractors. Costs incurred under brokering arrangements shall be allocated to all of the benefitting cost categories.

(2) *Direct training services—title II–C.* Costs for direct training services that may be charged to the title II–C program are the costs identified in paragraph (d)(1) of this section as well as costs directly related to providing those services to participants specified in section 264(c)(1) of the Act and which can be specifically identified with one or more of those services.

(3) *Training-related and supportive services—title II–A.* Costs for training-related and supportive services that may be charged to the title II–A program are:

(i) The personnel and non-personnel costs directly related to providing outreach, intake, and eligibility determination as well as those services to participants specified in section 204(b)(2) of the Act and which can be specifically identified with one or more of those services. Generally, such costs are limited to:

(A) Salaries, fringe benefits, equipment, supplies, space, staff training, transportation, and other related costs of personnel directly engaged in providing training-related and/or supportive services; and

(B) Salaries, fringe benefits, and related non-personnel costs of program component supervisors and/or coordinators as well as clerical staff, provided such staff work exclusively on activities or functions specified in section 204(b)(2) of the Act or actual allocations of time and related costs are made.

(ii) Needs-based payments and other financial assistance to eligible applicants and participants.

(4) *Training-related and supportive services—title II–C.* Costs for training-related and supportive services that may be charged to the title II–C program are the costs identified in paragraph (d)(3) of this section as well as costs directly related to providing those services to participants specified in section 264(c)(2) of the Act and which can be specifically identified with one or more of those services.

(5) *Administration.* The costs of administration are that portion of necessary and allowable costs associated with the overall management and administration of the JTPA program and which are not directly related to the provision of services to participants or otherwise allocable to the program cost objectives/categories in paragraphs (b)(1)–(8) or (c)(1)–(5) of this section. These costs can be both personnel and non-personnel and both direct and indirect. Costs of administration shall include:

(i) Except as provided in paragraph (e)(1) of this section, costs of salaries, wages, and related costs of the recipient's or subrecipient's staff or PIC staff engaged in:

(A) Overall program management, program coordination, and general administrative functions, including the salaries and related costs of the executive director, JTPA director, project director, personnel officer, fiscal officer/bookkeeper, purchasing officer, secretary, payroll/insurance/property clerk and other costs associated with carrying out administrative functions;

(B) Preparing program plans, budgets, schedules, and amendments thereto;

(C) Monitoring of programs, projects, subrecipients, and related systems and processes;

(D) Procurement activities, including the award of specific subgrants, contracts, and purchase orders;

(E) Providing State or local officials and the general public with information about the program (public relations);

(F) Developing systems and procedures, including management information systems, for assuring compliance with program requirements;

(G) Preparing reports and other documents related to the program requirements;

(H) Coordinating the resolution of audit findings;

(I) Evaluating program results against stated objectives; and

(J) Performing administrative services including such services as general legal services, accounting services, audit services; and managing purchasing, property, payroll, and personnel;

(ii) Costs for goods and services required for administration of the program, including such goods and services as rental or purchase of equipment, insurance, utilities, office supplies, postage, and rental and maintenance of office space;

(iii) The costs of organization-wide management functions; and

(iv) Travel costs incurred for official business in carrying out program management or administrative activities, including travel costs incurred by PIC members.

(e) *Other cost classification guidance.* (1) Personnel and related non-personnel costs of the recipient's or subrecipient's staff, including project directors, that perform services or activities that benefit two or more of the cost objectives/categories identified in this section may be allocated to the benefitting cost objectives/categories based on documented distributions of actual time worked and related costs.

(2) Indirect or overhead costs normally shall be charged to administration, except that specific costs charged to an overhead or indirect cost pool that can be identified directly with a JTPA cost objective/category other than administration may be charged to the JTPA cost objective/category directly benefitted. Documentation of such charges shall be maintained.

(3) Where an award to a subrecipient is for a "commercially available or off-the-shelf training package", as defined at § 626.5 of this chapter, the subrecipient may charge all costs of such package to the direct training services cost category.

(4) Profits, fees, and other revenues earned by a subrecipient that are in excess of actual costs incurred, to the extent allowable and consistent with the guidelines on allowable costs prescribed by the Governor in accordance with § 627.435(i), Cost principles and allowable costs, may be allocated to all three cost categories based on the proportionate share of actual costs incurred attributable to each category.

(f) *Administrative cost pool.* Joint JTPA administrative costs that are charged initially to an administrative cost pool must be allocated, for JTPA Federal reporting purposes, to the benefitting JTPA programs based on the benefits received by each program.

§ 627.445 Limitations on certain costs.

(a) *State-administered programs*—(1) *Services for older individuals.* Of the funds allocated for any program year for section 202(c)(1)(D) of the Act to carry out activities pursuant to section 204(d) of the Act—

(i) Not less than 50 percent shall be expended for the cost of direct training services; and

(ii) Not more than 20 percent shall be expended for the cost of administration.

(2) *State education services.* Of the funds allocated for any program year for sections 202(c)(1)(C) and 262(c)(1)(C) of the Act to carry out activities pursuant to section 123(d)(2)(B) of the Act—

(i) Not less than 50 percent shall be expended for the cost of direct training services; and

(ii) Not more than 20 percent shall be expended for the cost of administration.

(3) The limitations specified in paragraph (a)(2) of this section shall apply to the combined total of funds allocated for sections 202(c)(1)(C) and for section 262(c)(1)(C) of the Act.

(b) *SDA allocations.* (1) In applying the title II–A and II–C cost limitations specified in section 108(b)(4) of the Act, the funds allocated to a service delivery area shall be net of any:

(i) Transfers made in accordance with sections 206, 256, and 266 of the Act; and

(ii) Reallocations made by the Governor in accordance with section 109(a) of the Act.

(2) The limitations specified in paragraph (b)(1) of this section shall apply separately to the funds allocated for title II–A and title II–C programs.

(3) The title II–B administrative cost limitation of 15 percent shall be 15 percent of the funds allocated for any program year to a service delivery area, excluding any funds transferred to title II–C in accordance with section 256 of the Act. (section 253(a)(3)).

(c)(1) The State shall establish a system to regularly assess compliance

with the cost limitations including periodic review and corrective action, as necessary.

(2) States and service delivery areas shall have the 3-year period of fund availability to comply with the cost limitations in section 108 of the Act and paragraphs (a) and (b) of this section. (section 161(b)).

(d) Administrative costs incurred by a community-based organization or private non-profit service provider shall not be included in the limitation described in section 108(b)(4)(A) of the Act if:

(1) Such costs are incurred under an agreement that meets the requirements of section 141(d)(3)(C) (i) and (ii) of the Act;

(2) The total administrative expenditures of the service delivery area, including the administrative expenditures of such community-based organizations and private non-profit service providers, do not exceed 25 percent of the funds allocated to the service delivery area for the program year of allocation; and

(3) The total direct training expenditures of the service delivery area, including the direct training expenditures of such community-based organizations and private non-profit service providers, is equal to or exceeds 50 percent of the funds allocated to the service delivery area for the program year less one-half of the percentage by which the total administrative expenditures of the service delivery area exceeds 20 percent; for example, if the total administrative expenditures of the service delivery area is 24 percent then the total direct training expenditures of the service delivery area must be at least 48 percent.

(e) The provisions of this section do not apply to any title III programs.

(f) The provisions of this section do not apply to any designated SDA which served as a concentrated employment program grantee for a rural area under the Comprehensive Employment and Training Act (section 108(d)).

§ 627.450 Program income.

(a) *Definition of program income.* (1) Program income means income received by the recipient or subrecipient directly generated by a grant or subgrant supported activity, or earned only as a result of the grant or subgrant. Program income includes:

(i) Income from fees for services performed and from conferences;

(ii) Income from the use or rental of real or personal property acquired with grant or subgrant funds;

(iii) Income from the sale of commodities or items fabricated under a grant or subgrant;

(iv) Revenues earned by a governmental or private non-profit service provider under either a fixed-price or reimbursable award that are in excess of the actual costs incurred in providing the services; and

(v) Except for States, as defined in the Department of Treasury's Cash Management Improvement Act regulation at 31 CFR 205.3, interest income earned on advances of subgrant funds.

(2) Program income does not include:

(i) Rebates, credits, discounts, refunds, etc., or interest earned on any of them, which shall be credited in accordance with § 627.435(d), Cost principles and allowable costs;

(ii) Taxes, special assessments, levies, fines, and other such governmental revenues raised by a recipient or subrecipient; or

(iii) Income from royalties and license fees for copyrighted material, patents, patent applications, trademarks, and inventions developed by a recipient or subrecipient.

(3) *Property.* Proceeds from the sale of property shall be handled in accordance with the requirements of § 627.465, of this part, Property management standards.

(b) *Cost of generating program income.* Costs incidental to the generation of program income may be deducted, if not already charged to the grant, from gross income to determine program income.

(c) *Use of program income.* (1) A recipient or subrecipient may retain any program income earned by the recipient or subrecipient only if such income is added to the funds committed to the particular JTPA grant or subgrant under which it was earned and such income is used for JTPA purposes and under the terms and conditions applicable to the use of the grant funds. The classification of costs in § 627.440 and the administrative cost limitation in § 627.445 shall apply to such funds.

(2) Program income generated under title II may also be used to satisfy the matching requirement of section 123(b) of the Act.

(3) Program income shall be used prior to the submission of the final report for the funding period of the program year to which the earnings are attributable.

(4) If the subrecipient that earned program income cannot use such income for JTPA purposes, the recipient may permit another entity to use the program income for JTPA purposes.

(5) Program income not used in accordance with the requirements of this section shall be returned to the Department of Labor.

(d) *Program and other income after the funding period.* Rental income and user fees on real and personal property acquired with JTPA funds shall continue to be JTPA program income in subsequent funding periods. There are no Federal requirements governing the disposition of all other income that is earned after the end of the funding period.

§ 627.455 Reports required.

(a) General: The Governor shall report to the Secretary pursuant to instructions issued by the Secretary. Reports shall be submitted no more frequently than quarterly in accordance with section 165(f) of the Act, and within 45 calendar days after the end of the report period. Additional reporting requirements for title III are set forth at § 631.15 of this chapter.

(b) A recipient may impose different forms or formats, shorter due dates, and more frequent reporting requirements on subrecipients, however, the recipient is required to meet the reporting requirements imposed on it by the Secretary.

(c) The Secretary may provide computer outputs to recipients to expedite or contribute to the accuracy of reporting. The Secretary may accept the required information from recipients in electronically reported format or computer printouts instead of prescribed forms.

(d) Financial reports: (1) Financial reports for programs under titles I, II, and III shall be submitted to the Secretary by each State quarterly and by program year of appropriation.

(2) Each recipient shall report program outlays on an accrual basis. If the recipient's accounting records are not normally kept on the accrual basis, the recipient shall develop such accrual information through an analysis of the documentation on hand.

(3) A final financial report is required 90 days after the expiration of a funding period (see § 627.485 of this part, Closeout).

§ 627.460 Requirements for records.

(a) Records, including the records identified in section 165(g) of the Act, shall be retained in accordance with section 165(e) of the Act. In establishing the time period of record retention requirements for records of subrecipients, the State may either:

(1) Impose the time limitation requirement of section 165(e) of the Act; or

(2) Require that subrecipient records for each funding period be retained for 3 years after the subrecipient submits to the awarding agency its final expenditure report for that funding period.

(b) The Governor shall ensure that the records under this section shall be retained beyond the prescribed period, if any litigation or audit is begun or if a claim is instituted involving the grant or agreement covered by the records. In these instances, the Governor shall ensure that the records shall be retained until the litigation, audit, or claim has been finally resolved.

(c) In the event of the termination of the relationship with a subrecipient, the Governor or SDA grant recipient or title III SSG shall be responsible for the maintenance and retention of the records of any subrecipient unable to retain them.

(d) Substitution of microfilm: Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) Federal and awarding agencies' access to records—(1) *Records of recipients and subrecipients.* The awarding agency, the Department of Labor (including the Department of Labor's Office of the Inspector General), and the Comptroller General of the United States, or any of their authorized representatives, have the right of timely and reasonable access to any books, documents, papers, computer records, or other records of recipients and subrecipients that are pertinent to the grant, in order to conduct audits and examinations, and to make excerpts, transcripts, and photocopies of such documents. This right also includes timely and reasonable access to recipient and subrecipient personnel for the purpose of interview and discussion related to such documents.

(2) *Expiration of right of access.* The right of access in this section is not limited to the required retention period but shall last as long as the records are retained.

§ 627.463 Public access to records.

(a) *Access*—(1) *Public access.* Except as provided in paragraph (b) of this section, records maintained by recipients or subrecipients pursuant to section 165(a) of the Act shall be made available to the public upon request, notwithstanding the provisions of State or local law.

(2) *Freedom of Information Act (FOIA).* Records maintained by recipients or subrecipients are not subject to the Freedom of Information Act (5 U.S.C. 552).

(b) *Exceptions.* A record maintained by a recipient or subrecipient pursuant to section 165(a) of the Act shall not be made available to the public, notwithstanding the provisions of State or local law, where such record is:

(1) Information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; or

(2) A trade secret, or commercial or financial information, obtained from a person and privileged or confidential.

(c) *Fees.* For processing of a request for a record under paragraph (a)(1) of this section, a recipient or subrecipient may charge a fee to the extent sufficient to recover the cost applicable to processing such request. (section 165(a)(4)).

§ 627.465 Property management standards.

(a) *States and governmental subrecipients.* Real property, equipment, supplies, and intangible property acquired or produced after July 1, 1993, by States and governmental subrecipients with JTPA funds shall be governed by the definitions and property requirements in the DOL regulations at 29 CFR part 97.

(b) *Nongovernmental subrecipients.* Except as provided in paragraph (c) of this section, real and personal property, including intangible property, acquired or produced after July 1, 1993, by nongovernmental subrecipients with JTPA funds shall be governed by the definitions and property management standards of OMB Circular A–110, as codified by administrative regulations of the Department of Labor.

(c) *Special provisions for property acquired under subgrants to commercial organizations*—(1) *Scope.* This paragraph (c) applies to real and personal property other than supplies that are acquired or produced after July 1, 1993, under a JTPA subgrant to a commercial organization.

(2) *Property acquired by commercial subrecipients.* Title to property acquired or produced by a subrecipient that is a commercial organization shall vest in the awarding agency, provided such agency is a governmental entity or nongovernmental organization that is not a commercial organization. Property so acquired or produced shall be considered to be acquired or produced by the awarding agency and paragraph (a) or (b) of this section, as appropriate shall apply to that property. If the awarding agency is also a commercial organization, title shall vest in the higher level, non commercial awarding agency that made the subaward to the commercial subrecipient.

(3) *Approval for acquisition.* A subrecipient that is a commercial organization shall not acquire property subject to this section without the prior approval of the awarding agency.

(d) *Notification to the Secretary of real property acquisitions.* Recipients shall notify the Secretary immediately upon acquisition of real property with JTPA funds, including acquisitions by subrecipients. Such notification shall include the location of the real property and the Federal share percentage.

§ 627.470 Performance standards.

(a) General: The Secretary shall prescribe performance standards for adult programs under title II–A, for youth programs under title II–C, for dislocated worker programs under title III, and for older worker programs under section 204(d) of the Act. Any performance standards developed for employment competencies shall be based on such factors as entry level skills and other hiring requirements.

(b) Pursuant to instructions and timelines issued by the Secretary, the Governor shall:

(1) Collect the data necessary to set performance standards pursuant to section 106 of the Act; and

(2) Maintain records and submit reports required by sections 106(j)(3), 165(a)(3), (c)(1), and (d) and 121(b)(6) of the Act.

(c) Title II performance standards: (1) The Governor shall establish SDA performance standards for title II within the parameters set by the Secretary pursuant to sections 106(b) and (d) of the Act and apply the standards in accordance with section 202(c)(1)(E) of the Act.

(2) The Governor shall establish incentive award policies pursuant to section 106(b)(7) of the Act, except for programs operated under section 204(d) of the Act.

(3) The Governor shall provide technical assistance to SDA's failing to meet performance standards established by the Secretary for a given program year. (section 106a(j)(2)).

(4)(i) If an SDA fails to meet a prescribed number of the Secretary's performance standards for 2 consecutive years, the Governor shall notify the Secretary and the service delivery area of the continued failure, and impose a reorganization plan (section 106(j)(4)).

(ii) The number of standards deemed to constitute failure shall be specified by the Secretary biennially and shall be based on an appropriate proportion of the total number of standards established by the Secretary for that performance cycle.

(iii) A reorganization plan shall not be imposed for a failure to meet performance standards other than those established by the Secretary.

(e)(1) If the Governor does not impose a required reorganization plan, required by paragraph (c)(4) of this section, within 90 days of the end of the second program year in which an SDA has failed to meet its performance standards, the Secretary shall develop and impose such a plan (section 106(j)(5)).

(2) Before imposing a reorganization plan, the Secretary shall notify the Governor and SDA in writing of the intent to impose the plan and provide both parties the opportunity to submit comments within 30 days of receipt of the Secretary's notice.

(d) An SDA subject to a reorganization plan under paragraph (c)(4) or (d) of this section may, within 30 days of receiving notice of such action, appeal to the Secretary to revise or rescind the reorganization plan under the procedures set forth at § 627.471 of this subpart, Reorganization plan appeals (section 106(j)(6)(A)).

(f) Secretarial action to recapture or withhold funds: (1) The Secretary shall recapture or withhold an amount not to exceed one-fifth of the State administration set-aside allocated under sections 202(c)(1)(A) and 262(c)(1)(A) of the Act when:

(i) the Governor has failed to impose a reorganization plan under paragraph (c)(4) of this section, for the purposes of providing technical assistance under a reorganization plan imposed by the Secretary (section 106(j)(5)(B)); or

(ii) the Secretary determines in an appeal provided for at paragraph (e) of this section, and set forth at §627.471 of this subpart, that the Governor has not provided appropriate technical assistance as required at section 106(j)(2), for the purposes of providing such assistance (section 106(j)(6)(B)).

(2)(i) A Governor of a State that is subject to recapture or withholding under paragraph (f)(1) of this section may, within 30 days of receipt of such notice, appeal such recapture or withholding to the Secretary.

(ii) The Secretary may consider any comments submitted by the Governor, and shall make a decision within 45 days after the appeal is received.

(g) Title III performance standards: (1) The Governor shall establish SSG performance standards for programs under title III within the parameters set annually by the Secretary pursuant to section 106(c) and (d) of the Act.

(2) Any performance standard for programs under title III shall make appropriate allowances for the difference in cost resulting from serving workers receiving needs-related payments authorized under § 631.20 of this chapter (section 106(c)(2)).

(3) The Secretary annually shall certify compliance, if the program is in compliance, with the title III performance standards established pursuant to paragraph (a) of section 322(a)(4).

(4) The Governor shall not establish standards for the operation of programs under title III that are inconsistent with the performance standards established by the Secretary under provisions of section 106(c) of the Act (Section 311(b)(8)).

(5) When an SSG fails to meet performance standards for 2 consecutive years, the Governor may institute procedures pursuant to the Governor's by-pass authority in accordance with § 631.38(b) of this chapter or require redesignation of the substate grantee in accordance with § 631.35 of this chapter, as appropriate.

§ 627.471 Reorganization plan appeals.

(a) A reorganization plan imposed by the Governor, as provided for at § 627.470(c)(4) of this part, or by the Secretary, as provided for at § 627.470(d) of this part, may be appealed directly to the Secretary without prior exhaustion of local remedies.

(b)(1) Appeals shall be submitted to the Secretary, U.S. Department of Labor, Washington, DC 20210, Attention: ASET. A copy of the appeal shall be provided simultaneously to the Governor.

(2) The Secretary shall not accept an appeal dated later than 30 days after receipt of written notification from the Governor or the Secretary.

(3) The appealing party shall explain why it believes the decision to impose the reorganization plan is contrary to the provisions of section 106 of the Act.

(4) The Secretary shall accept the appeal and make a decision only with regard to determining whether or not the decision to impose the reorganization plan is inconsistent with section 106 of the Act. The Secretary may consider any comments submitted by the Governor or the SDA, as appropriate. The Secretary shall make a final decision within 60 days after this appeal is received. (section 106(j)).

§ 627.475 Oversight and monitoring.

(a) The Secretary may monitor all recipients and subrecipients of financial assistance pursuant to section 163 of the Act.

(b) The Governor is responsible for oversight of all SDA and SSG activities and State-supported programs. The Governor shall develop and make available for review a State monitoring plan. The plan shall specify the mechanism which:

(1) Ensures that established policies to achieve program quality and outcomes meet the objectives of the Act and regulations promulgated thereunder;

(2) Enables the Governor to determine if SDA's and SSG's have demonstrated substantial compliance with the requirements for oversight;

(3) Determines that a Job Training Plan shall be disapproved if the plan does not meet the criteria contained in section 105(b)(1) of the Act;

(4) Regularly examines expenditures against the cost categories and cost limitations specified in the Act and these regulations;

(5) Ensures that SDA's and SSG's are monitored onsite regularly, but not less than once annually; and

(6) Provides for corrective action to be imposed if items in paragraphs (b) (1)–(4) of this section are not met.

(c) The Governor shall issue instructions to SDA's and title III SSG's on the development of a substate monitoring plan. The instructions for development of the monitoring plan, at a minimum, shall address the monitoring scope and frequency, and the Secretary's emphasis and direction. The substate monitoring plan shall be part of the job training plan.

(d) The Governor shall establish general standards for PIC oversight responsibilities. The required PIC standards shall be included in the Governor's Coordination and Special Services Plan (GCSSP).

(e)(1) The PIC, pursuant to standards established by the Governor, shall establish specific policies for monitoring and oversight of SDA performance which shall be described in the job training plan.

(2) The PIC may exercise independent oversight over activities under the job training plan which shall not be circumscribed by agreements with the appropriate chief elected official(s) of the SDA.

(f) The PIC and chief elected official(s) may conduct such oversight as they, individually or jointly, deem necessary or delegate oversight responsibilities to an appropriate entity pursuant to their mutual agreement.

§ 627.480 Audits.

(a) *Non-Federal Audits*—(1) *Governments.* Each recipient and governmental subrecipient is responsible for complying with the Single Audit Act of 1984 (31 U.S.C. 7501–7) and 29 CFR part 96, the

Department of Labor regulations which implement Office of Management and Budget (OMB) Circular A–128, "Audits of State and Local Governments".

(2) *Non-governmental subrecipients.* Each non-governmental subrecipient shall comply with OMB Circular A–133, "Audits of Institutions of Higher Education and Other Nonprofit Institutions", as implemented by the Department of Labor regulations at 29 CFR part 96. The provisions of this paragraph (a)(2) do not apply to any non-governmental subrecipient that is:

(i) A commercial organization; or

(ii) A hospital or an institution of higher education for which State or local governments choose to apply OMB Circular A–128.

(3) *Commercial organizations.* A commercial organization which is a subrecipient and which receives $25,000 or more a year in Federal financial assistance to operate a JTPA program shall have either:

(i) A program specific annual independent financial and compliance audit conducted and prepared in accordance with generally accepted government auditing standards; or

(ii) An organization-wide audit that includes coverage of the JTPA program within its scope.

(b) *Federal audits.* The notice of audits conducted or arranged by the Office of Inspector General or the Comptroller General shall be provided in advance as required by section 165(b) of the Act.

(c) *Audit reports.* (1) Audit reports of recipient-level entities and other organizations which receive JTPA funds directly from the U.S. Department of Labor shall be submitted to the Office of the Inspector General.

(2) Audit reports of other organizations than those described in paragraph (c)(1) of this section shall be submitted to the entity which provided the JTPA funds.

(d) Each entity that receives JTPA program funds and awards a portion of those funds to one or more subrecipients shall:

(1) Ensure that each subrecipient complies with the applicable audit requirements;

(2) Resolve all audit findings that impact the JTPA program with its subrecipient and ensure that corrective action for all such findings (including debt collection action for disallowed costs) is instituted within 6 months after receipt of the audit report; and

(3) Maintain an audit resolution file documenting the disposition of reported questioned costs and corrective actions taken for all findings; the ETA Grant Officer may request that an audit resolution report, as specified in paragraph (e)(2) of this section, be submitted for such audits or may have the audit resolution reviewed through the compliance review process.

(e)(1) Audits of recipient-level entities and other organizations which receive JTPA funds directly from DOL and all audits conducted by or under contract for the Office of Inspector General shall be issued by the OIG to the Employment and Training Administration after acceptance by OIG.

(2) After receipt of the audit report, the ETA Grant Officer shall request that the State submit an audit resolution report documenting the disposition of the reported questioned costs, i.e., whether allowed or disallowed, the basis for allowing questioned costs, the method of repayment planned or required, and corrective actions, including debt collection efforts, taken or planned.

(f) If the recipient intends to request a waiver of liability under section 164(e)(2) of the Act for misexpenditures by a subrecipient, such requests shall be accompanied by the audit resolution report along with supporting documentation.

(g) If the recipient intends to propose the use of "stand-in" costs as substitutes for otherwise unallowable costs, the proposal shall be included with the audit resolution report. To be considered, the proposed "stand-in" costs shall have been reported as uncharged JTPA program costs, included within the scope of the audit, and accounted for in the auditee's financial system as required by § 627.425, of this part, Standards for financial management and participant data systems. To be accepted, stand-in costs shall be from the same title, cost category, and funding period as the costs which they are proposed to replace.

(h) After receiving the audit resolution report, the ETA Grant Officer shall review the report, the recipient's disposition, and any liability waiver request. If the Grant Officer agrees with all aspects of the recipient's disposition of the audit, the Grant Officer shall so notify the recipient. If the Grant Officer disagrees with the recipient's conclusion on specific points in the audit, the Grant Officer shall resolve the audit through the initial and final determination process described in § 627.606 of this part.

§ 627.481 Audit resolution.

(a) *Federal audit resolution.* When the OIG issues an audit report to the Employment and Training Administration for resolution, the ETA Grant Officer shall provide a copy of the report to the recipient (if it does not already have the report), along with a request that the recipient submit its audit resolution report as specified in § 627.480(e)(2), of this part, unless the Grant Officer chooses to proceed directly against the recipient pursuant to § 627.601.

(1) For audits of recipient-level entities and other organizations which receive JTPA funds directly from DOL, the Grant Officer shall request that the audit resolution report be submitted within 60 days from the date that the audit report is issued by the OIG.

(2) For audits of subrecipient organizations, the Grant Officer shall provide the recipient with a 180-day period within which to resolve the audit with its subrecipient(s), and shall request that the audit resolution report be submitted at the end of that 180-day period.

(b) After receiving the audit resolution report, the ETA Grant Officer shall review the report, the recipient's disposition, any liability waiver request, and any proposed "stand-in" costs. If the Grant Officer agrees with all aspects of the recipient's disposition of the audit, the Grant Officer shall so notify the recipient, constituting final agency action on the audit. If the Grant Officer disagrees with the recipient's conclusion on specific points in the audit, or if the recipient fails to submit its audit resolution report, the Grant Officer shall resolve the audit through the initial and final determination process described in § 627.606 of this part. Normally, the Grant Officer's notification of agreement (a concurrence letter) or disagreement (an initial determination) with the recipient's audit resolution report will be provided within 180 days of the Grant Officer's receipt of the report.

(c) *Non-Federal audit resolution.* (1) To ensure timely and appropriate resolution for audits of all subrecipients, including SDA grant recipients and title III SSG's, and to ensure recipient-wide consistency, the Governor shall prescribe standards for audit resolution and debt collection policies and procedures that shall be included in each job training plan in accordance with section 104(b)(12) of the Act.

(2) The Governor shall prescribe an appeals procedure for audit resolution disputes which, at a minimum, provides for:

(i) The period of time, not less than 15 days nor more than 30 days, after the issuance of the final determination in which an appeal may be filed;

(ii) The rules of procedure;

(iii) Timely submission of evidence;

(iv) The timing of decisions; and
(v) Further appeal rights, if any.

§ 627.485 Closeout.

(a) *General.* The Grant Officer shall close out each annual JTPA grant agreement within a timely period after the funding period covered by the award has expired.

(b) Revisions to the reported expenditures for a program year of funds may be made until 90 days after the time limitation for expenditure of JTPA funds, as set forth in section 161(b) of the Act, has expired. The Grant Officer may extend this deadline if the recipient submits a written request with justification. After that time, the Grant Officer shall consider all reports received as final and no additional revisions may be made.

(c) When closing out a JTPA grant, the Grant Officer shall notify the recipient, by certified mail, that, since the time limitation for expenditure of funds covered by the grant award has expired, it is the Department of Labor's intent to close the annual grant as follows:

(1) *Cost adjustment.* Based on receipt of reports in paragraph (b) of this section, the Grant Officer shall make upward or downward adjustments to the allowable costs; and

(2) *Cash adjustment.* DOL shall make prompt payment to the recipient for allowable reimbursable costs; the recipient shall promptly refund to DOL any balance of cash advanced that is in excess of allowable costs for the grant award being closed.

(d) The recipient shall have an additional 60 days after the date of the notice described in paragraph (c) of this section in which to provide the Grant Officer with information as to the reason(s) why closeout should not occur.

(e) At the end of the 60-day period described in paragraph (d) of this section, the Grant Officer shall notify the recipient that closeout has occurred, unless information provided by the recipient, pursuant to paragraph (d) of this section, indicates otherwise.

§ 627.490 Later disallowances and adjustments after closeout.

The closeout of a grant does not affect:

(a) The Grant Officer's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The recipient's obligation to return any funds due as a result of later refunds, corrections, subrecipient audit disallowances, or other transactions;

(c) Records retention requirements in § 627.460 of this part, Requirements for records, and § 627.463 of this part, Public access to records;

(d) Property management requirements in § 627.465 of this part, Property management standards; and

(e) Audit and audit resolution requirements in § 627.480 of this part, Audits and § 627.481 of this part, Audit resolution.

§ 627.495 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms of the grant constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Secretary may take any actions permitted by law to recover the funds.

(b) The Secretary shall charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR ch. II).

Subpart E—Grievances Procedures at the State and Local Level

§ 627.500 Scope and purpose.

(a) *General.* This subpart establishes the procedures which apply to the handling of non-criminal complaints under the Act at the Governor, the SDA, and the SSG levels. Nothing contained in this subpart shall be deemed to prejudice the separate exercise of other legal rights in pursuit of remedies and sanctions available outside the Act. Complaints of discrimination pursuant to section 167(a) of the Act shall be handled under 29 CFR parts 31, 32 and 34.

(b) *Handling of criminal complaints and reports of fraud, waste, and abuse.* All information and complaints involving fraud, waste, abuse or criminal activity shall be reported directly and immediately to the DOL Office of the Inspector General.

(c) *Non-JTPA remedies.* Whenever any person, organization, or agency believes that a recipient, an SDA, an SSG, or other subrecipient has engaged in conduct that violates the Act and that such conduct also violates a Federal statute other than JTPA, or a State or local law, that person, organization, or agency may, with respect to the non-JTPA cause of action, institute a civil action or pursue other remedies authorized under other Federal, State or local law against the recipient, the SDA, the SSG, or other subrecipient, without first exhausting the remedies in this subpart. Nothing in the Act or this chapter shall:

(1) Allow any person or organization to file a suit which alleges a violation of JTPA or regulations promulgated thereunder without first exhausting the administrative remedies described in this subpart; or

(2) Be construed to create a private right of action with respect to alleged violations of JTPA or the regulations promulgated thereunder.

§ 627.501 State grievance and hearing procedures for non-criminal complaints at the recipient level.

(a)(1) Each recipient shall maintain a recipient-level grievance procedure and shall ensure the establishment of procedures at the SDA level and the SSG level for resolving any complaint alleging a violation of the Act, regulations promulgated thereunder, grants, or other agreements under the Act. The procedures shall include procedures for the handling of complaints and grievances arising in connection with JTPA programs operated by each SDA, SSG, and subrecipient under the Act (section 144(a)).

(2) The procedures described in paragraph (a)(1) of this section shall also provide for resolution of complaints arising from actions taken by the recipient with respect to investigations or monitoring reports.

(b) The recipient's grievance hearing procedure shall require written notice to interested parties of the date, time, and place of the hearing; an opportunity to present evidence; and a written decision. For matters under paragraph (a)(2) of this section, the notice of hearing shall indicate the nature of the violation(s) which the hearing covers.

§ 627.502 Grievance and hearing procedures for non-criminal complaints at the SDA and SSG levels.

(a) Each SDA and SSG, pursuant to guidelines established by the recipient, shall establish procedures for resolving complaints and grievances arising in connection with JTPA programs operated by the SDA, the SSG, and other subrecipients under the Act. The procedures also shall provide for resolution of complaints arising from actions taken by the SDA or the SSG with respect to investigations or monitoring reports of their subgrantees, contractors, and other subrecipients. (section 144(a)).

(b) Each SDA and SSG grievance hearing procedure shall include written notice of the date, time, and place of the hearing; an opportunity to present evidence; a written decision; and a notice of appeal rights.

(c) The SDA and SSG procedures shall provide for a decision within 60 days of the filing of the complaint.

§ 627.503 Recipient-level review.

(a) If a complainant does not receive a decision at the SDA or the SSG level within 60 days of filing the complaint or receives a decision unsatisfactory to the complainant, the complainant shall have the right to request a review of the complaint by the recipient. The recipient shall issue a decision within 30 days of receipt of the complaint.

(b) The recipient shall also provide for an independent review of a complaint initially filed at the recipient level on which a decision was not issued within 60 days of receipt of a complaint or on which the complainant has received an adverse decision. A decision shall be made within 30 days of receipt by the recipient.

(c) A request for review under the provisions of paragraph (a) or (b) of this section shall be filed within 10 days of receipt of the adverse decision or, if no timely decision is rendered, within 15 days from the date on which the complainant should have received a timely decision.

(d) With the exception of complaints alleging violations of the labor standards at section 143 of the Act, the recipient's decision is final unless the Secretary exercises the authority for Federal-level review in accordance with the provisions at § 627.601, of this part, Complaints and grievances at the Federal level. Complaints alleging violations of section 143 of the Act shall be handled under the procedures set forth at § 627.603, of this part, Special handling of labor standards violations under section 143.

§ 627.504 Non-criminal grievance procedure at employer level.

(a) Recipients, SDA's, SSG's, and other subrecipients shall assure that other employers, including private-for-profit employers of participants under the Act, have a grievance procedure relating to the terms and conditions of employment available to their participants (section 144(b)).

(b) Employers under paragraph (a) of this section may operate their own grievance system or may utilize the grievance system established by the recipient, the SDA, or the SSG under this subpart. Employers shall inform participants of the grievance procedures they are to follow when the participant begins employment.

(c) An employer grievance system shall provide for, upon request by the complainant, a review of an employer's decision by the SDA, or the SSG and the recipient if necessary, in accordance with § 627.501 and § 627.502 of this part.

Subpart F—Federal handling of non-criminal complaints and other allegations.

§ 627.600 Scope and purpose.

This subpart establishes the procedures which apply to the filing, handling, and reviewing of complaints at the Federal level. Nothing in the Act or this chapter shall allow any person or organization to join or sue the Secretary with respect to the Secretary's responsibilities under JTPA except after exhausting the remedies in subpart E of this part and this subpart F. Complaints of discrimination pursuant to section 167(a) of the Act shall be handled under 29 CFR parts 31, 32 and 34.

§ 627.601 Complaints and allegations at the Federal level.

(a) The types of complaints and allegations that may be received at the Federal level for review include:

(1) Complaints for which the recipient has failed to issue a timely decision as required by § 627.503 of this part;

(2) Alleged violations of the Act and/or the regulations promulgated thereunder resulting from Federal, State, and/or SDA and SSG monitoring and oversight reviews;

(3) Alleged violations of the labor standards provisions at section 143 of the Act;

(4) Alleged violations of the relocation provisions in section 141(c) of the Act; and

(5) Other allegations of violations of the Act or the regulations promulgated thereunder.

(b) Upon receipt of a complaint or allegation alleging any of the violations listed in paragraph (a) of this section, the Secretary may:

(1) Direct the recipient to handle a complaint through local grievance procedures established under § 627.502 of this part; or

(2) Investigate and determine whether the recipient or subrecipient(s) are in compliance with the Act and regulations promulgated thereunder (section 163 (b) and (c)).

(3) Allegations of violations of sections 141(c) or 143 of the Act and § 627.503 of this part shall be handled under paragraph (b)(2) of this section.

§ 627.602 Resolution of investigative findings.

(a)(1) As a result of an investigation or monitoring by the Department, or of the actions specified in paragraph (c) of § 627.601 of this part, the Grant Officer shall notify the recipient of the findings of the investigation and shall give the recipient a period of time, not to exceed 60 days, depending on the nature of the findings, to comment and to take appropriate corrective actions.

(2) The Grant Officer shall review the complete file of the investigation and the recipient's actions. The Grant Officer's review shall take into account the sanction provisions of subpart G of this part. If the Grant Officer agrees with the recipient's handling of the situation, the Grant Officer shall so notify the recipient. This notification shall constitute final agency action.

(3) If the Grant Officer disagrees with the recipient's handling of the matter, the Grant Officer shall proceed pursuant to § 627.606 of this part, Grant Officer resolution.

(b) [Reserved].

§ 627.603 Special handling of labor standards violations under Section 143 of the Act.

(a) A complaint alleging JTPA section 143 violations may be submitted to the Secretary by either party to the complaint when:

(1) The complainant has exhausted the grievance procedures set forth at subpart E of this part, or

(2) The 60-day time period specified for reaching a decision under a procedure set for at subpart E of this part has elapsed without a decision. (section 144 (a) and (d)(1)).

(b)(1) The Secretary shall investigate the allegations contained in a complaint alleging violations of JTPA section 143, make a determination whether a violation has occurred, and issue a decision within 120 days of receipt by the Secretary of the complaint. (section 144 (c) and (d)).

(2) If the results of the Secretary's investigation indicate that a decision by a recipient under a procedure set forth at subpart E of this part requires modification or reversal, or that the 60-day time period for decision under section 144(a) has elapsed, the Secretary shall modify, reverse, or issue such decision.

(3) If the Secretary modifies or reverses a decision made under a procedure set forth at subpart E of this part, or issues a decision where the 60-day time period has elapsed without a decision, the Secretary shall offer an opportunity for a hearing, in accordance with the procedures under section 166 of the Act and subpart H of this part (sections 144(d)(2) and 166(a)).

(4) If the Secretary upholds a recipient's decision, the determination is the final decision of the Secretary. (section 144(d)(3)). This decision is not appealable to the Office of Administrative Law Judges.

(c) Except as provided in paragraph (d) of this section, remedies available

under this section to a grievant for violations of section 143 of the Act shall be limited to:

(1) Suspension or termination of payments under the Act;

(2) Prohibition of placement of a participant, for an appropriate period of time, in a program under the Act with an employer that has violated section 143 of the Act, as determined under section 144 (d) or (e) of the Act; and/or

(3) Appropriate equitable relief (other than back pay). (section 144(f)(1)).

(d) Available remedies for violations of sections 143 (a)(4), (b)(1), (b)(3), and (d) of the Act include the remedies listed in subsection (c) of this section, and may include the following:

(1) Reinstatement of the grievant to the position held prior to displacement;

(2) Payment of lost wages and benefits; and/or

(3) Reestablishment of other relevant terms, conditions, and privileges of employment.

(e) Nothing in this section shall be construed to prohibit a grievant from pursuing a remedy authorized under another Federal, State, or local law for a violation of section 143 of the Act. (section 144(g)).

§ 627.604 Alternative procedure for handling labor standards violations under section 143 of the Act—binding arbitration.

(a) A person alleging a violation of section 143 of the Act, as an alternative to processing the grievance under a procedure described at section 144 of the Act, may submit the grievance to a binding arbitration procedure, if a collective bargaining agreement covering the parties to the grievance so provides (section 144(e)(1)).

(b) A person electing to have her/his complaint on JTPA section 143 labor standard violations processed under binding arbitration provisions—

(1) Shall choose binding arbitration before, and in lieu of, initiating a complaint under other grievance procedure established pursuant to section 144 of the Act, and

(2) May not elect binding arbitration for a complaint that previously has been or is subject to any other grievance procedure established under the Act.

(c) Binding arbitration decisions under the provisions of section 144(e) of the Act are not reviewable by the Secretary.

(d) The remedies available to a grievant under binding arbitration are limited to those set forth at section 144(f)(1)(C) and (f)(2) of the Act (section 144(e)(2)).

(e) Nothing in this section shall be construed to prohibit a grievant from pursuing a remedy authorized under another Federal, State, or local law for a violation of section 143 of the Act (section 144(g)).

§ 627.605 Special Federal review of SDA- and SSG-level complaints without decision.

(a) Should the recipient fail to provide a decision as required in § 627.503 of this part, the complainant may then request from the Secretary a determination whether reasonable cause exists to believe that the Act or regulations promulgated thereunder have been violated.

(b) The Secretary shall act within 90 days of receipt of a request made pursuant to paragraph (a) of this section. Where there is reasonable cause to believe the Act or regulations promulgated thereunder have been violated, the Secretary shall direct the recipient to issue a decision adjudicating the dispute pursuant to recipient and local procedures. The Secretary's action does not constitute final agency action and is not appealable under the Act (sections 166(a) and 144(c)). If the recipient does not comply with the Secretary's order within 60 days, the Secretary may impose a sanction upon the recipient for failing to issue a decision.

(c) A request pursuant to paragraph (a) of this section shall be filed no later than 15 days from the date on which the complainant should have received a decision as required in § 627.503 of this part. The complaint shall contain the following:

(1) The full name, telephone number (if any), and address (if any) of the person making the complaint;

(2) The full name and address of the respondent against whom the complaint is made;

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged violation;

(4) The provisions of the Act, regulations promulgated thereunder, grant, or other agreement under the Act believed to have been violated;

(5) A statement disclosing whether proceedings involving the subject of the request have been commenced or concluded before any Federal, State, or local authority, and, if so, the date of such commencement or conclusion, the name and address of the authority, and the style of the case; and

(6) A statement of the date the complaint was filed with the recipient, the date on which the recipient should have issued a decision, and an attestation that no decision was issued.

(d)(1) A request pursuant to paragraph (a) of this section will be considered to have been filed when the Secretary receives from the complainant a written statement sufficiently precise to evaluate the complaint and the grievance procedure used by the recipient, the SDA, or the SSG.

(2) When an imprecise request is received within the 15-day period prescribed in paragraph (a) of this section, the Secretary may extend the period for submission.

§ 627.606 Grant Officer resolution.

(a) When the Grant Officer is dissatisfied with the State's disposition of an audit, as specified in § 627.481 of this part, or other resolution of violations (including those arising out of incident reports or compliance reviews), with the recipient's response to findings resulting from investigations pursuant to § 627.503 of this part, or if the recipient fails to comply with the Secretary's decision pursuant to § 627.605(b) of this part, the initial and final determination process shall be used to resolve the matter.

(b) Initial determination. The Grant Officer shall make an initial determination on the findings for both those matters where there is agreement and those where there is disagreement with the recipient's resolution, including the allowability of questioned costs or activities. Such initial determination shall be based upon the requirements of the Act, regulations promulgated thereunder, grants, contracts, or other agreements under the Act.

(c) Information resolution. The Grant Officer shall not revoke a recipient's grant in whole or in part, nor institute corrective actions or sanctions, without first providing the recipient with an opportunity to present documentation or arguments to resolve informally those matters in controversy contained in the initial determination. The initial determination shall provide for an informal resolution period which shall be at least 60 days from issuance of the initial determination. If the matters are resolved informally, the Grant Officer shall issue a final determination pursuant to paragraph (d) of this section which notifies the parties in writing of the nature of the resolution and may close the file.

(d) Grant Officer's final determination. (1) If the matter is not fully resolved informally, the Grant Officer shall provide each party with a written final determination by certified mail, return receipt requested. For audits of recipient-level entities and other recipients which receive JTPA funds directly from DOL, ordinarily the final determination will be issued not later than 180 days from the date that the OIG issues the final approved audit

report to the Employment and Training Administration. For audits of subrecipients conducted by the OIG, ordinarily the final determination will be issued not later than 360 days from the date the OIG issues the final approved audit report to ETA.

(2) A final determination under this paragraph (d) shall:

(i) Indicate that efforts to informally resolve matters contained in the initial determination have been unsuccessful;

(ii) List those matters upon which the parties continue to disagree;

(iii) List any modifications to the factual findings and conclusions set forth in the initial determination;

(iv) Establish a debt, if appropriate;

(v) Require corrective action when needed;

(vi) Determine liability, method of restitution of funds and sanctions; and

(vii) Offer an opportunity for a hearing in accordance with subpart G of this part.

(3) Unless a hearing is requested, a final determination under this paragraph (d) constitutes final agency action and is not subject to further review.

(d) Nothing in this section shall preclude the Grant Officer from issuing an initial determination and/or final determination directly to a subrecipient, in accordance with section 164(e)(3) of the Act. In such a case, the Grant Officer shall inform the recipient of such action.

Subpart G—Sanctions for Violations of the Act.

§ 627.700 Purpose and scope.

This subpart describes the sanctions and appropriate corrective actions that may be imposed by the Secretary for violations of the Act, regulations promulgated thereunder, or grant terms and conditions. (Sections 106(j)(5), 164 (b), (d), (e), (f), (g), and (h)).

§ 627.702 Sanctions and corrective actions.

(a) Except for actions under sections 106(j), 164 (b) and (f), and 167 of the Act and the funding restrictions specified at § 627.423 of this part, Funding restrictions for "high-risk" recipients and subrecipients, the Grant Officer shall utilize initial and final determination procedures outlined in § 627.606, Grant Officer resolution, of this part to impose a sanction or corrective action.

(b) To impose a sanction or corrective action regarding a violation of section 167 of the Act, the Department shall utilize the procedures of 29 CFR part 31, 32 and 34.

(c) To impose a sanction or corrective action for failure to meet performance standards, where the recipient has not acted as required at section 106(j)(4), the Grant Officer shall utilize the procedures set forth at section 106(j)(5) of the Act.

(d) To impose a sanction or corrective action for non-compliance with the procurement standards provisions set forth at section 164(a) of the Act and § 627.420 of this part, where the recipient has not acted, the Grant Officer may utilize the procedures set forth at section 164(b) of the Act.

(e) The recipient shall be held responsible for all funds under the grant(s) to the recipient. The recipient shall hold subrecipients, including SDA's and SSG's, responsible for JTPA funds received through the grant, and may ultimately hold the units of local government which constitute the SDA or the SSG responsible for such funds.

(f) Nothing in this section shall preclude the Grant Officer from imposing a sanction directly against a subrecipient, as authorized in section 164(e)(3) of the Act. In such a case, the Grant Officer shall inform the recipient of such action.

§ 627.703 Failure to comply with procurement provisions.

(a) If, as part of the recipient's annual on-site monitoring of its SDA's/SSG's, the recipient determines that an SDA/SSG is not in compliance with the procurement requirements established in accordance with the provisions at section 164(a)(3) of the Act and § 627.420 of this part, Procurement, and § 627.422 of this part, Selection of service providers, the recipient shall:

(1) Require corrective action to secure prompt compliance; and

(2) Impose the sanctions provided for under the provisions at section 164(b) if the recipient finds that the SDA/SSG has failed to take timely corrective action under paragraph (a)(1) of this section (section 164(a) (4) and (5)).

(b) An action by the recipient to impose a sanction against either an SDA or SSG, in accordance with this section, may be appealed to the Secretary under the same terms and conditions as the disapproval of the respective plan, or plan modification, as set forth at § 628.425(e), Review and approval (section 164(b)(2)).

(c) If, upon a determination under paragraph (a)(2) of this section to impose a sanction under section 164(b) of the Act, the recipient fails to promptly take the actions required under paragraph (a)(2) of this section, the Secretary shall take such actions against the recipient or the SDA/SSG as appropriate (section 164(b)(3)).

§ 627.704 Process for waiver of State liability.

(a) A recipient may request a waiver of liability as described in section 164(e)(2) of the Act. Any such request shall be made no later than the informal resolution period described in § 627.606(b) of this part.

(b) A waiver of the recipient's liability can only be considered by the Grant Officer when:

(1) The misexpenditure was not a violation of section 164(e)(1) of the Act, or did not constitute fraud;

(2) The misexpenditure of JTPA funds occurred at a subrecipient level;

(3) The recipient has issued a final determination which disallows the misexpenditure, the recipient's appeal process has been exhausted, and a debt has been established; and

(4) The recipient requests such a waiver and provides documentation to demonstrate that it has substantially complied with the requirements of section 164(e)(2) (A), (B), (C), and (D) of the Act.

(c) The recipient shall not be released from liability for misspent funds under the determination required by section 164(e) of the Act unless the Grant Officer determines that further collection action, either by the recipient or subrecipient, would be inappropriate or would prove futile.

§ 627.706 Process for advance approval of a recipient's contemplated corrective actions.

(a) The recipient may request advance approval from the Grant Officer for contemplated corrective actions, including debt collection actions, which the recipient plans to initiate or to forego. The recipient's request shall include a description and assessment of all actions taken by the subrecipient to collect the misspent funds.

(b) Based on the recipient's request, the Grant Officer may determine that the recipient may forego certain collection actions against a subrecipient where:

(1) The subrecipient was not at fault with respect to the liability criteria set forth in section 164(e)(2) (A), (B), (C), and (D) of the Act;

(2) The misexpenditure of funds was not made by that subrecipient but by an entity that received JTPA funds from that subrecipient;

(3) A final determination which disallows the misexpenditure and establishes a debt has been issued at the appropriate level;

(4) Final action within the recipient's appeal system has been completed; and

(5) Further debt collection action by that subrecipient or the recipient would be either inappropriate or futile.

§ 627.708 Offset process.

(a) In accordance with section 164(d) of the Act, the primary sanction for misexpenditure of JTPA funds is repayment.

(b) A recipient may request that a debt, or a portion thereof, be offset against amounts chargeable by the recipient as administrative costs under the current or a future JTPA entitlement.

(1) For title II grants, any offset shall be applied against the recipient-level 5 percent administrative cost set-aside only and may not be distributed by the recipient among its subrecipients.

(2) For title III grants, any such offset must be applied against that portion of funds reserved by the recipient for recipient-level administration only and may not be distributed by the recipient among it subrecipients.

(c) The Grant Officer may approve an offset request, under section 164(d) of the Act, if the misexpenditures were not in violation of section 164(e)(1) of the Act.

(d) If offset is granted, the debt shall not be fully satisfied until the Grant Officer reduces amounts allotted to the State by the amount of the misexpenditure.

(e) The recipient shall not have the authority to reduce allocations to an SDA or SSG for misexpenditure of JTPA funds under section 164(d) of the Act.

Subpart H—Hearings by the Office of Administrative Law Judges

§ 627.800 Scope and purpose.

(a) The jurisdiction of the Office of the Administrative Law Judges (OALJ) extends only to those complainants identified in sections 141(c), 144(d), 164(f), and 166(a) of the Act.

(b) Actions arising under section 167 of the Act shall be handled under 29 CFR part 34.

(c) All other disputes arising under the Act shall be adjudicated under the appropriate recipient or subrecipient grievance procedures or other applicable law.

§ 627.801 Procedures for filing request for hearing.

(a) Within 21 days of receipt of a final determination imposing a sanction or corrective action, or denying financial assistance, the applicant, the recipient, the SDA, the SSG, or other subrecipient of funds against which the Grant Officer has imposed a sanction or corrective action may transmit by certified mail, return receipt requested, a request for hearing to the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street, NW., suite 400, Washington, DC 20001, with one copy to the departmental official who issued the determination.

(b) The 21-day filing requirement in paragraph (a) of this section is jurisdictional. Failure to timely request a hearing acts as a waiver of the right to hearing.

(c) A request for a hearing under this section shall state specifically those issues of the final determination upon which review is requested. Those provisions of the final determination not specified for review, or the entire final determination when no hearing has been requested within the 21 days, shall be considered resolved and not subject to further review. Only alleged violations of the Act, regulations promulgated thereunder, grant or other agreement under the Act fairly raised in the determination, and the request for hearing are subject to review.

(d) The procedures in this subpart apply in the case of a complainant who has not had a dispute adjudicated under the alternative dispute resolution process set forth in § 627.805 of this part within the 60 days, except that the request for hearing before the OALJ must be filed within 15 days of the conclusion of the 60-day period. In addition to including the final determination upon which review is requested, the complainant shall include a copy of any Stipulation of Facts and a brief summary of proceedings.

§ 627.802 Rules of procedure.

(a) The rules of practice and procedure promulgated by the OALJ at subpart A of 29 CFR part 18, shall govern the conduct of hearings under this section, except that a request for hearing under this section shall not be considered a complaint to which the filing of an answer by DOL or a DOL agency or official is required. Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to cross-examination, shall apply.

(b) Prehearing procedures. In all cases, the ALJ should encourage the use of prehearing procedures to simplify and to clarify facts and issues.

(c) Subpoenas. Subpoenas necessary to secure the attendance of witnesses and the production of documents or things at hearings shall be obtained from the ALJ and shall be issued pursuant to the authority contained in section 163(b) of the Act, incorporating 15 U.S.C. 49.

(d) Timely submission of evidence. The ALJ shall not permit the introduction at the hearing of any documentation if such documentation has not been made available for review by the other parties to the proceeding either at the time ordered for any prehearing conference, or, in the absence of such an order, at least 3 weeks prior to the hearing date.

(e) Burden of production. The Grant Officer shall have the burden of production to support her or his decision. To this end, the Grant Officer shall prepare and file an administrative file in support of the decision which shall be made part of the record. Thereafter, the party or parties seeking to overturn the Grant Officer's decision shall have the burden of persuasion.

§ 627.803 Relief.

In ordering relief, the ALJ shall have the full authority of the Secretary under section 164 of the Act.

§ 627.804 Timing of decisions.

The ALJ should render a written decision not later than 90 days after the closing of the record.

§ 627.805 Alternative dispute resolution.

(a) Parties to a complaint under § 627.801 of this part, Procedures for filing a request for hearing, may choose to waive their rights to an administrative hearing before the OALJ by choosing to transfer the settlement of their dispute to an individual acceptable to all parties for the purpose of conducting an informal review of the stipulated facts and rendering a decision in accordance with applicable law. A written decision will be issued within 60 days after the matter is submitted for informal review.

(b) The waiver of the right to request a hearing before the OALJ will automatically be revoked if a settlement has not been reached or a decision has not been issued within the 60 days provided paragraph (a) of this section.

(c) The decision rendered under this informal review process shall be treated as a final decision of an Administrative Law Judge pursuant to section 166(b) of the Act.

§ 627.806 Other authority.

Nothing contained in this subpart shall be deemed to prejudice the separate exercise of other legal rights in pursuant to remedies and sanctions available outside the Act.

Subpart I—Transition Provisions

§ 627.900 Scope and purchase.

In order to provide for the orderly transition to and implementation of the provisions of this chapter, the following conditions apply to the use of JTPA title II and title III funds allotted by formula to the State. These regulations identify issues which require action by the Governor, and those which are operational during the transition period.

§ 627.901 Transition period.

The transition period will be through program year PY 1992 ending June 30, 1993 unless otherwise stated. The intent of the transition period is to complete, to the extent possible, activity begun on or before June 30, 1993 under current policy and regulations and to ensure that all requirements mandated by the 1992 JTPA amendments have been implemented.

§ 627.902 Governor's actions.

The following are actions that must be accomplished by the Governor prior to June 30, 1993:

(a) Review current policies, practices, procedures, and delivery systems to ensure that they conform to the requirements of the amendments;

(b) Modify the Governor's coordination and special services plan in accordance with instructions issued by the Secretary;

(c) Modify job training plans as necessary;

(d) Execute a new Governor/Secretary agreement and a new grant agreement;

(e) Issue procurement standards that comply with the Act and these regulations as described in § 627.420 of this part, Procurement;

(f) Issue instructions necessary to implement program year 1993 cost categories pursuant to § 627.440 of this part, Classification of costs;

(g) Issue instructions necessary for SDAs to report program expenditures by year of appropriation pursuant to § 627.455 of this part, Reports required;

(h) Certify private industry councils pursuant to § 628.410 of this chapter, Private Industry Council;

(i) Resolve outstanding grievances, investigations, and hearings in effect on June 30, 1993 under the regulations published September 22, 1989 at 20 CFR 629.51;

(j) Issue instructions necessary for service delivery areas to operate the 1993 summer program in accordance with regulations found at subpart G of part 628 of this chapter, The Summer Youth Employment and Training Program.

§ 627.903 Actions which are at the discretion of the Governor.

(a) Establish a State Human Resource Investment Council (SHRIC);

(b) Issue instructions to "grandparent" participants in JTPA programs as of June 30, 1993 for purposes of completing training;

(c) Issue instructions for use of current 6 percent performance standards incentive funds to further develop and implement data collection and management information systems to track the program experience of participants. PY 1993 and subsequent performance standards incentive funds may not be used for this purpose;

(d) Of the title II and title III unobligated balance of funds available as of June 30, 1993, any amount may be reprogrammed into PY 1993 activity. The Department believes these amounts will be minimal and not represent a significant proportion of the funds available. Such reprogrammed funds will be subject to requirements contained in JTPA regulations effective July 1, 1993.

§ 627.904 Transition and implementation.

(a) *Review.* The Governor shall conduct a comprehensive review of the current policies, procedures, and delivery systems relating to programs authorized under the Job Training Partnership Act for the purpose of ensuring the effective implementation of the amendments. Such a review shall include consideration of the appropriateness of current SDA designations, the representation on current State and local councils, the adequacy of current administrative systems, the effectiveness of current outreach, service delivery, and coordination activities, and other relevant matters.

(b) *Governor's Coordination and Special Services Plan (GCSSP).* The GCSSP will require modification to assure conformance to the requirements of the amendments. The plan is to be modified pursuant to instructions issued by the Secretary and shall be submitted to the Secretary for review by May 15, 1993.

(c) *Job training plans.* Service delivery area job training plans will require modification to comply with § 628.420 of this chapter, Job training plan.

(d) *Governor/Secretary agreement and grant agreement.* A new Governor/Secretary agreement is required to assure that the State shall comply with JTPA as amended, and the applicable rules and regulations; the Wagner-Peyser Act, as amended, and the applicable rules and regulations. A new grant agreement is needed to provide the basis for Federal obligation of funds for programs authorized by titles I, II and III, and such other funds as the Secretary may award under the grant.

(e) *Procurement standards.* In order to ensure fiscal accountability and prevent waste, fraud, and abuse in programs administered under JTPA, as amended, the Governor shall prescribe and implement procurement standards according to § 627.420 of this part, Procurement. All procurements initiated on or after July 1, 1993 shall be governed by and follow the requirements in § 627.420 of this part.

(f) *Participants.* In order to have the least possible disruption to program participants, during PY 1993, Governors have the flexibility to "grandparent" participants already enrolled in JTPA programs up to an including June 30, 1993 under existing rules and regulations, but not to beyond June 30, 1994. All participants in programs on June 30, 1993, will be eligible for transfer to programs operated under the new provisions at any time beginning on July 1, 1993. "Hard to serve" barriers to participation, assessment and Individual Service Strategy provisions of the amendments will not apply to participants enrolled prior to July 1, 1993.

(g) *Cost categories.* Cost categories and limitations applicable to PY 1992 and earlier funds will be subject to existing regulations either until the funds have been exhausted or program activity has been completed. Any prior year carry over funds reprogrammed into PY 1993 will be subject to the reporting requirements and cost limitations associated with PY 1993 funds.

(h) *Financial reporting.* Notwithstanding reprogramming, expenditures must be recorded separately by year of appropriation.

(i) *Private Industry Council.* The private industry councils shall be certified pursuant to § 627.410 of this part, Private Industry Council.

(j) *Grievances, Investigations, and Hearings.* Generally, all grievances, investigations and hearings pending on or before June 30, 1993 should be resolved and settled under then-existing rules and procedures. The Department believes the interests of all parties are best served by adhering to the current regulation at 20 CFR part 629 subpart D. Grievances, investigations, and hearings occurring on or after July 1, 1993 will be governed by the procedures described in subparts E, F, and H of this part.

(k) *Summer Program.* The Title II–B Summer Youth Employment Program for 1993 shall be governed by the Act

and regulations in effect prior to the Amendments (prior to September 7, 1992).

(l) *SDA designation.* At the Governor's discretion, SDA's designated prior to July 1, 1992 need not be subject to the provisions of § 628.405, Service delivery areas.

§ 627.905 Guidance on contracts and other agreements.

The Department does not intend for contracts, agreements, inter-agency agreements, retainers, and other like arrangements to be negotiated and/or entered into for the sole purpose of applying existing rules and regulations. The 1992 JTPA amendments are effective July 1, 1993. The Department intends that contracts, awards and agreements entered into on or before June 30, 1993 are to be used to serve and/or train participants enrolled on or before June 30, 1993, unless the contracts and agreements are modified to comply with the new amendments and regulations.

§ 627.906 Determinations on State and SDA implementation.

(a) The Department expects that the States and SDA's will fully implement the provisions of the Act and these regulations, especially those regarding procurement, the cost principles, categories, and limitations and participant service requirements and eligibility beginning July 1, 1993.

(b) The Department expects that the implementation by the States and SDA's of the program design features in these regulations, particularly objective assessment and development of the ISS, may require additional time beyond July 1, 1992 to fully implement.

(c) In deciding to allow or disallow questioned costs related to the implementation of the provisions described in paragraph (b) of this section, the Grant Officer will consider the extent to which the State's and SDA's have made good faith efforts in properly implementing such provisions in the period July 1, 1993 through June 30, 1994.

2. Part 628 is revised to read as follows:

PART 628—PROGRAMS UNDER TITLE II OF THE JOB TRAINING PARTNERSHIP ACT

Subpart A—Scope and Purpose

Sec.
628.100 Scope and purpose of part 628.

Subpart B—State Planning

628.200 Scope and purpose.
628.205 Governor's coordination and special services plan.
628.210 State Job Training Coordinating Council.
628.215 State Human Resource Investment Council.

Subpart C—State Programs

628.300 Scope and purpose.
628.305 State distribution of funds.
628.310 Administration.
628.315 Education coordination and grants.
628.320 Services for older individuals.
628.325 Incentive grants, capacity building and technical assistance.

Subpart D—Local Service Delivery System

628.400 Scope and purpose.
628.405 Service delivery areas.
628.410 Private Industry Council.
628.415 Selection of SDA grant recipient and administrative entity.
628.420 Job training plan.
628.425 Review and approval.
628.426 Disapproval of the plan.
628.430 State SDA submission.

Subpart E—Program Design Requirements for Programs Under Title II of the Job Training Partnership Act

628.500 Scope and Purpose.
628.505 Eligibility.
628.510 Intake, referrals, and targeting.
628.515 Objective assessment.
628.520 Individual service strategy.
628.525 Limitations.
628.530 Referrals of participants to non-title II programs.
628.535 Limitations on job search assistance.
628.540 Volunteer program.
628.545 Linkages and coordination.
628.550 Transfer of funds.

Subpart F—The Adult Program

628.600 Scope and purpose.
628.605 Eligibility.
628.610 Authorized services.

Subpart G—The Summer Youth Employment and Training Program

628.700 Scope and purpose.
628.701 Program goals and objectives.
628.702 Eligibility.
628.705 SYETP authorized services.
628.710 Period of program operation.

Subpart H—Youth Training Program

628.800 Scope and purpose.
628.803 Eligibility.
628.804 Authorized services.

Authority: 29 U.S.C. 1579(a).

Subpart A—Scope and Purpose

§ 628.100 Scope and purpose of part 628.

(a) This part sets forth requirements for implementation of programs under title II of the Job Training Partnership Act. In this part, the provisions generally pertaining to title II are covered in subparts B, C, D and E of this part. Matters specific to titles II–A, II–B, or II–C are addressed in subparts F, G or H of this part respectively.

(b) Title II–A Adult Training programs are to prepare adults for participation in the labor force by providing job training and other services that will result in increased employment and earnings, increased occupational and educational skills, reduced welfare dependency, and result in improved long-term employability.

(c) Title II–B Summer Youth Employment and Training programs are to provide eligible youth with exposure to the world of work, enhance the basic education skills of youth, to encourage school completion or enrollment in supplemental or alternative school programs and to enhance the citizenship skills of youth.

(d) Title II–C Youth Training programs are to improve the long-term employability of youth; enhance the educational, occupational and citizenship skills of youth; encourage school completion or enrollment in alternative school programs; increase the employment and earnings of youth; reduce welfare dependency; and to assist youth in addressing problems that impair their ability to make successful transition from school to work, to apprenticeship, to the military or to postsecondary education and training.

Subpart B—State Planning

§ 628.200 Scope and purpose.

This subpart provides requirements for the submission of the Governor's Coordination and Special Services Plan, as well as the procedures for plan review. This subpart also contains requirements for the composition and responsibilities of the State Job Training Coordinating Council and the State Human Resource Investment Council.

§ 628.205 Governor's coordination and special services plan.

(a)(1) *Submittal.* By a date established by the Secretary, each State seeking financial assistance under the Act shall submit to the Secretary biennially the Governor's Coordination and Special Services Plan (GCSSP) encompassing two program years (section 121(a)).

(2) The GCSSP shall address the requirements of section 121(b) including a description of the Governor's coordination criteria, the measures taken by the State to ensure coordination and prevent duplication with the Job Opportunities and Basic Skills program, the certification of the implementation of the procurement system as required at section 164(a)(6), the technical assistance and training plan, goals, and the efforts to accomplish such goals. for the training and placement of women in nontraditional employment and apprenticeship, the projected use of

resources, including oversight of program performance, program administration, program financial management and audit resolution procedures, capacity building, priorities and criteria for State incentive grants, and performance goals for State supported programs (section 121(b)).

(b) *GCSSP review.* The Secretary shall review the GCSSP for overall compliance with the provisions of the Act. If the GCSSP is disapproved, the Secretary shall notify the Governor in writing within 45 days of submission of the reasons for disapproval so that the Governor may modify the plan to bring it into compliance with the Act (section 121(d)).

(c) *Information to SDA's.* Prior to December 31 of the year preceding the program years for which the plan is developed, the State shall make available to the service delivery areas in the State information on its plans to undertake State activities in program areas including education coordination grants, services to older workers, and capacity building.

§ 628.210 State Job Training Coordinating Council.

(a) The Governor shall appoint a State Job Training Coordinating Council (SJTCC) pursuant to section 122 of the Act. In lieu of a SJTCC, the Governor may establish and utilize a State Human Resource Investment Council pursuant to section 701 of the Act and in accordance with § 628.215 of this part.

(b) Consistent with section 122(a)(3) of the Act, the SJTCC shall be composed as follows: 30 percent, business and industry representatives; 30 percent, State and local government and local education agency representatives; 30 percent, organized labor and community-based organization representatives; and 10 percent, representatives from the general public. The SJTCC shall have the specific functions and responsibilities outlined in sections 122, 317, and 501 of the Act.

(c) Funding for the SJTCC shall be provided pursuant to sections 202(c)(1)(A) and 262(c)(1)(A) of the Act.

§ 628.215 State Human Resource Investment Council

(a) *Establishment and responsibilities.* The State may, in accordance with sections 701, 702, and 703, establish a State Human Resource Investment Council (HRIC). The HRIC's responsibilities are described at section 701(a) of the Act. The HRIC shall carry out the following responsibilities:

(1) Review the provision of services and the use of funds and resources under applicable Federal human resource programs and advise the Governor on methods of coordinating such provision of services and use of funds and resources consistent with the laws and regulations governing such programs;

(2) Advise the Governor on the development and implementation of State and local standards and measures relating to applicable Federal human resource programs and coordination of such standards and measures; and

(3) Carry out the duties and functions prescribed for existing State councils described under the laws relating to the applicable Federal human resource programs.

(4) Perform other functions as specified by the Governor (section 701).

(b) *Applicable Programs.* For the purposes of this section, the programs included are those listed at section 701(b)(2) of the Act. A program shall be included only if the Governor and the head of the State agency responsible for the administration of the program jointly agree to include such program. In addition, programs under the Carl Perkins Vocational and Applied Technology Act shall require the agreement of the State council on vocational education (section 701(b)(1)(B)).

(c) *Composition.* The Governor shall establish procedures to ensure appropriate representation on the HRIC from among the categories of representation specified in section 702 of the Act.

(d) *Funding.* (1) Funding to carry out the functions of the HRIC shall be available pursuant to section 703(a) of the Act.

(i) Each State agency participating in a HRIC under title II is encouraged to provide funds to support such council in a manner consistent with its representation on the HRIC (section 703(d)).

(ii) The costs associated with the operation of the HRIC shall be allocated among the funding sources on the basis of benefits received.

(2) A HRIC which meets the requirements of title VII and includes each of the programs listed at section 701(b)(2)(A) of the Act shall be authorized to use JTPA State Education and Coordination Grant funds (section 123(a)(2)(D)(ii)).

(e) *Replacement of other councils.* A HRIC meeting the requirements of title VII shall replace the councils of the participating agencies listed at section 701(b)(2)(A) of the Act.

(f) *Expertise.* The Governor shall ensure that in the composition of the HRIC and the staff of the HRIC there exists the proper expertise to carry out the functions of the HRIC and the council(s) it replaces (sections 702(c)(2) and 703(b)).

(g) *Certification.* Each State shall certify to the Secretary the establishment and membership of the HRIC at least 90 days before the beginning of each period of 2 program years for which a job training plan is submitted under the Act (section 703(c)).

Subpart C—State Programs

§ 628.300 Scope and purpose.

This subpart provides requirements for the State-operated programs including the education coordination and grants, services to older workers, and incentive grants to SDA's and grants to SDA's for capacity building and technical assistance.

§ 628.305 State distribution of funds.

(a) The funds made available to the Governor under sections 202(c) and 262(c) shall be used to carry out activities and services under this subpart.

§ 628.310 Administration.

Funds provided to the Governor under sections 202(c)(1)(A) and 262(c)(1)(A) of the Act may be used for overall administration, management, oversight of program performance; technical assistance to SDA's failing to meet performance standards as described in section 106(j)(1); auditing; and activities under sections 121 and 122.

§ 628.315 Education coordination and grants.

(a) *Governor's responsibilities.* The Governor shall allocate funds to any State education agency, or agencies. For the purposes of this section, "State education agency" shall not include the State agency which administers the JTPA program within the State or other agencies which do not have education as a primary function, such as correctional agencies, although this limitation shall not preclude such an agency from being an ultimate subrecipient of funds (section 123(a)(1)).

(b) *Agreements.* (1) Each State education agency to be allocated funds under section 123(a)(1) of the Act shall participate in joint planning activities with the Governor in order to develop a plan which shall be submitted in the GCSSP (section 123(c)).

(2) The Governor and the State education agency(ies) shall jointly agree on the plan required in paragraph (b)(1) of this section, which shall include a description of the agreements described

in paragraph (b)(3) of this section (section 123(c)).

(3) Projects to undertake the activities set forth in section 123(a)(2) shall be conducted in accordance with agreements between the State education agency(ies) and administrative entities in service delivery areas in the State. The agreements may include other entities such as State agencies, local education agencies and alternative service providers (section 123(b)(1)(B)).

(4)(i) When there is a failure by the State education agency and the Governor in development of the joint plan described in paragraph (b)(2) of this section, the Governor shall not allocate funds under section 123(a)(1) to such education agency, nor shall such funds be available for expenditure by the Governor (section 123(c)).

(ii) When any State education agency declines the allocation of funds under section 123(a)(1), or when there is a failure to reach the agreement(s) specified in paragraph (b)(3) of this section, the funds may be used by the Governor for the education and coordination activities described in section 123(a)(2) (A), (B), and (C) of the Act (section 123(e)).

(c) *Allowable activities.* (1) Funds made available for education coordination and grants under section 123 of the Act shall be used to pay the Federal share of education coordination and grants projects (section 123(a)(2)).

(2) Projects conducted for eligible individuals found at section 123(a)(2) (A), (B) and (C) including those which:

(i) Provide school-to-work services of demonstrated effectiveness, including youth apprenticeship programs;

(ii) Provide literacy and lifelong learning opportunities and services of demonstrated effectiveness, including basic education and occupational skills training, and

(iii) Provide statewide coordinated approaches to education and training services, including model programs, designated to train, place, and retain women in nontraditional employment. (section 123(a)).

(3) Projects for coordination of education and training which may include support activities pertaining to the HRIC which meets the requirements of title VII.

(d) *Expenditure requirements.* (1)(i) At least 80 percent of the funds allocated under section 202(c)(1)(C) of the Act shall be expended to pay for the Federal share of projects described in paragraph (c)(2) of this section (section 123(d)(2)(B)).

(ii) The Governor shall assure that not less than 75 percent of the funds expended for such projects are expended for eligible economically disadvantaged participants each of whom shall be an individual experiencing barriers to employment (section 123(d)(2)(C)).

(iii) Priority for funds not expended on noneconomically disadvantaged participants shall be given to individuals determined eligible for title III programs and persons experiencing barriers to employment.

(iv) The Governor may assure compliance with the requirements to serve participants with barriers to employment by targeting of projects to particular barrier groups (*e.g.* school dropouts).

(2) Not more than 20 percent of funds allocated under section 202(c)(1)(C) of the Act may be expended to:

(i) Facilitate coordination of education and training services for participants in the projects described in section 123(a)(2) (A), (B) and (C), or

(ii) (A) Support activities pertaining to a HRIC that meets the requirements of § 628.215 of this part, or

(B) Support activities pertaining to a State council which carries out functions similar to those of a HRIC if such council was established prior to July 1, 1992.

(e) *Matching.* The Governor shall define and assure the provision of adequate resources by the State (including funds available to the State from State and federal sources, as appropriate) to meet the matching requirement of section 123(b) of the Act.

(f) Eligible youth, age 14 through 15, may be served in the program under this section to the extent set forth in the agreements under paragraph (b)(3) of this section.

§ 628.320 Services for older individuals.

(a) Consultation. (1) The Governor shall consult with the appropriate PIC's and chief elected official(s) prior to entering into agreements to provide services under section 204(d) and to assure that services provided to participants under section 204(d) are consistent with the programs and activities provided in the SDA to eligible older participants.

(2) The GCSSP shall specify the process for accomplishing the consultation required by paragraph (a)(2) of this section.

(b) Funds available under section 204(d) shall be used by the Governor to provide services on an equitable basis throughout the State, taking into account the relative share of the population of eligible older individuals residing in each SDA and the participation of such older individuals in the labor force.

(c) Delivery of services. (1) Services to participants eligible under section 204(d) shall be delivered through agreements with SDA's private industry councils, public agencies, private nonprofit organizations (including veterans organizations) and private-for-profit organizations.

(2) Priority for delivery of services under this section shall be given to agencies and organizations which have a demonstrated effectiveness in providing training and employment services to such older individuals.

(d) Eligibility. Individuals provided services under section 204(d) shall be economically disadvantaged, based on criteria applicable in the SDA in which they reside, and shall be individuals age 55 or older, except that each program year not more than 10 percent of participants enrolled under section 204(d) may be individuals who are not economically disadvantaged but have serious barriers to employment as identified by the Governor and have been determined within the last 12 months to meet the income eligibility requirements for title V of the Older Americans Act of 1965 (section 204(d)(5)(B)(i)).

(e) Applicable requirements. Except as provided in the Act, the provisions of title II–A shall apply to programs conducted under section 204(d) (section 204(d)(6)).

(f) The Governor shall make efforts to coordinate the delivery of services under section 204(d) with the delivery of services under title V of the Older Americans Act of 1965. Such coordination may include coenrollment, coordination of a continuum of services between this section and title V of the Older Americans Act and other appropriate linkages.

(g) The Governor shall give consideration to assisting programs involving training for jobs in growth industries and jobs reflecting the use of new technological skills (section 204(d)(3)).

§ 628.325 Incentive grants, capacity building and technical assistance.

(a) Funds available to the Governor under sections 202(c)(1)(B) and 262(c)(1)(B) shall be used to provide incentive grants to SDA's and for capacity building and technical assistance.

(b) Incentive grants. (1) Not less than 67 percent of the funds available under sections 202(c)(1)(B) and 262(c)(1)(B) shall be used by the Governor to provide incentive grants for programs, except programs under section 204(d), exceeding title II performance standards. (section 106(b)(7)).

(2) Incentive grant funds under this section shall be distributed by the Governor among SDA's within the State pursuant to section 106(b)(7).

(3) In addition to other activities, SDA's may use incentive grant funds for capacity building and technical assistance activities

(4) The Governor shall, as part of the annual statement of goals and objectives required by section 121(a)(1) of the Act, provide SDA's with the specific policies and procedures to implement section 106(b)(7) of the Act.

(5) In a State which is the service delivery area, incentive grant funds shall be distributed in a manner determined by the Governor and as described in the GCSSP. The Governor shall give consideration to recognizing the performance of service providers within the State.

(6) Incentive grant funds may be used to conduct allowable title II activities for either eligible youth, eligible adults, or both at the discretion of the SDA.

(c) Capacity building and technical assistance.

(1) Up to 33 percent of the funds available under section 202(c)(1)(B) may be used by the Governor to provide capacity building and technical assistance efforts aimed at improving the competencies of the personnel who staff JTPA and other related human service systems that serve JTPA participants.

(2) In providing capacity building and technical assistance activities, the Governor shall:

(i) Consult with SDA's concerning capacity building and technical assistance activities consistent with the process specified in the GCSSP;

(ii) Ensure that the use of funds will assist staff providing services to participants by directing resources to SDA and service provider staff for capacity building efforts, building a statewide capacity building strategy based on an assessment of local capacity building needs developed in cooperation with the SDA's, and delivering training and technical assistance directly to the local level;

(iii) Ensure that expenditures for the purchase of hardware/software to develop Statewide communications and training mechanisms involving computer-based communication technologies directly facilitate interaction with the National Capacity Building and Information Dissemination Network (National Network) described in section 453 of the Act and facilitate the use of computer-based training techniques;

(iv) Ensure that technical assistance materials developed with funds under this section are made available to be shared with other States and SDA's in coordination with the National Network; and

(v) Technical assistance is provided to service delivery areas failing to meet performance standards pursuant to section 106(j)(2) of the Act.

(d) Cost sharing. (1) Cost sharing approaches are encouraged among States, SDA's and/or among other Federal, State, and local human service programs in developing electronic communications, training mechanisms and/or contributing to the National Network.

(2) All shared costs shall be allocated among the contributing funding sources on the basis of benefits received.

Subpart D—Local Service Delivery System

§ 628.400 Scope and purpose.

This subpart sets forth requirements for the selection of service delivery areas, the establishment and responsibilities of the private industry council, and the selection of the SDA grant recipient and administrative entity. This subpart also contains the requirements for the local job training plan as well as the procedures for its review and approval by the State.

§ 628.405 Service delivery areas.

(a)(1) The Governor, after receiving recommendations from the SJTCC, shall designate SDA's within the State in accordance with the provisions of section 101 of the Act.

(2) Each request for designation as an SDA shall be submitted in a form and by a date established by the Governor, but not more frequently than once every two years to coincide with the development of the GCSSP and local job training plans.

(3) The Governor shall provide instructions on whether existing SDA's are required to request SDA designation in accordance with paragraph (a)(2) of this section.

(b)(1) The Governor shall approve SDA designation requests from entities with a population of 200,000 or more that satisfy the criteria specified in section 101(a)(4)(A) of the Act.

(2) When there are competing applications under paragraph (b)(1) of this section for the same geographic area, the Governor shall designate the entity with the population closest to 200,000, if the remaining reduced area also continues to satisfy the criteria specified in section 101(a)(4)(A) of the Act. The Governor shall offer to designate the remaining reduced area as an SDA as well.

(3) When there are competing applications under paragraph (b)(1) of this section for the same geographic area and the designation of the entity with the population closest to 200,000 would have the effect of reducing the population of the competing entity to below a population of 200,000, the Governor has the discretion to determine which request to honor.

(d) The Governor may, in accordance with section 101(a)(4)(B) of the Act, approve a request to be a SDA from any unit, or contiguous units, of general local government, without regard to population, which serves a substantial portion of a labor market area. In making such designations, the Governor shall evaluate the degree to which a proposed service delivery area meets criteria established by the Governor which, at a minimum, shall include:

(1) The capability to effectively deliver job training services;

(2) The capacity to administer the job training program in accordance with the Act, applicable rules and regulations and State standards; and

(3) The portion of a labor market served.

(e) For the purposes of SDA designations under sections 101(a)(4)(A) and (B), the term "substantial part" and "substantial portion" of a labor market area shall be defined by the Governor, but shall not be less than 10% of the population of a labor market area.

(f) All areas within the State shall be covered by designated SDA's. After honoring all requests for designation from eligible entities under section 101(a)(4)(A) of the Act, and making any qualified discretionary designations under section 101(a)(4)(B), the Governor shall include uncovered areas in the State within other designated SDA's willing to accept them or within another new SDA within the State.

(g) Appeals. (1) Only an entity which meets the requirements of section 101(a)(4)(A) of the Act for designation as a service delivery area, but which has had its request to be an SDA denied, may appeal the Governor's denial of service delivery area designation to the Secretary of Labor.

(2) Appeals made pursuant to paragraph (g)(1) of this section shall be submitted by certified mail, return receipt requested, to the Secretary, U.S. Department of Labor, Washington, DC 20210, Attention: ASET. A copy of the appeal shall simultaneously be provided to the Governor.

(3) The Secretary shall not accept an appeal dated later than 30 days after receipt of written notification of the denial from the Governor.

(4) The appealing party shall explain why it believes the denial is contrary to the provisions of section 101 of the Act.

(5) The Secretary shall accept the appeal and make a decision only with regard to whether or not the denial is inconsistent with section 101 of the Act. The Secretary may consider any comments submitted by the Governor. The Secretary shall make a final decision within 30 days after the appeal is received. (Section 101(a)(4)(C)).

(6) The Secretary shall notify the Governor and the appellant in writing of the Secretary's decision.

§ 628.410 Private Industry Council.

(a) Certification of the PIC. (1) The chief elected official(s) of the SDA shall establish and the Governor shall certify the private industry council (PIC) pursuant to section 102 of the Act.

(2) The Governor shall recertify the PIC biennially, one year prior to the date for submittal of the 2-year SDA job training plan to the Governor.

(3) The Governor shall issue a schedule and instructions for the submission of materials needed to certify the PIC; the instructions shall at a minimum, require the submission of:

(i) A written statement of the PIC composition which shall be consistent with section 102 (a), (b), (c), and (d), of the Act and shall include the names of individuals nominated and their qualifications;

(ii) A description of the nomination process;

(iii) The written agreement(s) among the appropriate chief elected official(s) and the PIC, including procedures for the development of the SDA job training plan and the selection of the grant recipient and administrative entity; and

(iv) A description of the basic organizational structure and operational framework through which the PIC intends to carry out its role under the Act.

(b) Responsibilities of the PIC. Pursuant to section 103 of the Act, the PIC shall:

(1) Provide policy and program guidance for all activities under the job training plan for the SDA;

(2) In accordance with agreements negotiated with the appropriate chief elected official(s), determine the procedures for development of the job training plan and select the grant recipient and administrative entity for the SDA;

(3) As specified in subpart D of part 627 of this chapter, exercise independent oversight over programs and activities under the job training plan, which oversight shall not be circumscribed by agreements with the appropriate chief elected official(s) of the SDA;

(4) Be a party to the designation of substate grantees under title III, as set forth in § 631.35 of this chapter;

(5) Establish guidelines for the level of skills to be provided in occupational skills training programs funded by the administrative entity;

(6) Consult with the Governor on agreements to provide services for older individuals under section 204(d) of the Act;

(7) Establish youth and adult competency levels consistent with performance standards established by the Secretary, based on such factors as entry level skills and other hiring requirements, in consultation with educational agencies and, where appropriate, with representatives of business, organized labor and community-based organizations pursuant to section 106(b)(5) and 107(d); and

(8) Identify occupations for which there is a demand in the area served.

(c) Substate plan. The PIC shall be provided the opportunity to review and comment on a substate grantee plan under title III of the Act prior to the submission of such plan to the Governor (section 313(a)).

(d) The State Employment Service agency shall develop jointly with each appropriate PIC and chief elected official(s) for the SDA those components of the plans required under the Wagner-Peyser Act, which are applicable to the SDA. (See part 652 of this chapter.)

(e) Single SDA States. (1) In any case in which the service delivery area is a State, the SJTCC may be reconstituted as a PIC when the PIC meets the requirements of section 102(a).

(2) When the service delivery area is a State and the functions of the SJTCC are embodied in the HRIC, the HRIC may be reconstituted as a PIC if the requirements for private sector business representation at section 102(a)(1) are met (section 102(h)).

§ 628.415 Selection of SDA grant recipient and administrative entity.

(a) *Selection of SDA grant recipient.* (1) The SDA grant recipient and the entity to administer the SDA's job training plan for title II, developed pursuant to section 104 of the Act, shall be selected by agreement of the PIC and chief elected official(s) of the SDA. These may be the same or different entities.

(2) The specific functions and responsibilities of the entities described in paragraph (a)(1) of this section shall be spelled out in the agreement between the PIC and the chief elected official(s), and shall specifically address the provisions of section 141(i) of the Act. (Section 103(b)(1).)

(b) *Subrecipient requirements.* (1) The Governor may establish requirements pertaining to subrecipient, including SDA grant recipient, responsibility for JTPA funds.

(2) The requirements described in paragraph (b)(1) of this section shall not preclude the selection of any entity identified in section 103(b) as SDA grant recipient.

§ 628.420 Job training plan.

(a) The Governor shall issue instructions and schedules to assure that job training plans and plan modifications for SDA's within the State conform to all requirements of the Act.

(b) The Governor's instructions for development of the SDA's job training plan shall require that the plan contain the following information:

(1) A complete and detailed discussion of the elements found in section 104(b) of the Act;

(2) A discussion of the SDA's compliance with the Secretary's program goals, as outlined in the planning guidance provided to the Governor; and

(3) An oversight plan for the SDA which includes: (i) A description of the oversight activities of the PIC and the chief elected official(s), and (ii) the SDA administrative entity's monitoring plan which includes the Governor's monitoring requirements for service providers.

(c) The Governor may also require that the SDA job training plan contain a capacity building and technical assistance strategy that includes plans for designating capacity building as a staff function, assessing local capacity building needs, and developing and participating in computerized communication mechanisms.

(d) The SDA job training plan shall be submitted to the Governor jointly by the PIC and the chief elected official(s) (section 103(d)).

(e) Modifications. Modifications to the SDA job training plan shall be submitted jointly by the PIC and chief elected official(s) of the SDA to the Governor for approval.

§ 628.425 Review and approval.

(a) *Standards and procedures.* (1) The Governor shall establish standards and procedures for the review and approval or disapproval of the SDA job training plan and plan modifications that shall be provided to the SDA's at the same time as the instructions and schedules for preparation of the plans are provided.

(2) The procedures and standards described in paragraph (a)(1) of this section shall provide for approval or disapproval of the SDA job training plan.

(b) *Plan approval.* Except when the Governor makes a finding under the provisions of section 105(b)(1) of the Act, the Governor shall approve the SDA job training plan or plan modification. The notice of approval shall be provided to the chief elected official(s) and to the private industry council.

§ 628.426 Disapproval of the plan.

(a) If the Governor disapproves the SDA job training plan or plan modification for any reason, the Governor shall notify the PIC and chief elected official(s) for the SDA in writing as provided in section 105(b)(2) of the Act.

(b) If the Governor disapproves the SDA job training plan or plan modification, the Governor shall provide the PIC and the chief elected official(s) for the SDA 20 days to correct the deficiencies and resubmit the plan or plan modification. Within 15 days after the plan or plan modification is resubmitted, the Governor shall make a final decision and shall notify the PIC and the appropriate chief elected official(s) of the SDA of the final disapproval or approval.

(c) Governor mediation. If the PIC and the appropriate chief elected official(s) of an SDA are unable to reach an agreement under the provisions of section 103(b)(1) or (d) of the Act, any such party may request the Governor to mediate such agreements.

(d) Failure to reach agreement. If the PIC and the chief elected official(s) fail to reach the required agreements in sections 103(b)(1) or (d) of the Act, funds may not be made available to an SDA under section 104 of the Act and the Governor shall merge the affected area into one or more other existing service delivery areas (section 105(c)(1)).

(e) Appeals. (1) In accordance with section 105(b)(2) of the Act, any final disapproval by the Governor of the SDA job training plan or modification may be appealed by the PIC or chief elected official(s) of the SDA to the Secretary.

(2) The Secretary shall not accept an appeal dated later than 30 days after receipt by the PIC and chief elected official(s) of the final disapproval of the SDA job training plan or modification from the Governor.

(3) The Secretary shall accept an appeal under this paragraph (e) and shall determine only whether or not the disapproval is clearly erroneous under section 105(b)(1) of the Act. The Secretary may consider any comments submitted by the Governor. In accordance with section 105(b)(2) of the Act, the Secretary shall make a final decision within 45 days after the appeal is received by the Secretary.

(4) The Secretary shall notify the Governor and the appellant in writing of the Secretary's decision.

(f) Appeals of plan revocations. Pursuant to section 164(b)(1) of the Act, a notice of intent to revoke approval of all or part of a plan may be appealed to the Secretary. Such appeals shall be treated as a disapproval under paragraphs (c) and (e) of this section, except that the revocation shall not become effective until the later of:

(1) The time for appeal under paragraph (e) of this section has expired; or

(2) The date on which the Secretary issues a decision affirming the revocation.

(f) In the event that a plan is disapproved and the Governor's decision is upheld upon appeal, the Governor shall merge the affected area into other designated SDA's willing to accept it or include it in another SDA within the State.

§ 628.430 State SDA submission.

(a) Pursuant to section 105(d) of the Act, when the SDA is the State, the Governor, not less than 60 days before the beginning of the first of the two program years covered by the job training plan and in accordance with instructions issued by the Secretary, shall submit to the Secretary a SDA job training plan covering two-program-years. When the SDA is the State, modifications to the plan shall be submitted to the Secretary for approval.

(b) When a State submits an SDA job training plan or plan modification pursuant to paragraph (a) of this section, the Secretary shall review the plan or plan modification for overall compliance with the provisions of the Act. The State's plan shall be considered approved unless, within 45 days of receipt of the submission described in paragraph (a) of this section, the Secretary notifies the Governor in writing of inconsistencies between the submission and requirements of specific provisions of the Act. If the plan or plan modification is disapproved, the Governor may appeal the decision by requesting a hearing before an administrative law judge pursuant to subpart H of part 627 of this chapter.

Subpart E—Program Design Requirements for Programs Under Title II of the Job Training Partnership Act

§ 628.500 Scope and purpose.

This subpart contains the regulations pertaining to the program design requirements common to all programs conducted under title II of the Act. Regulations specifically pertaining to the Adult Program can be found in subpart F of this part. Regulations pertaining to the Summer Youth Employment and Training Program can be found in subpart G of this part. Regulations pertaining to the Youth Training Program can be found in subpart H of this part.

§ 628.505 Eligibility.

(a) *Eligibility Criteria.* (1) Individuals who apply to participate in a program under title II shall be evaluated for eligibility based on age and economic disadvantage. Specific eligibility criteria for programs under title II, parts A, B, and C are described in this part.

(2) Individuals served under title II shall be residents of the SDA, as determined by local government policy, except for the limited exceptions described in the job training plan, including joint programs operated by SDA's (section 141(e)).

(b) *Eligibility documentation.* (1) In order to promote the uniform and standard application of eligibility criteria for participation in the JTPA program, the Department shall issue guidance on eligibility documentation requirements.

(2) SDA utilization of eligibility guidance. The Grant Officer shall give consideration to the extent that the State and the SDA adopt and follow the guidance described in paragraph (b)(1) of this section in deciding to allow or disallow questioned costs related to the required documentation concerning an individual's eligibility.

§ 628.510 Intake, referrals and targeting.

(a) Collection of personal data. In addition to determining an applicant's eligibility, the intake process shall include a preliminary review of information relating to whether an applicant is included in one or more of the categories listed in section 203(b) of the Act.

(b) Information on services. Upon application, an eligible individual shall be provided information by the SDA or its service providers on the full array of services available through the SDA and its service providers, including information for women about the

opportunities for nontraditional training and employment.

(c) Assessment during intake. At the discretion of the service provider, some assessment activities may be conducted during the intake process in order to determine an eligible applicant's suitability for title II program services.

(d) Referral of applicants. During the intake process, determinations may be made prior to enrollment to refer an eligible applicant to another human service, training or education program deemed more suitable for the individual.

(e) Referrals from service providers to service delivery areas for additional assessment. (1) Each service provider shall ensure that an eligible applicant who cannot be served by its particular program shall be referred to the SDA for further assessment, as necessary, and suitable referral to other appropriate programs.

(2) Each SDA shall take the appropriate steps (*e.g.*, contract provisions, local administrative issuances, and/or PIC policies, etc.) to ensure that its service providers adhere to the provisions of this section, and that they maintain documentation of referrals.

(3) Each SDA shall develop an appropriate mechanism to assess applicants referred by service providers and describe such mechanism in its SDA job training plan.

(f) "Most in need." SDA's that satisfy the requirements of sections 203(b) and 263(b) pertaining to hard to serve individuals shall be deemed to meet the "most in need" criteria at section 141(a) of the Act.

(g) The SDA's method of meeting the requirements of sections 203(b) and 263(b) pertaining to hard to serve individuals shall be implemented consistent with the equal opportunity provisions of 29 CFR parts 31, 32, and 34.

§ 628.515 Objective assessment.

(a) *General.* The requirements of this section shall apply to programs conducted under title I and title II, parts A, B and C.

(b) *Definition.* (1) For purposes of this part, an *objective assessment* means an examination of the capabilities, needs, and vocational potential of a participant and is to be used to develop a service strategy and employment goal. Such assessment is to be client-centered and a diagnostic evaluation of a participant's employment barriers taking into account the participant's family situation, work history, education, occupational skills, interest, aptitudes (including interests and aptitudes for nontraditional occupations), attitude towards work, motivation, behavior patterns affecting employment potential, financial resources and needs, supportive service needs, and personal employment information as it relates to the local labor market.

(2) For the program under title II–B, the objective assessment shall include an examination of the basic skills and supportive service needs of each participant and may include the other areas listed in paragraph (b)(1) of this section (Sections 204(a)(1)(A), 253(c)(1) and 264(b)(1)(A)).

(c) *Methods of objective assessment.* (1) The SDA shall choose the most appropriate means to measure skills, abilities, attitudes, and interests of the participants. The methods used in conducting the objective assessment may include but are not limited to structured interviews, paper and pencil tests, performance tests (*e.g.* skills, and/or work samples, including those that measure interest and capability to train in nontraditional employment), behavioral observations, interest and/or attitude inventories, career guidance instruments, aptitude tests, and basic skills tests.

(2) Instruments used for objective assessment may be developed at the local level; however, any formalized instruments nationally available should be used only for the specific populations for which they are normed.

(d) *Updating of assessments.* Objective assessment should be treated as an ongoing process. As additional relevant information relating to a participant becomes available, it should be reviewed and considered, as appropriate.

(e) *Other sources of objective assessment.* Other non-JTPA assessments (*e.g.* through the Job Opportunities and Basic Skills (JOBS) program under title IV of the Social Security Act, or through schools) which have been completed within one year of application for services, and which meet the requirements of this section, may be used to comply with the requirement to assess each participant.

§ 628.520 Individual service strategy.

(a) *General.* The requirements of this section shall apply to programs conducted under title I and title II, parts A, B and C.

(b) *Definition.* (1) *Individual service strategy (ISS)* means an individual plan for a participant, which plan shall include an employment goal (including, for women, consideration of nontraditional employment), appropriate achievement objectives, and the appropriate combination of services for the participant based on the objective assessments conducted pursuant to § 628.515 of this part, Objective assessment. In developing the ISS, the participant shall be counseled regarding required loan repayments if enrollment in an education program requires the participant's personal indebtedness. The participant shall also be apprised of the requirements for self sufficiency and the occupational demands within the labor market.

(2) Decisions concerning appropriate services shall be client-centered, and ensure that the participant is not excluded from training or career options consistent with the provisions of 29 CFR parts 31, 32 and 34 concerning nondiscrimination and equal opportunity.

(3) For the program under title II–B, the ISS may include the components specified in paragraph (b)(1) of this section. (sections 204(a)(1)(B), 253(c)(2) and 264(b)(1)(B)).

(c) *Joint Development of ISS.* The ISS shall be developed in partnership with the participant and reflect the needs indicated by the objective assessment and the expressed interests and desires of the participant.

(d) *Review of ISS.* The ISS shall be reviewed periodically to evaluate the progress of each participant in meeting the objectives of the service strategy including an evaluation of the participant's progress in acquiring basic skills and occupational skills as appropriate, and the adequacy of the supportive services provided.

(e) *Provision of services.* If JTPA resources are not sufficient to provide the full range of training or support services which might be identified in the ISS, the SDA shall make every reasonable effort to arrange for, through other community resources, basic and occupational skills training and supportive services identified as needed in the ISS for participants under titles II–A and II–C and, in addition, preemployment and work maturity skills training and work experience combined with skills training for participants under title II–C (sections 204(a)(1)(D) and 264(b)(1)(D).

(f) *SDA review of objective assessment and ISS.* (1) The objective assessment and development of the ISS may be conducted by service providers.

(2) The SDA administrative entity shall ensure that development of the ISS and the services provided, respond to the individual needs of the participant and that the combination of services to the participant is indicated by the results of the objective assessment.

(g) *ISS and documentation of decisions.* The ISS shall be used as the

basic instrument for the SDA to document the appropriateness of the decisions made about the mix and combination of services for the participant, including referrals to other programs for specified activities.

§ 628.525 Limitations.

Participation in a JTPA program does not create an entitlement to services, and nothing in the Act or this part shall be construed to establish a private right of action for a participant to obtain services described in the objective assessment or ISS.

§ 628.530 Referrals of participants to non-title II programs.

(a) When a participant is determined, through the objective assessment and the ISS, to be better served by a program other than one under title II (*e.g.* Job Corps, Vocational Rehabilitation, State or local education, substance abuse treatment center, and/or dislocated worker programs), the participant shall be referred to the appropriate program. Such referral shall be documented in the ISS.

(b) In cases where there will be a continuing relationship with an individual, a referral to another program(s) for specific services will be part of the participant's title II program participation and documented in the ISS.

(c) In cases when there will not be a continuing relationship with an individual as the result of a referral to a program other than title II, only an assessment has been provided and no ISS has been developed, the individual shall not be counted for purposes of calculating performance against the SDA's performance standards.

§ 628.535 Limitations on job search assistance.

(a) *General.* Job search assistance is designed to give a participant skills in acquiring full-time employment. See § 626.5 of this chapter, Definitions.

(b) *Conditions.* Job Search activities may be conducted only:

(1) For participants when specified as appropriate in the ISS; and

(2) When delivered in conjunction with other training or educational services designed to increase the participant's ability to acquire employment. Examples include completion of a classroom training course combined with a job search assistance class; a work experience activity followed by job search training; a pre-apprenticeship training program combined with a job search club; or office skills development training combined with job search training.

(c) *Exceptions.* Job search assistance activities including job search skills training and job clubs may be provided without the accompanying services specified in paragraph (b) of this section only when:

(1) The objective assessment and the ISS indicate that the additional services are not appropriate; and

(2) The activities are not available or accessible through other public agencies, including Employment Service as determined by the SDA.

(d) *Determination of job search availability.* For purposes of this section, job search assistance activity will normally be considered to be available from a local employment service office within the commuting area.

§ 628.540 Volunteer program.

(a) Requirement. Pursuant to sections 204(c)(6) and 264(d)(7) of the Act, the SDA shall make opportunities available for individuals who have successfully participated in programs under this part to volunteer assistance, in the form of mentoring, tutoring, and other activities.

(1) The SDA should develop local goals and objectives regarding their efforts to engage the volunteer assistance of former participants.

(2) The SDA shall maintain documentation of its efforts to implement the locally established volunteer program.

(b) [Reserved]

§ 628.545 Linkages and coordination.

(a) *General requirements.* In the conduct of programs under this part, the SDA shall establish appropriate linkages and coordination procedures with other federal programs and with appropriate education and training agencies which shall be described in the SDA job training plan. (Sections 104(b) (3) and (4), 205 (a) and (b) and 265).

(b) *Requirements for youth.* For the youth programs under this part, formal agreements shall be established with local educational agencies, which, at a minimum, shall specify:

(1) The procedures for referring and serving in-school youth;

(2) The methods of assessment of in-school youth; and

(3) Procedures for notifying the SDA when a youth drops out of the school system.

(c) *Schoolwide projects.* (1) In conducting a schoolwide project for low income individuals under sections 263(g) and 275(d) the SDA shall establish a cooperative agreement with the appropriate local educational agency.

(2) In addition to the requirements listed in paragraphs (a) and (b) of this section, the cooperative agreement shall include:

(i) A description of the ways in which the JTPA schoolwide project will supplement the educational program of the school;

(ii) Identification of measurable goals to be achieved by the schoolwide project and a provision for assessing the extent to which such goals are met;

(iii) A description of the ways in which the program will use available JTPA and other education program resources;

(iv) A description of the number of individuals to be served by the schoolwide project; and

(v) Assurances that JTPA resources shall be used to supplement and not supplant existing sources of funds.

(3) In areas where there is more than one local educational agency, cooperative agreements for schoolwide projects are required only with those local education agencies that will participate in programs under schoolwide projects (section 263(g)).

§ 628.550 Transfer of funds.

If described in the job training plan and approved by the Governor:

(a) An amount up to 10 percent of the funds allocated to the SDA under section 202(b) of the Act for title II–A may be transferred to the program under title II–C of the Act;

(b) An amount up to 10 percent of the funds allocated to the SDA under section 252(b) of the Act for title II–B may be transferred to the program under title II–C of the Act; and

(c) An amount up to 10 percent of the funds allocated to the SDA under section 262(b) of the Act for title II–C may be transferred to the program under title II–A of the Act.

Subpart F—The Adult Program

§ 628.600 Scope and purpose.

This subpart contains the regulations specifically pertaining to programs conducted under title II–A, the Adult Program.

§ 628.605 Eligibility.

(a) *Age and economic disadvantage.* Except as provided in paragraph (b), an individual shall be eligible to participate under this part only if he or she is economically disadvantaged and 22 years of age or older.

(b) *Non-economically disadvantaged individuals.* Up to 10 percent of the individuals served under this subpart in each SDA may be individuals who are not economically disadvantaged, if such individuals face serious barriers to

employment in accordance with section 203(c) of the Act.

(c) *Requirement to assist hard-to-serve individuals.* Not less than 65 percent of individuals served under this subpart shall have one or more of the additional barriers to employment as described in section 203(b) of the Act.

(d) *Addition of barrier.* An SDA may identify and add one additional serious barrier to employment to the categories listed at sections 203(b) of the Act in accordance with the specific procedures and requirements in section 203(d).

(e) *Criteria for older workers under joint programs.* (1) The SDA may establish written financial or non-financial agreements with sponsors of programs under title V of the Older Americans Act to carry out joint programs.

(2) Joint programs under this paragraph (e) may include referrals between programs, co-enrollment and provision of services.

(3) Under agreements pursuant to this paragraph (e), individuals eligible under title V of the Older Americans Act individuals shall be deemed to satisfy the requirements of section 203(d)(5)(A) of the Act. (Older Americans Act, Pub. L. 102–375, section 510.)

§ 628.610 Authorized services.

(a) The services that may be provided under this subpart are those described at section 204(b) of the Act.

(b) Counseling and supportive services: Counseling and supportive services provided under this subpart may be provided to a participant for a period of up to 1 year after the date on which the participant completes the program.

Subpart G—The Summer Youth Employment and Training Program

§ 628.700 Scope and purpose.

This subpart contains the regulations for the Summer Youth Employment and Training Program (SYETP) under part B of title II of the Act. The regulations in part 627 of this chapter and subpart E of this part apply to the SYETP to the extent that they do not conflict with the provisions of this subpart.

§ 628.701 Program goals and objectives.

(a) Each SDA shall establish written goals and objectives that shall be used in evaluating the effectiveness of its SYETP activities. Such goals and objectives may include improvement in school retention, academic performance (including mathematics and reading comprehension) and employability skills, and demonstrated coordination with other appropriate community organizations.

(b) The SDA shall ensure that the activities and services offered under the SYETP are consistent with and will contribute to the achievement of the goals and objectives developed pursuant to paragraph (a) of this section.

§ 628.702 Eligibility.

(a) *Age and economic disadvantage.* An individual is eligible to participate in programs funded under title II–B of the Act, if such individual is

(1) Age 14 through 21; and

(2)(i) Economically disadvantaged; or

(ii) Has been determined to meet the eligibility requirements for free meals under the National School Lunch Act during the most recent school year (see paragraph (b) of this section). "Most recent school year" means the current school year unless the eligibility determination is made during an interim period between school terms, in which case the term means the preceding school year.

(b) *Eligibility determination verification.* The SDA may accept the same documentation utilized by the local educational agency for approving free lunch meals or an assurance by school officials concerning the students' participation in the free school lunch program under the National School Lunch Act.

§ 628.705 SYETP Authorized services.

(a) The services that may be provided under this subpart are those described at section 253 of the Act.

(b) Basic and remedial education. The SDA shall ensure the availability of basic or remedial education for SYETP participants pursuant to the assessment process described in § 628.515 of this part from funds available to the SDA or by other education and training programs, including but not limited to the Job Corps, the JOBS program, youth corps programs or alternative or secondary schools.

(c) *Work Experience.* Work experience shall be conducted consistent with the provisions of § 627.245.

(d) *Concurrent Enrollment.* Youth being served under the SYETP or the Youth Training Program authorized under title II, part C, of the Act (see subpart H of this part) are not required to be terminated from participation in one program to enroll in the other. The SDA may enroll such youth concurrently in programs under this subpart and subpart H of this part, pursuant to guidance to be issued by the Secretary, in order to promote continuity and coordination of services.

§ 628.710 Period of program operation.

(a) Except as provided under paragraph (b) of this section, the SYETP shall be conducted during the school vacation period occurring during the summer months.

(b) An SDA operating within the jurisdiction of one or more local educational agencies that operate schools on a year-round full-time basis may offer SYETP activities to participants in such a jurisdiction during the school vacation period(s) treated as the period(s) equivalent to a school summer vacation.

Subpart H—Youth Training Program

§ 628.800 Scope and purpose.

(a) This subpart implements title II–C of the Act. Title II–C programs and activities have as their primary objective to increase the long-term employability of eligible youth. The Youth Training Program provides for year-round youth programs to address the employment needs and skill deficiencies of in-school and out-of-school youth.

(b) This subpart establishes program design (*e.g.*, objective assessment, and development of the participant ISS) elements and additional requirements that must be followed by the SDA's and service providers. The youth services authorized by this subpart are intended to be comprehensive. Coordination of Youth Training Program activities with other community and youth service opportunities is strongly encouraged.

§ 628.803 Eligibility.

(a) *Out-of-school youth.* An out-of-school youth shall be eligible to participate in programs under this subpart, if such individual is:

(1) Age 16 through 21; and

(2) Economically disadvantaged.

(b) *In-school youth.* An in-school youth shall be eligible to participate in programs under this subpart, if such individual is:

(1)(i) Age 16 through 21; or

(ii) If provided in the job training plan, age 14 through 21 inclusive; and

(2)(i) Economically disadvantaged;

(ii) Participating in a compensatory education program under Chapter I of title I of the Elementary and Secondary Education Act of 1965; or

(iii) Has been determined to meet the eligibility requirements for free meals under the National School Lunch Act during the most recent school year. *Most recent school year* means the current school year unless the eligibility determination is made during an interim period between school terms, in which case the term means the preceding school year.

(c) *Eligibility determination verification.* The SDA may accept the same documentation utilized by the

local educational agency for approving free lunch meals or an assurance by school officials concerning the students' participation in the free school lunch program under the National School Lunch Act.

(d) *Requirement to serve hard-to-serve individuals.* (1) Not less than 65 percent of the in-school youth who participate in an SDA's program under this subpart shall have one or more additional barriers to employment, as described in section 263(b) of the Act.

(2) Not less than 65 percent of the out-of-school youth who participate in an SDA's program under this subpart shall have one or more barriers to employment, as described in section 263(d) of the Act, in addition to any criterion listed in paragraph (b)(2) of this section.

(e) *Addition of barrier:* An SDA may identify and add one additional serious barrier to employment to the categories listed at sections 263 (b) and (d) of the Act in accordance with the specific procedures and requirements in section 263(h) of the Act.

(f) *Services to non-economically disadvantaged individuals.* Up to 10 percent of the youth served by an SDA under this subpart may be individuals who are not economically disadvantaged, but such individuals shall face one or more serious barriers to employment in accordance with section 263(e) of the Act.

(g) *Eligibility based on schoolwide project participation.* (1) In addition to the individuals who meet the conditions described in § 628.803 of this part, individuals who are not economically disadvantaged may participate in programs under this subpart if they are enrolled in accordance with a schoolwide project pursuant to section 263(g) of the Act.

(2) For purposes of this section, the term "school" means an individual building, facility, campus or a portion of the school such as the 11th or 12th grade.

(h)(1) *Out-of-school ratio.* Not less than 50 percent of the total title II–C participants in each SDA shall be out-of-school individuals, in accordance with section 263(f)(1) of the Act.

(2) *Schoolwide project ratios.* Those in-school participants who are served under a schoolwide project shall not be counted in determining the ratio of in-school to out-of-school youth in paragraph (h)(1) of this section.

§ 628.804 Authorized services.

(a) The SDA and the PIC shall take into consideration exemplary program strategies and services, including those selected for replication pursuant to section 453(c) of the Act concerning capacity building, in the development of services for programs under this subpart.

(b) Except as provided in paragraph (c) of this section, in order to participate in programs under this part an individual who is under the age of 18 and a school dropout shall enroll in and attend a school, course or programs described in sections 264(d)(2)(B) (ii) and (iii).

(c) An individual who is a school dropout and under the age of 18 may participate in programs under this part without meeting the requirements of paragraph (b) of this section for a limited interim period which may be during the summer months, during periods between school terms, or when a course of study is not immediately available.

(d) The provision of preemployment and work maturity skills training shall be accompanied either by work experience or by other additional services which are designed to increase the basic education or occupational skills of the participant (section 264(d)(3)(A)).

(e) The provision of work experience, job search assistance, job search skills training, and job club activities under programs conducted under this subpart shall be accompanied by other additional services which are designed to increase the basic education or occupational skills of the participant (section 264(d)(3)(B)).

(f) The additional services offered pursuant to paragraphs (d) and (e) of this section may be provided concurrently or sequentially with services provided under other education and training programs (*e.g.*, Job Opportunities and Basic Skills programs under title IV of the Social Security Act, Job Corps (see part 638 of this chapter), schools, etc.).

(g) Schoolwide projects for low-income schools shall meet the conditions in sections 263(g) (1) and (2) of the Act.

(h) Entry employment experiences in public or private non-profit agencies under this subpart shall not exceed 500 hours, and shall increase or develop the long-term employability of eligible in-school and out-of-school youth. Entry employment experiences may include:

(1) Work experience as described in § 627.245 of this chapter;

(2) Cooperative education programs that coordinate educational programs with work in the private sector; and

(i)(1) Limited internships in the private sector under this subpart which shall involve assignments in the private for-profit sector, not to exceed 500 hours and shall be designed to enhance the long-term employability of youth.

(2) The limited internship shall provide on-site private sector exposure to work and the requirements for successful job retention.

(3) A limited internship may be combined with classroom instruction relating to a particular position, occupation, industry or on the basic skills and abilities to successfully compete in the local labor market.

(j)(1) On-the-job (OJT) training activities approved under this subpart shall be consistent with the provisions of subpart B of part 627 of this chapter and shall:

(i) Be for positions that pay the participant a wage that equals or exceeds the average wage at placement in the preceding program year in the SDA for participants under title II–A;

(ii) Be for positions that have career advancement potential; and

(iii) Include a formal, written program of structured job training that will provide the participant with an orderly combination of instruction in work maturity skills, general employment competencies, and occupational specific skills.

(2) In those cases where the OJT participant is a school dropout, the participant shall participate in a program in accordance with the provisions of paragraph (b) of this section.

(k) Counseling and supportive services provided under this subpart may be provided to a participant for a period of up to 1 year after the date on which the participant completes the program.

(l) Year-Round Operations. Programs for youth under this subpart shall:

(1) Provide for a year-round education and training program that is coordinated with the appropriate local educational agencies, service providers, and other programs; and

(2) As appropriate, ensure services for youth are available on a multiyear basis, consistent with the determined needs and goals of the youth served.

(3) The year-round program delivery requirement of this paragraph does not prohibit schools on a 9-month operations schedule, from providing services for programs under this part.

PART 629—[REMOVED AND RESERVED]

4. Part 629 is removed and reserved.

PART 630—[REMOVED AND RESERVED]

5. Part 630 is removed and reserved.

6. Part 631 is revised to read as follows:

PART 631—PROGRAMS UNDER TITLE III OF THE JOB TRAINING PARTNERSHIP ACT

Subpart A—General Provisions

Sec.
631.1 Scope and purpose.
631.2 Definitions.
631.3 Participant eligibility.
631.4 Approved training rule.

Subpart B—Additional Title III Administrative Standards and Procedures

631.11 Allotment and obligation of funds by the Secretary.
631.12 Reallotment of funds by the Secretary.
631.13 Classification of costs at State and substate levels.
631.14 Limitations on certain costs.
631.15 Federal reporting requirements.
631.16 Complaints, investigations, and penalties.
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Subpart C—Needs-Related Payments

631.20 Needs-related payments.

Subpart D—State Administration

631.30 Designation or creation and functions of a State dislocated worker unit or office and rapid response assistance.
631.31 Monitoring and oversight.
631.32 Allocation of funds by the Governor.
631.33 State procedures for identifying funds subject to mandatory Federal reallotment.
631.34 Designation of substate areas.
631.35 Designation of substate grantees.
631.36 Biennial State plan.
631.37 Coordination activities.
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Subpart E—State Programs

631.40 State program operational plan.
631.41 Allowable State activities.

Subpart F—Substate Programs

631.50 Substate plan.
631.51 Allowable substate program activities.
631.52 Selection of service providers.
631.53 Certificate of continuing eligibility.

Subpart G—Federal Delivery of Dislocated Worker Services Through National Reserve Account Funds

631.60 General.
631.61 Application for funding and selection criteria.
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631.63 Reporting.
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Subpart H—[Reserved]

Subpart I—Disaster Relief Employment Assistance

631.80 Scope and purpose.
631.81 Availability of funds.
631.82 Substate allocation.
631.83 Coordination.
631.84 Allowable projects.
631.85 Participant eligibility.
631.86 Limitations on disaster relief employment.
631.87 Definitions.

Authority: 29 U.S.C. 1579(a); sec. 6305(f), Pub. L. 100–418, 102 Stat. 1107; § 631.30(d)(7) also issued under 29 U.S.C. 2107(a); § 631.37(e) also issued under sec. 402, Pub. L. 100–689, 102 Stat. 4178–4179 (29 U.S.C. 1751 note).

Subpart A—General Provisions

§ 631.1 Scope and purpose.

This part implements title III of the Act. Title III programs seek to establish an early readjustment capacity for workers and firms in each State; to provide comprehensive coverage to workers regardless of the cause of dislocation; to provide early referral from the unemployment insurance system to adjustment services as an integral part of the adjustment process; to foster labor, management and community partnerships with government in addressing worker dislocation; to emphasize retraining and reemployment services rather than income support; to create an on-going substate capacity to deliver adjustment services; to tailor services to meet the needs of individuals; to improve accountability by establishing a system of mandated performance standards; to improve financial management by monitoring expenditures and reallotting available funds; and to provide the flexibility to target funds to the most critical dislocation problems.

§ 631.2 Definitions.

In addition to the definitions contained in sections 4, 301, and 303(e) of the Act and part 626 of this chapter, the following definitions apply to programs under title III of the Act and this part:

Substantial layoff (for participant eligibility) means any reduction-in-force which is not the result of a plant closing and which results in an employment loss at a single site of employment during any 30 day period for:

(a)(1) At least 33 percent of the employees (excluding employees regularly working less than 20 hours per week); and

(2) At least 50 employees (excluding employees regularly working less than 20 hours per week); or

(b) At least 500 employees (excluding employees regularly working less than 20 hours per week).

Substantial layoff (for rapid response assistance) means any reduction-in-force which is not the result of a plant closing and which results in an employment loss at a single site of employment during any 30 day period for at least 50 employees (excluding employees regularly working less than 20 hours per week) (section 314(b)(4)).

§ 631.3 Participant eligibility.

(a) Eligible dislocated workers, as defined in section 301 of the Act, are eligible to participate in programs under this part. For the purposes of determining eligibility under the provisions of section 301(a)(1)(A) of the Act, the term "eligible for" unemployment compensation includes any individual whose wages from employment would be considered in determining eligibility for unemployment compensation under Federal or State unemployment compensation laws.

(b)(1) Except as provided in paragraph (b)(3) of this section, workers who have not received an individual notice of termination but who are employed at a facility for which the employer has made a public announcement of planned closure shall be considered eligible dislocated workers with respect to the provision of basic readjustment services specifically identified in section 314(c) of the Act with the exception of supportive services and relocation assistance.

(2) Such individuals identified in (b)(1) of this section shall be eligible to receive all services authorized in sections 314 of the Act after a date which is 180 days prior to the scheduled closure date of the facility, subject to the provisions of § 631.20 of this part and other applicable provisions regarding receipt of supportive services.

(3) Paragraphs (b)(1) and (b)(2) of this section shall not apply to individuals who are likely to remain employed with the employer or to retire instead of seeking new employment.

(4) For the purposes of paragraph (b)(1) of this section, the Governor shall establish criteria for defining "public announcement". Such criteria shall include provisions that the public announcement shall be made by the employer and shall indicate a planned closure date for the facility. (Section 314(h)).

(c) Eligible dislocated workers include individuals who were self-employed (including farmers and ranchers) and are unemployed:

(1) Because of natural disasters, subject to the provisions of paragraph (e) of this section; or

(2) As a result of general economic conditions in the community in which they reside.

(d) For the purposes of paragraph (c) of this section, categories of economic conditions resulting in the dislocation

of a self-employed individual may include, but are not limited to:

(1) Failure of one or more businesses to which the self-employed individual supplied a substantial proportion of products or services;

(2) Failure of one or more businesses from which the self-employed individual obtained a substantial proportion of products or services;

(3) Substantial layoff(s) from, or permanent closure(s) of, one or more plants or facilities that support a significant portion of the State or local economy.

(e) The Governor is authorized to establish procedures to determine the eligibility to participate in programs under this part of the following categories of individuals:

(1) Self-employed farmers, ranchers, professionals, independent tradespeople and other business persons formerly self-employed but presently unemployed.

(2) Self-employed individuals designated in paragraph (d)(1) of this section who are in the process of going out of business, if the Governor determines that the farm, ranch, or business operations are likely to terminate.

(3) Family members and farm or ranch hands of individuals identified under paragraphs (d)(1) and (2) of this section, to the extent that their contribution to the farm, ranch, or business meets minimum requirements as established by the Governor.

(f) The Governor is authorized to establish procedures to identify individuals permanently dislocated from their occupations or fields of work, including self-employment, because of natural disasters. For the purposes of this paragraph (f), categories of natural disasters include, but are not limited to, any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, drought, fire, or explosion.

(g) The State may provide services to displaced homemakers (as defined in section 4 of the Act) under this part only if the Governor determines that such services may be provided without adversely affecting the delivery of such services to eligible dislocated workers. (Section 311(b)(4).)

(h) An eligible dislocated worker issued a certificate of continuing eligibility as provided in § 631.53 of this part shall remain eligible for assistance under this part for the period specified in the certificate not to exceed 104 weeks. The 45-day enrollment provisions described in subpart B of part 627 of this chapter shall be waived for eligible individuals who possess a valid certificate under this paragraph and it is not required that a new application be taken prior to participation.

(i) An eligible dislocated worker who does not possess a valid certificate shall remain eligible if such individual:

(1) Remains unemployed, or

(2) Accepts temporary employment for the purpose of income maintenance prior to, and/or during participation in a training program under this part with the intention of ending such temporary employment at the completion of the training and entry into permanent unsubsidized employment as a result of the training. Such temporary employment must be with an employer other than that from which the individual was dislocated. This provision applies to eligible individuals both prior to and subsequent to enrollment.

§ 631.4 Approved training rule.

An eligible dislocated worker who is participating in any retraining activity, except on-the-job training, under Title III of the Act or this part shall be deemed to be in training with the approval of the State agency for purposes of section 3304(a)(8) of the Internal Revenue Code of 1986. Participation in the approved training shall not disqualify the individual from receipt of unemployment benefits to which the individual is otherwise entitled. (Section 314(f)(2).)

Subpart B—Additional Title III Administrative Standards and Procedures

§ 631.11 Allotment and obligation of funds by the Secretary.

(a) Funds shall be allotted among the various States in accordance with section 302(b)(1) of the Act, subject to paragraph (b) of this section.

(b) Funds shall be allotted among the various States in accordance with section 302(b)(2)(A) and (B) of the Act as soon as satisfactory data are available under section 462(e) of the Act.

(c) Allotments for the Commonwealth of the Northern Mariana Islands and other territories and possessions of the United States shall be made by the Secretary in accordance with the provisions of section 302(e) of the Act.

§ 631.12 Reallotment of funds by the Secretary.

(a) Based upon reports submitted by States pursuant to § 631.15 of this part, the Secretary shall make determinations regarding total expenditures of funds within the State with reference to the amount required to be reallotted pursuant to section 303(b) of the Act. For purposes of this paragraph (a)—

(1) The funds to be reallotted will be an amount equal to the sum of:

(i) Unexpended funds in excess of 20 percent of the prior program year's formula allotment to the State, and

(ii) All unexpended funds from the formula allotment for the program year preceding the prior program year.

(2)(i) The current program year is the year in which the determination is made; and

(ii) The prior program year is the year immediately preceding the current program year.

(3) Unexpended funds shall mean the remainder of the total funds made available by formula that were available to the State for the prior program year minus total accrued expenditures at the end of the prior program year.

(4) Reallotted funds will be made available from current year allotments made available by formula.

(b) Based upon the most current and satisfactory data available, the Secretary shall identify eligible States, pursuant to the definitions in section 303(e) of the Act.

(c) The Secretary shall recapture funds from States identified in paragraph (a) of this section and reallot and reobligate such funds by a Notice of Obligation (NOO) adjustment to current year funds to eligible States as identified in paragraph (b) of this section, as set forth in section 303 (a), (b), and (c) of the Act.

(d) Reallotted funds shall be subject to allocation pursuant to § 631.32 of this part, and to the cost limitations at § 631.14 of this part.

§ 631.13 Classification of costs at State and substate levels.

(a)(1) Allowable costs under title III shall be planned, controlled, and charged by either the State or the substate grantee against the following cost categories: rapid response services, basic readjustment services, retraining services, needs-related payments and supportive services, and administration. Costs shall be reported to the Secretary of Labor in accordance with the reporting requirements established pursuant to § 631.15 of this part.

(2) Except for administrative cost pools described in subpart D of part 627 of this chapter, all costs shall be allocable to a particular cost category to the extent that benefits are received by such category; and no costs shall be chargeable to a cost category except to the extent that benefits are received by such category.

(b) Rapid response services shall include the cost of rapid response

activities identified at section 314(b) of the Act.

(1) Staff salary and benefit costs are chargeable to the rapid response services cost category only for that portion of staff time actually spent on rapid response activities.

(2) All other costs are chargeable to the rapid response services cost category only to the extent that they are for response purposes.

(c) Basic readjustment services shall include the cost of basic readjustment services identified at section 314(c) of the Act, except that the cost of supportive services under section 314(c)(15) of the Act shall be charged to the needs-related payments and supportive services cost category, as provided in paragraph (e) of this section.

(d) Retraining services shall include the cost of retraining services identified at section 314(d) of the Act.

(e) Needs-related payments and supportive services shall include the cost of needs-related payments identified in section 314(e) of the Act, and supportive services identified in section 4(24) of the Act and provided for in section 314(c)(15) of the Act.

(f)(1) Administration shall include the costs incurred by recipients and subrecipients in the administration of programs under title III of the Act, and shall be that portion of necessary and allowable costs which is not directly related to the provision of services and otherwise allocable to the cost categories in paragraphs (b) through (e) of this section. The description of administrative costs in subpart D of part 627 shall be used by States and substate grantees as guidance in charging administration costs to title III programs.

(2) Administration does not include the costs of activities under section 314(b) of the Act and which are provided for in paragraph (b) of this section.

(3) Administration shall include title III funds used for coordination of worker adjustment programs with the Federal-State unemployment compensation system and with chapter 2 of title II of the Trade Act of 1974 (19 U.S.C. 2271 *et seq.*) and part 617 of this chapter. (sections 311(b)(10) and 314(f)).

§ 631.14 Limitations on certain costs.

(a) Retraining Services. Of the funds allocated to a substate grantee under part A of title III for any program year, not less than 50 percent shall be expended for retraining services specified under section 314(d) of the Act, unless a waiver of this requirement is granted by the Governor. The Governor shall prescribe criteria that will allow substate grantees to apply in advance for a waiver of this requirement, pursuant to section 315(a)(2) of the Act. The Governor shall prescribe the time and form for the submission of an application for such a waiver, as provided for at section 315(a)(3) of the Act. The Governor shall not grant a waiver that allows less than 30 percent of the funds expended by a substate grantee to be expended for retraining activities.

(b) Needs-Related Payments and Supportive Services. Of the funds allocated to the Governor, or allocated to any substate grantee, under part A of title III for any program year, not more than 25 percent may be expended to provide needs-related payments and other supportive services.

(c) Administrative cost. Of the funds allocated to the Governor, or allocated to any substate grantee, under part A of title III for any program year, not more than 15 percent may be expended to cover the administrative cost of programs.

(d) Reallotted funds are subject to the limitations on certain costs contained in paragraphs (a), (b) and (c) of this section.

(e) Funds allocated (or distributed) to substate areas under the provisions of section 302(c)(1)(E) of the Act shall be considered funds allocated to a substate grantee for the program year of the funds' initial allotment to the State, and included the cost limitations defined in paragraphs (a), (b) and (c) of this section.

(f) Funds reserved by the Governor under the provisions of section 302(c)(1) of the Act, other than funds distributed to substate grantees under the provisions of JTPA section 302(c)(1)(E), shall be considered funds allocated to the Governor for the program year of the funds' initial allotment to the State and included in the cost limitations applicable to the Governor.

(g) States and substate grantees have the full period of time that the funds are available to them to comply with the cost limitations described in JTPA section 315 and paragraphs (a), (b), and (c) of this section.

(h) Combination of Funds. (1) Substate grantees within a State may combine funds allocated under part A of title III for provision of services to eligible dislocated workers from two or more substate areas. Funds contributed by the substate grantees under this section remain subject to the cost limitations which apply to each substate grantee's total allocation (section 315(d)).

(2) To combine funds under this provision, substate grantees must be in contiguous substate areas or part of the same labor market area.

(i) For the purposes of this section:

(1) *Allotment to the State* means allotted by the formula described in section 302(b) of the Act, as adjusted by reallotments among the States, in accordance with section 303 of the Act. For purposes of determining availability and of applying cost limitations, funds will retain the identity of the program year in which they were initially allotted to a State, irrespective of subsequent reallotments.

(2) *Allocated to the substate grantee* means allocated by the formula prescribed by the Governor under section 302(b) of the Act, and allocated (or distributed) under the provisions of section 302(c)(1)(E), as adjusted by within State reallocations implemented by the Governor through procedures established pursuant to section 303(d) of the Act. For purposes of determining availability and of applying cost limitations, funds will retain the identity of the program year in which they were initially allotted to the State.

(3) *Allocated to the Governor* refers to funds reserved by the Governor for use in accordance with the provisions of section 302(c)(1) of the Act, exclusive of any such funds which are distributed or allocated to substate grantees pursuant to section 302(c)(1)(E).

(j) The cost limitations described in this section do not apply to any designated substate grantee which served as a concentrated employment program grantee for a rural area under the Comprehensive Employment and Training Act. (Section 108(d).)

§ 631.15 Federal reporting requirements.

Notwithstanding the requirements described in subpart D of part 627 of this chapter, the Governor shall report to the Secretary pursuant to instructions issued by the Secretary for programs and activities funded under this part. Such reports shall include a cost breakdown of all funds made available under this part used by the State Dislocated Worker Unit for administrative expenditures, in accordance with instructions issued by the Secretary. Reports shall be provided to the Secretary within 45 calendar days after the end of the report period. (Sections 165(a)(2) and 311(b)(11).)

§ 631.16 Complaints, investigations, and penalties.

The provisions of this section apply in addition to the sanctions provided in subpart G of part 627 of this chapter.

(a) The Secretary shall investigate a complaint or report received from an aggrieved party or a public official which alleges that a state is not complying with the provisions of the State plan required under section 311(a) of the Act. (Section 311(e)(1).)

(b) Where the Secretary determines that a State has failed to comply with its State plan, and that other remedies under the Act and part 627 of this chapter are not available or are not adequate to achieve compliance, the Secretary may withhold an amount not to exceed 10 percent of the allotment to the State for the program year in which the determination is made for each such violation. (Section 311(e)(2)(A).)

(c) The Secretary will not impose the penalty provided for under paragraph (b) of this section until all other remedies under the Act and part 627 of this chapter for achieving compliance have been exhausted or are determined to be unavailable or inadequate to achieve State compliance with the terms of the State plan.

(d) The Secretary will make no determination under this section until the affected State has been afforded adequate written notice and an opportunity to request and to receive a hearing before an administrative law judge pursuant to the provisions of subpart H of part 627 of this chapter. (Section 311(e)(2)(B).)

§ 631.17 Federal monitoring and oversight.

The Secretary shall conduct oversight of State administration of programs under this part, including the administration by each State of the rapid response assistance services provided in such State. The Secretary may review and determine the effectiveness, efficiency and timeliness of service conducted by the State in accordance with § 631.30(b) of this part, and may specify any corrective actions deemed appropriate and necessary (section 314(b)(3)).

§ 631.18 Federal by-pass authority.

(a) In the event that a State fails to submit a biennial State plan that is approved under § 631.36 of this part, the Secretary shall make arrangements to use the amount that would be allotted to the State for the delivery in that State of the programs, activities, and services authorized under title III of the Act and this part.

(b) No determination may be made by the Secretary under this section until the affected State is afforded written notification of the Secretary's intent to exercise by-pass authority and an opportunity to request and to receive a hearing before an administrative law judge pursuant to the provisions of subpart H of part 627 of this chapter.

(c) The Secretary will exercise by-pass authority only until such time as the affected State has an approved plan under the provisions of § 631.36 of this part. (Section 321(b).)

§ 631.19 Appeals.

Except as provided in this part, disputes arising in programs under this part shall be adjudicated under the appropriate State or local grievance procedures required by subpart E of part 627 of this chapter or other applicable law. Complaints alleging violations of the Act or this part may be filed with the Secretary, pursuant to subpart F of part 627 of this chapter. Paragraphs (a) through (e) of this section refer to appeal rights set forth in this part.

(a) Subpart D of part 628 of this chapter (appeals of denial of SDA designation) shall apply to denial of substate area designations under § 631.34(c) (1) and (3) of this part.

(b) Subpart D of part 628 of this chapter (appeals of final disapproval of SDA job training plans or modifications) shall apply to final disapproval of substate plans under § 631.50(f) of this part.

(c) Subpart D of part 628 of this chapter (appeals of a Governor's notice of intent to revoke approval of all or part of a plan) shall apply to a Governor's notice of intent to exercise by-pass authority under § 631.38 of this part.

(d) Subpart D of part 628 of this chapter (appeals of the Secretary's disapproval of a plan when the SDA is the State) shall apply to plan disapproval when the substate area is the State, as set forth in § 631.50 (g) and (h) of this part.

(e) Decisions pertaining to designations of substate grantees under § 631.35 of this part are not appealable to the Secretary.

Subpart C—Needs-related payments

§ 631.20 Needs-related payments.

(a) Title III funds available to States and substate grantees may be used to provide needs-related payments to participants in accordance with the approved State or substate plan, as appropriate.

(b) In accordance with the approved substate plan, needs-related payments shall be provided to an eligible dislocated worker only in order to enable such worker to participate in training or education programs under this part. To be eligible for needs-related payments:

(1) An eligible worker who has ceased to qualify for unemployment compensation must have been enrolled in a training or education program by the end of the thirteenth week of the worker's initial unemployment compensation benefit period, or, if later, by the end of the eighth week after an employee is informed that a short-term layoff will in fact exceed 6 months.

(2) For purposes of paragraph (b)(1) of this section, the term *enrolled in a training or education program* means that the worker's application for training has been approved and the training institution has furnished written notice that the worker has been accepted in the approved training program beginning within 30 calendar days.

(3) An eligible worker who does not qualify for unemployment compensation must be participating in a training or education program. (Section 314(e)(1).)

(c) Needs-related payments shall not be provided to any participant for the period that such individual is employed, enrolled in or receiving on-the-job training, out-of-area job search, or basic readjustment services in programs under the Act, nor to any participant receiving trade readjustment allowances, on-the-job training, out-of-area job search allowances, or relocation allowances under chapter 2 of title II of the Trade Act of 1974 (19 U.S.C. 2271 *et seq.*) or part 617 of this chapter. (Section 314(e)(1)).

(d) The level of needs-related payments to an eligible dislocated worker in programs under this part shall not exceed the higher of:

(1) The applicable level of unemployment compensation; or

(2) The poverty level (as by the published by the Secretary of Health and Human Services). (Section 314(e)(2).)

Subpart D—State Administration

§ 631.30 Designation or creation and functions of a State dislocated worker unit or office, and rapid response assistance.

(a) *Designation or creation of State dislocated worker unit or office.* The State shall designate or create an identifiable State dislocated worker unit or office with the capabilities and functions identified in paragraph (b) of this section. Such unit or office may be an existing organization or new organization formed for this purpose. (Section 311(b)(2).) The State dislocated worker unit or office shall.

(1) Make appropriate retraining and basic adjustment services available to eligible dislocated workers through substate grantees, and in statewide, regional or industrywide projects;

(2) Work with employers and labor organizations in promotion labor-

management cooperation to achieve the goals of this part;

(3) Operate a monitoring, reporting, and management system to provide adequate information for effective program management, review, and evaluation;

(4) Provide technical assistance and advice to substate grantees;

(5) Exchange information and coordinate programs with the appropriate economic development agency, State education and training and social services programs;

(6) Coordinate with the unemployment insurance system, the Federal-State Employment Service system, the Trade Adjustment Assistance program and other programs under this chapter;

(7) Receive advance notice of plant closings and mass layoffs as provided at section 3(a)(2) of the Worker Adjustment and Retraining Notification Act (29 U.S.C. 2102(a)(2)) and part 639 of this chapter;

(8) Immediately notify (within 48 hours) the appropriate substate grantees following receipt of an employer notice of layoff or plant closing or of any other information that indicates a projected layoff or plant closing by an employer in the grantee's substate area, in order to continue and expand the services initiated by the rapid response team (section 311(b)(3)(D));

(9) Fully consult with labor organizations where substantial numbers of their members are to be served; and

(10) Disseminate throughout the State information on the availability of services and activities under title III of the Act and this part.

(b) *Rapid response capability.* The dislocated worker unit shall have one or more rapid response specialists, and the capability to provide rapid response assistance, on-site, for dislocation events such as permanent closures and substantial layoffs throughout the State. The State will not transfer the responsibility for the rapid response assistance functions of the State dislocated worker unit to another entity, but the State may contract with another entity to perform rapid response assistance services. Nothing in this paragraph shall remove or diminish the dislocated worker unit's accountability for ensuring the effective delivery of rapid response assistance services throughout the State. Section 311(b)(12)).

(1) State rapid response specialists should be knowledgeable about the resources available through programs under this part and all other appropriate resources available through public and private sources to assist dislocated workers. The expertise required by this part includes knowledge of the Federal, State, and local training and employment systems; labor-management relations and collective bargaining activities; private industry and labor market trends; programs and services available to veterans; and other fields necessary to carry out the rapid response requirements of the Act.

(2) The rapid response specialists should have:

(i) The ability to organize a broad-based response to a dislocation event, including the ability to coordinate services provided under this part with other State-administered programs available to assist dislocated workers, and the ability to involve the substate grantee and local service providers in the assistance effort;

(ii) The authority to provide limited amounts of immediate financial assistance for rapid response activities, including, where appropriate, financial assistance to labor-management committees formed under paragraph (c)(2) of this section;

(iii) Credibility among employers and in the employer community in order to effectively work with employers in difficult situations; and

(iv) Credibility among employee groups and in the labor community, including organized labor, in order to effectively work with employees in difficult situations.

(3) The dissemination of information on the State dislocated worker unit's services and activities should include efforts to ensure that major employers, organized labor, and groups of employees not represented by organized labor, are aware of the availability of rapid response assistance. The State dislocated worker unit should make equal effort in responding to dislocation events without regard to whether the affected workers are represented by a union.

(4) In a situation involving an impending permanent closure or substantial layoff, a State may provide funds, where other public or private resources are not expeditiously available, for a preliminary assessment of the advisability of conducting a comprehensive study exploring the feasibility of having a company or group, including the workers, purchase the plant and continue it in operation.

(5) Rapid response specialists may use funds available under this part:

(i) To establish on-site contact with employer and employee representatives within a short period of time (preferably 48 hours or less) after becoming aware of a current or projected permanent closure or substantial layoff in order to—

(A) Provide information on and facilitate access to available public programs and services; and

(B) Provide emergency assistance adapted to the particular permanent closure or substantial layoff; such emergency assistance may include financial assistance for appropriate rapid response activities, such as arranging for the provision of early intervention services and other appropriate forms of immediate assistance in response to the dislocation event;

(ii) To promote the formation of labor-management committees as provided for in paragraph (c) of this section, by providing—

(A) Immediate assistance in the establishment of the labor-management committee, including providing immediate financial assistance to cover the start-up costs of the committee;

(B) A list of individuals from which the chairperson of the committee may be selected;

(C) Technical advice as well as information on sources of assistance, and liaison with other public and private services and programs; and

(D) Assistance in the selection of worker representatives in the event no union is present;

(iii) To provide ongoing assistance to labor-management committees described in paragraph (c) of this section by—

(A) Maintaining ongoing contact with such committees, either directly or through the committee chairperson;

(B) Attending meetings of such committees on an *ex officio* basis; and

(C) Ensuring ongoing liaison between the committee and locally available resources for addressing the dislocation, including the establishment of linkages with the substate grantee or with the service provider designated by the substate grantee to act in such capacity;

(iv) To collect information related to—

(A) Economic dislocation (including potential closings or layoffs); and

(B) All available resources within the State for serving displaced workers, which information shall be made available on a regular basis to the Governor and the State Council to assist in providing an adequate information base for effective program management, review, and evaluation;

(v) To provide or obtain appropriate financial and technical advice and liaison with economic development agencies and other organizations to assist in efforts to avert worker dislocations;

(vi) To disseminate information throughout the State on the availability of services and activities carried out by the dislocated worker unit or office; and

(vii) To assist the local community in developing its own coordinated response and in obtaining access to State economic development assistance.

(6) Notwithstanding the definition of "substantial layoff (for rapid response assistance)" at § 631.2 of this part, the Governor may, under exceptional circumstances, authorize rapid response assistance provided by a State dislocated worker unit when the layoff of 50 or more individuals is not at a single site of employment or is not during a single 30 day period. For purposes of this provision, "exceptional circumstances" include those situations in which layoffs or permanent closures would have a major impact upon the community(ies) in which they occur. (Section 314(b)).

(c) *Labor-management committees.* As provided for in sections 301(b)(1) and 314(b)(1)(B) of the Act, labor-management committees are a form of rapid response assistance which may be voluntarily established to respond to actual or prospective worker dislocation.

(1) Labor management committees ordinarily include (but are not limited to) the following—

(i) Shared and equal participation by workers and management, with members often selected in an informal fashion;

(ii) Shared financial participation between the company and the State, using funds provided under Title III of the Act, in paying for the operating expenses of the committee; in some instances, labor union funds may help to pay committee expenses;

(iii) A chairperson, to oversee and guide the activities of the committee who—

(A) Shall be jointly selected by the labor and management members of the committee;

(B) Is not employed by or under contract with labor or management at the site; and

(C) Shall provide advice and leadership to the committee and prepare a report on its activities;

(iv) The ability to respond flexibly to the needs of affected workers by devising and implementing a strategy for assessing the employment and training needs of each dislocated worker and for obtaining the services and assistance necessary to meet those needs;

(v) A formal agreement, terminable at will by the workers or the company management, and terminable for cause by the Governor; and

(vi) Local job identification activities by the chairperson and members of the committee on behalf of the affected workers.

(2) Because they include employee representatives, labor-management committees typically provide a channel whereby the needs of eligible dislocated workers can be assessed, and programs of assistance developed and implemented, in an atmosphere supportive to each affected worker. As such, committees must be perceived to be representative and fair in order to be most effective.

§ 631.31 Monitoring and oversight.

The Governor is responsible for monitoring and oversight of all State and substate grantee activities under this part. In such monitoring and oversight of substate grantees, the Governor shall ensure that expenditures and activities are in accordance with the substate plan or modification thereof, and with the cost limitations described in § 631.14 of this part.

§ 631.32 Allocation of funds by the Governor.

Of the funds allotted to the Governor by the Secretary under §§ 631.11 and 631.12 of this part.

(a) The Governor shall issue allocations to substate grantees, the sum of which shall be no less than 50 percent of the State's allotment. (Section 302(d)).

(b)(1) The Governor shall prescribe the formula to be used in issuing substate allocations required under paragraph (a) of this section to substate grantees.

(2) The formula prescribed pursuant to paragraph (b)(1) of this section shall utilize the most appropriate information available to the Governor. In prescribing the formula, the Governor shall include (but need not be limited to) the following information:

(i) Insured unemployment data;

(ii) Unemployment concentrations;

(iii) Plant closing and mass layoff data;

(iv) Declining industries data;

(v) Farmer-rancher economic hardship data; and

(vi) Long-term unemployment data.

(3) The Governor may allow for an appropriate weight for each of the formula factors set forth in paragraph (b)(2) of this section. A weight of zero for any of the factors required in section 302(d) of the Act and identified in paragraph (b)(2) of this section shall only be made when a review of available data indicates that the factor is not relevant to determining the incidence of need for worker dislocation assistance within the State. The formula may be amended no more frequently than once each program year. (Section 302(d).)

(c) The Governor may reserve an amount equal to not more than 40 percent of the funds allotted to the State under § 631.11 and § 631.12 of this part for State activities and for discretionary allocations to substate grantees. (Section 302(c)(1).)

(d) The Governor may reserve an additional amount equal to not more than 10 percent of the funds allotted to the State under § 631.11 of this part. The Governor shall allocate such funds, subject to the SJTCC or HRIC review and comment, during the first three quarters of the program year among substate grantees on the basis of need. Such funds shall be allocated to substate grantees and shall not be used for statewide activities. Such funds shall be included in each substate grantee's allocation for purposes of cost limitations, as described in § 631.14 of this part. (Sections 302(c)(2) and 317(1)(B).)

§ 631.33 State procedures for identifying funds subject to mandatory Federal reallotment.

The Governor shall establish procedures to assure the equitable identification of funds required to be reallotted pursuant to section 303(b) of the Act. Funds so identified may be funds reserved by the State pursuant to section 302(c)(1)(A) through (D) of the Act and/or allocated to substate grantees pursuant to section 302(c)(1)(E), (c)(2) and/or (d) of the Act. (Section 303(d).) Such procedures may not exempt either State or substate funds from reallotment.

§ 631.34 Designation of substate areas.

(a) The Governor, after receiving recommendations from the SJTCC or HRIC, shall designate substate areas for the State. (Section 312(a).)

(b) In designating substate areas, the Governor shall:

(1) Ensure that each service delivery area within the State is included within a substate area and that no SDA is divided among two or more substate areas; and

(2) Consider the availability of services throughout the State, the capability to coordinate the delivery of services with other human services and economic development programs, and the geographic boundaries of labor market areas within the State.

(c) Subject to paragraph (b) of this section, the Governor shall designate as a substate area:

(1) Any single SDA that has a population of 200,000 or more;

(2) Any two or more contiguous SDA's that:

(i) In the aggregate have a population of 200,000 or more; and

(ii) Request such designation; and

(3) Any concentrated employment program grantee for a rural area as described in section 101(a)(4)(A)(iii) of the Act.

(d) In addition to the entities identified in paragraph (c) of this section, the Governor may, without regard to the 200,000 population requirement, designate SDAs with smaller populations as substate areas.

(e) The Governor may deny a request for substate area designation from a consortium of two or more SDAs that meets the requirements of paragraph (c)(2) of this section only upon a determination that the request is not consistent with the effective delivery of services to eligible dislocated workers in the relevant labor market area, or would not otherwise be appropriate to carry out the purposes of title III. The Governor will give good faith consideration to all such requests by a consortium of SDAs to be a substate area. In denying a consortium's request for substate area designation, the Governor shall set forth the basis and rationale for the denial. (Section 312(a)(5).)

(f) In the case where the service delivery area is the State, the entire State shall be designated as a single substate area.

(g)(1) Entities described in paragraphs (c)(1) and (3) of this section may appeal the Governor's denial of substate area designation to the Secretary of Labor. The procedures that apply to such appeals shall be those set forth at subpart D of part 628 for appeals of the Governor's denial of SDA designation.

(2) An entity described in paragraph (c)(2) of this section that has been denied substate area designation may utilize the State-level grievance procedures required by section 144(a) of the Act and subpart E of part 627 of this chapter for the resolution of disputes arising from such a denial.

(h) Designation of substate areas shall not be revised more than once each two years. All such designations must be completed no later than four months prior to the beginning of any program year. (Section 312(a)(6).)

§ 631.35 Designation of substate grantees.

The Governor may establish procedures for the designation of substate grantees.

(a) Designation of the substate grantee for each substate area shall be made on a biennial basis.

(b) Entities eligible for designation as substate grantees include:

(1) Private industry councils in the substate area;

(2) Service delivery area grant recipients or administrative entities designated under Title II of the Act;

(3) Private non-profit organizations;

(4) Units of general local government in the substate area, or agencies thereof;

(5) Local offices of State agencies; and

(6) Other public agencies, such as community colleges and area vocational schools.

(c) Substate grantees shall be designated in accordance with an agreement among the Governor, the local elected official or officials of such area, and the private industry council or councils of such area. Whenever a substate area is represented by more than one such official or council, the respective officials and councils shall each designate representatives, in accordance with procedures established by the Governor (after consultation with the SJTCC or HRIC), to negotiate such agreement.

(d) The agreement specified in paragraph (c) of this section shall set forth the conditions, considerations, and other factors related to the selection of substate grantees in accordance with section 312(b) of the Act.

(e) The Governor shall negotiate in good faith with the parties identified in paragraph (c) of this section and shall make a good faith effort to reach agreement. In the event agreement cannot be reached on the selection of a substate grantee, the Governor shall select the substate grantee.

(f) Decisions under paragraphs (c), (d), and (e) of this section are not appealable to the Secretary. (Section 312 (b) and (c)).

§ 631.36 Biennial State plan.

(a) In order to receive an allotment of funds under § 631.11 and § 631.12 of this part, the State shall submit to the Secretary, in accordance with instructions issued by the Secretary, on a biennial basis, a biennial State plan. (Section 311). Such plan shall include:

(1) Assurances that—

(i) The State will comply with the requirements of Title III of the Act and this part;

(ii) Services will be provided only to eligible displaced workers, except as provided in paragraph (a)(2) of this section;

(iii) Services will not be denied on the basis of State of residence to eligible dislocated workers displaced by a permanent closure or substantial layoff within the State; and may be provided to other eligible dislocated workers regardless of the State of residence of such workers;

(2) Provision that the State will provide services under this part to displaced homemakers only if the Governor determines that the services may be provided to such workers without adversely affecting the delivery of services to eligible dislocated workers;

(3) A description of the substate allotment and reallotment procedures and assurance that they meet the requirements of the Act and this part;

(4) A description of the State procurement system and procedures to be used under title III of the Act and this part which are consistent with the provisions in subpart D of part 627 of this chapter; and

(5) Assurance that the State will not prescribe any performance standard which is inconsistent with subpart D of part 627 of this chapter.

(b) The State biennial plan shall be submitted to the Secretary on or before the May 1 immediately preceding the first of the two program years for which the funds are to be made available.

(c) Any plan submitted under paragraph (a) of this section may be modified to describe changes in or additions to the programs and activities set forth in the plan. No plan modification shall be effective unless reviewed pursuant to paragraph (d) of this section and approved pursuant to paragraph (e) of this section.

(d) The Secretary shall review State biennial plans and plan modifications, including any comments thereon submitted by the SJTCC or HRIC, for overall compliance with the provisions of the Act, this part, and the instructions issued by the Secretary.

(e) A State biennial plan or plan modification is submitted on the date of its receipt by the Secretary. The Secretary shall approve a plan or plan modification within 45 days of submission unless, within 30 days of submission, the Secretary notifies the Governor in writing of any deficiencies in such plan or plan modification.

(f) The Secretary shall not finally disapprove the State biennial plan or plan modification of any State except after written notice and an opportunity to request and to receive a hearing before an administrative law judge pursuant to the provisions of subpart H of part 627 of this chapter.

§ 631.37 Coordination activities.

(a) Services under this part shall be integrated or coordinated with services

and payments made available under chapter 2 of title II of the Trade Act of 1974 (19 U.S.C. 2271 *et seq.*) and part 617 of this chapter and programs provided by any State or local agencies designated under section 239 of the Trade Act of 1974 (19 U.S.C. 2311) or part 617 of this chapter. (Section 311 (b)(10).) Such coordination shall be effected under provisions of an interagency agreement when the State agency responsible for administering programs under this part is different from the State agency administering Trade Act programs.

(b) States may use funds allotted under §§ 631.11 and 631.12 of this part for coordination of worker readjustment programs, (*i.e.*, programs under this part and trade adjustment assistance under part 617 of this chapter) and the unemployment compensation system consistent with the limitation on administrative expenses (see § 631.14(a)(1) of this part). Each State shall be responsible for coordinating the unemployment compensation system and worker readjustment programs. (Section 314(f).)

(c) Services under this part shall be coordinated with dislocated worker services under title III of the Carl D. Perkins Vocational Education Act (20 U.S.C. 2351 *et seq.*). (Section 311(b)(5).)

(d) In promoting labor management cooperation, including the formation of labor-management committees under this part, the dislocated worker unit shall consider cooperation and coordination with labor-management committees established under other authorities. (Section 311(b)(3)(B).)

(e) In accordance with section 402 of the Veterans' Benefits and Programs Improvement Act of 1988, 29 U.S.C. 1751 note, services under this part shall be coordinated with programs administered by the Department of Veterans Affairs and with other veterans' programs such as the Veterans' Job Training Act (29 U.S.C. 1721 note), title IV–C of the Job Training Partnership Act (29 U.S.C. 1721 *et seq.*), part 635 of this chapter, and the Transition Assistance Program.

§ 631.38 State by-pass authority.

(a)(1) In the event that a substate grantee fails to submit a plan, or submits a plan which is not approved by the Governor (see § 631.50(f) of this part), the Governor may direct the expenditure of funds allocated to the substate area.

(2) The Governor's authority under this paragraph (a) to direct the expenditure of funds remains in effect only until such time as a plan is submitted and approved, or a new substate grantee is designated. (Section 313(c).)

(3) The Governor shall not direct the expenditure of funds under this paragraph (a) until after the affected substate grantee has been afforded advance written notice of the Governor's intent to exercise such authority and an opportunity to appeal to the Secretary pursuant to the provisions of subpart D of part 628 of this chapter.

(b)(1) If a substate grantee fails to expend funds allocated to it in accordance with its plan, the Governor, subject to appropriate notice and opportunity for comment in the manner required by section 105(b)(1), (2), and (3) of the Act, may direct the expenditure of funds only in accordance with the substate plan.

(2) The Governor's authority under this paragraph (b) to direct the expenditure of funds remain in effect only until:

(i) The substate grantee corrects the failure;

(ii) The substate grantee submits an acceptable modification; or

(iii) A new substate grantee is designated. (Sections 313 (a) and (d).)

(3) The Governor shall not direct the expenditure of funds under this paragraph (b) until after the affected substate grantee has been afforded advance written notice of the Governor's intent to exercise such authority, and an opportunity to appeal to the Secretary pursuant to the provisions of § 628.5(c) of this chapter.

(c) When the substate area is the State, the Secretary shall have the same authority as the Governor under paragraphs (a) and (b) of this section.

Subpart E—State Programs

§ 631.40 State program operational plan.

(a) The Governor shall submit to the Secretary biennially, in accordance with instructions issued by the Secretary, a State program operational plan describing the specific activities, programs and projects to be undertaken with the funds reserved by the Governor under § 631.32(c) of this part.

(b) The State program operational plan shall include a description of the mechanisms established between the Federal-State Unemployment Compensation System, the Trade Adjustment Assistance Program, the State Employment service and programs authorized under title III of the Act and this part to coordinate the identification and referral of dislocated workers and the exchange of information.

§ 631.41 Allowable State activities.

(a) States may use funds reserved under § 631.32(c) of this part, subject to the provisions of the State biennial and program operational plans, for:

(1) Rapid response assistance;

(2) Basic readjustment services when undertaken in Statewide, regional or industrywide projects, or, initially, as part of rapid response assistance;

(3) Retraining services, including (but not limited to) those in section 314(d) of the Act when undertaken in Statewide, industrywide and regional programs;

(4) Coordination with the unemployment compensation system, in accordance with § 631.37(b) of this part;

(5) Discretionary allocation for basic readjustment and retraining services to provide additional assistance to substate areas that experience substantial increases in the number of dislocated workers, to be expended in accordance with the substate plan or a modification thereof;

(6) Incentives to provide training of greater duration for those who require it; and

(7) Needs-related payments in accordance with section 315(b) of the Act.

(b) Activities will be coordinated with other programs serving dislocated workers, including training under chapter 2 of title II of the Trade Act of 1974 (19 U.S.C. 2271 *et seq.*) and part 617 of this chapter.

(c) Where appropriate, State-level activities should be coordinated with activities and services provided by substate grantees.

(d) Retraining services provided to individuals with funds available to a State should be limited to those individuals who can most benefit from and are in need of such services.

(e) Other than basic and remedial education, literacy and English for non-English speakers training, retraining services provided with funds available to a State shall be limited to those for occupations in demand in the area or another area to which the participant is willing to relocate, or in sectors of the economy with a high potential for sustained demand or growth.

(f) Services provided to displaced homemakers should be part of ongoing programs and activities under title III and this part and not separate and discrete programs.

(g) Basic readjustment services described in § 631.3(b)(1), provided to individuals who have not received a specific notice of termination or layoff and work at a facility at which the employer has made a public announcement that such facility will close, shall to the extent practicable be funded by the State with funds reserved under § 631.32(c). (Section 314(h).)

(h) The provisions of section 107(a), (b) and (e) of the Act (but not subsections (c) and (d) of section 107) and subpart D of part 627 of this chapter apply to State selection of service providers for funded activities authorized in § 631.32(c) of this part.

Subpart F—Substate Programs

§ 631.50 Substate plan.

(a) In order to receive an allocation of funds under § 631.32 of this part, the substate grantee shall submit to the Governor a substate plan, in accordance with instructions issued by the Governor. Such plan shall meet the requirements of this section and shall be approved by the Governor prior to funds being allocated to a substate grantee.

(b) The Governor shall issue instructions and schedules that assure that substate plans and plan modifications conform to all requirements of the Act and this part and contain the statement required by section 313(b) of the Act.

(c) Substate plans shall provide for compliance with the cost limitation provisions of § 631.14 of this part.

(d) The SJTCC or HRIC shall review and submit to the Governor written comments on substate plans.

(e) Prior to the submission of the substate plan to the Governor, the substate grantee shall submit the plan to the parties to the agreement described in § 631.35(c) of this part for review and comment. (Section 313(a).)

(f) The Governor's review and approval (or disapproval) of a substate plan or plan modification, and appeals to the Secretary from disapprovals thereof, shall be conducted according to the provisions of section 105 of the Act and subpart D of part 628 of this chapter. (Section 313(c).)

(g) If a substate grantee fails to meet the provisions for plan submission and approval found in this section, the Governor may exercise the by-pass authority set forth at § 631.38 of this part.

(h) When the substate area is the State, the substate plan (and plan modification(s)) shall be submitted by the Governor to the Secretary. The dates for submission and consideration and the Secretary's review and approval (or disapproval) of the plan or plan modification, and appeals to administrative law judges from disapproval thereof, shall be conducted according to the provisions of subpart D of part 628 of this chapter.

§ 631.51 Allowable substate program activities

(a) The substate grantee may use JTPA section 302(c)(1), (c)(2), and (d) funds allocated by the Governor under § 631.32 of this part for basic readjustment services, retraining services, supportive services and needs-related payments.

(b) The provisions of subpart D of part 627 of this chapter (procurement, cost principles and allowable costs) apply to funds allocated to substate grantees under this part unless otherwise specifically provided for.

(c) Other than basic and remedial education, literacy and English for non-English speakers training, retraining services provided with funds available to a substate area shall be limited to those for occupations in demand in the area or another area to which the participant is willing to relocate, or in sectors of the economy with a high potential for sustained demand or growth.

(d) Retraining services provided to individuals with funds available to a substate area should be limited to those individuals who can most benefit from and are in need of such services. (Sections 312(e) and 141(a).)

§ 631.52 Selection of service providers.

(a) The substate grantee shall provide authorized JTPA title III services within the substate area, pursuant to an agreement with the Governor and in accordance with the approved State plan and substate plan, including the selection of service providers.

(b) The substate grantee may provide authorized JTPA Title III services directly or through contract, grant, or agreement with service providers. (Section 312(d).)

(c) Services provided to displaced homemakers should be part of ongoing programs and activities under title III of the Act and this part and not separate and discrete programs.

(d) The provisions of section 107 (a), (b), (c) and (e) of the Act and subpart D of part 627 of this chapter apply to substate grantee selection of service providers as specified in this section.

§ 631.53 Certificates of continuing eligibility.

(a) A substate grantee may issue to any eligible dislocated worker who has applied for the program authorized in this part a certificate of continuing eligibility. Such a certificate of continuing eligibility:

(1) May be effective for periods not to exceed 104 weeks,

(2) Shall not include any reference to any specific amount of funds,

(3) Shall state that it is subject to the availability of funds at the time any such training services are to be provided, and

(4) Shall be non-transferable.

(b) Acceptance of a certificate of continuing eligibility shall not be deemed to be enrollment in training.

(c) Certificates of continuing eligibility may be used, subject to the conditions included on the face of the certificate, in two distinct ways:

(1) To defer the beginning of retraining: Any individual to whom a certificate of continuing eligibility has been issued under paragraph (a) of this section shall remain eligible for retraining and education services authorized under this part for the period specified in the certificate, notwithstanding the definition of "eligible dislocated worker" in section 301(a) of the Act or the participant eligibility provisions in § 631.3 of this part, and may use the certificate in order to receive retraining services, subject to the limitations contained in the certificate; or

(2) To permit eligible dislocated workers to seek out and arrange their own retraining with service providers approved by the substate grantee; retraining provided pursuant to the certificate shall be in accord with requirements and procedures established by the substate grantee and shall be conducted under a grant, contract, or other arrangement between the substate grantee and the service provider.

(d) Substate grantees shall ensure that records are maintained showing to whom such certificates of continuing eligibility have been issued, the dates of issuance, and the number redeemed by the substate grantees.

Subpart G—Federal Delivery of Dislocated Worker Services Through National Reserve Account Funds

§ 631.60 General.

Of the funds appropriated for title III of the Act, 20 percent (less those amounts allotted in accordance with section 302(e) of the Act) shall be used for Federal responsibilities, described in section 323 of the Act. Subject to the provisions of section 924 of the Act, the Secretary may reserve funds under this part for awards to entities submitting applications for such funds based upon selection criteria published by the Secretary. The Secretary may utilize reserve funds to provide additional assistance to States to assist the States in carrying out programs under this part.

§ 631.61 Application for funding and selection criteria.

To qualify for consideration for funds reserved by the Secretary for activities

under section 323 of the Act, applications shall be submitted to the Secretary pursuant to instructions issued by the Secretary specifying application procedures, selection criteria, and approval process. Separate instructions will be issued for each category of grant awards, as determined by the Secretary.

§ 631.62 Cost limitations.

The expenditure of funds provided to grantees under this subpart shall be consistent with the cost limitations specified in section 315 of the Act and described in paragraphs (a), (b) and (c) of § 631.14 of this part, except as provided in the instructions under § 631.61.

§ 631.63 Reporting.

(a) Grantees under part B of title III of the Act shall submit reports as prescribed by the Secretary.

(b) Significant developments: Grantees shall notify the Secretary of developments that have a significant impact on the grant or subgrant supported activities, including problems, delays, or adverse conditions which may materially impair the ability to meet the objectives of the project. This notification shall include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

§ 631.64 General administrative requirements.

(a) Activities under this subpart may be carried out and funding provided directly to grantees other than States.

(b) All grantees and subgrantees under this subpart which are States or substate grantees are subject to the provisions in part 627 of this chapter.

(c) For grantees other than States and substate grantees, the following provisions shall apply to grants under this subpart.

(1) *Grievance procedures.* (i) Each grantee shall establish and maintain a grievance procedure for grievances or complaints about its programs and activities from participants, subgrantees, subcontractors, and other interested persons. Hearings on any grievance shall be conducted within 30 days of filing of a grievance and decisions shall be made not later than 60 days after the filing of a grievance. Except for complaints alleging fraud or criminal activity, complaints shall be made within one year of the alleged occurrence.

(ii) Grantees shall be subject to the provisions of section 144 of the Act, 29 CFR part 97 and 41 CFR part 29–70.

(iii) If the grantee is already subject to the grievance procedure process and requirements established by the Governor (*i.e.*, through another JTPA grant, subgrant, or contract), its adherence to that procedure shall meet the requirements of this paragraph (c)(1).

(2) *Uniform Administrative Standards.* Grantees shall be subject to the standards and requirements described in 29 CFR Part 97 or 41 CFR parts 29–70 (1984 ed.), as appropriate, as well as any additional standards prescribed in grant documents or Secretarial guidelines. If the grantee/subgrantee is already subject to additional standards established by the Governor (*i.e.*, through another JTPA grant, subgrant, or contract), its adherence to those standards shall meet the requirements of this paragraph (c)(2).

Subpart H—[Reserved]

Subpart I—Disaster Relief Employment Assistance

§ 631.80 Scope and purpose.

This subpart establishes a Disaster Relief Employment Assistance program under title IV, part J of JTPA which shall be administered in conjunction with the title III National Reserve Grants Programs.

§ 631.81 Availability of funds.

Funds appropriated to carry out this part may be made available by grant to the Governor of any State within which is located an area that has suffered an emergency or a major disaster as defined in paragraphs (1) and (2), respectively, of section 102 of the Disaster Relief Act of 1974 (42 U.S.C. 5122 (1) and (2)) (referred to in this subpart as the "disaster area"). The Secretary shall prescribe procedures for applying for funds.

§ 631.82 Substate allocation.

(a) Not less than 80 percent of the grant funds available to any Governor under § 631.81 of this part shall be allocated by the Governor to units of general local government located, in whole or in part, within such disaster areas. The remainder of such funds may be reserved by the Governor for use, in concert with State agencies, in cleanup, rescue, repair, renovation, and rebuilding activities associated with such major disaster.

(b) The JTPA title III program SSG for the disaster area shall be designated local entity for administration of the grant funds under this subpart.

§ 631.83 Coordination.

Funds made available under this subpart to Governors and units of general local government shall be expended in consultation with—

(a) Agencies administering programs for disaster relief provided under the Disaster Relief Act of 1974; and

(b) The JTPA title II administrative entity and the private industry council in each service delivery area within which disaster employment programs will be conducted under this subpart.

§ 631.84 Allowable projects.

Funds made available under this subpart to any unit of general local government in a disaster area—

(a) Shall be used exclusively to provide employment on projects to provide food, clothing, shelter and other humanitarian assistance for disaster victims; and on projects regarding demolition, cleanup, repair, renovation, and reconstruction of damaged and destroyed structures, facilities, and lands located within the disaster area; and

(b) May be expended through public and private non-profit agencies and organizations engaged in such projects.

§ 631.85 Participant eligibility.

An individual shall be eligible to be offered disaster employment under this subpart if such individual is—

(a)(1) Eligible to participate, enroll, or is a participant or enrolled, in a program under title III of the Act, other than an individual who is actively engaged in a training program; or

(2) Eligible to participate in programs or activities through the Native American and Migrant programs; or

(3) Unemployment as a consequence of the disaster.

(b) [Reserved]

§ 631.86 Limitations on disaster relief employment.

No individual shall be employed under this subpart for more than 6 months for work related to recovery from a single natural disaster (described in § 631.3(f) of this part.

§ 631.87 Definitions.

As used in this subpart, the term "unit of general local government" includes:

(a) In the case of a community conducting a project in an Indian reservation or Alaska Native village, the grantee designated under the JTPA Section 401 Indian and Native American Program (see part 632 of this chapter), or a consortium of such grantees and the State; and

(b) In the case of a community conducting a project in a migrant or seasonal farmworker community, the grantee designated under the JTPA Section 402 Migrant and Seasonal

Farmworker Program (see part 633 of this chapter), or a consortium of such grantees and the State.

7. Part 637 is revised to read as follows:

PART 637—PROGRAMS UNDER TITLE V OF THE JOB TRAINING PARTNERSHIP ACT

Subpart A—General Provisions

Sec.
637.100 Scope and purpose.
637.105 Definitions.

Subpart B—Program Planning and Operation

637.200 Allotments to States.
637.205 Notice of intent to participate.
637.210 Incentive bonus program applications.
637.215 Review and approval of applications for incentive bonus payments.
637.220 Eligibility criteria for individuals to be counted in determining incentive bonuses.
637.225 Determination of incentive bonus.
637.230 Use of incentive bonuses.

Subpart C—Additional Title V Administrative Standards and Procedures

637.300 Management systems, reporting and recordkeeping.
637.305 Federal monitoring and oversight.
637.310 Audits.

Subpart D—Data Collection [Reserved]

Authority: 29 U.S.C 1579(a); 29 U.S.C. 1791i(e).

Subpart A—General Provisions

§ 637.100 Scope and purpose.

(a) This part implements title V of the Act which creates a program to provide incentive bonuses to States for providing certain employable dependent individuals with job training to reduce welfare dependency, to promote self-sufficiency, to increase child support payments, and to increase employment and earnings (section 501).

(b) This part applies to programs operated with funds under title V of the Job Training Partnership Act.

§ 637.105 Definitions.

In addition to the definitions contained in sections 4, 301, 303(e), and in § 626.4 of this chapter, the following definitions apply to the administration of title V of the Act and this part:

Absent parent means an individual who is continuously absent from the household and who is a non-custodial parent of a dependent child receiving aid to families with dependent children (AFDC) under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*).

Disability assistance means benefits offered pursuant to title XVI of the Social Security Act, relating to the supplemental security income program.

Federal contribution means the amount of the Federal component of cash payments to individuals within the participating State under welfare and/or disability assistance programs, including part A of title IV of the Social Security Act.

Subpart B—Program Planning and Operation

§ 637.200 Allotments to States.

(a) For each program year for which funds are appropriated to carry out programs under this part, the Secretary shall pay to each participating State the amount the State is eligible to receive in accordance with this part. No payments shall be made for any years for which funds are not appropriated and/or not available (section 502(a)).

(b) If the appropriation is not sufficient to pay to each State the amount it is eligible to receive in accordance with this part, the State shall receive a percentage of the total available funds equal to the percentage of its bonus compared to the national total of bonuses (section 502(b)).

(c) If an additional amount is made available after the application of paragraph (b) of this section, such additional amount shall be allocated among the States by increasing payment in the same manner as was used to reduce payment, except that no State shall be paid an amount which exceeds the amount to which it is eligible (section 502(c)).

§ 637.205 Notice of intent to participate.

(a) Any State seeking to participate in the incentive bonus program shall notify the Secretary of its intent to do so no later than 30 days before the beginning of its first program year of participation (i.e., June 1) (section 505(a)).

(b) Pursuant to instructions issued by the Secretary, the notification referenced in paragraph (a) of this section shall be in the form of a letter from the Governor to the Secretary advising the Secretary of the State's intention to apply for, receive and expend bonuses under this program in a manner consistent with this part (section 505(b)).

(c) After the State's submission of a notice of intent to participate, incentive bonuses may be claimed by a State for any individual who:

(1)(i) Was an absent parent of any child receiving AFDC at the time such individual was determined to be eligible for participation in programs under the Act;

(ii) Has participated in education, training, or other activities (including the Job Corps) funded under the Act; and

(iii) Pays child support for a child specified in paragraph (c)(1) of this section following termination from activities funded under the Act; or

(i) Is blind or disabled;

(ii) Was receiving disability assistance at the time such individual was determined to be eligible for participation in programs under the Act;

(iii) Has participated in education, training, or other activities (including the Job Corps) funded under the Act; and

(iv) Earns from employment a wage or an income (section 506).

(d) A Governor may withdraw the State's participation in the incentive bonus program in any program year by submitting a written notice of withdrawal.

§ 637.210 Incentive bonus program applications.

(a) Any State seeking to receive an incentive bonus under this title shall submit an Incentive Bonus Program application pursuant to instructions issued by the Secretary that will contain the criteria for approval of such application. Each application shall contain, at a minimum, the following information:

(1) A list of eligible individuals who met the requirements of § 637.14 of this part during the program year;

(2) The amount of the incentive bonus attributable to each eligible individual who is claimed by the State; and

(3) A statement certifying the availability of documentation to verify the eligibility of participants and the amount of the incentive bonus claimed by the State (section 505(b)).

(b) Such application for any program year shall be submitted by the State to the Secretary no later than August 31 following the end of the program year for which the bonus is being claimed. A copy of such application shall also be submitted at the same time to the appropriate DOL Employment and Training Administration Regional Office.

§ 637.215 Review and approval of applications for incentive bonus payments.

(a) The Secretary shall review all applications for overall compliance with JTPA, the requirements of this part, and the instructions issued by the Secretary.

(b) The Secretary shall inform a State within 30 days after receipt of the application as to whether or not its application has been approved.

(c) If the application is not approved, the Department shall issue an initial notice of denial of payment indicating

the reasons for such denial. The Governor will then have 30 days to respond to the reasons for the denial before a final decision is made.

(d) If the Department determines that the additional information provided does not adequately respond to the questions raised in the initial review process, a final denial of payment shall be issued. The Governor may then appeal the decision in accordance with the procedures at subpart H of part 627 of this chapter (sections 504(c) and 505(c)).

§ 637.220 Eligibility criteria for individuals to be counted in determining incentive bonuses.

An individual shall be eligible to be counted as part of the State's request for an incentive bonus payment under this part if the individual:

(a)(1) Was an absent parent of any child receiving AFDC at the time such individual was determined to be eligible for participation in programs under the Act;

(2) Has participated in education, training, or other activities (including the Job Corps) funded under the Act; and

(3) Pays child support for a child specified in paragraph (a)(1) of this section following termination from activities funded under the Act; or

(b)(1) Is blind or disabled;

(2) Was receiving disability assistance at the time such individual was determined to be eligible for participation in programs under the Act;

(3) Has participated in education, training, or other activities (including the Job Corps) funded under the Act; and

(4) Earns from employment a wage or an income (section 506).

§ 637.15 Determination of incentive bonus.

The amount of the incentive bonus to be paid to each State shall be the total of the incentive bonuses claimed for each eligible individual within the State. The amount of the incentive bonus to be paid each State shall be determined by the sum of

(a) An amount equal to the total of the amounts of child support paid by each individual who is eligible under § 637.14(a) of this part, for up to 2 years after such individual's termination from JTPA; and,

(b) An amount equal to the total reduction in the Federal contribution to the amounts received under title XVI of the Social Security Act (42 U.S.C. 1381 *et seq.*) by each individual who is eligible under § 637.14(b) of this part, for up to 2 years after such individual's termination from JTPA (section 503).

§ 637.230 Use of incentive bonuses.

(a) During any program year, the Governor may use an amount not to exceed 5 percent of the State's total bonus payment for the administrative costs incurred under this program, including data and information collection and compilation, recordkeeping, or the preparation of applications for incentive bonuses (section 504(a)(1)(A)).

(b) The remainder, not less than 95 percent of the incentive bonuses received, shall be distributed to SDAs and Job Corps Centers within the State in a manner consistent with an agreement between the Governor and these SDAs and centers. This agreement shall reflect an equitable method of distribution which is based on the degree to which the effort of the SDA and/or Center contributed to the State's qualification for incentive bonus funds under title V (section 504(a)(1)(B)).

(c) Not more than 10 percent of the incentive bonus received in any program year by each SDA and/or Job Corps Center may be used for the administrative costs of establishing and maintaining systems necessary for operation of programs under title V, including the costs of providing incentive payments described in paragraph (d) of this section, technical assistance, data and information collection and compilation, management information systems, post-program followup activities, and research and evaluation activities (section 504(a)(2)).

(d) Each SDA and/or Job Corps Center may make incentive payments to service providers, including participating State and local agencies, and community-based organizations, that demonstrate effectiveness in delivering employment and training systems to eligible individuals under this title (section 504(b)).

(e) All remaining funds received by each SDA shall be used for activities described in sections 204 and 264 of JTPA and shall be subject to regulations governing the operation of programs under titles II–A and II–C of JTPA. All remaining funds received by each Job Corps Center shall be used for activities authorized under part B of title IV (section 504(a)(2)).

Subpart C—Additional Title V Administrative Standards and Procedures

§ 637.300 Management systems, reporting and recordkeeping.

(a) The Governor shall ensure that the State's financial management system and recordkeeping system comply with subpart D of part 627 of this chapter.

(b) Notwithstanding the provisions of § 629.36 of this chapter, the Governor shall report to the Secretary pursuant to instructions issued by the Secretary regarding activities funded under this part. Reports shall be required semi-annually and annually. Reports shall be provided to the Secretary within 45 calendar days after the end of the report period.

(c) The Governor shall assure that appropriate and adequate records are maintained for the required time period to support all incentive bonus payment applications. Such records shall include documentation to support individuals' eligibility under this part.

§ 637.305 Federal monitoring and oversight.

The Secretary shall conduct oversight of the programs and activities conducted in accordance with this part.

§ 637.310 Audits.

The Governor shall ensure that the State complies with the audit provisions at § 629.42 of this chapter.

Subpart D—Data Collection [Reserved]

Signed at Washington, DC, this 17th day of December 1992.

Lynn Martin,

Secretary of Labor.

[FR Doc. 92–31075 Filed 12–28–92; 8:45 am]

BILLING CODE 4510–30–M

federal register

Tuesday
December 29, 1992

Part IV

Department of Health and Human Services

Food and Drug Administration

21 CFR Part 316
Orphan Drug Regulations: Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 316

[Docket No. 85N-0483]

RIN 0905-AB55

Orphan Drug Regulations

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing final regulations to implement section 2 of the Orphan Drug Act, which consists of four sections added to the Federal Food, Drug, and Cosmetic Act (the act). In the **Federal Register** of January 29, 1991 (56 FR 3338), the agency proposed regulations to implement this section of the Orphan Drug Act. The Orphan Drug Act directs FDA to provide written recommendations on studies required for approval of a marketing application for an orphan drug. It also provides for the designation of drugs, including antibiotics and biological products, as orphan drugs when certain conditions are met, and it provides conditions under which a sponsor of an approved orphan drug enjoys exclusive approval for that drug for the orphan indication for 7 years following the date of the drug's marketing approval. Finally, section 2 of the Orphan Drug Act encourages sponsors to make orphan drugs available for treatment on an "open protocol" basis before the drug has been approved for general marketing. This action will benefit consumers by encouraging manufacturers to develop and make available to patients drugs for diseases and conditions that are rare in the United States.

EFFECTIVE DATE: January 28, 1993.

FOR FURTHER INFORMATION CONTACT: Emery J. Sturniolo, Office of Orphan Products Development (HF-35), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, (301) 443-4718.

SUPPLEMENTARY INFORMATION:

I. Background

In enacting the Orphan Drug Act (Pub. L. 97-414), Congress required FDA to issue regulations for the implementation of sections 525 and 526 (21 U.S.C. 360aa-360bb) that the Orphan Drug Act added to the act. These sections relate to written FDA recommendations on studies required for approval of marketing applications for orphan drugs and for the designation of eligible drugs as orphan drugs. Accordingly, in the **Federal Register** of January 29, 1991 (56 FR 3338), FDA issued a notice of proposed rulemaking entitled "Orphan Drug Regulations" for the implementation of these sections as well as for the implementation of sections 527 and 528 of the act (21 U.S.C. 360cc-360dd), which relate to exclusive marketing for orphan drugs and the encouragement of sponsors to make orphan drugs available for treatment on an "open protocol" basis before the drug has been approved for general marketing. This notice of proposed rulemaking will hereinafter be referred to as the "NPRM."

FDA announced that the proposed regulations codified existing administrative practices implementing the Orphan Drug Act as amended. The agency noted that the proposed regulations would, where possible, attempt to ensure that the act's incentives were available only when they would further the purposes of the Orphan Drug Act and that the act should never be used to block significant improvements in the treatment of rare diseases.

II. Summary of and Response to Comments

In response to FDA's NPRM, the agency received 40 public comments. Most comments came from either companies or trade associations of companies that are marketing or hope to market orphan drugs and from two associations representing patients with rare diseases or conditions. FDA has responded to all comments that were received and filed in FDA's Dockets Management Branch. Most comments are considered in the numerical order of the proposed sections to which they are related.

A. General Comments on the Preamble

1. One comment addressed the following statement in the Preamble: "FDA proposes that this regulation, when final, will apply only prospectively. Therefore, FDA does not plan to reconsider any prior actions under the Orphan Drug Act, or change any orphan-drug status, to conform to the final regulation." (See NPRM, section II.B., paragraph 18). The comment expressed the fear that the prospective-only application of the regulation might mean that FDA would be unable to approve a clinically superior subsequent drug otherwise identical to a pioneer that had been approved and obtained orphan drug exclusive marketing prior to the effective date of this rule.

FDA advises that the fear expressed in the comment is groundless. FDA meant only to rule out reconsideration of previous drug designation and approval decisions. FDA did not mean that it would refuse to approve a clinically superior drug that might not have been approvable prior to promulgation of this rule.

2. Another comment objected to the use of the proposed rule as operational policy prior to issuance of final regulations. The comment argued that the final rule should not apply retrospectively to drugs that held orphan designation prior to the effective date of the final rule.

FDA has not relied on the proposed rule to dictate operational policy during the interim period between the publication of the NPRM and the publication of this final rule. However, FDA decision's during this period have as a matter of fact been consistent with the provisions of the proposed rule. As to retrospective application of the proposed rule, FDA does not regard the application of these regulations to already designated drugs as a retrospective application as long as FDA does not reconsider previous decisions concerning these drugs.

3. One comment stated that designated orphan drugs should be exempt from all investigational new drug application (IND), new drug application (NDA), product license application (PLA), and Establishment License Application (ELA) user fees, as user fees for review of these drugs would be inconsistent with the intent of the Orphan Drug Act.

FDA advises that the question of user fees is outside the purview of this regulation. However, in the future, when and if user fees are considered, designated orphan drugs will be considered for exemption from them.

4. Several comments urged that marketing applications for drugs whose approvals are temporarily barred by the exclusive marketing provisions of the Orphan Drug Act nevertheless be completely reviewed so that they may be quickly approved upon the expiration of the 7 years' exclusive marketing period.

FDA advises that, once the agency determines that approval of a drug would be temporarily barred by the exclusive marketing provisions of the Orphan Drug Act, the timing of the review will be decided on a case-by-case basis by the appropriate division of the Center for Biologics Evaluation and Research or the Center for Drug Evaluation and Research. Such decisions will be based on time and resource considerations as well as on

the complexity of information to be considered.

5. Some comments argued that the proposed regulations go too far in protecting exclusive marketing rights, while other comments argued that they do not go far enough.

On the whole, based on the legislative history of the Orphan Drug Act and FDA's understanding of its purposes, the agency came to its conclusions by seeking as much as possible to protect the incentives of the Orphan Drug Act without allowing their abuse. FDA believes the final rule achieves the best balance possible between protecting exclusive marketing rights and fostering competition.

B. Sameness Versus Difference

6. One comment suggested that proposed § 316.3(b)(3)(ii) be amended to include a reference to "severe" adverse reactions in addition to "frequent" adverse reactions. Another comment suggested substituting the word "meaningful" for "substantial" in the same paragraph and substituting the phrase, "clinically significant adverse effects" for "relatively frequent effects."

FDA has carefully considered the suggested changes and concludes that it will not amend the final rule as requested because the proposed changes would not add to the clarity of the regulation. The use of the words, "frequent," "meaningful," and "relatively frequent adverse effects" are intended as examples of considerations that might be relevant in determining clinical superiority and are not intended as the only routes to demonstrating greater safety of a drug. FDA's decision not to use the suggested words and phrases does not mean that FDA would not consider less severe adverse reactions in a meaningful portion of the target population or a diminution of clinically significant adverse effects as being evidence of greater safety.

7. One comment pointed out that § 316.3(b)(13)(i) and (b)(13)(ii) should both use the phrase, "intended for the same use," which was used in proposed § 316.3(b)(13)(i) but was omitted from paragraph (b)(13)(ii).

FDA agrees, and the phrase, "intended for the same use," which was inadvertently omitted, has been added to § 316.3(b)(13)(ii).

8. Another comment stated that § 316.3(b)(3)(i) refers to "the same kind of evidence to support a comparative effectiveness claim for two different drugs." The comment asked that FDA make clear that the standard in the NPRM will be consistent with FDA's prescription drug advertising standard, which requires a showing of clinical significance of the claim.

FDA believes that it is more accurate to draw a comparison between the clinical superiority standard in this rule with FDA's standards for use of such claims in prescription drug labeling found in 21 CFR 201.57(c)(3)(v) (as distinguished from drug standards for advertising).

9. Several comments asked that examples be provided and the difference between "minor" and "major" convenience be clarified as stated in the NPRM preamble statement (section II.E. (56 FR 3341 at 3343)) "This third basis for finding a subsequent drug to be clinically superior is intended to constitute a narrow category, and its proposed use is not intended to open the flood gates to FDA approval for every drug for which a minor convenience over and above that attributed to an already approved orphan drug can be demonstrated."

FDA does not believe that it can anticipate all or even most possible bases for categorizing some contributions as major and others as minor. Each will vary with the facts. Hence, examples could be as misleading as they could be helpful.

10. Another comment proposed that the concept of "active moiety" be applied to macromolecular products as well as to micromolecular products and that differences in active moieties by themselves be used as the sole criterion for establishing product differences.

FDA disagrees, because it does not believe that the concept of active moiety, as used for small molecules, is useful for macromolecular entities. For micromolecular products, the active moiety is the whole covalently bound part of the molecule that is active. This means that it generally consists of all of the molecule except added parts that make it a salt or ester. Essentially, any change in covalent structure creates a new active moiety whose properties may well differ from the old active moiety. With macromolecules, it would be trivially easy to make minor covalent changes that would leave the activity of the drug unaltered, but would create a "different drug" if the micromolecular definition of active moiety were to be used. This would render exclusive marketing of macromolecular drugs meaningless and would decrease incentives to develop orphan drugs. When such a change is meaningful, of course, it deserves, and under the rule would gain, exclusive marketing.

11. A comment suggested that FDA should assume that macromolecular drugs made by different manufacturers are by definition different.

FDA strongly disagrees, because this would result in a de facto exclusion of all biological products from eligibility for exclusive marketing rights, the major incentive of the Orphan Drug Act. Regardless of how similar they were to each other, each sponsor's drug would be entitled to exclusive marketing, or, put another way, would not be kept from marketing by the exclusive marketing status of the prior drug, rendering such status meaningless for these drugs. Because macromolecules, and particularly recombinant products, offer great promise for the diagnosis and treatment of rare diseases and conditions, and because FDA does not believe that Congress intended to eliminate them from the operation of the Orphan Drug Act's exclusive marketing incentive, FDA will not consider every drug manufactured by a different manufacturer to be different for purposes of the act. This matter was fully discussed in the preamble to the NPRM (56 FR 3341 through 3343.)

12. Another comment suggested that the rule should define the term, "arbitrary," (as used in the NPRM, section II.B (56 FR 3339)) and provide examples for greater ease in determining what is "salami slicing" or artificial and medically implausible subsets.

FDA believes that the term "arbitrary" needs no further explanation. The NPRM by implication defines the term "arbitrary" as "medically implausible." Setting forth examples could mislead as easily as it could assist because every FDA decision on arbitrariness would necessarily be highly fact dependent.

13. A comment proposed that:

> * * * closely related, complex partly definable drugs with similar therapeutic intent be considered the same if they are derived from the same source and manufactured by a similar process, such as two live viral vaccines for the same indication, would be considered the same drug unless the subsequent drug were shown to possess different quantitive in vitro biologic activity or to be clinically superior.

FDA disagrees. Whereas a difference in in vitro quantitative biologic activity may constitute part of the evidence needed to support a claim of clinical superiority, it will not normally suffice for that purpose. Because such differences do not all correlate with clinical superiority, if no such correlation is independently proven with respect to an orphan drug, no meaningful difference for purposes of the Orphan Drug Act will have been shown. In addition, FDA sees no significance for purposes of the Orphan Drug Act with regard to the source from which the drugs are derived and the processes by which they are

manufactured, unless such factors lead to clinical superiority.

14. Another comment suggested that the NPRM preamble could be read to indicate that glycosylation is not a post-translational modification.

FDA certainly did not intend such a meaning and takes this opportunity to make clear that it views glycosylation as a post-translational modification.

15. The comment addressed in the previous paragraph also stated the view that, under the proposed rule, clinical superiority will always lead to approval of a subsequent drug.

FDA agrees with the comment's viewpoint. Assuming that a subsequent drug's marketing application is otherwise approvable, FDA will not interpret the Orphan Drug Act to block approval of any drug proved to be clinically superior to a drug with currently effective exclusive marketing rights.

16. One comment noted a disparity between: (1) FDA's firmness in requiring comparative clinical trials to demonstrate greater efficacy, and (2) FDA's stated intent to enforce such a requirement only "in some cases" to demonstrate safety.

FDA agrees that reliable information on safety differences may require comparative trials. Valid safety information may, however, come from other sources as well; the agency believes that the requirements for approving a drug because it is safer than an approved orphan drug may not always need to include the conduct of comparative clinical trials.

17. Two comments questioned why FDA treats micromolecular drugs and macromolecular drugs differently.

As discussed in comment 10, and in detail in the NPRM, FDA does not believe that the concept of active moiety, which has been useful when applied to micromolecular drugs, is adequate to deal with the different situation that obtains with macromolecular drugs.

18. Two comments challenged the use of the concept of clinical superiority, contending that the criteria for demonstrating it are insufficiently clear. Also, the comments noted that, to a sick patient, removing even a minor adverse reaction can result in clinical superiority.

FDA agrees that a small demonstrated improvement in efficacy or diminution in adverse reactions may be sufficient to allow a finding of clinical superiority. Despite the agency's inability to define "clinical superiority" as precisely as some would like, the agency believes that it is a useful concept.

FDA also believes that it constitutes the best tool for giving effect to the intent of Congress to provide incentives for potential sponsors to develop safer and more effective orphan drugs.

19. A comment suggested that, as proof of clinical superiority, FDA should always require a demonstration of it in rigorous double-blind, head-to-head comparative clinical trials such as those required to support other comparative safety and efficacy claims. Such studies, according to the comment, should be done using the licensed product and the subsequent product formulated with the same biologically active units and the same excipients.

While randomized double-blind, concurrently controlled clinical trials are usually the most reliable sources of evidence, other kinds of studies can be considered adequate and well-controlled studies within the meaning of (21 CFR 314.126) to support a finding of clinical superiority. This final rule should not preclude that possibility even if concurrently controlled trials will usually be needed. As stated, the kinds of data needed to demonstrate clinical superiority for purposes of the Orphan Drug Act will be the same as the kinds of data required to allow label claims of superiority.

20. Two comments suggested that, for drugs indicated for acquired immunodeficiency syndrome (AIDS) and other similar serious diseases, a lower does with little or no loss of effectiveness should qualify the drug as clinically superior.

FDA believes that a lower dose per se, without diminution of side effects or enhanced patient convenience should not constitute clinical superiority for purposes of this rule.

21. One comment argued that a subsequent drug should not be approved unless the subsequent drug is shown to be both "materially different" and clinically superior. Specifically, the comment stated, peptides which mimic the active sites of a protein drug should not be considered different from the protein drug.

FDA advises that, under "criterion 3," which states that "two drugs would be considered the same drug if the principal, but not necessarily all, structural features of the two drugs were the same, unless the subsequent drug were shown to be clinically superior" (NPRM, section II.E. (56 FR 3341 through 3342)), which the agency is adopting, either differences in active moiety or clinical superiority will be sufficient to make two micromolecular drugs different. With regard to macromolecular drugs, clinical superiority by itself will render a subsequent drug different. However, even if clinical superiority cannot be proven, macromolecular drugs may be different because of major differences in molecular structure apart from post-translational events. In other words, FDA believes that there are certain major differences in the chemical composition of drugs that make them different for purposes of the Orphan Drug Act regardless of whether they produce different clinical responses.

As to the peptide example, in order for a peptide that resembles a portion of a protein product to be considered a different drug, FDA will require a clear demonstration that the peptide is clinically superior to the entire protein.

22. One comment suggested that the final rule must state how much superiority would represent a major contribution to patient care.

There is no way to quantify such superiority in a general way. The amount and kind of superiority needed would vary depending on many factors, including the nature and severity of the disease or condition, the quality of the evidence presented, and diverse other factors.

23. Another comment argued that the concept of clinical superiority is neither supported by the act nor appropriately defined. Further, the comment argued that direct comparative clinical trials usually needed to demonstrate clinical superiority would be difficult because subjects would be scarce, the time to perform the trials would exceed the period of exclusive marketing, and the cost would be prohibitive.

Congress left it to FDA to define "such drug" as used in 21 U.S.C. 360cc and provided no guidance on the meaning of this term. Thus, it is within FDA's authority to define what is the "same" and what is a "different" drug. "Clinical superiority" is a rational and permissible means of making this distinction. FDA understands the difficulties inherent in proving clinical superiority but believes the requirement is necessary in order to protect the value of the primary incentive that Congress created in the Orphan Drug Act. If FDA allows exclusive marketing rights to be eliminated without evidence of clinical superiority or based on shoddy evidence, the incentive will be worthless.

24. Several comments argued that FDA must recognize the effect of price on access to patient care and urged that cost considerations must be used in determining whether a subsequent drug makes a major contribution to patient care. On the other hand, several other comments stated that cost should not be a factor in decisions about whether a

drug represents a major contribution to patient care.

FDA agrees with the latter comments. Although FDA understands that costs can indeed have a major impact on access to a drug, FDA has no authority over drug pricing or any authority to consider it in drug approval. Further, considering price as a factor in whether or not a drug makes a major contribution to patient care is problematic. If FDA could approve a drug because its relatively low cost were deemed to constitute a major contribution to patient care, there would be no effective tool that FDA could use to prevent the sponsor of the subsequent drug from quickly raising its price to the level of its competitor's price after approval.

25. Several comments suggested that FDA should liberally construe the concept, "major contribution to patient care." These comments advanced the following examples of factors that the comments would have the agency consider: convenient treatment location; duration of treatment; patient comfort; improvements in drug efficiency; advances in the ease and comfort of drug administration; longer periods between doses; and potential for self administration.

FDA agrees that these factors, when applicable to severe or life-threatening diseases, might sometimes be legitimately considered to bear on whether a drug makes a major contribution to patient care. However, this determination will have to be made on a case-by-case basis.

26. In contrast to the previous comments, three comments argued that the concept of "major contribution to patient care" should be narrowly construed so that only truly important differences could result in a finding of a "major contribution" if greater safety and/or effectiveness are not involved. The comments urged that minor improvements in patient convenience, such as a change that allows for home use of a drug for the first time, or "political considerations" should not qualify and that, in any case, head-to-head comparative clinical trials should be required.

Home use or improved patient access may or may not constitute a major contribution to patient care, depending on the drug and the nature of the disease, among other things. While comparative trials are, of course, preferred and will usually be required, it is possible that, in some circumstances, a demonstration of a major contribution to patient care can be made without such trials.

27. Several comments argued that a subsequent drug should be deemed to be clinically superior to the first approved drug if its delivery system results in enhanced compliance among patients who would otherwise experience compliance difficulties. Examples provided for variations in drug delivery warranting such a finding included: novel inhalation therapy; oral, intranasal, inhalational, transdermal vehicles of administration where intravenous means were once all that was available; innovative time-release delivery mechanisms; the availability of an improved delivery system that eliminates the risk of hemophilia B; and a new parenteral administration that permits once-a-day administration rather than four-times-a-day injections or infusions.

FDA agrees that a change in drug delivery systems might in some cases constitute a major contribution to patient care, but this can only be decided on a case-by-case basis, considering the nature of the disease or condition, the nature of the drug, the nature of the mode of administration, and other factors.

28. Three comments stated that investigational drugs that are significantly purer than approved drugs should be considered clinically superior without comparative clinical trials. An example provided was investigational factor IX products, which are 90 percent factor IX as compared to currently marketed factor IX products, which are only 10 percent factor IX.

If sponsors provide evidence to demonstrate that an improvement in purity will cause a drug to meet one or more of the criteria for clinical superiority, FDA will consider such evidence, which should normally include comparative clinical trials.

29. A comment argued that the NPRM ignores the precedent set in *Genentech* v. *Bowen and Young*, 676 F. Supp. 301 (D.D.C. 1987), in which the court allegedly held that one amino acid difference made a different drug. The comment argued that the final rule should reflect this alleged holding in order to allow FDA to fend off future legal challenges.

FDA disagrees with the comment's characterization of the *Genentech* v. *Bowen and Young* holding. In that case, the court held only the orphan-drug designation of a subsequent drug during the pioneer's period of exclusive marketing was lawful because the subsequent drug was of synthetic origin and did not present the danger of contamination with disease that the pioneer, which was manufactured from human cadavers, did. Although in that case it was argued that one amino acid difference made a different drug, the court never so held. For reasons described above (see comment 10) and in the NPRM, FDA has not adopted this principle in the final rule.

30. One comment suggested that differences in those parts of macromolecules demonstrated to be important for function should form the basis for determining whether two given molecules are different.

Although some changes in critical parts of the molecule, e.g., in the primary structure at the active site, would alter the function of the macromolecule, FDA does not agree that any change in the part of a molecule important for function should be considered a basis for defining a drug as different. Many changes, even in those parts of the molecule, would be of no significance. The agency believes that the changes that are of significance can be evaluated in preclinical laboratory and animal studies and in clinical trials, and, if they show promise of causing a chemically significant difference, the sponsor can develop the drug and demonstrate the difference. A showing of such a difference would represent a basis for approving the drug as a different drug.

31. Another comment urged FDA to develop a guidance document describing differences in amino acid sequence of a protein which would be considered "minor."

FDA declines to set forth hypothetical situations of the kind asked for, as such determinations will be highly fact-dependent.

32. One comment urged that function should play some role in defining when drugs composed of protein are the same. When drugs show similar qualitative activity that appears related to their effectiveness, in vivo or in vitro, the comment said, and the amino acid sequence of the subsequent product is coincident with that of the pioneer, the drug should be considered the same drug.

FDA agrees with the comment generally. Under the criterion 3 proposed for adoption in the NPRM (see comment 21), drugs with similar qualitative activity and similar amino acid sequence would not be considered different from the pioneer unless some clinical superiority could be demonstrated.

33. One comment urged that FDA should deem a drug different from the pioneer if FDA would require a full NDA with original supporting data before approving the subsequent drug. The comment found this approach preferable to "FDA's proposed mixture

of sometimes relying on physical structure, sometimes relying on functional effect, sometimes refusing to consider functional effect, and making presumptions about whether particular physical structures are likely to have a functional effect * * *."

In developing the NPRM, FDA considered deeming drugs to be different if the agency would normally require a full NDA or PLA with original supporting data before approving the subsequent drug. However, such a rule would make it too easy to break exclusive marketing by making small modifications in molecular structure or in the drug's indications, changes that would usually trigger a requirement for a full NDA. Indeed, for many complex macromolecular products, there is no degree of similarity that would lead to approval of an application without a full NDA or PLA. This would mean that most macromolecules would be ineligible for exclusive marketing rights, an outcome that, for reasons described above, does not seem compatible with the purpose of the Orphan Drug Act.

34. One comment requested that FDA make available the report of the Institute of Medicine, National Academy of Sciences (IOM) concerning issues discussed in section II.E. of the NPRM, i.e., reasonable criteria for identifying drugs as different for purposes of determining orphan-drug exclusive marketing rights.

The report of this workshop, held on November 19, 1990, is available from National Academy Press (Report of a Workshop, "Microheterogeneity of Biological Macromolecules," Forum on Drug Development, 1991. Division of Health Science Policy, Institute of Medicine, National Academy Press, 2101 Constitution Ave. NW., Washington, DC 20418).

As was mentioned in the preamble to the proposed rule (56 FR 3338 at 3343), FDA's choice of the third criterion (NPRM, section II.E. (56 FR 3338 at 3341 through 3342)) in the NPRM and in this final rule is consistent with the discussions at the IOM's "Workshop on Microheterogeneity of Biological Macromolecules."

C. Written Recommendations for Investigations of Orphan Drugs

35. One comment expressed a view that information on the current regulatory and marketing status and history of the drug product that the sponsor is required to submit under proposed § 316.10(b)(7) should be specific only to the sponsor's regulatory and marketing activities.

In order to provide useful recommendations on the studies necessary to support marketing approval of a drug, FDA needs whatever information is known or accessible to the sponsor concerning approved indications, recalls, adverse experience, other uses, abuse potential, etc., on the drug. This would include both the sponsor's regulatory and marketing activities and those of others about which the sponsor knows or could reasonably find out about.

36. Two comments requested that FDA inform sponsors, as soon as possible, when the agency no longer believes that its (previously given) recommendations are adequate to obtain marketing approval and give the reason for its change of opinion along with the scientific rationale.

FDA does not have the resources to monitor all factors affecting continued validity of all guidance previously given. Therefore, FDA must place the burden on the sponsor periodically to seek confirmation that the recommendations it received from FDA still apply. This is not difficult if the sponsor is in frequent touch with FDA's review divisions and if the sponsor diligently reviews literature on relevant subjects. FDA will undertake to respond to specific inquiries by a sponsor concerning any change of FDA's position or previous advice.

37. Another comment suggested that FDA should, on request, provide recommendations concerning how to prove clinical superiority of a drug in order to show that it is "different" within the meaning of proposed § 316.3.

FDA advises that, if asked such a question, FDA will ordinarily recommend head-to-head clinical trails between the drugs, as this will normally be what is necessary to demonstrate clinical superiority to FDA's satisfaction. In addition, FDA may suggest endpoints for such studies.

38. Another comment requested that FDA develop a mechanism to notify sponsors early in the development process whether their drugs are the same as one being developed by another sponsor and whether either drug is considered a macromolecular drug or a micromolecular drug.

FDA advises that information on the existence of investigational products generally is confidential and may not be disclosed. In addition, FDA would normally not be able to determine whether drugs are the same or different until all data for marketing applications for both drugs are submitted. Hence, FDA declines to provide the requested early information and advice.

39. Another comment expressed concern that small firms are disadvantaged compared to multinational corporations with respect to their ability to learn about parallel research of another firm on the same drug. To investigate this possible bias against small firms, the comment proposed a full-scale economic assessment of this rule.

FDA does not agree that small firms are at a unique information disadvantage when developing orphan drugs. Imperfect knowledge about competitors' research is an expected risk factor in any research program, and, while small firms are inherently less able to tolerate excessive financial risk-taking, imperfect knowledge about competitor research is probably a less important risk factor for orphan drugs than for other pharmaceuticals. Orphan product development has been extensively publicized, both in the trade press and in sponsors' and investigators' efforts to locate test subjects, so that subsequent researchers in product areas where high research costs are likely almost always to have considerable information about competitors' efforts. Even if small firms had such a disadvantage, FDA cannot make confidential commercial information available. Therefore, FDA believes that a full-scale economic assessment of this aspect of the rule would be pointless.

40. Several comments suggested that FDA adopt time limits for response to requests for written recommendations as well as responses to requests on all matters associated with administration of the Orphan Drug Act.

Due to resource limitations, FDA cannot now impose time limits on itself for response to applications and requests pursuant to the Orphan Drug Act. However, the agency will respond to requests as expeditiously as its resources will allow.

41. One comment asked that the rule include the address for submitting requests for FDA action under this rule.

FDA agrees and has added the address of the Office of Orphan Products Development to the final rule in new § 316.4.

D. Designation of Orphan Drugs Based on Prevalence

42. Another comment recommended the removal of the requirement that a drug be designated as an orphan drug in order for the sponsor to be entitled to apply for orphan-product grants. The comment expressed a need for grants to support clinical studies on orphan devices and medical foods.

FDA advises that the Orphan Drug Amendments of 1988 (Pub. L. 100–290) provided that medical foods and medical devices for rare disease or conditions are eligible for grants and

contracts to support clinical studies of safety and effectiveness. The preamble to the NPRM was in error to the extent that it implied the contrary. FDA solicits grant applications for clinical studies on medical devices and medical foods as well as on drugs and biologicals intended for rare diseases or conditions.

43. One comment suggested that there should be a process for designating medical foods and medical devices for rare diseases or conditions in light of the fact that the act now recognizes these and provides for grants and contracts to support clinical studies on these products.

FDA does not agree that a process for designating medical foods and medical devices for rare diseases or conditions is necessary. Although eligible for grants and contracts, sponsors of orphan medical devices and medical foods are not eligible for exclusive marketing rights. Hence, the main purpose for designation does not exist so far as these products are concerned. Further, with respect to grants and contracts, FDA's experience to date shows that a designation process would be unnecessary in order to establish eligibility for grants and contracts.

44. On its own initiative, FDA is adding to § 316.20(b)(4) a requirement that a description of the product for which orphan-drug designation is requested be submitted with the application for designation. This obviously important requirement clearly was within the scope of the NPRM and its omission was an oversight.

45. A comment requested that FDA make clear that the agency can grant orphan-drug designation to new versions of currently marketed orphan drugs if they are clinically superior to the original.

Orphan-drug designation can be granted to new sponsors of drugs currently protected by orphan-drug exclusive marketing if such sponsors provide a plausible scientific rationale in an application submitted pursuant to § 316.20 that studies to be conducted on the drug may result in a finding of clinical superiority over the marketed drug.

46. Another comment stated that authoritative information required to establish prevalence of a disease or condition and/or cost recovery estimates may not be available and the final rule should require only the best information available or all available references known to the sponsor.

FDA expects that applicants for orphan-drug designation will make every effort to survey the literature and obtain all information available on the prevalence of the indicated disease or condition and cost and marketing information, where required. Obviously, if information is not available, it cannot be submitted, but FDA expects sponsors to make a diligent search.

47. A comment expressed a fear that basing the prevalence criterion on the number of diagnosed patients who could benefit from the treatment makes possible orphan designation for a drug with a huge patient class.

FDA acknowledges that improved methods of diagnosis, better screening, or altered attitudes towards the need for therapy may produce a large increase in the number of patients who are diagnosed with a disease and could benefit from a drug. Prior to the development of such new diagnostic methods, better screening or new attitudes, however, FDA has no way of determining the likely treatment population other than by relying on current diagnostic methods and treatment attitudes.

48. A comment stated that it is unclear how FDA intends to handle investigational orphan drugs that are also being studied for common indications.

FDA advises that when a drug is being studied for a common as well as a rare disease, the rare disease indication will be handled just as it would be for a drug being studied only for a rare disease.

49. A comment requested that the agency provide substantive guidance, clarification, or definition on how an applicant can demonstrate that a subset of patients is "medically plausible."

FDA declines to provide examples of medical plausibility or to further develop the definition of this term. Application of the concept is a matter of judgment based on the specific facts of each case. Also, any hypothetical examples FDA might provide could well be misleading.

50. One comment argued that the proposed requirement that sponsors show the actual number of diagnosed cases in order to obtain orphan drug designation would be burdensome. For many diseases, the comment argued, there is little epidemilogical data giving the actual number of affected patients. It suggested that the appropriate number for determining prevalence of a disease is one which reflects both diagnosed and undiagnosed people.

FDA has already stated its strong preference for counting only diagnosed symptomatic patients in determining prevalence as the best approach to fulfill the purposes of the Orphan Drug Act. There is a lack of existing data and of precise methods for identifying the number of undiagnosed and asymptomatic patients who have a given disease. To impose such a requirement would add considerably to the cost of submitting requests for orphan drug designation without significant improvement of the factual bases for such requests.

51. Another comment agreed with the requirement that sponsors demonstrate that the actual number of diagnosed cases does not exceed 200,000 persons in the United States as of the date of application of designation. However, the comment requested that the agency go further and include the requirement in the final regulation itself rather than just in the preamble.

FDA agrees and is amending § 316.21(b) in the final rule accordingly.

52. Two comments argued that the requirement in proposed § 316.21(b)(2) that a sponsor show estimated prevalence of any other disease or condition for which the drug has been approved or is being developed is immaterial and burdensome.

The agency has reconsidered the proposed requirement and decided that such information would only be necessary in special circumstances, and will not be routinely required to make a decision on applications for designation. The regulation has been revised to require the information only upon request by FDA.

53. One comment suggested that FDA should divulge its sources and the processes whereby it verifies that the sponsor's prevalence data are correct.

FDA will on request provide a list of its sources used for verification of its conclusion as to the prevalence of a disease or condition. In the process, FDA will not provide any materials which it is obligated to treat as trade secret or confidential.

54. A comment suggested that in the case of vaccines, disease prevalence should be calculated based on an average annual target population over the prior 7 years rather than on the target population at the time of submission of the application for orphan designation. This, the comment argued, would provide greater predictability to the prospective sponsor of an orphan vaccine.

Under the terms of 21 U.S.C. 360bb, determinations "shall be made on the basis of the facts and circumstances as of the date such drug is designated * * *." FDA has interpreted this language to require that estimates of target population should reflect numbers of persons who would receive the vaccine as of the date of designation. The agency does not believe that the law contemplates the use of predictive models for growth or decline of disease populations.

55. Another comment stated that, because data on the side effects of cancer or its treatment are limited or nonexistent, sponsors requesting designation of drugs for patients refractory to primary cancer therapies or other cancer subgroups should be able to rely on references to published incidence data, mortality tables, and expert medical testimony.

FDA advises that, where data are limited, sponsors should provide the best data available. Where published incidence data, mortality tables, and expert medical testimony are all that is available, this will normally be sufficient.

The comment further recommended that the final rule provide guidance including references to methods for deriving estimated prevalence data by using published incidence data.

FDA declines to provide such guidance as part of this published final rule but will provide data on methods of extrapolation when asked about this by potential sponsors regarding specific diseases.

56. One comment argued that FDA should provide for denial of designation if it is obvious that the drug will be used for nonorphan diseases or conditions with prevalence in excess of 200,000.

FDA will deny an orphan-drug designation application if it finds that the proposed orphan indication is a counterfeit, i.e., an artificial subset of the total population of potential users of the drug. However, the agency will continue to grant orphan drug designations for drugs that are being investigated for or are already approved for common diseases and conditions when there is also a rare disease for which the drug may be useful and is being studied, if the drug meets the orphan-drug criteria. The incentives of the Orphan Drug Act are needed to encourage testing and development of drugs for rare diseases or conditions even when a drug in question is being tested or approved for a more common indication. Otherwise, sponsors may be deterred by the lack of potential profit from testing drugs for rare diseases.

57. One comment suggested that § 316.26, which deals with amendments to orphan-drug designation, be broadened to allow such amendments when there are changes in medical technology or where diagnostic capabilities for a disease are improved.

FDA agrees that such changes are warranted, but only when the advances concerned are unanticipated. FDA has amended the final rule to this effect.

58. Several comments suggested that orphan-drug designation and exclusive marketing should be revoked when FDA determines that a drug that it has designated is later proved to have commercial potential or when the prevalence of the indicated rare disease or condition later exceeds 200,000 people in the United States.

FDA advises that legislation that would have authorized FDA to take such actions was vetoed by the President in 1990.

59. One comment argued that FDA had not sufficiently considered when and on what terms it will suspend (as distinguished from revoke) an orphan drug designation under § 316.29. The comment inquired as to when and under what terms FDA would restore a suspended designation.

After considering this comment, the agency concludes that it should not suspend an orphan drug designation on the grounds stated in § 316.29 but should only revoke it. The possibility of suspension raises troublesome questions about bases for and conditions of reinstatement of designation and the rights of subsequent sponsors. Hence, FDA has decided that, when the conditions set forth in § 316.29 occur (untrue statement of material fact, or omission of material information, or ineligibility of the drug at the time of designation), the appropriate remedy is permanent revocation of designation and suspension or withdrawal of exclusive marketing rights, with no eligibility for reinstatement of such rights. FDA has amended § 316.29 to reflect this conclusion.

E. Designation of Orphan Drugs Based on Nonrecovery of Cost

60. One comment concerning § 316.21 suggested a different approach for verifying data estimates and their justifications. The comment suggested that the sponsor be required to obtain an independent certified public accountant (CPA) report on certain agreed-upon procedures with respect to data, estimates and justification provided. Next, FDA, the sponsor, and the CPA would agree on procedures tailored to address matters of specific interest to the agency. Then, the independent CPA would report on the results of applying these procedures in a summary of findings—negative, assurance, or both. Lastly, the level of assurance provided in the independent CPA's report on how the agreed upon procedures would be applied would depend on the nature and scope of the procedures.

The comment suggested the following specific change in the text of § 316.21(c)(8):

(8) the sponsor shall submit a report of an independent Certified Public Accountant in accordance with Statement on Standards for Attestation established by the American Institute of Certified Public Accountants on agreed upon procedures performed with respect to the data, estimates, and justifications submitted pursuant to this section. Cost data shall be determined in accordance with generally accepted accounting principles.

FDA agrees that the suggested change is appropriate and has added the quoted passage to the final rule.

61. A comment stated that FDA has seriously underestimated the impact on multi-national corporations of demonstrating a lack of profitability in light of the fact that multi-national corporations will find it very difficult to collect information on the costs of orphan drug development and to separate those costs from costs of other research and development activities. According to the comment, the requirement of collection and separation will discourage use of orphan-drug incentives by multi-national corporations.

FDA believes that, although multi-national corporations may face problems that others do not, the potential benefits of orphan drug exclusive marketing would seem to outweigh the burden of separating costs between profitable ventures and orphan drug research and development projects.

62. Another comment correctly noted a typographical error in § 316.24(a): A reference to § 316.26, should have been a reference to § 316.25.

The error is being corrected in the final rule.

63. A comment suggested that orphan-drug designation should be denied for drugs that are likely to have commercial and competitive viability, even in small populations. The comment expressed concern that the exclusive marketing provisions of the act will limit the competition that has existed among manufacturers of blood clotting factor in the past. Alleging that this competition has kept prices down.

Existing provisions of the act do not provide a "commercial viability" basis for denial of requests for orphan drug designation when such drugs are for populations of 200,000 or less. Indeed, upon enacting an amendment to the Orphan Drug Act in 1984, Congress expressed its determination to accept the possibility that a designated orphan drug might be commercially viable with or without orphan drug exclusive marketing. (See 130 Congressional Record, S.14254 Floor Debates, October 11, 1984).

F. FDA Procedures

64. On its own initiative, FDA has added new § 316.30, requiring sponsors

of designated orphan drugs to submit annual reports detailing progress made in the development of their orphan drugs in the past year. The agency believes that this provision is within the scope of the NPRM and will allow FDA to follow the development of orphan drugs and to identify and help to remove roadblocks to drug development and marketing.

65. A comment concerning § 316.27 argued that submission to FDA of copies of agreements embodying transfers of ownership of orphan-drug designation rights should be voluntary and not mandatory.

FDA agrees, and § 316.27(a)(2)(iii) has been changed in the final rule to make clear that either a list of rights assigned and reserved or copies of relevant agreements will meet the requirement of this paragraph.

66. Several comments argued that FDA should establish a process whereby the agency routinely informs sponsors when they are investigating drugs whose approval is likely to be barred by the Orphan Drug Act.

FDA believes that it is now adequately making this information available. The agency provides a list (updated monthly) of all designated orphan drugs to all sponsors who file a request for orphan-drug designation. Additionally, this list is available upon request from the National Information Center for Orphan Drugs and Rare Diseases (NICODARD), P.O. Box 1133, Washington, DC 20013–1133 (phone 1–800–456–3505). Hence, no new procedure is necessary.

66a. On its own initiative, FDA is revising proposed § 316.28 to reflect current practice of making available monthly an updated list of all designated orphan drugs and making available annually a cumulative updated list of all designated orphan drugs. In the past, the agency published an annual list in the **Federal Register**; however, it has found that its current practice is a more effective means of making the information available in a timely manner. The lists are on display at the FDA Dockets Management Branch and are available from NICODARD (see comment 66).

67. Several comments by holders of orphan-drug exclusive approval requested that such holders be accorded notice and an opportunity for a hearing when faced with the imminent approval of a similar drug that FDA considers to be a different drug for purposes of the act.

On March 4, 1987, in response to a citizen petition filed by Genentech, Inc., FDA declined to establish such a challenge procedure, citing the following grounds: (1) There is no property right to exclusive approval under the Orphan Drug Act; and (2) procedures are already in place that accord a holder of exclusive approval all the process that would be due under these circumstances. These procedures include the citizen petition procedure (21 CFR 10.30) and a right of subsequent judicial review in the courts.

In the NPRM (section II.I. (56 FR 3344)), FDA cited the following reasons for declining to create such procedures: (1) Neither the Constitution, nor the Administrative Procedure Act, nor the Orphan Drug Act requires a hearing of this kind; (2) hearings are time consuming and resource intensive; and (3) the citizen petition procedure is available to a holder of exclusive approval. Furthermore, in the NPRM, FDA refused to propose creation of a less formal nonhearing administrative challenge procedure because: (1) There is no requirement for it under the Constitution or any statute; (2) postdecisional judicial review is preferable to an administrative challenge procedure because a predecisional challenge procedure would be time consuming and could be used for purposes of delay; (3) it would be difficult to determine who should have the right to challenge an incipient approval and who would be entitled to what notice of what anticipated agency action; and, finally, (4) a predecisional administrative challenge procedure would present difficulty due to the nondisclosability of relevant information under FDA's public information regulations.

Despite a careful reconsideration of its position on the question of establishing predecisional challenge procedures, the agency declines to adopt such procedures. The other reasons given in the NPRM for declining to do so are still valid and even if a reviewing court were to hold that orphan drug exclusivity is a constitutionally protected property right, such a holding would not automatically require that a firm whose drug has been granted exclusivity be accorded a predecisional hearing. *Matthews* v. *Eldridge*, 424 U.S. 319 (1976); *Mackey* v. *Montrym*, 443 U.S. 1 (1979); *Barry* v. *Barchi*, 443 U.S. 1 (1979). Under these and other cases, the "property" right to exclusive marketing, if it exists, does not always require that a hearing take place before approval of what FDA concludes is a similar but different drug.

FDA is still persuaded that its current regulations satisfy any applicable requirement of due process. Insofar as notice is concerned, in FDA's view, a holder of exclusive approval would learn that a potential competitor drug has been designated, as FDA is required to publish all such designations. See 21 U.S.C. 360bb(c) and § 316.52(d), the latter of which is codified by this notice. As to a procedure for challenging an approval, either impending or after the fact, the citizen petition procedure provides such a procedure, and the holder of the earlier designation has a right to seek judicial review of an adverse decision. This procedure is sufficient under *Barry* v. *Barchi, supra*.

In addition, FDA is still concerned about the potential for holders of exclusive approval to delay the marketing of competitors' approvable subsequent drugs by use of any challenge procedure. The fact that all challenge procedures, particularly hearings, are time consuming and expensive, adds to FDA's reluctance to create such procedures.

For the above reasons, FDA has, after careful consideration, decided that the final rule should not include an opportunity for a hearing or other challenge procedures for holders of exclusive approval to challenge subsequent drug approvals.

68. One comment argued that FDA should notify sponsors of marketing applications for orphan drugs when another sponsor of the same drug for the same use has attained orphan drug exclusive marketing status. The comment suggested that the sponsor barred from marketing approval by orphan drug exclusive marketing should be informed, within 30 days, of the approval of the drug receiving exclusive approval.

FDA disagrees. As stated previously, FDA usually does not know that approval of a marketing application is barred by the Orphan Drug Act until the review of that application shows that the subsequent drug is the same as the pioneer. Hence, FDA cannot set a time limit on notification of subsequent sponsors. In addition, FDA routinely publicizes all marketing application approvals. Therefore, it is reasonable to expect that subsequent sponsors can, with minimal effort, learn of these approvals.

G. Orphan-Drug Exclusive Approval

69. A comment suggested that § 316.30 be reworded to allow more than one company to share exclusive marketing rights if the first company to obtain FDA approval agrees.

FDA advises that § 316.30(a)(3) provides that a holder of exclusive approval may give consent for other marketing applications to gain approval. This provision enables the holder to share exclusive marketing rights with

any number of other sponsors. The agency believes that the current wording of this paragraph need not be changed in order to achieve the objective of the comment.

70. A comment requested that the high cost of an orphan drug be considered evidence that "sufficient quantities" of the drug are not available "to meet the needs of persons with the disease or condition for which the drug was designated." Such a finding would then allow for the approval of subsequent identical drugs.

FDA does not have the authority under existing law to equate high cost with lack of sufficient quantities, even though cost may affect access to a drug. As Congress used the term, "sufficient quantities" refers only the presence of enough drug and the means of its administration to meet the needs of all in the United States with the disease or condition for which the drug was designated.

71. Two comments urged that § 316.36 clearly set forth the criteria and procedure for a determination of whether "sufficient quantities" are available. One comment suggested that the lack of sufficient quantities must be "long-term" or "deliberate." Alternatively, the comment suggested that a finding of a lack of commitment on the part of the exclusive marketing holder should be necessary to break exclusive marketing. A third comment suggested as a standard for agency action the inability to provide the drug for 1 year. Two comments requested that FDA make allowances for temporary production difficulties, disruptions caused by natural disasters, interruptions in supplies and component parts, economic crises, or other causes beyond the holder's control. One comment suggested that the sponsor should be given adequate time to restore supplies and that the revocation should not occur unless another sponsor can supply at least 75 percent of the market at least 12 months earlier than the first-approved sponsor. This comment urged a right of appeal by the pioneer.

FDA advises that it will act quickly to approve another marketing application when there are insufficient supplies of the drug or insufficient means of its administration for any reason. In granting FDA authority to revoke exclusive marketing because of insufficient quantities, Congress did not refer in any way to the behavior or attitude of the initial holder, and revocation is in no sense a punishment. The provision exists solely in order to get drugs quickly to the people who need them. Accordingly, in determining whether there are "sufficient quantities" of a drug, FDA will always make the needs of patients its primary concern. For the same reason, the agency declines to create an administrative appeals process for reviewing decisions under § 316.36.

72. Another comment proposed that FDA impose, as a condition of maintaining exclusive marketing rights, a requirement that holders of such rights must sell whatever quantities are necessary to subsequent sponsors in order to conduct required comparative studies. If the holder refused, it would be given 60 days to comply or lose exclusive marketing rights.

FDA believes that most subsequent sponsors will have access to the holder's product. However, if that is not the case, FDA would be without authority to impose the condition described. Congress has set forth only two situations in which exclusive marketing rights can be removed. The situation described above is not one of them.

73. Another comment, which agreed with FDA's decision to rule out cost considerations in determining the existence of sufficient quantities of orphan drugs, suggested that the agency amend the final rule to specify that no authority to do so exists.

FDA believes that statements in the preambles to the NPRM and to this final rule are sufficient notification that the agency believes it lacks authority to consider costs of drugs in rendering decisions under § 316.36. Hence, no change in the rule is necessary.

H. Open Protocols

74. One comment argued that FDA should make clear that the final rule will require parallel controlled studies in order to obtain marketing approval. The comment noted that open protocols may be a threat to encouraging placebo-controlled studies for marketing approval.

FDA understands that the existence of open protocols may increase the difficulty of recruiting subjects for placebo-controlled studies. However, Congress has mandated that FDA encourage open protocols, and this final rule will do so. This does not mean that FDA is relaxing its standards for the approval of drugs. The requirements for demonstrating safety and effectiveness are not any less for orphan drugs than for any other drugs.

I. Availability of Information

75. One comment suggested that § 316.52 should be amended to provide that notice in the **Federal Register** be published concurrently with each orphan-drug designation decision.

FDA disagrees with this suggestion. A current list of drugs designated as orphan drugs is freely available from NICODARD (see comment 66 for address and telephone number). Publishing each orphan-drug designation in the **Federal Register** would be an unduly burdensome task.

76. A comment suggested that as much information as possible regarding details about designated orphan drugs and applications for designation should be made available because of the public's "right to know."

FDA advises that the agency releases as much information as it can consistent with the Freedom of Information Act, FDA's regulations, and long-standing policies concerning the protection of trade secret data and confidential commercial information.

77. Two comments suggested that FDA inform a holder of exclusive marketing rights when a subsequent sponsor has applied for designation for the same drug for the same indication and that a decision concerning the sameness or difference of the products should be made prior to the decision to designate the second drug.

FDA disagrees. As previously stated, current information on all designated orphan drugs is available from NICODARD (see comment 66). FDA is treating the filing of applications for designation as a submission of confidential information which will not be disclosed until and unless designation is granted. In addition, for reasons stated previously, FDA cannot make preliminary decisions as to the sameness or difference of any two drugs. Also, as stated in the NPRM preamble, FDA will designate a structurally identical subsequent drug as an orphan drug, even in the face of a holder's exclusive marketing rights, if the subsequent sponsor advances a plausible basis on which to conclude that its product may be proven "clinically superior." This is because FDA does not want to stifle research and development of potentially better drugs.

78. One comment stated that the impact of the regulation would be "major" for purposes of Executive Order 12291, which requires extensive regulatory impact and flexibility analyses prior to promulgation of regulations having a "major" impact on small businesses. The comment added an opinion that such an analysis would demonstrate that the agency's "original test" (the comment's meaning for this term is unclear) for determining sameness/difference presented a more cost-effective alternative without the adverse effect on competition, unlike the proposed policy.

FDA disagrees with the premise that analyses under Executive Order 12291 are the appropriate means for evaluating the relative usefulness of methods for determining sameness/differences. FDA has consulted with the IOM in developing the adopted approach and will evaluate and propose revisions to the approach if necessary in the interests and needs of people with rare diseases and conditions.

79. One comment stated that FDA should be required to prepare an economic impact statement under the Regulatory Flexibility Act on grounds that the proposed rule adversely affects a significant number of small entities.

FDA disagrees because the overall impact of the Orphan Drug Act benefits small businesses, many of which would otherwise be unable to bear the substantial cost of new product development. Moreover, the economic effects of the proposed rule, and the final rule, are simply those contemplated by Congress in its enactment of the Orphan Drug Act. (See the discussion below in section III.)

III. Economic Impact

The agency has examined the economic impact of the final rule in accordance with Executive Order 12291 and the Regulatory Flexibility Act (Pub. L. 96–354) and concludes that this is not a major rule as defined by Executive Order 12291 and will not have a significant impact on a substantial number of small entities.

It is clear that the Orphan Drug Act, as implemented by existing administrative practices, has significantly increased the rate at which new orphan drugs are marketed. While two or three drugs that might be eligible as orphan drugs were approved annually prior to the Orphan Drug Act, an average of eight designated orphan drugs have been approved per year and marketed since 1984. Moreover, orphan-drug designation has been granted to an average of 41 drugs per year since 1984. Thus, the Orphan Drug Act, as implemented since 1983, has provided an effective stimulus for the development and marketing of drugs for diseases or conditions that are rare in the United States. In debating the need for orphan drug exclusive marketing, Congress weighed the potential dangers of granting orphan drug exclusive marketing, which would limit competition, against the benefits to be gained by encouraging sponsors to develop drugs of marginal commercial value. In passing the law, Congress determined that the benefits exceeded the dangers. Any form of exclusive marketing may have negative consequences, such as noncompetitive pricing. To date, however, there has been insufficient experience with the implementation of the statute to judge whether an optimal benefit-cost balance has been attained. It is clear, nonetheless, that these incentives have been highly successful in contributing to the development and approval of orphan drugs that would not otherwise have been developed. Thus, in FDA's view, the essential benefit-cost considerations of Executive Order 12291 have been satisfied in favor of the rule as here published.

The agency also recognizes that changes in the statutory incentive structure would theoretically produce corresponding changes in the level of benefits, i.e., the number of orphan drugs developed. FDA, however, concludes that further incremental analysis of the statutory provisions would be highly conjectural and beyond the availability of meaningful data from experience to date.

The Regulatory Flexibility Act requires that the agency consider the impact of the regulation on small entities. FDA believes that these rules benefit, rather than disadvantage, most affected small businesses. Prior to enactment of the Orphan Drug Act, few small businesses could afford to devote resources to the discovery of new treatments for rate diseases, because the small market for such products severely limited the profitability of this research. Subsequent to enactment, the combined stimulus of research grants, tax credits, and exclusive marketing influenced many small firms to develop new products for formerly inaccessible markets. FDA finds therefore that, in general, the incentives provided under the act will serve to enhance the viability and competitiveness of small entities.

IV. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(8) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

V. Paperwork Reduction Act of 1980

This final rule contains information collections which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980. The information collections will not be effective until OMB approval is obtained. The title, description, and identification of those who will respond to the information collection requirements are shown below with an estimate of the annual reporting and recordkeeping burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Title: Orphan Drug Regulations.

Description: These final regulations specify the procedures for sponsors of orphan drugs to use in availing themselves of the incentive provided for in the Orphan Drug Act and set forth the procedures FDA would use in administering it.

Description of Respondents: Businesses or other for-profit organizations.

ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN

Section	Annual number of respondents	Annual frequency	Average burden hours per response	Annual burden hours
316.2 and 316.10 ..	3	1	125	375
316.20	90	1.78	125	20,025
316.22	5	1	2	10
316.27	5	1	4	20
316.30	450	1	2	900
316.36	0.2	3	15	9
Total .	.....	.....	.....	21,339

List of Subjects in 21 CFR Part 316

Administrative practice and procedures, drugs, Orphan drugs, Reporting and recordkeeping requirement.

Therefore, under the Federal Food, Drug, and Cosmetic Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 316 is added as follows:

PART 316—ORPHAN DRUGS

Subpart A—General Provisions

Sec.

316.1 Scope of this part.
316.2 Purpose.
316.3 Definitions.
316.4 Address for submissions.

Subpart B—Written Recommendations for Investigations of Orphan Drugs

316.10 Content and format of a request for written recommendations.
316.12 Providing written recommendations.
316.14 Refusal to provide written recommendations.

Subpart C—Designation of an Orphan Drug

316.20 Content and format of a request for orphan-drug designation.
316.21 Verification of orphan-drug status.
316.22 Permanent-resident agent for foreign sponsor.

316.23 Timing of requests for orphan-drug designation; designation of already approved drugs.
316.24 Granting orphan-drug designation.
316.25 Refusal to grant orphan-drug designation.
316.26 Amendment to orphan-drug designation.
316.27 Change in ownership of orphan-drug designation.
316.28 Publication of orphan-drug designations.
316.29 Revocation of orphan-drug designation.
316.30 Annual reports of holder of orphan-drug designation.

Subpart D—Orphan-drug Exclusive Approval

316.31 Scope of orphan-drug exclusive approval.
316.34 FDA recognition of exclusive approval.
316.36 Insufficient quantities of orphan drugs.

Subpart E—Open Protocols for Investigations

316.40 Treatment use of a designated orphan drug.

Subpart F—Availability of Information

316.50 Guidelines.
316.52 Availability for public disclosure of data and information in requests and applications.

Authority: Secs. 525, 526, 527, 528, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360aa, 360bb, 360cc, 360dd, 371).

Subpart A—General Provisions

§ 316.1 Scope of this part.

(a) This part implements sections 525, 526, 527, and 528 of the act and provides procedures to encourage and facilitate the development of drugs for rare diseases or conditions, including biological products and antibiotics. This part sets forth the procedures and requirements for:

(1) Submissions to FDA of:

(i) Requests for recommendations for investigations of drugs for rare diseases or conditions;

(ii) Requests for designation of a drug for a rare disease or condition; and

(iii) Requests for gaining exclusive approval for a drug product for a rare disease or condition.

(2) Allowing a sponsor to provide an investigational drug product under a treatment protocol to patients who need the drug for treatment of a rare disease or condition.

(b) This part does not apply to food, medical devices, or drugs for veterinary use.

(c) References in this part to regulatory sections of the Code of Federal Regulations are to chapter I of title 21, unless otherwise noted.

§ 316.2 Purpose.

The purpose of this part is to establish standards and procedures for determining eligibility for the benefits provided for in section 2 of the Orphan Drug Act, including written recommendations for investigations of orphan drugs, a 7-year period of exclusive marketing, and treatment use of investigational orphan drugs. This part is also intended to satisfy Congress' requirements that FDA promulgate procedures for the implementation of sections 525(a) and 526(a) of the act.

§ 316.3 Definitions.

(a) The definitions and interpretations contained in section 201 of the act apply to those terms when used in this part.

(b) The following definitions of terms apply to this part:

(1) *Act* means the Federal Food, Drug, and Cosmetic Act as amended by section 2 of the Orphan Drug Act (sections 525–528 (21 U.S.C. 360aa–360dd)).

(2) *Active moiety* means the molecule or ion, excluding those appended portions of the molecule that cause the drug to be an ester, salt (including a salt with hydrogen or coordination bonds), or other noncovalent derivative (such as a complex, chelate, or clathrate) of the molecule, responsible for the physiological or pharmacological action of the drug substance.

(3) *Clinically superior* means that a drug is shown to provide a significant therapeutic advantage over and above that provided by an approved orphan drug (that is otherwise the same drug) in one or more of the following ways:

(i) Greater effectiveness than an approved orphan drug (as assessed by effect on a clinically meaningful endpoint in adequate and well controlled clinical trials). Generally, this would represent the same kind of evidence needed to support a comparative effectiveness claim for two different drugs; in most cases, direct comparative clinical trials would be necessary; or

(ii) Greater safety in a substantial portion of the target populations, for example, by the elimination of an ingredient or contaminant that is associated with relatively frequent adverse effects. In some cases, direct comparative clinical trials will be necessary; or

(iii) In unusual cases, where neither greater safety nor greater effectiveness has been shown, a demonstration that the drug otherwise makes a major contribution to patient care.

(4) *Director* means the Director of FDA's Office of Orphan Products Development.

(5) *FDA* means the Food and Drug Administration.

(6) *Holder* means the sponsor in whose name an orphan drug is designated and approved.

(7) *IND* means an investigational new drug application under part 312 of this chapter.

(8) *Manufacturer* means any person or agency engaged in the manufacture of a drug that is subject to investigation and approval under the act or the biologics provisions of the Public Health Service Act (42 U.S.C. 262–263).

(9) *Marketing application* means an application for approval of a new drug filed under section 505(b) of the act, a request for certification of an antibiotic under section 507 of the act, or an application for a biological product/establishment license submitted under section 351 of the Public Health Service Act (42 U.S.C. 262).

(10) *Orphan drug* means a drug intended for use in a rare disease or condition as defined in section 526 of the act.

(11) *Orphan-drug designation* means FDA's act of granting a request for designation under section 526 of the act.

(12) *Orphan-drug exclusive approval* or *exclusive approval* means that, effective on the date of FDA approval as stated in the approval letter of a marketing application for a sponsor of a designated orphan drug, no approval will be given to a subsequent sponsor of the same drug product for the same indication for 7 years, except as otherwise provided by law or in this part.

(13) *Same drug* means:

(i) If it is a drug composed of small molecules, a drug that contains the same active moiety as a previously approved drug and is intended for the same use as the previously approved drug, even if the particular ester or salt (including a salt with hydrogen or coordination bonds) or other noncovalent derivative such as a complex, chelate or clathrate has not been previously approved, except that if the subsequent drug can be shown to be clinically superior to the first drug, it will not be considered to be the same drug.

(ii) If it is a drug composed of large molecules (macromolecules), a drug that contains the same principal molecular structural features (but not necessarily all of the same structural features) and is intended for the same use as a previously approved drug, except that, if the subsequent drug can be shown to be clinically superior, it will not be considered to be the same drug. This criterion will be applied as follows to different kinds of macromolecules:

(A) Two protein drugs would be considered the same if the only differences in structure between them were due to post-translational events or infidelity of translation or transcription or were minor differences in amino acid sequence; other potentially important differences, such as different glycosylation patterns or different tertiary structures, would not cause the drugs to be considered different unless the differences were shown to be clinically superior.

(B) Two polysaccharide drugs would be considered the same if they had identical saccharide repeating units, even if the number of units were to vary and even if there were postpolymerization modifications, unless the subsequent drug could be shown to be clinically superior.

(C) Two polynucleotide drugs consisting of two or more distinct nucleotides would be considered the same if they had an identical sequence of purine and pyrimidine bases (or their derivatives) bound to an identical sugar backbone (ribose, deoxyribose, or modifications of these sugars), unless the subsequent drug were shown to be clinically superior.

(D) Closely related, complex partly definable drugs with similar therapeutic intent, such as two live viral vaccines for the same indication, would be considered the same unless the subsequent drug was shown to be clinically superior.

(14) *Sponsor* means the entity that assumes responsibility for a clinical or nonclinical investigation of a drug, including the responsibility for compliance with applicable provisions of the act and regulations. A sponsor may be an individual, partnership, corporation, or Government agency and may be a manufacturer, scientific institution, or an investigator regularly and lawfully engaged in the investigation of drugs. For purposes of the Orphan Drug Act, FDA considers the real party or parties in interest to be a sponsor.

§ 316.4 Address for submissions.

All correspondence and requests for FDA action pursuant to the provisions of this rule should be addressed as follows: Office of Orphan Products Development (HF-35), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

Subpart B—Written Recommendations for Investigations of Orphan Drugs

§ 316.10 Content and format of a request for written recommendations.

(a) A sponsor's request for written recommendations from FDA concerning the nonclinical and clinical investigations necessary for approval of a marketing application shall be submitted in the form and contain the information required in this section. FDA may require the sponsor to submit information in addition to that specified in paragraph (b) of this section if FDA determines that the sponsor's initial request does not contain adequate information on which to base recommendations.

(b) A sponsor shall submit two copies of a completed, dated, and signed request for written recommendations that contains the following:

(1) The sponsor's name and address.

(2) A statement that the sponsor is requesting written recommendations on orphan-drug development under section 525 of the act.

(3) The name of the sponsor's primary contact person and/or resident agent, and the person's title, address, and telephone number.

(4) The generic name and trade name, if any, of the drug and a list of the drug product's components or description of the drug product's formulation, and chemical and physical properties.

(5) The proposed dosage form and route of administration.

(6) A description of the disease or condition for which the drug is proposed to be investigated and the proposed indication or indications for use for such disease or condition.

(7) Current regulatory and marketing status and history of the drug product, including:

(i) Whether the product is the subject of an IND or a marketing application (if the product is the subject of an IND or a marketing application, the IND or marketing application numbers should be stated and the investigational or approved indication or indications for use specified);

(ii) Known marketing experience or investigational status outside the United States;

(iii) So far as is known or can be determined, all indications previously or currently under investigation anywhere;

(iv) All adverse regulatory actions taken by the United States or foreign authorities.

(8) The basis for concluding that the drug is for a disease or condition that is rare in the United States, including the following:

(i) The size and other known demographic characteristics of the patient population affected and the source of this information.

(ii) For drugs intended for diseases or conditions affecting 200,000 or more people in the United States, or for a vaccine, diagnostic drug, or preventive drug that would be given to 200,000 or more persons per year, a summary of the sponsor's basis for believing that the disease or condition described in paragraph (b)(6) of this section occurs so infrequently that there is no reasonable expectation that the costs of drug development and marketing will be recovered in future sales of the drug in the United States. The estimated costs and sales data should be submitted as provided for in § 316.21(c).

(9) A summary and analysis of available data on the pharmacologic effects of the drug.

(10) A summary and analysis of available nonclinical and clinical data pertinent to the drug and the disease to be studied including copies of pertinent published reports. When a drug proposed for orphan drug designation is intended to treat a lift-threatening or severely debilitating illness, especially where no satisfactory alternative therapy exists, the sponsor may wish voluntarily to provide this information. A sponsor of such a drug may be entitled to expeditious development, evaluation, and marketing under 21 CFR part 312, subpart E.

(11) An explanation of how the data summarized and analyzed under paragraphs (b)(9) and (b)(10) of this section support the rationale for use of the drug in the rare disease or condition.

(12) A definition of the population from which subjects will be identified for clinical trials, if known.

(13) A detailed outline of any protocols under which the drug has been or is being studied for the rare disease or condition and a summary and analysis of any available data from such studies.

(14) The sponsor's proposal as to the scope of nonclinical and clinical investigations needed to establish the safety and effectiveness of the drug.

(15) Detailed protocols for each proposed United States or foreign clinical investigation, if available.

(16) Specific questions to be addressed by FDA in its recommendations for nonclinical laboratory studies and clinical investigations.

§ 316.12 Providing written recommendations.

(a) FDA will provide the sponsor with written recommendations concerning the nonclinical laboratory studies and clinical investigations necessary for approval of a marketing application if none of the reasons described in § 316.14 for refusing to do so applies.

(b) When a sponsor seeks written recommendations at a stage of drug

development at which advice on any clinical investigations, or on particular investigations would be premature, FDA's response may be limited to written recommendations concerning only nonclinical laboratory studies, or only certain of the clinical studies (e.g., Phase 1 studies as described in § 312.21 of this chapter). Prior to providing written recommendations for the clinical investigations required to achieve marketing approval, FDA may require that the results of the nonclinical laboratory studies or completed early clinical studies be submitted to FDA for agency review.

§ 316.14 Refusal to provide written recommendations.

(a) FDA may refuse to provide written recommendations concerning the nonclinical laboratory studies and clinical investigations necessary for approval of a marketing application for any of the following reasons:

(1) The information required to be submitted by § 316.10(b) has not been submitted, or the information submitted is incomplete.

(2) There is insufficient information about:

(i) The drug to identify the active moiety and its physical and chemical properties, if these characteristics can be determined; or

(ii) The disease or condition to determine that the disease or condition is rare in the United States; or

(iii) The reasons for believing that the drug may be useful for treating the rare disease or condition with that drug; or

(iv) The regulatory and marketing history of the drug to determine the scope and type of investigations that have already been conducted on the drug for the rare disease or condition; or

(v) The plan of study for establishing the safety and effectiveness of the drug for treatment of the rare disease or condition.

(3) The specific questions for which the sponsor seeks the advice of the agency are unclear or are not sufficiently specific.

(4) On the basis of the information submitted and on other information available to the agency, FDA determines that the disease or condition for which the drug is intended is not rare in the United States.

(5) On the basis of the information submitted and on other information available to the agency, FDA determines that there is an inadequate basis for permitting investigational use of the drug under part 312 of this chapter for the rare disease or condition.

(6) The request for information contains an untrue statement of material fact.

(b) A refusal to provide written recommendations will be in writing and will include a statement of the reason for FDA's refusal. Where practicable, FDA will describe the information or material it requires or the conditions the sponsor must meet for FDA to provide recommendations.

(c) Within 90 days after the date of a letter from FDA requesting additional information or material or setting forth the conditions that the sponsor is asked to meet, the sponsor shall either:

(1) Provide the information or material or amend the request for written recommendations to meet the conditions sought by FDA; or

(2) Withdraw the request for written recommendations. FDA will consider a sponsor's failure to respond within 90 days to an FDA letter requesting information or material or setting forth conditions to be met to be a withdrawal of the request for written recommendations.

Subpart C—Designation of an Orphan Drug

§ 316.20 Content and format of a request for orphan-drug designation.

(a) A sponsor that submits a request for orphan-drug designation of a drug for a specified rare disease or condition shall submit each request in the form and containing the information required in paragraph (b) of this section. A sponsor may request orphan-drug designation of a previously unapproved drug, or of a new orphan indication for an already marketed drug. In addition, a sponsor of a drug that is otherwise the same drug as an already approved orphan drug may seek and obtain orphan-drug designation for the subsequent drug for the same rare disease or condition if it can present a plausible hypothesis that its drug may be clinically superior to the first drug. More than one sponsor may receive orphan-drug designation of the same drug for the same rare disease or condition, but each sponsor seeking orphan-drug designation must file a complete request for designation as provided in paragraph (b) of this section.

(b) A sponsor shall submit two copies of a completed, dated, and signed request for designation that contains the following:

(1) A statement that the sponsor requests orphan-drug designation for a rare disease or condition, which shall be identified with specificity.

(2) The name and address of the sponsor; the name of the sponsor's primary contact person and/or resident agent including title, address, and telephone number; the generic and trade name, if any, of the drug or drug product; and the name and address of the source of the drug if it is not manufactured by the sponsor.

(3) A description of the rare disease or condition for which the drug is being or will be investigated, the proposed indication or indications for use of the drug, and the reasons why such therapy is needed.

(4) A description of the drug and a discussion of the scientific rationale for the use of the drug for the rare disease or condition, including all data from nonclinical laboratory studies, clinical investigations, and other relevant data that are available to the sponsor, whether positive, negative, or inconclusive. Copies of pertinent unpublished and published papers are also required.

(5) Where the sponsor of a drug that is otherwise the same drug as an already-approved orphan drug seeks orphan-drug designation for the subsequent drug for the same rare disease or condition, an explanation of why the proposed variation may be clinically superior to the first drug.

(6) Where a drug is under development for only a subset of persons with a particular disease or condition, a demonstration that the subset is medically plausible.

(7) A summary of the regulatory status and marketing history of the drug in the United States and in foreign countries, e.g., IND and marketing application status and dispositions, what uses are under investigation and in what countries; for what indication is the drug approved in foreign countries; what adverse regulatory actions have been taken against the drug in any country.

(8) Documentation, with appended authoritative references, to demonstrate that:

(i) The disease or condition for which the drug is intended affects fewer than 200,000 people in the United States or, if the drug is a vaccine, diagnostic drug, or preventive drug, the persons to whom the drug will be administered in the United States are fewer than 200,000 per year as specified in § 316.21(b), or

(ii) For a drug intended for diseases or conditions affecting 200,000 or more people, or for a vaccine, diagnostic drug, or preventive drug to be administered to 200,000 or more persons per year in the United States, there is no reasonable expectation that costs of research and development of the drug for the indication can be recovered by sales of the drug in the United States as specified in § 316.21(c).

(9) A statement as to whether the sponsor submitting the request is the real party in interest of the development and the intended or actual production and sales of the product.

(c) Any of the information previously provided by the sponsor to FDA under Subpart B of this part may be referenced by specific page or location if it duplicates information required elsewhere in this section.

§ 316.21 Verification of orphan-drug status.

(a) So that FDA can determine whether a drug qualifies for orphan-drug designation under section 526(a) of the act, the sponsor shall include in its request to FDA for orphan-drug designation under § 316.20 either:

(1) Documentation as described in paragraph (b) of this section that the number of people affected by the disease or condition for which the drug product is indicated is fewer than 200,000 persons; or

(2) Documentation as described in paragraph (c) of this section that demonstrates that there is no reasonable expectation that the sales of the drug will be sufficient to offset the costs of developing the drug for the U.S. market and the costs of making the drug available in the United States.

(b) For the purpose of documenting that the number of people affected by the disease or condition for which the drug product is indicated is less than 200,000 persons, "prevalence" is defined as the number of persons in the United States who have been diagnosed as having the disease or condition at the time of the submission of the request for orphan-drug designation. To document the number of persons in the United States who have the disease or condition for which the drug is to be indicated, the sponsor shall submit to FDA evidence showing:

(1) The estimated prevalence of the disease or condition for which the drug is being developed, together with a list of the sources (including dates of information provided and literature citations) for the estimate;

(2) Upon request by FDA, the estimated prevalence of any other disease or condition for which the drug has already been approved or for which the drug is currently being developed, together with an explanation of the bases of these estimates; and

(3) The estimated number of people to whom the drug will be administered annually if the drug is a vaccine or is a drug intended for diagnosis or prevention of a rare disease or condition, together with an explanation of the bases of these estimates (including dates of information provided and literature citations).

(c) When submitting documentation that there is no reasonable expectation that costs of research and development of the drug for the disease or condition can be recovered by sales of the drug in the United States, the sponsor shall submit to FDA:

(1) Data on all costs that the sponsor has incurred in the course of developing the drug for the U.S. market. These costs shall include, but are not limited to, nonclinical laboratory studies, clinical studies, dosage form development, record and report maintenance, meetings with FDA, determination of patentability, preparation of designation request, IND/marketing application preparation, distribution of the drug under a "treatment" protocol, licensing costs, liability insurance, and overhead and depreciation. Furthermore, the sponsor shall demonstrate the reasonableness of the cost data. For example, if the sponsor has incurred costs for clinical investigations, the sponsor shall provide information on the number of investigations, the years in which they took place, and on the scope, duration, and number of patients that were involved in each investigation.

(2) If the drug was developed wholly or in part outside the United States, in addition to the documentation listed in paragraph (c)(1) of this section:

(i) Data on and justification for all costs that the sponsor has incurred outside of the United States in the course of developing the drug for the U.S. market. The justification, in addition to demonstrating the reasonableness of the cost data, must also explain the method that was used to determine which portion of the foreign development costs should be applied to the U.S. market, and what percent these costs are of total worldwide development costs. Any data submitted to foreign government authorities to support drug pricing determinations must be included with this information.

(ii) Data that show which foreign development costs were recovered through cost recovery procedures that are allowed during drug development in some foreign countries. For example, if the sponsor charged patients for the drug during clinical investigations, the revenues collected by the sponsor must be reported to FDA.

(3) In cases where the drug has already been approved for marketing for any indication or in cases where the drug is currently under investigation for one or more other indications (in addition to the indication for which orphan-drug designation is being sought), a clear explanation of and justification for the method that is used to apportion the development costs among the various indications.

(4) A statement of and justification for any development costs that the sponsor expects to incur after the submission of the designation request. In cases where the extent of these future development costs are not clear, the sponsor should request FDA's advice and assistance in estimating the scope of nonclinical laboratory studies and clinical investigations and other data that are needed to support marketing approval. Based on these recommendations, a cost estimate should be prepared.

(5) A statement of and justification for production and marketing costs that the sponsor has incurred in the past and expects to incur during the first 7 years that the drug is marketed.

(6) An estimate of and justification for the expected revenues from sales of the drug in the United States during its first 7 years of marketing. The justification should assume that the total market for the drug is equal to the prevalence of the disease or condition that the drug will be used to treat. The justification should include:

(i) An estimate of the expected market share of the drug in each of the first 7 years that it is marketed, together with an explanation of the basis for that estimate;

(ii) A projection of and justification for the price at which the drug will be sold; and

(iii) Comparisons with sales of similarly situated drugs, where available.

(7) The name of each country where the drug has already been approved for marketing for any indication, the dates of approval, the indication for which the drug is approved, and the annual sales and number of prescriptions in each country since the first approval date.

(8) A report of an independent certified public accountant in accordance with Statement on Standards for Attestation established by the American Institute of Certified Public Accountants on agreed upon procedures performed with respect to the data estimates and justifications submitted pursuant to this section. Cost data shall be determined in accordance with generally accepted accounting principles.

(d) A sponsor that is requesting orphan-drug designation for a drug designed to treat a disease or condition that affects 200,000 or more persons shall, at FDA's request, allow FDA or FDA-designated personnel to examine at reasonable times and in a reasonable

manner all relevant financial records and sales data of the sponsor and manufacturer.

§ 316.22 Permanent-resident agent for foreign sponsor.

Every foreign sponsor that seeks orphan-drug designation shall name a permanent resident of the United States as the sponsor's agent upon whom service of all processes, notices, orders, decisions, requirements, and other communications may be made on behalf of the sponsor. Notifications of changes in such agents or changes of address of agents should preferably be provided in advance, but not later than 60 days after the effective date of such changes. The permanent-resident agent may be an individual, firm, or domestic corporation and may represent any number of sponsors. The name of the permanent-resident agent shall be provided to: Office of Orphan Products Development (HF–35), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

§ 316.23 Timing of requests for orphan-drug designation; designation of already approved drugs.

(a) A sponsor may request orphan-drug designation at any time in the drug development process prior to the submission of a marketing application for the drug product for the orphan indication.

(b) A sponsor may request orphan-drug designation of an already approved drug product for an unapproved use without regard to whether the prior marketing approval was for an orphan-drug indication.

§ 316.24 Granting orphan-drug designation.

(a) FDA will grant the request for orphan-drug designation if none of the reasons described in § 316.25 for requiring or permitting refusal to grant such a request applies.

(b) When a request for orphan-drug designation is granted, FDA will notify the sponsor in writing and will publicize the orphan-drug designation in accordance with § 316.28.

§ 316.25 Refusal to grant orphan-drug designation.

(a) FDA will refuse to grant a request for orphan-drug designation if any of the following reasons apply:

(1) The drug is not intended for a rare disease or condition because:

(i) There is insufficient evidence to support the estimate that the drug is intended for treatment of a disease or condition in fewer than 200,000 people in the United States, or that the drug is intended for use in prevention or in diagnosis in fewer than 200,000 people annually in the United States; or

(ii) Where the drug is intended for prevention, diagnosis, or treatment of a disease or condition affecting 200,000 or more people in the United States, the sponsor has failed to demonstrate that there is no reasonable expectation that development and production costs will be recovered from sales of the drug for the orphan indication in the United States. A sponsor's failure to comply with § 316.21 shall constitute a failure to make the demonstration required in this paragraph.

(2) There is insufficient information about the drug, or the disease or condition for which it is intended, to establish a medically plausible basis for expecting the drug to be effective in the prevention, diagnosis, or treatment of that disease or condition.

(3) A drug that is otherwise the same drug as one that already has orphan-drug exclusive approval for the same rare disease or condition and the sponsor has not submitted a medically plausible hypothesis for the possible clinical superiority of the subsequent drug.

(b) FDA may refuse to grant a request for orphan-drug designation if the request for designation contains an untrue statement of material fact or omits material information.

§ 316.26 Amendment to orphan-drug designation.

(a) At any time prior to approval of a marketing application for a designated orphan drug, the sponsor holding designation may apply for an amendment to the indication stated in the orphan-drug designation if the proposed change is due to new and unexpected findings in research on the drugs, information arising from FDA recommendations, or unforeseen developments in treatment or diagnosis of the disease or condition.

(b) FDA will grant the amendment if it finds that the initial designation request was made in good faith and that the amendment is intended to conform the orphan-drug designation indication to the results of unanticipated research findings, to unforeseen developments in the treatment or diagnosis of the disease or condition, or to changes based on FDA recommendations, and that, as of the date of the submission of the amendment request, the amendment would not result in exceeding the prevalence or cost recovery thresholds in § 316.21 (a)(1) or (a)(2) upon which the drug was originally designated.

§ 316.27 Change in ownership of orphan-drug designation.

(a) A sponsor may transfer ownership of or any beneficial interest in the orphan-drug designation of a drug to a new sponsor. At the time of the transfer, the new and former owners are required to submit the following information to FDA:

(1) The former owner or assignor of rights shall submit a letter or other document that states that all or some rights to the orphan-drug designation of the drug have been transferred to the new owner or assignee and that a complete copy of the request for orphan-drug designation, including any amendments to the request, supplements to the granted request, and correspondence relevant to the orphan-drug designation, has been provided to the new owner or assignee.

(2) The new owner or assignee of rights shall submit a statement accepting orphan-drug designation and a letter or other document containing the following:

(i) The date that the change in ownership or assignment of rights is effective;

(ii) A statement that the new owner has a compete copy of the request for orphan-drug designation including any amendments to the request, supplements to the granted request, and correspondence relevant to the orphan-drug designation; and

(iii) A specific description of the rights that have been assigned and those that have been reserved. This may be satisfied by the submission of either a list of rights assigned and reserved or copies of all relevant agreements between assignors and assignees; and

(iv) The name and address of a new primary contact person or resident agent.

(b) No sponsor may relieve itself of responsibilities under the Orphan Drug Act or under this part by assigning rights to another person without:

(1) Assuring that the sponsor or the assignee will carry out such responsibilities; or

(2) Obtaining prior permission from FDA.

§ 316.28 Publication of orphan-drug designations.

Each month FDA will update a publically available list of drugs designated as orphan drugs. A cumulative, updated list of all designated drugs will be provided annually. These will be placed on file at the FDA Dockets Management Branch, and will contain the following information:

(a) The name and address of the manufacturer and sponsor;

(b) The generic name and trade name, if any, of the drug and the date of the granting of orphan-drug designation;

(c) The rare disease or condition for which orphan-drug designation was granted; and

(d) The proposed indication for use of the drug.

§ 316.29 Revocation of orphan-drug designation.

(a) FDA may revoke orphan-drug designation for any drug if the agency finds that:

(1) The request for designation contained an untrue statement of material fact; or

(2) The request for designation omitted material information required by this part; or

(3) FDA subsequently finds that the drug in fact had not been eligible for orphan-drug designation at the time of submission of the request therefor.

(b) For an approved drug, revocation of orphan-drug designation also suspends or withdraws the sponsor's exclusive marketing rights for the drug but not the approval of the drug's marketing application.

(c) Where a drug has been designated as an orphan drug because the prevalence of a disease or condition (or, in the case of vaccines, diagnostic drugs, or preventive drugs, the target population) is under 200,000 in the United States at the time of designation, its designation will not be revoked on the ground that the prevalence of the disease or condition (or the target population) becomes more than 200,000 persons.

§ 316.30 Annual reports of holder of orphan-drug designation.

Within 14 months after the date on which a drug was designated as an orphan drug and annually thereafter until marketing approval, the sponsor of a designated drug shall submit a brief progress report to the FDA Office of Orphan Products Development on the drug that includes:

(a) A short account of the progress of drug development including a review of preclinical and clinical studies initiated, ongoing, and completed and a short summary of the status or results of such studies.

(b) A description of the investigational plan for the coming year, as well as any anticipated difficulties in development, testing, and marketing; and

(c) A brief discussion of any changes that may affect the orphan-drug status of the product. For example, for products nearing the end of the approval process, sponsors should discuss any disparity between the probable marketing indication and the designated indication as related to the need for an amendment to the orphan-drug designation pursuant to § 316.26.

Subpart D—Orphan-drug Exclusive Approval

§ 316.31 Scope of orphan-drug exclusive approval.

(a) After approval of a sponsor's marketing application for a designated orphan-drug product for treatment of the rare disease or condition concerning which orphan-drug designation was granted, FDA will not approve another sponsor's marketing application for the same drug before the expiration of 7 years from the date of such approval as stated in the approval letter from FDA, except that such a marketing application can be approved sooner if, and such time as, any of the following occurs:

(1) Withdrawal of exclusive approval or revocation of orphan-drug designation by FDA under any provision of this part; or

(2) Withdrawal for any reason of the marketing application for the drug in question; or

(3) Consent by the holder of exclusive approval to permit another marketing application to gain approval; or

(4) Failure of the holder of exclusive approval to assure a sufficient quantity of the drug under section 527 of the act and § 316.36.

(b) If a sponsor's marketing application for a drug product is determined not to be approvable because approval is barred under section 527 of the act until the expiration of the period of exclusive marketing of another drug product, FDA will so notify the sponsor in writing.

§ 316.34 FDA recognition of exclusive approval.

(a) FDA will send the sponsor (or, the permanent-resident agent, if applicable) timely written notice recognizing exclusive approval once the marketing application for a designated orphan-drug product has been approved. The written notice will inform the sponsor of the requirements for maintaining orphan-drug exclusive approval for the full 7-year term of exclusive approval.

(b) When a marketing application is approved for a designated orphan drug that qualifies for exclusive approval, FDA will publish in its publication entitled "Approved Drug Products with Therapeutic Equivalence Evaluations" information identifying the sponsor, the drug, and the date of termination of the orphan-drug exclusive approval. A subscription to this publication and its monthly cumulative supplements is available from the Superintendent of Documents, Government Printing Office, Washington, DC 20402–9325.

§ 316.36 Insufficient quantities of orphan drugs.

(a) Under section 527 of the act, whenever the Director has reason to believe that the holder of exclusive approval cannot assure the availability of sufficient quantities of an orphan drug to meet the needs of patients with the disease or condition for which the drug was designated, the Director will so notify the holder of this possible insufficiency and will offer the holder one of the following options, which must be exercised by a time that the Director specifies:

(1) Provide the Director in writing, or orally, or both, at the Director's discretion, views and data as to how the holder can assure the availability of sufficient quantities of the orphan drug within a reasonable time to meet the needs of patients with the disease or condition for which the drug was designated; or

(2) Provide the Director in writing the holder's consent for the approval of other marketing applications for the same drug before the expiration of the 7-year period of exclusive approval.

(b) If, within the time that the Director specifies, the holder fails to consent to the approval of other marketing applications and if the Director finds that the holder has not shown that it can assure the availability of sufficient quantities of the orphan drug to meet the needs of patients with the disease or condition for which the drug was designated, the Director will issue a written order withdrawing the drug product's exclusive approval. This order will embody the Director's findings and conclusions and will constitute final agency action. An order withdrawing the sponsor's exclusive marketing rights may issue whether or not there are other sponsors that can assure the availability of alternative sources of supply. Once withdrawn under this section, exclusive approval may not be reinstated for that drug.

Subpart E—Open Protocols for Investigations

§ 316.40 Treatment use of a designated orphan drug.

Prospective investigators seeking to obtain treatment use of designated orphan drugs may do so as provided in § 312.34 of this chapter.

Subpart F—Availability of Information

§ 316.50 Guidelines.

FDA's Office of Orphan Products Development will maintain and make publicly available a list of guidelines that apply to the regulations in this part. The list states how a person can obtain a copy of each guideline. A request for a copy of the list or for any guideline should be directed to the Office of Orphan Products Development (HF-35), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

§ 316.52 Availability for public disclosure of data and information in requests and applications.

(a) FDA will not publicly disclose the existence of a request for orphan-drug designation under section 526 of the act prior to final FDA action on the request unless the existence of the request has been previously publicly disclosed or acknowledged.

(b) Whether or not the existence of a pending request for designation has been publicly disclosed or acknowledged, no data or information in the request are available for public disclosure prior to final FDA action on the request.

(c) Upon final FDA action on a request for designation, FDA will determine the public availability of data and information in the request in accordance with part 20 and § 314.430 of this chapter and other applicable statutes and regulations.

(d) In accordance with § 316.28, FDA will make a cumulative list of all orphan drug designations available to the public and update such list monthly.

(e) FDA will not publicly disclose the existence of a pending marketing application for a designated orphan drug for the use for which the drug was designated unless the existence of the application has been previously publicly disclosed or acknowledged.

(f) FDA will determine the public availability of data and information contained in pending and approved marketing applications for a designated orphan drug for the use for which the drug was designated in accordance with part 20 and § 314.430 of this chapter and other applicable statutes and regulations.

Dated: May 21, 1992.

David A. Kessler,

Commissioner of Food and Drugs.

Louis W. Sullivan,

Secretary of Health and Human Services.

[FR Doc. 92-31192 Filed 12-28-92; 8:45 am]

BILLING CODE 4160-01-M

federal register

Tuesday
December 29, 1992

Part V

Department of Education

34 CFR Part 316 et. al.

Training Personnel for the Education of Individuals With Disabilities; Final Regulations and Notice

DEPARTMENT OF EDUCATION

34 CFR Parts 316, 318, and 319

RIN 1820-AA95

Training Personnel for the Education of Individuals With Disabilities in the Matter of Grants for Personnel Training, Parent Training and Information Centers, and Grants to State Educational Agencies and Institutions of Higher Education

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations for the Training Personnel for the Education of Individuals With Disabilities program authority as reauthorized in the Individuals With Disabilities Education Act Amendments of 1991 (1991 Amendments), Public Law 102-119. The regulations conform existing regulations to statutory provisions enacted in the 1991 Amendments; add additional priorities, including priorities pertaining to AMERICA 2000 (the President's strategy for moving the Nation toward the National Education Goals); and include modifications to certain existing regulations. The Training Personnel for the Education of Individuals With Disabilities program furthers AMERICA 2000, the President's strategy for moving the Nation toward the National Education Goals, by seeking to enable parents to more fully and effectively meet the educational needs of their children with disabilities and to enhance the quality and quantity of personnel available to serve these children. National Education Goal 1 calls for all children to start school ready to learn, and National Education Goal 3 calls for all American students to demonstrate competency in challenging subject matter and to learn to use their minds well.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Max Mueller, U.S. Department of Education, 400 Maryland Avenue, SW., room 3072, Switzer Building, Washington, DC 20202-2651. Telephone: (202) 205-9554. Deaf and hearing impaired individuals may call (202) 205-9999 for TDD services.

SUPPLEMENTARY INFORMATION: The major purposes of the proposed regulations are: (1) To incorporate requirements and new program authorities set forth in the 1991 Amendments; (2) to add new priorities; and (3) to make a number of changes to modify the existing regulations and conform them to the 1991 Amendments. On August 5, 1992, the Secretary published a notice of proposed rulemaking for this program in the **Federal Register** (57 FR 34620-34638).

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, eight parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows. Issues are discussed under the part of the regulations to which they pertain.

Technical and other minor changes—and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority—are not addressed.

Part 316

Comments: Three commenters expressed concern that the proposed regulations required experimental rural centers to serve a large, sparsely settled area (§ 316.10(b)(2)), whereas the regulations appeared, through the use of the word "may", to give greater flexibility to urban centers (§ 316.10(b)(1)). Commenters supported the flexibility provided for experimental urban centers, but expressed concern regarding the more restrictive nature of the focus for experimental rural centers. Commenters indicated that maximum flexibility should be provided for both rural and urban experimental centers to reach difficult-to-serve populations, and that the distinction between "may" and "must" was inconsistent and contradictory.

Discussion: The Secretary agrees that all the experimental centers should have the greatest possible flexibility to meet the needs of special populations who may not be adequately served by other centers. However, the regulations must follow the dictates of the law that require rural centers to "serve large numbers of parents of children with disabilities located in rural areas."

Changes: Language has been changed to emphasize the flexibility of the experimental rural centers by making it clear that rural centers can also meet the statutory mandate by serving sparsely populated areas that contain large numbers of parents given the expanse of the geographic area.

Part 318

Comments: One commenter felt that the proposed regulations (§ 318.10(a) (4) and (5)) provided too little information on the new authority for professional development partnerships and the provision of technical assistance to those partnerships.

Discussion: The Secretary believes that the content of these activities is appropriately elaborated in the priorities (§ 318.11(a) (6) and (7)).

Changes: None.

Comments: Three commenters suggested that serious emotional disturbance (SED), while it is not a low incidence disability, is still so critical as to merit separate attention (§ 318.11(a)(10)). These commenters were concerned about the effect of deletion of SED from this priority.

Discussion: The Secretary agrees that the shortage of personnel to provide services to children with serious emotional disturbance is among the most critical personnel issues in the field. However, the addition of authority to reserve funds for specific disability groups (§ 318.11(b)) permits the Secretary to continue to focus resources on this group without confusing the issue of low incidence disabilities, or placing SED professional preparation programs in direct competition with programs preparing personnel for true low incidence populations.

Changes: None.

Comments: One commenter viewed the priority on preparing personnel to meet the National Education Goals (§ 318.11(a)(17)) as being premature because the relationship of the goals to services for children with disabilities is not established enough to permit intelligent implementation of this priority.

Discussion: This priority is intended to contribute to identifying the relationships between the National Education Goals and programs and services for children with disabilities. The Secretary believes that the National Education Goals have been firmly established and that programs to address these goals are developing rapidly. It is critical that these programs include sufficient consideration of the needs of children with disabilities in school reform initiatives. This priority will support efforts to ensure consideration of children with disabilities in school reform initiatives at least in terms of professional preparation.

Changes: None.

Comments: One commenter suggested that the inclusion of a separate priority for students with attention deficit

disorder (ADD) (§ 318.11(a)(19)) was inappropriate.

Discussion: While ADD is not currently identified as a specific category of disability under the Individuals With Disabilities Education Act (IDEA), the Secretary believes that the needs of these children are critical. The importance of meeting the needs of these children has been recognized by the Congress in the reports accompanying the past two appropriation acts, which directed funds toward training activities related to ADD. This priority is intended to implement this objective.

Changes: None.

Comments: Three commenters expressed concern that the authority given to the Secretary to direct resources to specific disabilities or geographic areas (§ 318.11(b)) needs further clarification. More specifically, the commenters felt that the regulations should include procedures and criteria for identifying specific needs.

Discussion: The principal sources of data relating to the identification of particularly critical needs are the States' comprehensive systems of personnel development. However, other data could also be brought to bear on decisions to reserve funds for specific disability groups or geographic areas. For example, it is clear that shortages of teachers for children with visual impairments, other health impairments, and serious emotional disturbance are especially severe, independent of any State-by-State analyses. It is also clear that several largely rural States face particular problems in recruiting sufficient fully qualified personnel.

Changes: The section has been changed by adding a brief description of sources of data for making these decisions.

Comments: One commenter suggested that all of the application requirements under § 318.20 should apply to all professional personnel projects authorized in part 318.

Discussion: The Secretary agrees that these requirements are generally desirable for most training activities. However, they are not appropriate for some of the training activities under the program. For example, the requirement in § 318.20(a) to train personnel based on the personnel needs of a State or States employing program graduates may not be appropriate for a special project developing curricula for broad distribution.

Changes: None.

Part 319

Comments: Three comments related to the competitive projects under the State educational agency grants program (§ 319.3(b)). The commenters suggested that the section should be deleted or modified. The principal concern expressed by commenters was that awarding projects on a competitive basis was inconsistent with the general purpose of IDEA section 632, which is to assist States in meeting their most critical personnel needs (priorities).

Discussion: The competitive grant portion of this program is authorized by the statute and must be reflected in the regulations. The Secretary agrees that State priorities must be considered. Section 319.1 specifies that all programs, including those funded competitively, "must be consistent with the personnel needs identified in the States' comprehensive systems of personnel development" under IDEA sections 613 and 676(b)(8).

Changes: The description has been modified to clarify that the priorities referred to in this section are State priorities.

Comments: Two commenters recommended limiting technical assistance awards (§ 319.2(c)) to nonprofit institutions, organizations, and agencies. The commenters argued that there was no evidence that a sufficient pool of technical assistance expertise was not available in the nonprofit community, and that limiting this program to nonprofit organizations would make the requirements of these technical assistance activities more consistent with other technical assistance programs under IDEA.

Discussion: The Secretary does not disagree that a sufficient pool of technical assistance expertise may be available in the nonprofit community. However, the Secretary believes that technical assistance should be provided by the best available source if the authorizing legislation is silent on the issue.

Changes: None.

Comments: Three respondents commented on the proposed changes in the method for determining State awards (§ 319.21(a)). Two supported the proposed change, while the third suggested that large States would suffer a reduction in funds. This commenter suggested an alternative that would permit a higher base award for smaller States but maintain the existing formula for determining the bonus amount.

Discussion: The Secretary recognizes that the proposed change in regulations may result in significant one-time reductions in funding for the largest States. However, it is important that regulations reflect an equitable balance between the needs of the small States and the large ones, and provide grants of sufficient size and scope to all States. In addition, the proposed regulations also better account for fluctuating appropriation levels than the current formula. For example, in 1992 a program budget increase of almost $2 million was shared by only the eleven largest States. The revised formula will allow equitable distribution of funds to all States in situations of either significant increases or reductions in overall funds.

Changes: None.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects

34 CFR Part 316

Act, Children with disabilities, Parent organizations, Parents, Reporting and recordkeeping requirements.

34 CFR Part 318

Education, Education of individuals with disabilities, Education—training, Grant programs—education, Reporting and recordkeeping requirements, Student aid, Teachers.

34 CFR Part 319

Education, Education of individuals with disabilities, Education—training, Grant programs—education, Student aid, Teachers.

Dated: December 1, 1992.

Lamar Alexander,

Secretary of Education.

(Catalog of Federal Domestic Assistance Number 84.029—Training Personnel for the Education of Individuals With Disabilities)

The Secretary amends title 34 of the Code of Federal Regulations by revising parts 316, 318, and 319 to read as follows:

PART 316—TRAINING PERSONNEL FOR THE EDUCATION OF INDIVIDUALS WITH DISABILITIES—PARENT TRAINING AND INFORMATION CENTERS

Subpart A—General

Sec.

316.1 What is the Training Personnel for the Education of Individuals with Disabilities—Parent Training and Information Centers program?
316.2 Who is eligible for an award?
316.3 What kinds of projects may the Secretary fund?
316.4 What regulations apply to this program?
316.5 What definitions apply to this program?

Subpart B—What Activities Does the Secretary Assist Under This Program?

316.10 What activities may the Secretary fund?

Subpart C—How Does the Secretary Make an Award?

316.20 What are the requirements for applicants?
316.21 How does the Secretary evaluate an application?
316.22 What selection criteria does the Secretary use to evaluate applications for parent centers and experimental centers?
316.23 What selection criteria does the Secretary use to evaluate applications for technical assistance activities?
316.24 What additional factors does the Secretary consider?

Subpart D—What Conditions Must a Grantee Meet?

316.30 What types of services are required?
316.31 What are the duties of the board of directors or special governing committee of a parent organization?
316.32 What are the reporting requirements under this program?
316.33 What other conditions must be met by grantees under this program?

Authority: 20 U.S.C. 1431(d) and 1434, unless otherwise noted.

Subpart A—General

§ 316.1 What is the Training Personnel for the Education of Individuals with Disabilities—Parent Training and Information Centers program?

(a) This program provides training and information to parents of children (infants, toddlers, children, and youth) with disabilities, and to persons who work with parents to enable parents to participate more fully and effectively with professionals in meeting the educational needs of their children with disabilities.

(b) Parent training and information programs may, at a grantee's discretion, include participation of State or local educational agency personnel if that participation will further an objective of the program assisted by the grant.

(Authority: 20 U.S.C. 1431(d))

§ 316.2 Who is eligible for an award?

Only parent organizations are eligible to receive awards under this program.

(Authority: 20 U.S.C. 1431(d))

§ 316.3 What kinds of projects may the Secretary fund?

The Secretary funds three kinds of projects under this program:

(a) Parent training and information centers.

(b) Experimental urban and rural parent training and information centers.

(c) Technical assistance for establishing, developing, and coordinating parent training and information programs.

(Authority: 20 U.S.C. 1431(d))

§ 316.4 What regulations apply to this program?

The following regulations apply to this program:

(a) The Education Department General Administrative Regulations (EDGAR) in the following parts of title 34 of the Code of Federal Regulations:

(1) Part 74 (Administration of Grants to Institutions of Higher Education, Hospitals, and Nonprofit Organizations).

(2) Part 75 (Direct Grant Programs).

(3) Part 77 (Definitions That Apply to Department Regulations).

(4) Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) Part 81 (General Education Provisions Act—Enforcement).

(6) Part 82 (New Restrictions on Lobbying).

(7) Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for a Drug-Free Workplace (Grants)).

(b) The regulations in this part 316.

(Authority: 20 U.S.C. 1431(d); 3474(a))

§ 316.5 What definitions apply to this program?

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Award
Department
EDGAR
Fiscal year
Local educational agency
Nonprofit
Private
Project
Secretary
State
State educational agency

(b) *Definitions in 34 CFR part 300.* The following terms used in this part are defined in 34 CFR part 300:

Individualized education program
Parent
Related services
Special education

(c) *Other definitions specific to 34 CFR part 316.* The following terms used in this part are defined as follows:

Act means the Individuals With Disabilities Education Act (IDEA).

Parent organization means a private nonprofit organization that is governed by a board of directors of which a majority of the members are parents of children with disabilities—particularly minority parents—and that includes members who are professionals—especially minority professionals—in the fields of special education, early intervention, and related services, and individuals with disabilities. If the private nonprofit organization does not have such a board, the organization must have a membership that represents the interests of individuals with disabilities, and must establish a special governing committee of which a majority of the members are parents of children with disabilities—particularly parents of minority children—and that includes members who are professionals—especially minority professionals—in the fields of special education, early intervention, and related services. Parent and professional membership of these boards or special governing committees must be broadly representative of minority and other individuals and groups having an interest in special education, early intervention, and related services.

(Authority: 20 U.S.C. 1431(d))

Subpart B—What Activities Does the Secretary Assist Under This Program?

§ 316.10 What activities may the Secretary fund?

(a) Parent training and information centers assisted under § 316.3(a) must assist parents to—

(1) Better understand the nature and needs of the disabling conditions of their children with disabilities;

(2) Provide follow-up support for the educational programs of their children with disabilities;

(3) Communicate more effectively with special and regular educators, administrators, related services personnel, and other relevant professionals;

(4) Participate fully in educational decisionmaking processes, including the development of the individualized education program, for a child with a disability;

(5) Obtain information about the range of options, programs, services, and resources available at the national, State, and local levels to children with disabilities and their families; and

(6) Understand the provisions for educating children with disabilities under the Act.

(b) Experimental urban centers under § 316.3(b) must serve large numbers of parents of children with disabilities located in high density areas, and experimental rural centers under § 316.3(b) must serve large numbers of parents of children with disabilities located in rural areas. The centers may focus on particular aspects of parent training and information services, including but not limited to those activities required under § 316.10(a). Experimental projects may include a planning and development phase.

(1) Experimental urban centers may concentrate on neighborhoods within a city or focus on specific unserved groups. They may serve an entire city or concentrate on a specific area or ethnic group within a city.

(2) Experimental rural centers may serve a large, sparsely populated area. Projects may identify specific methods, including use of technology and telecommunications, to reach these parents.

(c) The technical assistance to parent programs under § 316.3(c) includes technical assistance for establishing, developing, and coordinating parent training and information programs. Activities must include, but are not limited to, the following:

(1) Determining national needs and identifying unserved regions and populations.

(2) Identifying the specific technical assistance needs of individual centers.

(3) Developing programs in unserved areas.

(4) Conducting annual meetings at national and regional levels.

(5) Identifying and coordinating national activities to serve parents of children with disabilities. This may include conferences, publications, and maintenance of documents and data relevant to parent programs.

(6) Dissemination of information through media, newsletters, computers, and written documentation.

(7) Cooperative activities with other projects and organizations on common goals.

(8) Evaluation, including determination of the impact of technical assistance activities, and evaluation assistance to centers.

(9) Management assistance to centers.

(10) Involvement of parent programs and the Department in identifying one or more substantive specialization areas.

(11) Acting as a resource to parent training programs in identified specialization areas such as transition, supported employment, early childhood, integration, and technology.

(Authority: 20 U.S.C. 1431(d))

Subpart C—How Does the Secretary Make an Award?

§ 316.20 What are the requirements for applicants?

(a) Applicants for awards for parent centers and experimental centers under § 316.3 (a) and (b) shall demonstrate the capacity and expertise to conduct the authorized training and information activities effectively, and to network with clearinghouses, including those authorized under section 633 of the Act, other organizations and agencies, and other established national, State, and local parent groups representing the full range of parents of children with disabilities—especially parents of minority children.

(b) In order to assure that awards for parent centers under § 316.3(a) serve parents of minority children with disabilities (including parents served pursuant to § 316.33) representative to the proportion of the minority population in the areas being served, applicants for awards shall identify with specificity the special efforts that will be undertaken to involve those parents, including efforts to work with community-based and cultural organizations and the specification of supplementary aids, services, and supports that will be made available. Applicants shall also specify budgetary items earmarked to accomplish these efforts.

(c) Applicants for awards for experimental urban centers shall provide a rationale for their project and demonstrate a capability to serve the parents they have identified and targeted for services.

(Approved by the Office of Management and Budget under control number 1820–0028)

(Authority: 20 U.S.C. 1431(d))

§ 316.21 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application on the basis of the criteria in §§ 316.22 and 316.23.

(b) The Secretary awards up to 100 points for these criteria.

(c) The maximum possible score for each criterion is indicated in parentheses.

(Approved by the Office of Management and Budget under control number 1820–0028)

(Authority: 20 U.S.C. 1431(d))

§ 316.22 What selection criteria does the Secretary use to evaluate applications for parent centers and experimental centers?

The Secretary uses the following criteria to evaluate applications for parent centers and experimental centers:

(a) *Extent of present and projected need.* (15 points) The Secretary reviews each application to determine the extent to which the project makes an impact on parent training and information needs, consistent with the purposes of the Act, including consideration of the impact on—

(1) The present and projected needs in the applicant's geographic area for trained parents;

(2) The present and projected training and information needs for personnel to work with parents of children with disabilities; and

(3) Parents of minority infants, toddlers, children, and youth with disabilities.

(b) *Anticipated project results.* (25 points) The Secretary reviews each application to determine the extent to which the project will assist parents to—

(1) Better understand the nature and needs of the disabling conditions of their children with disabilities;

(2) Provide follow-up support for the educational programs of their children with disabilities;

(3) Communicate more effectively with special and regular educators, administrators, related services personnel, and other relevant professionals;

(4) Participate fully in educational decision-making processes, including the development of the individualized educational program, for a child with a disability;

(5) Obtain information about the range of options, programs, services, and resources available at the national, State, and local levels to children with disabilities and their families; and

(6) Understand the provisions for educating children with disabilities under the Act.

(c) *Plan of operation.* (20 points) The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(1) High quality in the design of the project;

(2) An effective management plan that ensures proper and efficient administration of the project;

(3) How the objectives of the project relate to the purpose of the program;

(4) The way the applicant plans to use its resources and personnel to achieve each objective; and

(5) How the applicant addresses the needs of parents of minority infants, toddlers, children, and youth with disabilities.

(d) *Evaluation plan.* (15 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(1) Are appropriate for the project;

(2) To the extent possible, are objective and produce data that are quantifiable (See 34 CFR 75.590, Evaluation by the grantee.); and

(3) Provide the data required for the annual report to Congress. (See 20 U.S.C. 1434 (a)(3) and (b))

(e) *Quality of key personnel.* (15 points) The Secretary reviews each application to determine the quality of the key personnel the applicant plans to use in the project, including—

(1) The qualifications of the project director;

(2) The qualifications of each of the other key personnel to be used on the project;

(3) The time each of the key personnel plans to commit to the project;

(4) How the applicant, as a part of its nondiscriminatory practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or disability; and

(5) Evidence of the applicant's past experience in the fields relating to the objectives of the project.

(f) *Budget and cost-effectiveness.* (10 points) the Secretary reviews each application to determine the extent to which—

(1) The budget for the project is adequate to support the project activities; and

(2) Costs are reasonable in relation to the objectives of the project.

(Approved by the Office of Management and Budget under control number 1820–0028)

(Authority: 20 U.S.C. 1431(d))

§ 316.23 What selection criteria does the Secretary use to evaluate applications for technical assistance activities?

The Secretary uses the following criteria to evaluate applications for technical assistance activities:

(a) *Plan of operation.* (25 points) The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(1) High quality in the design of the project;

(2) An effective plan of management that ensures proper and efficient administration of the project;

(3) A clear description of how the objectives of the project relate to the purpose of the program; and

(4) The way the applicant plans to use its resources and personnel to achieve each objective.

(b) *Project content.* (20 points) The Secretary reviews each application to determine—

(1) The project's potential for national significance, its potential for effectiveness, and the quality of its plan for dissemination of the results of the project;

(2) The extent to which substantive content and organization of the project—

(i) Are appropriate for the attainment of knowledge that is necessary for the provision of quality educational and early intervention services to infants, toddlers, children, and youth with disabilities; and

(ii) Demonstrate an awareness of relevant methods, procedures, techniques, technology, and instructional media or materials that can be used in the development of a model to assist parents of infants, toddlers, children, and youth with disabilities; and

(3) The extent to which project philosophy, objectives, and activities are related to the educational or early intervention needs of infants, toddlers, children, and youth with disabilities.

(c) *Applicant experience and ability.* (15 points) The Secretary looks for information that shows the applicant's—

(1) Experience and training in fields related to the objectives of the project;

(2) National experience relevant to performance of the functions supported by the project;

(3) Ability to conduct the proposed project;

(4) Ability to communicate with intended consumers of information; and

(5) Ability to maintain necessary communication and coordination with other relevant projects, agencies, and organizations.

(d) *Quality of key personnel.* (10 points) The Secretary reviews each application to determine the quality of the key personnel the applicant plans to use in the project, including—

(1) The qualifications of the project director;

(2) The qualifications of each of the other key personnel to be used in the project;

(3) The time that each of the key personnel plans to commit to the project;

(4) How the applicant, as a part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or disability; and

(5) Evidence of the key personnel's past experience and training in fields related to the objectives of the project.

(e) *Evaluation plan.* (15 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(1) Are appropriate for the project; and

(2) To the extent possible, are objective and produce data that are quantifiable. (See 34 CFR 75.590, Evaluation by the grantee.)

(f) *Adequacy of resources.* (5 points) The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment, and supplies.

(g) *Budget and cost effectiveness.* (10 points) The Secretary reviews each application to determine the extent to which—

(1) The budget is adequate to support the project; and

(2) Costs are reasonable in relation to the objectives of the project.

(Approved by the Office of Management and Budget under control number 1820–0028)

(Authority: 20 U.S.C. 1431(d))

§ 316.24 What additional factors does the Secretary consider?

In addition to the criteria in § 316.22, the Secretary considers the following factors in making an award:

(a) *Geographic distribution.* In selecting projects for awards for parent centers under § 316.3(a), the Secretary ensures that, to the greatest extent possible, awards are distributed geographically, on a State or regional basis, throughout all the States and serve parents of children with disabilities in both urban and rural areas.

(b) *Unserved areas.* In selecting projects for parent centers under § 316.3(a) and experimental centers under § 316.3(b), the Secretary gives priority to applications that propose to serve unserved areas.

(Authority: 20 U.S.C. 1431(d))

Subpart D—What Conditions Must a Grantee Meet?

§ 316.30 What types of services are required?

(a) Parent centers and experimental centers must be designed to meet the unique training and information needs of parents of children with disabilities who live in the areas to be served by the project, particularly those who are members of groups that have been traditionally underrepresented.

(b) Parent centers and experimental centers must consult and network with appropriate national, State, regional, and local agencies and organizations that serve or assist children with disabilities and their families in the geographic areas served by the project.

(Authority: 20 U.S.C. 1431(d))

§ 316.31 What are the duties of the board of directors or special governing committee of a parent organization?

A recipient's board of directors or special governing committee as described in § 316.5 must meet at least once in each calendar quarter to review the parent training and information activities under the award. Whenever a private nonprofit organization requests a renewal of an award under this part, the board of directors or special governing committee shall submit to the Secretary a written review of the parent training and information program conducted by that private nonprofit organization during the preceding fiscal year.

(Approved by the Office of Management and Budget under control number 1820–0028)

(Authority: 20 U.S.C. 1431(d))

§ 316.32 What are the reporting requirements under this program?

(a) Recipients shall, if appropriate, prepare reports describing their procedures, findings, and other relevant information in a form that will maximize the dissemination and use of these procedures, findings, and information. The Secretary requires their delivery, as appropriate, to the Regional and Federal Reserve Centers, the Clearinghouses, and the Technical Assistance to Parents Program (TAPP) assisted under parts C and D of the Act, as well as the National Diffusion Network, the ERIC Clearinghouse on the Handicapped and Gifted, and the Child and Adolescent Service Systems Program (CASSP) under the National Institute of Mental Health, appropriate parent and professional organizations, organizations representing individuals with disabilities, and other networks the Secretary may determine to be appropriate.

(b) The recipient shall provide data for every year of the project on—

(1) The number of parents provided information and training by disability category of their children;

(2) The types and modes of information or training provided;

(3) Strategies used to reach and serve parents of minority children with disabilities;

(4) The number of parents served as a result of activities described under paragraph (b)(3) of this section;

(5) Activities to network with other information clearinghouses and parent groups as required by § 316.20(a);

(6) The number of agencies and organizations consulted with at the national, State, regional, and local levels; and

(7) The number of parents served who are parents of children with disabilities birth through age five.

(Approved by the Office of Management and Budget under control number 1820–0530)

(Authority: 20 U.S.C. 1409(g); 1434(a)(3))

§ 316.33 What other conditions must be met by grantees under this program?

(a) In the case of a grant for parent centers under § 316.3(a) and experimental centers under § 316.3(b) to a private nonprofit organization for fiscal year 1993 or 1994, the organization, in expending the amounts described in paragraph (b) of this section, shall give priority to providing services to parents of children with disabilities birth through age five.

(b) With respect to a grant for a parent center or an experimental center to a private nonprofit organization for fiscal year 1993 or 1994, the amounts referred to in paragraph (a) of this section are any amounts provided in the grant in excess of the amount of any grant under this program provided to the organization for fiscal year 1992.

(c) Recipients of awards for parent centers and experimental centers shall serve parents of children representing the full range of disabling conditions.

(Authority: 20 U.S.C. 1431(d))

PART 318—TRAINING PERSONNEL FOR THE EDUCATION OF INDIVIDUALS WITH DISABILITIES—GRANTS FOR PERSONNEL TRAINING

Subpart A—General

Sec.

318.1 What is the purpose of the Training Personnel for the Education of Individuals with Disabilities—Grants for Personnel Training program?

318.2 Who is eligible for an award?

318.3 What regulations apply to this program?

318.4 What definitions apply to this program?

Subpart B—What Kinds of Projects Does the Secretary Assist Under This Program?

318.10 What activities may the Secretary fund?

318.11 What priorities may the Secretary establish?

Subpart C—How Does the Secretary Make an Award?

318.20 What are the requirements for applicants?

318.21 How does the Secretary evaluate an application?

318.22 What selection criteria does the Secretary use to evaluate applications for preservice training, leadership training, and professional development programs?

318.23 What selection criteria does the Secretary use to evaluate applications for special projects?

318.24 What selection criteria does the Secretary use to evaluate applications for technical assistance activities?

318.25 What additional factors does the Secretary consider?

Subpart D—What Conditions Must a Grantee Meet?

318.30 What are the priorities for award of student fellowships and traineeships?

318.31 Is student financial assistance authorized?

318.32 What are the student financial assistance criteria?

318.33 May the grantee use funds if a financially assisted student withdraws or is dismissed?

318.34 What are the reporting requirements under this program?

Authority: 20 U.S.C. 1431(a)–(c) and 1434, unless otherwise noted.

Subpart A—General

§ 318.1 What is the purpose of the Training Personnel for the Education of Individuals with Disabilities—Grants for Personnel Training program?

This program serves to increase the quantity and improve the quality of personnel available to serve infants, toddlers, children, and youth with disabilities.

(Authority: 20 U.S.C. 1431(a)–(c))

§ 318.2 Who is eligible for an award?

The following are eligible for assistance under this part:

(a) Institutions of higher education and appropriate nonprofit agencies are eligible under § 318.10(a) (1) and (2).

(b) Institutions of higher education, State agencies, and other appropriate nonprofit agencies are eligible under § 318.10(a)(3).

(c) States or other entities are eligible under § 318.10(a) (4) and (5). An entity may not receive financial assistance for a professional development partnership project and a technical assistance project during the same period.

(Authority: 20 U.S.C. 1431(a)–(c))

§ 318.3 What regulations apply to this program?

The following regulations apply to this program:

(a) The Education Department General Administrative Regulations (EDGAR) in the following parts of title 34 of the Code of Federal Regulations:

(1) Part 74 (Administration of Grants to Institutions of Higher Education, Hospitals, and Nonprofit Organizations).

(2) Part 75 (Direct Grant Programs).

(3) Part 77 (Definitions that Apply to Department Regulations).

(4) Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(6) Part 81 (General Education Provisions Act—Enforcement).

(7) Part 82 (New Restrictions on Lobbying).

(8) Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(9) Part 86 (Drug-Free Schools and Campuses).

(b) The regulations in this part 318.

(Authority: 20 U.S.C. 1431(a)–(c); 3474(a))

§ 318.4 What definitions apply to this program?

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Award
Department
EDGAR
Fiscal year
Grant period
Local educational agency
Nonprofit
Preschool
Private
Project
Public
Secretary
State
State educational agency

(b) *Definitions in 34 CFR part 300.* The following terms used in this part are defined in 34 CFR part 300:

Deafness
Deaf-blindness
Other health impairments
Related services
Special education

(c) *Definitions specific to 34 CFR part 318.* The following terms used in this part are defined as follows:

Act means the Individuals with Disabilities Education Act (IDEA).

Infants and toddlers with disabilities. (1) The term means individuals from birth through age two who need early intervention services because they—

(i) Are experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: Cognitive development, physical development, including vision and hearing, language and speech development, psychosocial development, or self-help skills; or

(ii) Have a diagnosed physical or mental condition that has a high probability of resulting in developmental delay.

(2) The term also includes children from birth through age two who are at risk of having substantial developmental delays if early intervention services are not provided.

National Education Goals means the following goals to be achieved by the year 2000:

(1) All children will start school ready to learn.

(2) The high school graduation rate will increase to at least 90 percent.

(3) Students will leave grades four, eight, and twelve having demonstrated competency in challenging subject matter, including English, mathematics, science, history, and geography, and every school will ensure that all students learn to use their minds well, so that they may be prepared for responsible citizenship, further learning, and productive employment in our modern economy.

(4) Students will be first in the world in science and mathematics achievement.

(5) Every adult will be literate and will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.

(6) Every school will be free of drugs and violence and will offer a disciplined environment conducive to learning.

(Authority: 20 U.S.C. 1401; 1431(a)–(c); 1472)

Subpart B—What Kinds of Projects Does the Secretary Assist Under This Program?

§ 318.10 What activities may the Secretary fund?

(a) The Secretary supports training programs in the following five areas:

(1) Preservice training of personnel for careers in special education, related services, and early intervention, including careers in—

(i) Special education teaching, including speech-language pathology, audiology, adapted physical education, and instructional and assistive technology;

(ii) Related services for children with disabilities in educational and other settings; and

(iii) Early intervention and preschool services.

(2) Leadership training, including—

(i) Supervision and administration at the advanced graduate, doctoral, and post-doctoral levels;

(ii) Research; and

(iii) Personnel preparation at the doctoral and post-doctoral levels.

(3) Special projects designed to include—

(i) Development, evaluation, and distribution of innovative approaches, curricula, and materials for personnel development; and

(ii) Other projects of national significance related to the preparation of personnel needed to serve infants, toddlers, children, and youth with disabilities.

(4) The formation of professional development programs consisting of consortia or partnerships of public and private entities.

(5) Technical assistance to the entities in paragraph (a)(4) of this section.

(b) Projects for preservice training, leadership training, and professional development programs must—

(1) Develop new programs to establish expanded capacity for quality preservice training; or

(2) Improve existing programs designed to increase the capacity and quality of preservice training.

(c) Projects supported under this program may provide training for degree, nondegree, certified, and noncertified personnel at associate degree through post-doctoral levels of preparation.

(Authority: 20 U.S.C. 1431(a)–(c))

§ 318.11 What priorities may the Secretary establish?

(a) The Secretary may, through a notice published in the Federal

Register, select annually one or more of the following priority areas for funding:

(1) *Preparation of personnel for careers in special education.* This priority supports preservice preparation of personnel for careers in special education. Preservice training includes additional training for currently employed teachers seeking additional degrees, certifications, or endorsements. Training at the baccalaureate, masters, or specialist level is appropriate. Under this priority, "personnel" includes special education teachers, speech-language pathologists, audiologists, adapted physical education teachers, vocational educators, and instructive and assistive technology specialists.

(2) *Preparation of related services personnel.* This priority supports preservice preparation of individuals to provide developmental, corrective, and other supportive services that assist children and youth with disabilities to benefit from special education. These include paraprofessional personnel, therapeutic recreation specialists, school social workers, health service providers, physical therapists, occupational therapists, school psychologists, counselors (including rehabilitation counselors), interpreters, orientation and mobility specialists, respite care providers, art therapists, volunteers, physicians, and other related services personnel.

(i) Projects to train personnel identified as special education personnel in the regulations in this part are not appropriate, even if those personnel may be considered related services personnel in other settings.

(ii) This priority is not designed for general training. Projects must include inducements and preparation to increase the probability that graduates will direct their efforts toward supportive services to special education. For example, a project in occupational therapy (OT) might support a special component on pediatric or juvenile psychiatric OT, support those students whose career goal is OT in the schools, or provide for practica and internships in school settings.

(3) *Training early intervention and preschool personnel.* This priority supports projects that are designed to provide preservice preparation of personnel who serve infants, toddlers, and preschool children with disabilities, and their families. Personnel may be prepared to provide short-term services or long-term services that extend into a child's school program. The proposed training program must have a clear and limited focus on the special needs of children within the age range from birth through five, and must include consideration of family involvement in early intervention and preschool services. Training programs under this priority must have a significant interdisciplinary focus.

(4) *Preparation of leadership personnel.* This priority supports projects that are designed to provide preservice professional preparation of leadership personnel in special education, related services, and early intervention. Leadership training is considered to be preparation in—

(i) Supervision and administration at the advanced graduate, doctoral, and post-doctoral levels;

(ii) Research; and

(iii) Personnel preparation at the doctoral and post-doctoral levels.

(5) *Special projects.* This priority supports projects that include development, evaluation, and distribution of innovative approaches to personnel preparation; development of curriculum materials to prepare personnel to educate or provide early intervention services; and other projects of national significance related to the preparation of personnel needed to serve infants, toddlers, children, and youth with disabilities.

(i) Appropriate areas of interest include—

(A) Preservice training programs to prepare regular educators to work with children and youth with disabilities and their families;

(B) Training teachers to work in community and school settings with children and youth with disabilities and their families;

(C) Inservice and preservice training of personnel to work with infants, toddlers, children, and youth with disabilities and their families;

(D) Inservice and preservice training of personnel to work with minority infants, toddlers, children, and youth with disabilities, and their families;

(E) Preservice and inservice training of special education and related services personnel in instructive and assistive technology to benefit infants, toddlers, children, and youth with disabilities; and

(F) Recruitment and retention of special education, related services, and early intervention personnel.

(ii) Both inservice and preservice training must include a component that addresses the coordination among all service providers, including regular educators.

(6) *Professional development partnerships.* This priority, listed in § 318.10(a)(4), supports the formation of consortia or partnerships of public and private entities for the purpose of providing opportunities for career advancement or competency-based training, including but not limited to certificate- or degree-granting programs in special education, related services, and early intervention for current workers at public and private agencies that provide services to infants, toddlers, children, and youth with disabilities. Activities authorized under this priority include, but are not limited to, the following:

(i) Establishing a program with colleges and universities to develop creative new programs and coursework options or to expand existing programs in the field of special education, related services, or early intervention. Funds may be used to provide release time for faculty and staff for curriculum development, instructional costs, and modest start-up and other program development costs.

(ii) Establishing a career development mentoring program using faculty and professional staff members of participating agencies as role models, career sponsors, and academic advisors for experienced State, city, county, and voluntary sector workers who have demonstrated a commitment to working in these fields and who are enrolled in higher education institution programs relating to these fields.

(iii) Supporting a wide range of programmatic and research activities aimed at increasing opportunities for career advancement and competency-based training in these fields.

(iv) Identifying existing public agency, private agency, and labor union personnel policies and benefit programs that may facilitate the ability of workers to take advantage of higher education opportunities such as leave time and tuition reimbursement.

(7) *Technical assistance to professional development partnerships.* This priority, listed in § 318.10(a)(5), supports technical assistance to States or entities receiving awards under professional development partnership projects. Activities must include, but are not limited to, the following:

(i) Identifying the specific technical assistance needs of individual projects.

(ii) Conducting annual meetings at the national level.

(iii) Identifying other projects under the Act related to professional development for the purpose of coordinating professional development projects. Coordination activities may include conferences, publications, and maintenance of documents and data relevant to the activities of the professional development projects.

(iv) Cooperating with other projects and organizations on common goals.

(v) Disseminating information through media, newsletters, computers, and written documentation.

(vi) Evaluating center activities, including impact determination, and evaluation assistance to centers.

(8) *Utilizing innovative recruitment and retention strategies.* This priority supports projects to develop emerging and creative sources of supply of personnel with degrees and certification in appropriate disciplines, and innovative strategies related to recruitment and retention of personnel.

(9) *Promoting full qualifications for personnel serving infants, toddlers, children, and youth with disabilities.* This priority supports projects designed specifically to train personnel who are working with less than full certification or outside their field of specialization, to assist them in becoming fully qualified. The following are appropriate under this priority: student incentives; extension, summer, and evening programs; internships; alternative certification plans; and other innovative practices.

(10) *Training personnel to serve low incidence disabilities.* This priority supports projects to train teachers of children with visual impairments including blindness, hearing impairments including deafness, orthopedic impairments, other health impairments, autism, traumatic brain injury, and severe and multiple disabilities.

(11) *Training personnel to work in rural areas.* This priority supports projects to train personnel to serve infants, toddlers, children, and youth with disabilities in rural areas. Projects, including curricula, procedures, practica, and innovative use of technology, must be designed to provide training to assist personnel to work with parents teachers, and administrators in these special environments. Special strategies must be designed to recruit personnel from rural areas who will most likely return to those areas.

(12) *Training personnel to provide transition assistance from school to adult roles.* This priority supports projects for preparation of personnel who assist youth with disabilities in their transition from school to adult roles. Personnel may be prepared to provide short-term transition services, long-term structured employment services, or instruction in community and school settings with secondary school students. It is especially important that preparation of transition personnel include training in instructional and assistive technology.

(13) *Preparation of paraprofessionals.* This priority supports projects for the preparation of paraprofessionals. This includes programs to train teacher aids, job coaches, interpreters, therapy assistants, and other personnel who provide support to professional staff in delivery of services to infants, toddlers, children, and youth with disabilities.

(14) *Improving services for minorities.* This priority supports projects to prepare personnel to serve infants, toddlers, children, and youth with disabilities who, because of minority status, require that personnel obtain professional competencies in addition to those needed to teach other children with similar disabilities. Projects funded under this priority must focus on specific minority populations, determine the additional competencies that are needed by professionals serving those populations, and develop those competencies.

(15) *Training minorities and individuals with disabilities.* This priority supports projects to recruit and prepare minority individuals and individuals with disabilities for careers in special education, related services, and early intervention.

(16) *Minority institutions.* This priority supports awards to Historically Black Colleges and Universities and other institutions of higher education whose minority student enrollment is at least 25 percent. Awards may provide training of personnel in all areas noted in § 318.10(a) (1) and (2), and must be designed to increase the capabilities of the institution in appropriate training areas.

(17) *Preparing personnel to meet the National Education Goals.* This priority supports projects that develop or expand innovative preservice and inservice training programs that are designed to provide personnel serving children with disabilities with skills that are needed to help schools meet the National Education Goals. These programs must promote the following:

(i) Increased collaboration among providers of special education, regular education, bilingual education, migrant education, and vocational education, and among public and private agencies and institutions.

(ii) Improved coordination of services among health and social services agencies and within communities regarding services for children with disabilities and their families.

(iii) Increased systematic parental involvement in the education of their children with disabilities.

(iv) Inclusion of children with disabilities in all aspects of education and society.

(v) Training that is designed to enable special education teachers to teach, as appropriate, to world class standards (such as those developed by the National Council on Teachers of Mathematics) as those standards are developed.

(18) *Interpreter training.* This priority supports projects to train educational interpreters. Support is limited to projects that demonstrate recruitment strategies, specifically adapted curricula, and incentives designed to increase the probability that program graduates will function productively as interpreters in instructional settings. These projects must be concentrated on student support, rather than on basic institutional support.

(19) *Attention deficit disorders.* This priority supports projects to devise new inservice and preservice training strategies for special education and regular classroom teachers and administrators to address the needs of children with attention deficit disorders (ADD). The purpose is not to develop distinct categorical programs for training personnel to teach children with ADD, but rather to enhance the skills of general and special education teachers and administrators to better serve this population of students. These strategies must be infused into personnel preparation programs of national organizations serving regular and special education personnel.

(b) Under paragraph (a) of this section, the Secretary may identify an amount of funds to be set aside for projects to address the needs of children with particular disabilities and in particular States or geographic areas. Decisions to implement this paragraph would be based on review of each State's comprehensive systems of personnel development, special studies, and other information.

(Authority: 20 U.S.C. 1431(a)–(c))

Subpart C—How Does the Secretary Make an Award?

§ 318.20 What are the requirements for applicants?

(a) An applicant under § 318.10(a) (1) or (2) shall demonstrate that the proposed project is consistent with the needs for personnel, including personnel to provide special education services to children with limited English proficiency, identified by the comprehensive systems of personnel development of the State or States typically employing program graduates.

(b) A project under § 318.10(a) (1) or (2) must include—

(1) Training techniques and procedures designed to foster collaboration among special education teachers, regular teachers,

administrators, related service personnel, early intervention personnel, and parents;

(2) Training techniques, procedures, and practica designed to demonstrate the delivery of services in an array of regular, special education, and community settings; and

(3) Interdisciplinary preparation of trainees.

(c) An applicant shall demonstrate how it will address, in whole or in part, the needs of infants, toddlers, children, and youth with disabilities from minority backgrounds.

(d) An applicant under § 318.10(a) (1) or (2) shall present a detailed description of strategies for recruitment and training of members of minority groups and persons with disabilities.

(e) For technical assistance under § 318.10(a)(5), to professional development partnership projects, an applicant shall demonstrate capacity and expertise in the education, training, and retention of workers to serve children and youth with disabilities through the use of consortia or partnerships established for the purpose of retaining the existing workforce and providing opportunities for career enhancements.

(f) An applicant under § 318.10(a) (1) or (2) shall demonstrate that it meets State and professionally recognized standards for the training of personnel, as evidenced by appropriate State and professional accreditation, unless the award is for the purpose of assisting the applicant to meet those standards.

(Approved by the Office of Management and Budget under control number 1820–0028)

(Authority: 20 U.S.C. 1410; 1431(a)–(c))

§ 318.21 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application on the basis of the criteria in §§ 318.22, 318.23, and 318.24.

(b) The Secretary awards up to 100 points for these criteria.

(c) The maximum possible score for each criterion is indicated in parentheses.

(Authority: 20 U.S.C. 1431(a)–(c))

§ 318.22 What selection criteria does the Secretary use to evaluate applications for preservice training, leadership training, and professional development programs?

The Secretary uses the following criteria to evaluate all applications for preservice training under § 318.10(a)(1), leadership training under § 318.10(a)(2) and professional development projects under § 318.10(a)(4).

(a) *Impact on critical present and projected needs.* (30 points) The Secretary reviews each application to determine the extent to which the training will have a significant impact on critical present and projected State, regional, or national needs in the quality or the quantity of personnel serving infants, toddlers, children, and youth with disabilities. The Secretary considers—

(1) The significance of the personnel needs to be addressed to the provisions of special education, related services, and early intervention. Significance of needs identified by the applicant may be shown by—

(i) Evidence of critical shortages of personnel to serve infants, toddlers, children, and youth with disabilities, including those with limited English proficiency, in targeted specialty or geographic areas, as demonstrated by data from the State comprehensive systems of personnel development; reports from the Clearinghouse on Careers and Employment of Personnel serving children and youth with disabilities; or other indicators of need that the applicant demonstrates are relevant, reliable, and accurate; or

(ii) Evidence showing significant need for improvement in the quality of personnel providing special education, related services, and early intervention services, as shown by comparisons of actual and needed skills of personnel in targeted speciality or geographic areas; and

(2) The impact the proposed project will have on the targeted need. Evidence that the project results will have an impact on the targeted needs may include—

(i) The projected number of graduates from the project each year who will have necessary competencies and certification to affect the need;

(ii) For ongoing programs, the extent to which the applicant's projections are supported by the number of previous program graduates that have entered the field for which they received training, and the professional contributions of those graduates; and

(iii) For new programs, the extent to which program features address the projected needs, the applicant's plan for helping graduates locate appropriate employment in the area of need, and the program features that ensure that graduates will have competencies needed to address identified qualitative needs.

(b) *Capacity of the applicant.* (25 points) The Secretary reviews each application to determine the capacity of the applicant to train qualified personnel, including consideration of—

(1) The qualifications and accomplishments of the project director and other key personnel directly involved in the proposed training program, including prior training, publications, and other professional contributions;

(2) The amount of time each key person plans to commit to the project;

(3) How the applicant, as a part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or disability;

(4) The adequacy of resources, facilities, supplies, and equipment that the applicant plans to commit to the project;

(5) The quality of the practicum training settings, including evidence that they are sufficiently available; apply state-of-the-art services and model teaching practices, materials, and technology; provide adequate supervision to trainees; offer opportunities for trainees to teach; and foster interaction between students with disabilities and their nondisabled peers;

(6) The capacity of the applicant to recruit well-qualified students;

(7) The experience and capacity of the applicant to assist local public schools and early intervention service agencies in providing training to these personnel, including the development of model practicum sites; and

(8) The extent to which the applicant cooperates with the State educational agency, the State-designated lead agency under part H of the Act, other institutions of higher education, and other appropriate public and private agencies in the region served by the applicant in identifying personnel needs and plans to address those needs.

(c) *Plan of operation.* (25 points) The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(1) High quality in the design of the project;

(2) The extent to which the plan of management ensures effective, proper, and efficient administration of the project;

(3) How well the objectives of the project relate to the purpose of the program;

(4) The way the applicant plans to use its resources and personnel to achieve each objective;

(5) The extent to which the application includes a delineation of competencies that program graduates will acquire and how the competencies will be evaluated;

(6) The extent to which substantive content and organization of the program—

(i) Are appropriate for the students' attainment of professional knowledge

and competencies deemed necessary for the provision of quality educational and early intervention services for infants, toddlers, children, and youth with disabilities; and

(ii) Demonstrate an awareness of methods, procedures, techniques, technology, and instructional media or materials that are relevant to the preparation of personnel who serve infants, toddlers, children, and youth with disabilities; and

(7) The extent to which program philosophy, objectives, and activities implement current research and demonstration results in meeting the educational or early intervention needs of infants, toddlers, children, and youth with disabilities.

(d) *Evaluation plan.* (10 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(1) Are appropriate for the project;

(2) To the extent possible, are objective and produce data that are quantifiable, including, but not limited to, the number of trainees graduated and hired; and;

(3) Provide evidence that evaluation data and student follow-up data are systematically collected and used to modify and improve the program. (See 34 CFR 75.590, Evaluation by the grantee.)

(e) *Budget and cost-effectiveness.* (10 points) The Secretary reviews each application to determine the extent to which—

(1) The budget for the project is adequate to support the project activities;

(2) Costs are reasonable in relation to the objectives of the project; and

(3) The applicant presents appropriate plans for the institutionalization of federally supported activities into basic program operations.

(Approved by the Office of Management and Budget under control number 1820–0028)

(Authority: 20 U.S.C. 1431(a)–(c))

§ 318.23 What selection criteria does the Secretary use to evaluate applications for special projects?

The Secretary uses the following criteria to evaluate special projects under § 318.10(a)(3):

(a) *Anticipated project results.* (20 points) The Secretary reviews each application to determine the extent to which the project will meet present and projected needs under parts B and H of the Act in special education, related services, or early intervention services personnel development.

(b) *Program content.* (20 points) The Secretary reviews each application to determine—

(1) The project's potential for national significance, its potential for replication and effectiveness, and the quality of its plan for dissemination of the results of the project;

(2) The extent to which substantive content and organization of the project—

(i) Are appropriate for the attainment of knowledge that is necessary for the provision of quality educational and early intervention services to infants, toddlers, children, and youth with disabilities; and

(ii) Demonstrate an awareness of relevant methods, procedures, techniques, technology, and instructional media or materials that can be used in the development of a model to prepare personnel to serve infants, toddlers, children, and youth with disabilities; and

(3) The extent to which program philosophy, objectives, and activities are related to the educational or early intervention needs of infants, toddlers, children, and youth with disabilities.

(c) *Plan of operation.* (15 points) The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(1) High quality in the design of the project;

(2) An effective plan of management that ensures proper and efficient administration of the project;

(3) How the objectives of the project relate to the purpose of the program; and

(4) The way the applicant plans to use its resources and personnel to achieve each objective.

(d) *Evaluation plan.* (15 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(1) Are appropriate for the project; and

(2) To the extent possible, are objective and produce data that are quantifiable. (See 34 CFR 75.590, Evaluation by the grantee.)

(e) *Quality of key personnel.* (15 points) The Secretary reviews each application to determine the quality of the key personnel the applicant plans to use in the project, including—

(1) The qualifications of the project director;

(2) The qualifications of each of the other key personnel to be used in the project;

(3) The time that each of the key personnel plans to commit to the project;

(4) How the applicant, as a part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or disability; and

(5) Evidence of the key personnel's past experience and training in fields related to the objectives of the project.

(f) *Adequacy of resources.* (5 points) The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment, and supplies.

(g) *Budget and cost effectiveness.* (10 points) The Secretary reviews each application to determine the extent to which—

(1) The budget is adequate to support the project; and

(2) Costs are reasonable in relation to the objectives of the project.

(Approved by the Office of Management and Budget under control number 1820–0028)

(Authority: 20 U.S.C. 1431(a)–(c))

§ 318.24 What selection criteria does the Secretary use to evaluate applications for technical assistance activities?

The Secretary uses the following criteria to evaluate applications for technical assistance activities under § 318.10(a)(5):

(a) *Plan of operation.* (25 points) The Secretary reviews each application to determine the quality of the plan to operation for the project, including—

(1) The quality of the project design;

(2) The effectiveness of the management plan in ensuring proper and efficient administration of the project;

(3) How the objectives of the project relate to the purpose of the program; and

(4) The way the applicant plans to use its resources and personnel to achieve each objective.

(b) *Program content.* (20 points) The Secretary reviews each application to determine—

(1) The project's potential for national significance, its potential for effectiveness, and the quality of its plan for dissemination of the results of the project;

(2) The extent to which substantive content and organization of the program—

(i) Are appropriate for the attainment of knowledge that is necessary for the provision of quality educational and early intervention services to infants, toddlers, children, and youth with disabilities; and

(ii) Demonstrate an awareness of relevant methods, procedures, techniques, technology, and

instructional media or materials that can be used in the development of a model to prepare personnel to serve infants, toddlers, children, and youth with disabilities; and

(3) The extent to which program philosophy, objectives, and activities are related to the educational or early intervention needs of infants, toddlers, children, and youth with disabilities.

(c) *Applicant experience and ability.* (15 points) The Secretary looks for information that shows the applicant's—

(1) Experience and training in fields related to the objectives of the project;

(2) National experience relevant to performance of the functions supported by this program;

(3) Ability to conduct the proposed project;

(4) Ability to communicate with intended consumers of information;

(5) Ability to maintain necessary communication and coordination with other relevant projects, agencies, and organizations; and

(6) Capacity and expertise in the education, training, and retention of workers to serve children and youth with disabilities through the use of consortia or partnerships established for the purpose of retaining the existing workforce and providing opportunities for career enhancements.

(d) *Quality of key personnel.* (10 points) The Secretary reviews each application to determine the quality of the key personnel the applicant plans to use in the project, including—

(1) The qualifications of the project director;

(2) The qualifications of each of the other key personnel to be used in the project;

(3) The time that each of the key personnel plans to commit to the project; and

(4) How the applicant, as a part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or disability.

(e) *Evaluation plan.* (15 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(1) Are appropriate for the project; and

(2) To the extent possible, are objective and produce data that are quantifiable. (See 34 CFR 75.590, Evaluation by the grantee.)

(f) *Adequacy of resources.* (5 points) The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment, and supplies.

(g) *Budget and cost effectiveness.* (10 points) The Secretary reviews each application to determine the extent to which—

(1) The budget is adequate to support the project; and

(2) Costs are reasonable in relation to the objectives of the project.

(Approved by the Office of Management and Budget under control number 1820-0028)

(Authority: 20 U.S.C. 1431(a)-(c))

§ 318.25 What additional factors does the Secretary consider?

To the extent feasible, the Secretary ensures that projects for professional development partnerships under § 318.10(a)(4) are geographically dispersed throughout the Nation in urban and rural areas.

(Authority: 20 U.S.C. 1431(a)-(c))

Subpart D—What Conditions Must a Grantee Meet?

§ 318.30 What are the priorities for award of student fellowships and traineeships?

A grantee shall give priority consideration in the selection of qualified recipients of fellowships and traineeships to individuals from disadvantaged backgrounds, including minorities and individuals with disabilities who are underrepresented in the teaching profession or in the specializations in which they are being trained.

(Authority: 20 U.S.C. 1431(a)-(c))

§ 318.31 Is student financial assistance authorized?

The sum of the assistance provided to a student under this part and any other assistance provided the student may not exceed the student's cost of attendance as follows:

(a) *Cost of attendance* means—

(1) Tuition and fees normally assessed a student carrying the same academic workload (as determined by the institution) including costs for rental or purchase of any equipment, materials, or supplies required of all students in the same course of study;

(2) An allowance (as determined by the institution) for books, supplies, transportation, and miscellaneous personal expenses for a student attending the institution on at least a half-time basis;

(3) An allowance (as determined by the institution) for room and board costs incurred by the student that—

(i) Is not less than $1,500 for students without dependents residing at home with parents;

(ii) Is the standard amount that the institution normally assesses its residents for room and board for students without dependents residing in institutionally owned or operated housing; and

(iii) Is based for all other students on the expenses reasonably incurred for room and board outside the institution, except that the amount may not be less than $2,500;

(4) For less than half-time students (as determined by the institution), tuition and fees and an allowance for books, supplies, and transportation (as determined by the institution) and dependent care expenses (in accordance with paragraph (a)(7) of this section);

(5) For a student engaged in a program of study by correspondence, only tuition and fees; and, if required, books and supplies, travel, and room and board costs incurred specifically in fulfilling a required period of residential training;

(6) For a student enrolled in an academic program that normally includes a formal program of study abroad, reasonable costs associated with the study as determined by the institution;

(7) For a student with one or more dependents, an allowance, as determined by the institution, based on the expenses reasonably incurred for dependent care based on the number and age of the dependents; and

(8) For a student with a disability, an allowance, as determined by the institution, for those expenses related to his or her disability, including special services, transportation, equipment, and supplies that are reasonably incurred and not provided for by other assisting agencies.

(b) For a student receiving all or part of his or her instruction by means of telecommunications technology, no distinction may be made with respect to the mode of instruction in determining costs, but this paragraph may not be construed to permit including the cost of rental or purchase of equipment.

(Authority: 20 U.S.C. 1087*ll*)

§ 318.32 What are the student financial assistance criteria?

Direct financial assistance may only be paid to a student in a preservice program, and only if the student—

(a) Is qualified for admission to the program of study;

(b) Maintains satisfactory progress in a course of study as defined in 34 CFR 668.7; and

(c)(1) Is a citizen or national of the United States;

(2) Provides evidence from the U.S. Immigration and Naturalization Service that he or she—

(i) Is a permanent resident of the United States; or

(ii) Is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident; or

(3) Has a permanent or lasting—as distinguished from temporary—principal, actual dwelling place in fact, without regard to intent, in Palau or the Commonwealth of the Northern Mariana Islands.

(Authority: 20 U.S.C. 1091)

§ 318.33 May the grantee use funds if a financially assisted student withdraws or is dismissed?

Financial assistance awarded to a student that is unexpended because the student withdraws or is dismissed from the training program may be used for financial assistance to other eligible students during the grant period.

(Authority: 20 U.S.C. 1087*ll*)

§ 318.34 What are the reporting requirements under this program?

Recipients shall, if appropriate, prepare reports describing their procedures, findings, and other relevant information in a form that will maximize the dissemination and use of those procedures, findings, and information. The Secretary requires their delivery, as appropriate, to the Regional and Federal Resource Centers, the Clearinghouses, and the Technical Assistance to Parents Program (TAPP) assisted under parts C and D of the Act, as well as the National Diffusion Network, the ERIC Clearinghouse on the Handicapped and Gifted, and the Child and Adolescent Service Systems Program (CASSP) under the National Institute of Mental Health, appropriate parent and professional organizations, organizations representing individuals with disabilities, and other networks the Secretary may determine to be appropriate.

(Approved by the Office of Management and Budget under control number 1820–0530)

(Authority: 20 U.S.C. 1409(g))

PART 319—TRAINING PERSONNEL FOR THE EDUCATION OF INDIVIDUALS WITH DISABILITIES—GRANTS TO STATE EDUCATIONAL AGENCIES AND INSTITUTIONS OF HIGHER EDUCATION

Subpart A—General

Sec.
319.1 What is the Training Personnel for the Education of Individuals with Disabilities—Grants to State Educational Agencies and Institutions of Higher Education program?
319.2 Who is eligible for an award?
319.3 What activities may the Secretary fund?
319.4 What regulations apply to this program?
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Subpart B—How Does One Apply for an Award?

319.10 What are the application requirements under this program?

Subpart C—How Does the Secretary Make an Award?

319.20 How does the Secretary evaluate an application?
319.21 How does the Secretary determine the amount of a basic State award?
319.22 How does the Secretary determine the amount available for the competitive award program?
319.23 What selection criteria does the Secretary use in the basic State award and competitive award programs?
319.24 What selection criteria does the Secretary use to evaluate applications for technical assistance activities?

Subpart D—What Conditions Must Be Met After an Award?

319.30 Is student financial assistance authorized?
319.31 What are the student financial assistance criteria?
319.32 May the grantee use funds if a financially assisted student withdraws or is dismissed?
319.33 What are the reporting requirements under this program?

Authority: 20 U.S.C. 1432, unless otherwise noted.

Subpart A—General

§ 319.1 What is the Training Personnel for the Education of Individuals with Disabilities—Grants to State Educational Agencies and Institutions of Higher Education program?

This program assists States in establishing and maintaining preservice and inservice programs to prepare special and regular education, related services, and early intervention personnel and their supervisors to meet the needs of infants, toddlers, children, and youth with disabilities. These programs must be consistent with the personnel needs identified in the State's comprehensive systems of personnel development under sections 613 and 676(b)(8) of the Individuals With Disabilities Education Act (IDEA). The program also assists States in developing and maintaining their comprehensive systems of personnel development, including conducting recruitment and retention activities.

(Authority: 20 U.S.C. 1432)

§ 319.2 Who is eligible for an award?

(a) Each State educational agency (SEA) is eligible to receive an award under the basic State award program described in § 319.3(a). If an SEA does not apply for an award, institutions of higher education (IHEs) within the State may apply for the award for that State. If an SEA chooses not to apply for basic State award, the SEA shall notify all IHEs within the State at least 30 days prior to the Department's closing date for applications.

(b) Only State educational agencies are eligible for a competitive award described in § 319.3(b).

(c) Profit and nonprofit organizations and agencies are eligible for technical assistance awards described in § 319.3(c).

(Authority: 20 U.S.C. 1432)

§ 319.3 What activities may the Secretary fund?

The Secretary fund basic State awards and may fund competitive grant awards and provide technical assistance to States in developing and maintaining their comprehensive systems of personnel development and in recruitment and retention strategies.

(a) *Basic State awards.* The Secretary makes an award to each State for the purposes described in § 319.1.

(b) *Competitive award program.* The Secretary may make competitive awards for the purposes described in § 319.1. These awards must address particularly high priority issues in a State that also have high potential for generalizability to needs in other States.

(c) *Technical assistance.* (1) The Secretary may provide technical assistance to State educational agencies on matters pertaining to the effective implementation of section 613(a)(3) of the IDEA.

(2) This activity includes, but is not limited to, technical assistance to the States relating to the following—

(i) Monitoring personnel needs in the State including identification of alternative approaches for determining current and projected needs;

(ii) Analyzing strategies to determine needs for professional preparation to meet the needs of children with disabilities;

(iii) Identifying, designing, adapting, testing, and disseminating new professional preparation strategies; and

(iv) Providing technical assistance in the personnel development, recruitment, and retention areas.

(3) Operational activities must include, but are not limited to, the following:

(i) Determining national needs and identifying unserved regions and populations.

(ii) Identifying the specific technical assistance needs of individual States related to professional preparation.

(iii) Conducting annual meetings at national and regional levels.

(iv) Dissemination of information through media, newsletters, computers, and written documentation.

(v) Cooperative activities with other personnel development projects and organizations on common goals.

(vi) Evaluation, including impact determination, and evaluation assistance to personnel development projects funded under section 632 of the IDEA as well as evaluation of comprehensive system of personnel development activities.

(Authority: 20 U.S.C. 1432)

§ 319.4 What regulations apply to this program?

The following regulations apply to this program:

(a) The Education Department General Administrative Regulations (EDGAR) in the following parts of title 34 of the Code of Federal Regulations:

(1) Part 74 (Administration of Grants to Institutions of Higher Education, Hospitals, and Nonprofit Organizations).

(2) Part 75 (Direct Grant Programs).

(3) Part 77 (Definitions that Apply to Department Regulations).

(4) Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(6) Part 81 (General Education Provisions Act—Enforcement).

(7) Part 82 (New Restrictions on Lobbying).

(8) Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(9) Part 86 (Drug-Free Schools and Campuses).

(b) The regulations in this part 319.

(Authority: 20 U.S.C. 1432; 3474(a))

§ 319.5 What definitions apply to this program?

The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Award
Department
EDGAR
Fiscal year
Grant period
Preschool
Project
Public
Secretary
State
State educational agency

(Authority: 20 U.S.C. 1432)

Subpart B—How Does One Apply for an Award?

§ 319.10 What are the application requirements under this program?

An institution of higher education that applies for an award under § 319.3(a) shall demonstrate that it meets State and professionally recognized standards for the training of special education and related services personnel, as evidenced by appropriate State and professional accreditation, unless—as indicated in a published priority of the Secretary—the award is for the purpose of assisting the applicant to meet those standards.

(Approved by the Office of Management and Budget under control number 1820-0028)

(Authority: 20 U.S.C. 1432)

Subpart C—How Does the Secretary Make an Award?

§ 319.20 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application on the basis of the criteria in §§ 319.23 and 319.24.

(b) The Secretary awards up to 100 points for these criteria.

(c) The maximum possible score for each criterion is indicated in parentheses.

(Authority: 20 U.S.C. 1432)

§ 319.21 How does the Secretary determine the amount of a basic State award?

The Secretary determines the amount of an award under § 319.3(a) as follows:

(a) The Secretary distributes no less than 80 percent of the funds available for these awards as follows:

(1) Each State receives a base amount to be determined by the Secretary, but not less than $85,000.

(2) From the funds remaining, the Secretary provides an additional amount to each State based on the State's proportion of the national child count provided under part B of the IDEA and subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965, as amended.

(b) After determining a State's award under paragraph (a) of this section, the Secretary determines annually the additional amount of funds to be awarded for the quality of the application based on the criteria set forth in § 319.23.

(Authority: 20 U.S.C. 1432)

§ 319.22 How does the Secretary determine the amount available for the competitive award program?

In any fiscal year, the Secretary may not expend for the competitive program under § 319.3(b) an amount more than 10 percent of the amount expended under section 632 of the IDEA in the preceding fiscal year.

(Authority: 20 U.S.C. 1432)

§ 319.23 What selection criteria does the Secretary use in the basic State award and competitive award programs?

The Secretary uses the following criteria to evaluate an application for a basic State award (SEA or IHE applicant) and for a competitive award:

(a) *Extent of need for the project.* (30 points) The Secretary reviews each application to determine—

(1) The extent to which the project identifies and selects priority needs from the range of personnel needs identified in the State comprehensive systems of personnel development;

(2) The extent to which the project addresses the personnel needs selected by the applicant under paragraph (a)(1) of this section; and

(3) If appropriate, how the project relates to actual and projected personnel needs for certified teachers in the State as identified by the State educational agency in its annual data report required under section 618 of the IDEA.

(b) *Program content.* (20 points) The Secretary reviews each application to determine the extent to which—

(1) Competencies that will be acquired by each trainee and how the competencies will be evaluated are identified;

(2) Substantive content of the training to be provided is appropriate for the attainment of professional knowledge and competencies that are necessary for the provision of quality educational or early intervention services to infants, toddlers, children, and youth with disabilities;

(3) Benefits to be gained by the number of trainees expected to be graduated or otherwise to complete training and employed over the next five years are described;

(4) Appropriate methods, procedures, techniques, and instructional media or materials will be used in the preparation of trainees who serve infants, toddlers, children, and youth with disabilities;

(5) If relevant, appropriate practicum facilities are accessible to the applicant agency and trainees and will be used for such activities as observation, participation, practice teaching, laboratory or clinical experience, internships, and other supervised

experiences of adequate scope and length;

(6) If relevant, practicum facilities for model programs will provide state-of-the-art educational services, including use of current and innovative curriculum materials, instructional procedures, and equipment; and

(7) Program philosophy, program objectives, and activities to be implemented to attain program objectives are related to the educational or early intervention needs of infants, toddlers, children, and youth with disabilities.

(c) *Plan of operation.* (15 points) The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(1) The quality of the project design;

(2) The effectiveness of the management plan in ensuring proper and efficient administration of the project;

(3) How the objectives of the project relate to the purpose of the program;

(4) The way the applicant plans to use its resources and personnel to achieve each objective; and

(5) How the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, gender, age, or disability.

(d) *Evaluation plan.* (15 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(1) Are appropriate for the project; and

(2) To the extent possible, are objective and produce data that are quantifiable, including, but not limited to, the number of trainees graduated and hired, and the number of trainees who complete short-term in-service or pre-service training programs. (See 34 CFR 75.590, Evaluation by the grantee).

(e) *Quality of key personnel.* (10 points) The Secretary reviews each application to determine the quality of the key personnel the applicant plans to use on the project, including—

(1) The qualifications of the project director;

(2) The qualifications of each of the other key personnel to be used in the project;

(3) The time that each of the key personnel plans to commit to the project;

(4) How the applicant, as a part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or disability; and

(5) Experience and training in fields related to the objectives of the project.

(f) *Adequacy of resources.* (5 points) The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment, and supplies.

(g) *Budget and cost-effectiveness.* (5 points) The Secretary reviews each application to determine the extent to which—

(1) The budget is adequate to support the project; and

(2) Costs are reasonable in relation to the objectives of the project.

(Approved by the Office of Management and Budget under control number 1820–0028)

(Authority: 20 U.S.C. 1432)

§ 319.24 What selection criteria does the Secretary use to evaluate applications for technical assistance activities?

The Secretary uses the following criteria to evaluate applications for technical assistance activities:

(a) *Plan of operation.* (25 points) The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(1) The quality of the project design;

(2) The effectiveness of the management plan in ensuring proper and efficient administration of the project;

(3) How the objectives of the project relate to the purpose of the program; and

(4) The way the applicant plans to use its resources and personnel to achieve each objective.

(b) *Program content.* (20 points) The Secretary reviews each application to determine—

(1) The project's potential for national significance, its potential effectiveness, and the quality of its plan for dissemination of the results of the project;

(2) The extent to which substantive content and organization of the program—

(i) Are appropriate for the attainment of knowledge that is necessary for the provision of quality educational and early intervention services to infants, toddlers, children, and youth with disabilities; and

(ii) Demonstrate an awareness of relevant methods, procedures, techniques, technology, and instructional media or materials that can be used in the development of a model to prepare personnel to serve infants, toddlers, children, and youth with disabilities; and

(3) The extent to which program philosophy, objectives, and activities are related to the educational or early intervention needs of infants, toddlers, children, and youth with disabilities.

(c) *Applicant experience and ability.* (15 points) The Secretary looks for information that shows the applicant's—

(1) Experience and training in fields related to the objectives of the project;

(2) National experience relevant to performance of the functions supported by this program;

(3) Ability to conduct the proposed project;

(4) Ability to communicate with intended consumers of information; and

(5) Ability to maintain necessary communication and coordination with other relevant projects, agencies, and organizations.

(d) *Quality of key personnel.* (10 points) The Secretary reviews each application to determine the quality of the key personnel the applicant plans to use in the project, including—

(1) The qualifications of the project director;

(2) The qualifications of each of the other key personnel to be used in the project;

(3) The time that each of the key personnel plans to commit to the project; and

(4) How the applicant, as a part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or disability.

(e) *Evaluation plan.* (15 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(1) Are appropriate for the project; and

(2) To the extent possible, are objective and produce data that are quantifiable. (See 34 CFR 75.590, Evaluation by the grantee.)

(f) *Adequacy of resources.* (5 points) The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment, and supplies.

(g) *Budget and cost effectiveness.* (10 points) The Secretary reviews each application to determine the extent to which—

(1) The budget is adequate to support the project; and

(2) Costs are reasonable in relation to the objectives of the project.

(Approved by the Office of Management and Budget under control number 1820–0028)

(Authority: 20 U.S.C. 1432)

Subpart D—What Conditions Must Be Met After an Award?

§ 319.30 Is student financial assistance authorized?

A grantee may use grant funds under § 319.2 (a) and (b) to provide traineeships or stipends. The sum of the assistance provided to a student through this part and any other assistance provided the student may not exceed the student's cost of attendance as follows:

(a) *Cost of attendance* means—

(1) Tuition and fees normally assessed a student carrying the same academic workload (as determined by the institution) including costs for rental or purchase of any equipment, materials, or supplies required of all students in the same course of study;

(2) An allowance (as determined by the institution) for books, supplies, transportation, miscellaneous and personal expenses for a student attending the institution on at least a half-time basis;

(3) An allowance (as determined by the institution) for room and board costs incurred by the student that—

(i) Is not less than $1,500 for students without dependents residing at home with parents;

(ii) Is the standard amount that the institution normally assesses its residents for room and board for students without dependents residing in institutionally owned or operated housing; and

(iii) Is based for all other students on the expenses reasonably incurred for room and board outside the institution, except that the amount may not be less than $2,500;

(4) For less than half-time students (as determined by the institution), tuition and fees and an allowance for books, supplies, and transportation (as determined by the institution) and dependent care expenses (in accordance with paragraph (a)(7) of this section);

(5) For a student engaged in a program of study by correspondence, only tuition and fees; and, if required, books and supplies, travel, and room and board costs incurred specifically in fulfilling a required period of residential training;

(6) For a student enrolled in an academic program that normally includes a formal program of study abroad, reasonable costs associated with the study as determined by the institution;

(7) For a student with one or more dependents, an allowance, as determined by the institution, based on the expenses reasonably incurred for dependent care based on the number and age of the dependents; and

(8) For a student with a disability, an allowance, as determined by the institution, for those expenses related to his or her disability, including special services, transportation, equipment, and supplies that are reasonably incurred and not provided for by other assisting agencies.

(b) For a student receiving all or part of his or her instruction by means of telecommunication technology, no distinction may be made with respect to the mode of instruction in determining costs. This paragraph may not be construed to permit including the cost of rental or purchase of equipment.

(Authority: 20 U.S.C. 1087ll)

§ 319.31 What are the student financial assistance criteria?

Direct financial assistance under § 319.2 (a) and (b) may only be paid to students in preservice programs and only if the student—

(a) Is qualified for admission to the program of study;

(b) Maintains satisfactory progress in a course of study as provided in 34 CFR 668.16(e); and

(c)(1) Is a citizen or national of the United States;

(2) Provides evidence from the U.S. Immigration and Naturalization Service that he or she—

(i) Is a permanent resident of the United States; or

(ii) Is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident; or

(3) Has a permanent or lasting—as distinguished from temporary—principal, actual dwelling place in fact, without regard to intent, in Palau or the Commonwealth of the Northern Mariana Inslands.

(Authority: 20 U.S.C. 1091)

§ 319.32 May the grantee use funds if a financially assisted student withdraws or is dismissed?

Financial assistance awarded to a student that is unexpended because the student withdraws or is dismissed from the training program may be used for financial assistance to other eligible students during the grant period.

(Authority: 20 U.S.C. 1087ll)

§ 319.33 What are the reporting requirements under this program?

Recipients shall, if appropriate, prepare reports describing their procedures, findings, and other relevant information in a form that will maximize the dissemination and use of those procedures, findings, and information. The Secretary requires their delivery, as appropriate, to the Regional and Federal Resource Centers, the Clearinghouses, and the Technical Assistance to Parents Program (TAPP) assisted under parts C and D of the IDEA, as well as the National Diffusion Network, the ERIC Clearinghouse on the Handicapped and Gifted, and the Child and Adolescent Service Systems Program (CASSP) under the National Institute of Mental Health, appropriate, parent and professional organizations, organizations representing individuals with disabilities, and other networks the Secretary may determine to be appropriate.

(Approved by the Office of Management and Budget under control number 1820–0530)

(Authority: 20 U.S.C. 1409(g))

[FR Doc. 92–31163 Filed 12–28–92; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF EDUCATION

Training Personnel for the Education of Individuals With Disabilities

[CFDA No.: 84.029]

Inviting Applications for New Awards for Fiscal Year (FY) 1993

Purpose of Program: The purpose of this program is to increase the quantity and improve the quality of personnel available to serve infants, toddlers, children, and youth with disabilities.

The Training Personnel for the Education of Individuals with Disabilities program supports AMERICA 2000, the President's strategy for moving the Nation toward the National Education Goals, by improving services for infants, toddlers, children, and youth with disabilities and by so doing helping them to reach the high levels of achievement called for in the National Education Goals. National Education Goal 1 calls for all children to start school ready to learn, and National Education Goal 3 calls for American students to demonstrate competency in challenging subject matter and to learn to use their minds well.

Eligible applicants: The following are eligible for assistance under this notice:

Institutions of higher education and appropriate nonprofit agencies are eligible under Preparation of Personnel for Careers in Special Education (Serious Emotional Disturbance) (84.029N), Training Personnel to Serve Low Incidence Disabilities (84.029A), Interpreter Training (84.029L), and Minority Institutions (84.029E) (34 CFR part 318).

States or other entities are eligible under Technical Assistance to Professional Development Partnerships (84.029C), but an entity may not receive financial assistance for a professional development partnership project and a technical assistance project during the same period (34 CFR part 318).

Profit and nonprofit organizations and agencies are eligible under Technical Assistance to State Educational Agencies (84.029V) (34 CFR part 319).

Note: The Department is not bound by any of the estimates in this notice.

Applications Available: January 13, 1993.

TRAINING PERSONNEL FOR THE EDUCATION OF INDIVIDUALS WITH DISABILITIES

[Application Notice for Fiscal Year 1993]

Title and CFDA No.	Deadline for transmittal of applications	Deadline for intergovernmental review	Available funds	Estimated range of awards (per year)	Estimated size of awards (per year)	Estimated number of awards	Project period in months
Preparation of Personnel for Careers in Special Education (Serious Emotional Disturbance) (84.029N).	2/26/93	4/27/93	[1]$500,000	$80,000–120,000	$100,000	5	Up to 60.
Training Personnel to Serve Low Incidence Disabilities (84.029A).	2/26/93	4/27/93	3,000,000	80,000–120,000	100,000	30	Up to 60.
Interpreter Training (84.029L)	2/26/93	4/27/93	500,000	80,000–120,000	100,000	5	Up to 60.
Minority Institutions (84.029E)	2/26/93	4/27/93	2,000,000	80,000–120,000	100,000	20	Up to 60.
Technical Assistance to State Educational Agencies (84.029V).	2/26/93	4/27/93	300,000	300,000	300,000	1	Up to 60.
Technical Assistance to Professional Development Partnerships (84.029C).	2/26/93	4/27/93	500,000	500,000	500,000	1	Up to 36.

[1] Under the authority in §318.11(b), the Secretary reserves the funds under this priority for training personnel to serve children with serious emotional disturbance.

Applicable Regulations: (a) The Education Department General Administration Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 85, 86, and (b) The regulations for this program in 34 CFR parts 318 and 319 as published elsewhere in this issue of the **Federal Register.**

Priorities: The priorities in the notice of final regulations for this program, as published elsewhere in this issue of the **Federal Register,** apply to these competitions.

For Applications or Information Contact: Max Mueller, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202–2651. Telephone: (202) 205–9554. Deaf and hearing impaired individuals may call (202) 205–9999 for TDD services.

Program Authority: 20 U.S.C. 1431 and 1432.

Dated: December 18, 1992.

Robert R. Davila,

Assistant Secretary, Office of Special Education and Rehabilitative Services.

[FR Doc. 92–31164 Filed 12–28–92; 8:45 am]

BILLING CODE 4000–01–M

federal register

Tuesday
December 29, 1992

Part VI

Department of the Interior

Bureau of Indian Affairs

List of Rejected Statute of Limitations Claims; Notice

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

List of Rejected Statue of Limitations Claims

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of rejected claims.

SUMMARY: This notice lists certain potential pre-1966 Indian damage claims which have been rejected for litigation by the Secretary of the Interior pursuant to the Indian Claims Limitation Act of 1982. This notice also contains a list of claims which the Bureau of Indian Affairs considers resolved.

DATE: To file an action in court, on any claim contained on the list of rejected claims, tribes, groups, and individual Indians must file such action no later than December 29, 1993.

FOR FURTHER INFORMATION CONTACT:

Aberdeen Area Director, Bureau of Indian Affairs, 115 4th Avenue, SE., Aberdeen, South Dakota 57401–4382, Telephone (605) 226–7343;

Albuquerque Area Director, Bureau of Indian Affairs, 615 1st Street, NW., Box 26567, Albuquerque, New Mexico 87125–6567, Telephone (505) 766–3170;

Anadarko Area Director, Bureau of Indian Affairs, WCD Office Complex, Box 368, Anadarko, Oklahoma 73005–0368, Telephone (405) 247–6673;

Billings Area Director, Bureau of Indian Affairs, 316 North 26th Street, Billings, Montana 59101–1397, Telephone (406) 657–6315;

Eastern Area Director, Bureau of Indian Affairs, 3701 N. Fairfax Drive, Suite 260/ Mailroom, Arlington, VA 22203 Telephone (703) 235–2571;

Junea Area Director, Bureau of Indian Affairs, Federal Building, P.O. Box 3–8000, Juneau, Alaska 99802–1219, Telephone (907) 586–7177;

Minneapolis Area Director, Bureau of Indian Affairs, 15 South 5th Street—10th Floor, Minneapolis, Minnesota 55401–1020, Telephone (612) 349–3631;

Muskogee Area Director, Bureau of Indian Affairs, 5th & West Okmulgee, Muskogee, OK 74401–4898, Telephone (918) 687–2296;

Navajo Area Director, Bureau of Indian Affairs, P.O. Box M, Window Rock, Arizona 86515–0714, Telephone (505) 863–9501;

Phoenix Area Director, Bureau of Indian Affairs, 1 North First Street, P.O. Box 10, Phoenix, Arizona 85001–0010, Telephone (602) 241–2305;

Portland Area Director, Bureau of Indian Affairs, 911 NE 11th Ave., Portland, OR 97232–4169, Telephone (503) 231–6702;

Sacramento Area Director, Bureau of Indian Affairs, 2800 Cottage Way, Sacramento, California 95825–1884, Telephone (916) 978–4691.

SUPPLEMENTARY INFORMATION: The Indian Claims Limitation Act of 1982, Public Law 97–394 (96 Stat. 1966, 1976) extends the statute of limitations governing pre-1966 Indian damage claims (28 U.S.C. 2415) which was due to expire on December 31, 1982. A claim subject to the statute of limitations is an Indian claim for money damages which arose prior to July 18, 1966. Claims against the United States are not governed by this law, only money damage claims against persons, corporations, states, or any other entities except the Federal Government. Claims for title to land are also not governed by this statute of limitations. This notice is required by section 5(c) of the Act.

Pursuant to sections 3 and 4 of the Indian Claims Limitation Act of 1982, lists of all potential Indian damage claims, which had at any time been identified by or submitted to the Bureau of Indian Affairs under the Department of the Interior's Statute of Limitations Program, were published in the **Federal Register** at 48 FR 13698, on March 31, 1983, amended at 48 FR 15008, on April 6, 1983; and at 48 FR 51204, on November 7, 1983, amended at 49 FR 518, on January 4, 1984. Excluded from these lists were claims which were erroneously identified as claims and those which had no legal merit whatsoever.

When rejecting any claim or category of claims included on the published lists, the Secretary must send a report to the appropriate tribe whose rights or the rights of whose members could be affected by the rejection. The report must identify each separate claim being rejected, list the names of potential plaintiffs and defendants, if known or reasonably ascertainable, and briefly set forth the reason or reasons for rejection. A written notice of rejection must be sent to individual Indian claimants if their identities and addresses are known or reasonably ascertainable from Bureau of Indian Affairs, records. After a report has been forwarded to a tribe, the Secretary must publish a notice in the **Federal Register** identifying the claims covered in the report. By the terms of the Indian Claims Limitation Act of 1982, any right of action on any claim appearing on the following list of claims, which have been rejected and reported accordingly by the Secretary, shall be barred unless a complaint is filed in accordance with date established in the "**DATES**" section of this notice. A list of claims which the Bureau of Indian Affairs considers resolved follows the list of rejected claims.

This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary Indian Affairs by 209 DM 8.

Eddie F. Brown,

Assistant Secretary–Indian Affairs.

BILLING CODE 4310–02–C

ABERDEEN AREA REJECTED CLAIMS:

A01-340-0001	A01-340-0011	A01-340-0017	A01-340-0023	A01-340-0025
A01-340-0029	A01-340-0030	A01-340-0031	A01-340-0034	A01-340-0036
A01-340-0039	A01-340-0042	A01-340-0045	A01-340-0057	A01-340-0058
A01-340-0063	A01-340-0068	A01-340-0070	A01-340-0072	A01-340-0076
A01-340-0079	A01-340-0081	A01-340-0082	A01-340-0086	A01-340-0090
A01-340-0095	A01-340-0101	A01-340-0102	A01-340-0103	A01-340-0106
A01-340-0107	A01-340-0109	A01-340-0117	A01-340-0137	A01-340-0139
A01-340-0144	A01-340-0145	A01-340-0147	A01-340-0148	A01-340-0176
A01-340-0179				

BILLINGS AREA REJECTED CLAIMS:

C52-201-0749	C52-201-0750	C52-201-0751	C52-201-0752	C52-201-0753
C52-201-0754	C52-201-0755	C52-201-0756	C52-201-0757	C52-201-0758
C52-201-0759	C52-201-0760	C52-201-0761	C52-201-0762	C52-201-0763
C52-201-0764	C52-201-0765	C52-201-0766	C52-201-0767	C52-201-0768
C52-201-0769	C52-201-0770	C52-201-0771	C52-201-0772	C52-201-0773
C52-201-0774	C52-201-0775	C52-201-0776		

MUSKOGEE AREA REJECTED CLAIMS:

G09-907-0003A	G09-907-0003B	G09-907-0003C	G09-907-0007A	G09-907-0027
G09-907-0027A	G09-907-0065A	G09-907-0070A	G09-907-0071A	

ALBUQUERQUE AREA REJECTED CLAIMS:

M20-704-0017	M20-707-0004	M20-707-0009	M20-707-0017	M20-707-0018
M20-707-0019	M20-707-0031	M20-707-0041	M20-707-0042	M20-707-0043
M20-707-0044	M20-707-0046	M20-707-0048	M20-711-0002	M20-711-0003
M20-711-0008	M20-711-0012	M20-711-0013	M20-711-0018	M20-711-0020
M20-711-0025	M20-711-0044	M20-711-0055	M20-711-0075	M20-711-0097
M20-711-0104	M20-715-0004	M20-715-0006	M20-715-0007	M20-715-0008
M20-715-0011	M20-715-0030	M20-715-0045	M20-715-0046	M20-715-0050
M20-715-0051				

PORTLAND AREA REJECTED CLAIMS:

P03-101-0313	P05-181-0009U	P06-120-0005	P07-143-0026	P10-000-0097
P10-107-0004	P10-111-0009	P10-111-0014	P10-111-0026	P10-122-0009

ANADARKO AREA RESOLVED CLAIMS:
B04-861-0150

BILLINGS AREA RESOLVED CLAIMS:

C51-201-1440	C51-201-1472	C55-204-0039	C55-204-0055	C55-204-0058
C55-204-0059	C55-204-0060	C55-204-0062	C55-204-0067	C55-204-0069
C55-204-0080	C55-204-0086	C55-204-0088	C55-204-0089	C55-204-0091
C55-204-0093	C55-204-0096	C55-204-0097	C55-204-0098	C55-204-0099
C55-204-0100	C55-204-0101	C55-204-0102	C55-204-0104	C55-204-0105
C55-204-0117	C55-204-0118	C55-204-0122	C56-206-0051	C56-206-0064
C57-207-0040	C57-207-0044	C57-207-0045	C57-207-0049	C57-207-0050
C57-207-0051	C57-207-0052	C57-207-0053	C57-207-0060	C57-207-0062
C57-207-0065	C57-207-0067	C57-207-0068	C57-207-0072	C57-207-0073
C57-207-0074	C57-207-0076	C57-207-0079	C57-207-0083	C57-207-0084
C57-207-0086	C57-207-0088	C57-207-0092	C57-207-0095	C57-207-0098
C57-207-0099	C57-207-0108	C57-207-0109	C57-207-0110	C57-207-0113
C57-207-0116	C57-207-0117	C57-207-0118	C57-207-0119	C57-207-0120
C57-207-0129	C57-207-0131	C57-207-0132	C57-207-0134	C57-207-0135
C57-207-0136	C57-207-0137	C57-207-0138	C57-207-0141	C57-207-0142
C57-207-0143	C57-207-0144	C57-207-0146		

MINNEAPOLIS AREA RESOLVED CLAIMS:

F55-432-0016	F55-432-0031	F55-432-0033	F55-432-0048	F55-432-0061
F55-439-0067	F55-439-0069	F55-439-0077	F55-439-0111	F60-470-0003

ALBUQUERQUE AREA RESOLVED CLAIMS:

M20-711-0110	M20-715-0017	M20-715-0018	M20-715-0020	M20-715-0028
M20-715-0038	M25-716-0027	M25-716-0028	M25-716-0029	M25-716-0030
M25-716-0031	M25-716-0032	M25-716-0033	M25-716-0034	M25-716-0035
M25-716-0036	M25-716-0037	M25-716-0038	M25-716-0039	M25-716-0040
M25-716-0041	M25-716-0042	M25-716-0145	M25-716-0147	M25-716-0148
M25-716-0149	M25-716-0150	M25-716-0151	M25-716-0152	M25-716-0153
M25-716-0154	M25-716-0155	M25-716-0156	M25-716-0157	M25-716-0158

PORTLAND AREA RESOLVED CLAIMS:

P03-101-0307	P04-180-0033	P04-180-0034	P04-180-0036	P06-117-0029
P11-124-0042	P11-124-0049	P11-124-0055	P12-102-0016	

[FR Doc. 92-31410 Filed 12-28-92; 8:45 am]
BILLING CODE 4310-02-M

federal register

Tuesday
December 29, 1992

Part VII

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 870

Abandoned Mine Reclamation Fund—Fee Collection and Coal Production Reporting, Reclamation Fee, Basis for Coal Weight Determination; Proposed Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 870

RIN 1029-AB68

Abandoned Mine Reclamation Fund—Fee Collection and Coal Production Reporting, Reclamation Fee, Basis for Coal Weight Determination

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

ACTION: Proposed rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) proposes to amend its regulations governing how the weight of each ton of coal produced is determined for reclamation fee purposes. This action will make the weight determination consistent with the normal business practice between a coal operator and a person operating a coal preparation plant when run-of-mine coal is purchased on an estimated clean coal basis and cleaned prior to resale or use. The revised regulations would define the records required to be maintained by a coal operator and a person operating a coal preparation plant to document the basis of coal sales and purchases.

DATES: *Written comments:* OSM will accept written comments on the proposed rule until 5 p.m. Eastern time on March 1, 1993.

Public Hearings: Upon request, OSM will hold public hearings on the proposed rule in Washington, DC on a date and at a time that would be subsequently announced. Upon request, OSM will also hold public hearings in the States of Kentucky and Virginia at times and dates to be announced prior to any requested hearings. OSM will accept requests for public hearings until 5 p.m. Eastern time on January 28, 1993. Individuals wishing to attend, but not testify, at any hearing should contact the person identified under "**FOR FURTHER INFORMATION CONTACT**" beforehand to verify that the hearing will be held.

ADDRESSES: *Written comments:* Hand deliver to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, room 660, 800 North Capitol St., NW., Washington, DC, or mail to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, room 660-NC, 1951 Constitution Avenue, NW., Washington, DC 20240.

Public Hearings: The addresses for any hearings scheduled in the District of Columbia and the States of Kentucky and Virginia will be announced prior to the hearings.

Request for public hearings: Submit request orally or in writing to the person and address specified under "**FOR FURTHER INFORMATION CONTACT.**"

FOR FURTHER INFORMATION CONTACT: Jane E. Robinson, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, room 635-NC, 1951 Constitution Avenue, NW., Washington, DC 20240. Telephone (202) 343-2826.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures
II. Background
III. Discussion of the Proposed Rules
IV. Procedural Matters

I. Public Comment Procedures

Written Comments

Written comments submitted on the proposed rule should be specific, should be confined to issues pertinent to the proposed rule, and should explain the reason for any recommended change. Where practical, commenters should submit three copies of their comments. Comments received after the close of the comment period (see "**DATES**") or delivered to addresses other that those listed above (see "**ADDRESSES**"), may not be considered or included in the Administrative Record for the final rule.

Public Hearings

OSM will hold public hearings on the proposed rule on request only. The times, dates, and addresses for all hearings will be announced in the **Federal Register** at least 7 days prior to any hearings which are to be held.

Any person interested in participating at a hearing at a particular location should inform Ms. Robinson (see "**FOR FURTHER INFORMATION CONTACT**") either orally or in writing of the desired hearing location by 5 p.m. Eastern time on January 28, 1993. If no one has contacted Ms. Robinson to express an interest in participating in a hearing at a given location by that date the hearing will not be held. If only one person expresses an interest, a public meeting rather than a hearing may be held and the results will be included in the Administrative Record.

If a hearing is held, it will continue until all persons wishing to testify have been heard. To assist the transcriber and ensure an accurate record, OSM requests that persons who testify at a hearing provide the transcriber a written copy of their testimony. To assist OSM in preparing appropriate questions, OSM also requests that persons who plan to testify submit to OSM at the address previously specified for the submission of written comments (see "**ADDRESSES**") an advance copy of their testimony.

II. Background

Section 402(a) of the Surface Mining Control and Reclamation Act (SMCRA) requires all operators of coal mining operations subject to its provisions to pay a reclamation fee on each ton of coal produced. In December 1977 OSM first promulgated regulations to implement this provision 42 FR 62714 (Dec. 13, 1977). Briefly, the regulations require that the AML fees must be paid on the actual gross weight of the coal, at the time of the first transaction (sale, transfer of ownership, or use) involving the coal. This regulation has been in effect basically unchanged since 1977. In 1982, OSM revised the regulatory language to clarify the point in time of fee determination and to stress that the actual gross weight of the coal must be used for fee calculation. At that time OSM also specifically noted that no fees were owed on impurities physically removed before the sale, transfer of possession or use. In 1988 OSM once again reminded operators that the general rule, which required all impurities not removed before the first transaction to be included in the gross weight for AML fee computation purposes, was not changed by the regulatory revision allowing a calculated weight reduction for excess moisture.

In order to apply this regulation OSM determines: (a) When the first transaction occurs; (b) the gross weight at the time, which includes impurities not physically removed before the transaction occurs; and (c) the actual not estimated or calculated, gross weight at the time (or as near to the time as possible) of the transaction.

OSM generally considers the first transaction to occur when physical possession of the coal, or such other indications of ownership as title and risk of loss, transfer to a purchaser. The time that payment is computed or made is not controlling. This approach is in accord with the Uniform Commercial Code (UCC), which has been adopted in all fifty states.

Section 2-401(2) of the UCC provides that:

> Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods * * *

Under UCC section 2-401(2), when a coal operator delivers run-of-mine coal to a buyer's preparation plant for

cleaning, the transaction upon which OSM calculates the AML fees under 30 CFR 870.12(b)(1) generally occurs upon delivery. In such a case, the AML fee is based on the run-of-mine tonnage which was delivered, including any impurities.

The fact that a coal operator is paid on some basis other than tons of actual run-of-mine coal shipped is immaterial to the critical issue—that is, the transfer of title. In many cases, when coal is delivered to a preparation plant by a coal operator, the transaction is not for cleaning and redelivery of the coal to the operator, but for the physical transfer of ownership of the coal to the preparation plant. The purchaser, in this instance, has total control of the goods and exercises all the indicia and rights of ownership, i.e., right to commingle, to alter shape and form, and to sell. In most instances the person operating a coal preparation plant does not keep an individual operator's coal separate from other sellers, nor maintain any documents of the actual weight of the coal recovered from the cleaning process, as opposed to the estimated weight of the clean coal purchased from each individual coal operator.

OSM collects AML fees based on the premise that the agreement a purchaser has with a coal operator for the purpose of determining the amount owed, is only the basis for payment and does not alter the fact that when the coal operator loads its coal on trucks or other means of transportation and delivers the coal to the preparation plant or other purchaser, title passes upon the physical delivery of the goods. Quite simply the coal operator in many instances is not shipping the coal for cleaning but for the purpose of selling the coal. The purchaser owns all the coal including the impurities. Accordingly, under 30 CFR 870.12 the actual gross weight includes the "impurities that have not been removed prior to the time of initial bona fide sale."

There is a perception that the AML fee rules may be unfair to the small independent coal operator who must sell his coal to a preparation plant that cleans and resells the coal. In such circumstances, the small operator is generally paid by the person operating the coal preparation plant on the estimated weight of the clean coal tonnage, even though methods typically used to estimate the clean coal yield may vary and may not be verifiable. Under these circumstances some small coal operators have objected to OSM's requirement for payment of reclamation fees on run-of-mine tonnage when the operator is paid on clean coal tons.

OSM published a notice of inquiry in the **Federal Register** (56 FR 10404) seeking comments, information, and recommendations from all interested parties to assist the agency in assessing the effectiveness of the current reclamation fee payment regulations in situations where the coal is cleaned by the purchaser. Specific attention was requested regarding the timing of the reclamation fee assessment, and whether OSM should allow operators whose coal is cleaned by another party, to pay on estimated clean coal tonnage rather than on actual weight. The comment period was from March 12, 1991 through June 25, 1991. Comments were received from coal companies, the Joint National Coal Association/ American Mining Congress Committee on Surface Mining Regulations, coal operator associations, and a law firm that commented on behalf of a group of independent operators.

None of the commenters supported OSM's current policy requiring coal operators to pay reclamation fees on run-of-mine coal tonnage when sold to a preparation plant and payment is received on the basis of clean coal tonnage. In addition, commenters claimed that OSM's policy is unfair to small and medium-sized independent operators, who cannot market their coal unless it is cleaned, and who are paid on an estimated or calculated clean coal basis.

OSM has considered several alternatives to its current policy, including those offered by the commenters. The alternatives that were evaluated included:

(A) Allowing an independent coal operator who sells run-of-mine coal to a customer for cleaning, or to an end user, to pay reclamation fees based on the estimated clean coal tonnage determined by the customer;

(B) Requiring operators of coal preparation plants and loading facilities to pay reclamation fees on all coal shipped from their plants or facilities;

(C) Requiring all coal operators to pay reclamation fees FOB mine, i.e. on run-of-mine tonnage; and

(D) Using an average reject factor that is established by the person operating a coal preparation plant or the end user, or adoption of a standard reject factor and/or testing method that is established by OSM.

After careful consideration, however, none of the above alternatives were considered viable by OSM for a variety of reasons and the responses to the notice of inquiry did not provide OSM with a sense of the scope of the run-of-mine coal versus clean coal issue. Also, the existing regulations that require reclamation fee payments on the amount of actual tonnage sold, transferred or used, do not allow OSM sufficient latitude to recognize industry's practice of coal preparation plant owners paying coal operators on the basis of estimated clean coal tonnage. Based on the limited amount of information available on independent preparation plants, OSM does not know how many of them are in operation or the volume of coal that is purchased by those preparation plants.

However, based on the experience OSM has gained during the past fifteen years on the implementation of the existing rules, coupled with the information received in response to the notice of inquiry, OSM is proposing a two-part revision to the current reclamation fee payment regulations as a solution. The first part would allow independent coal operators, many of whom do not have the ability to process their own coal, to pay a reclamation fee on the basis of the purchaser's estimate of the amount of clean coal contained in the run-of-mine tonnage delivered by the operator. OSM would allow payment of reclamation fees by the operator on the same basis as the actual coal transaction.

The second part of the proposed rule includes a requirement that preparation plants which purchase coal on an estimated clean coal basis actually clean the coal and a recapture provision to ensure reclamation fees are paid on any coal sold by a person operating a coal preparation plant when the quantity of coal sold is greater than estimated clean coal purchased. In this case, a person operating a coal preparation plant would be deemed an operator producing coal with regard to payment of reclamation fees on the coal sold, transferred or used in excess of coal purchased. The coal sold, transferred or used by the coal preparation plant in excess of coal purchased from such operators would therefore be deemed coal produced by the person operating the coal preparation plant. This recapture provision is important, since it would ensure that reclamation fees are paid on each ton of coal sold, transferred or used by the person operating a coal preparation plant. Market forces should limit discrepancies between estimated clean tonnages and actual clean tonnages because no seller would willingly be shortchanged in a transaction with a person operating a coal preparation plant merely to avoid the payment of reclamation fees. However, OSM recognizes that in some instances, small operators may have no alternative but to sell their coal to a regional preparation

plant, and therefore are at some disadvantage in ensuring that the estimated tonnage figures used by the preparation plant are fair and reliable. OSM has knowledge of instances where preparation plants actually sell more clean coal than the estimated clean coal purchased. In those cases, the person operating the coal preparation plant could properly be considered a producer of coal, since the plant has produced coal tonnage which has never been recorded and on which no reclamation fees have been paid. Since 1978 OSM has interpreted the term "operator" as used in section 402 of SMCRA, broadly.

The Act provides that all operators of coal mining operations subject to the provisions of the Act shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee. (30 U.S.C. 1232, in relevant part.)

OSM believes it has authority under section 402 to assess AML fees on preparation plant sales of such excess coal tonnage. OSM has indicated that "We believe that Congress intended the burden of fee payment to fall upon the person who stands to benefit directly from the sale, transfer, or use of the coal. This intent will guide the Office in making decisions as to who is liable for the fee. The identification of operators will be made in light of the realities of the business world and will not turn solely on a literal interpretation of the word "removes". 42 FR 62713 (December 13, 1977). OSM believes that if a preparation plant sells coal in excess of the amount the plant purchased as estimated clean coal, then the person operating the coal preparation plant may be considered to produce coal and to be a surface coal mining operation for purposes of reclamation fee payment, for reasons similar to the grounds for requiring an operation that reclaims coal from coal refuse to pay AML fees on the refuse coal produced. See 47 FR 28577 (1982).

Section 413 of SMCRA provides the Secretary with the general authority to require a person operating a coal preparation plant to keep records and pay reclamation fees. The proposed rule would implement this authority by requiring that both the coal operator and the person operating a coal preparation plant keep specific records to document the basis of a coal sale. All of the provisions of this rule are so interrelated that they must be considered nonseverable. The comments in response to the notice of inquiry on this rulemaking indicated a perception that the existing rule has inequitable consequences for small coal operators However, to address any such inequities, OSM regards as vital the provision providing for payment of fees by coal preparation plant owners on the excess of actual coal sold over estimated clean coal purchased. This provision would ensure that reclamation fees are assessed on any difference in such tonnages as appropriate, and that the fees will not be lost to the Government. Without this "recapture" provision, the use of estimated tonnage as the basis for fee payment could result in a significant loss to the AML fund. That would undermine the effectiveness of the AML program. To guard against such undermining, which could result if a court overturned part of the regulations, OSM intends to reinstate the current regulation (fee payment based on actual tonnage, and not on estimated tonnage) if any part of the final rule should be invalidated.

III. Discussion of the Proposed Rules

The proposed rules would allow a coal operator who sells run-of-mine coal to a person operating a coal preparation plant, as defined by 30 CFR 701.5, to pay reclamation fees on an estimated clean coal weight basis, if that is the basis upon which the coal operator is paid. Records to be kept that support the clean coal transaction are specified. Also, a person operating a coal preparation plant, as defined by 30 CFR 701.5, would be required to clean the coal and pay reclamation fees on the weight of any coal sold that is in excess of tonnage purchased from operators on an estimated clean coal basis.

Requirements for reclamation fee payment would recognize actual business practices between a coal operator and a preparation plant which cleans or processes the coal before it is sold or used. Payment of fees on estimated clean coal weight would apply only when the coal operator is actually paid by the person operating a preparation plan on the basis of estimated clean coal tonnage and all requirements for recordkeeping are met. Coal operators who sell run-of-mine tonnage to a coal preparation plant or end user on a raw coal basis would continue to be required to pay the reclamation fees on the actual run-of-mine tonnage delivered by the coal operator. Likewise, if a coal operator sells run-of-mine coal to a person operating a coal preparation plant on an estimated clean coal basis and the preparation plant fails to clean the coal, and to meet the specific recordkeeping requirements as proposed, the person operating the coal preparation plant would be liable for reclamation fee payment on the weight of the actual run-of-mine tonnage delivered by the coal operator, in excess of the tonnage for which available records document that reclamation fees have been properly paid. Where the person operating a coal preparation plant is also an active coal operator, OSM would continue to assess fees, on all shipped or used tonnage in excess of the estimated clean tonnage purchased from independent coal operators.

A coal operator who sells coal on an actual clean coal tonnage basis would pay reclamation fees on that basis, provided records are maintained to adequately document the actual clean coal weight. However, this proposed rule would not be applicable to coal operators who do not sell their coal to preparation plants or tipples that clean the coal before it is either resold, transferred or used by the entity operating the cleaning facility. For sales to entities other than preparation plants and tipples, OSM would be unable to verify tonnages sold or to recapture for reclamation fee purposes the fees attributable to under-estimates by buyers.

Use of actual weights, in the current rule, provides less opportunity for abuse or avoidance of fee payment. In order to address expressed perceptions that the current rule causes some inequities in the burden of fee payment for small coal operators, OSM is proposing a process for allowing fees to be paid on the basis of estimated clean weight. The proposed process includes a "recapture" provision in order to minimize collusion or significant inaccuracy in clean weight estimation.

Section 870.12(b)(3) of the proposed rule would be retroactive to October 1, 1990, the date OSM began its review of this issue and suspended debt identified by audit that related to estimated clean tonnage. The other provisions of the proposed rule would be prospective in application.

A. Section 870.11—Applicability

The proposed rule would amend existing § 870.11 to expand the abandoned mine reclamation fund fee collection and reporting requirements to include all coal preparation plants as defined in 30 CFR 701.5.

B. Section 870.12—Reclamation Fee

OSM proposes to revise existing § 870.12(b)(3) which requires that reclamation fees be based on the actual gross weight of the coal. The revised rule would allow a coal operator to pay reclamation fees on an estimated weight basis when that is the basis on which the coal operator is compensated for run-of-mine coal sold to a person operating a coal preparation plant.

Subparagraph § 870.12(b)(3)(iii) is revised and renumbered as § 870.12(b)(3)(iv). A new § 870.12(b)(3)(iii) is added to provide the conditions under which the estimated clean weight of the coal may be used as a basis of reclamation fee payment. Fee payment may be based on an estimated weight when title to the coal has transferred from the coal operator who sold the coal to the person operating a coal preparation plant who purchased the coal, and the person operating a coal preparation plant pays the coal operator on an estimated clean coal basis. The person operating the coal preparation plant must actually clean the coal and reconcile the estimated clean coal purchases to actual preparation plant sales tonnages and pay reclamation fees on any coal sold that exceeds tonnage purchased from operators on an estimated clean coal basis.

A new subparagraph § 870.12(d)(3) would require that a person operating a coal preparation plant who fails to clean the coal or to maintain records of coal purchases and sales, as specified in § 870.16, must pay reclamation fees based on run-of-mine tonnage purchased from operators, in excess of the tonnage for which available records document that fees have been properly paid.

A new paragraph (d) would be added at § 870.12 that will require a person who operates a coal preparation plant to pay reclamation fees on any actual coal tonnage sold that exceeds the weight of the estimated clean coal purchased from coal operators. In these circumstances the person operating the coal preparation plant will be deemed to be an operator for purposes of title IV reclamation fee payment, and will be required to pay fees on the economic benefit derived from this sale. A new subparagraph § 870.12(d)(1) is added to set forth the requirement that the formula a person operating a coal preparation plant uses to compute reclamation fee payment must be based on quarterly sales and purchases. When a preparation plant overestimates the amount of clean coal purchased during a quarter and a loss results, that loss can be used as a carryover and used to offset any gains in the next quarter, if applicable. The example provided below illustrates a method that could be used by a person operating a coal preparation plant to determine reclamation fee liability.

COAL PURCHASES AND SALES

Quarter	Estimated clean purchases	Actual clean	(Gain) Loss	Sales
923	180,000	178,000	2,000	182,800
924	212,000	202,000	10,000	213,700
931	194,00	203,700	(9,700)	205,200
932	181,000	190,000	(9,000)	170,540

CALCULATION OF (GAIN)/LOSS=BI–EI+P–S**

Quarter	Beginning inventory	Ending inventory	Purchase	Sales	(Gain) Loss
923	64,000	59,200	180,000	182,800	2,000
924	59,200	47,500	212,000	213,700	10,000
931	47,500	46,000	194,000	205,200	(9,700)
932	46,000	65,460	181,000	170,540	(9,000)

**Plant (gain)/loss.
Beginning inventory–ending inventory+purchases–sales.
Result: Both gain and losses flow from the calculation.

CALCULATION OF FEE LIABILITY

Quarter	(Gain) Loss	Beginning carryover allowance	Ending carryover allowance	Fee liability
923	2,000	.....	2,000	.....
924	10,000	2,000	12,000	.....
931	(9,700)	12,000	2,300	.....
932	(9,000)	2,300	.....	*1,005

*Based on the AML fee for underground coal ($.15 per ton).

A new subparagraph § 870.12(3)(d)(2) would be added to provide that the date the fee payment responsibility would begin for a person operating a coal preparation plant is the first day of the first complete calendar quarter after the effective date of the final rule.

C. Section 870.13—Fee computations

A new § 870.13(e) is added to require a person operating a coal preparation plant who purchases run-of-mine coal to keep separate records of surface mined coal, underground mined coal, and/or coal that is exempt from reclamation fee payment under § 870.11, to maintain records that can be used to allocate coal sales to the source of the coal purchases. In the absence of records that identify the source of the purchased coal as underground coal or exempt coal, reclamation fees owed would be assessed at the surface mined rate on all tonnage for which available records do not properly document the source of the coal. The example provided below illustrates a method that could be used to document allocation of purchased tonnages to sales.

ABC PREPARATION PLANT SUMMARY OF EST. CLEAN COAL PURCHASES

[July 1 through September 30, 1992]

Seller	Tons				Percent allocated fee		
	Surface	Underground	Exempt	Total	Total (percent)	Tons	Liability
A COAL CO	15,676.45			15,678.45	8.7103	783.93	$274.38
B COAL CO		18,256.56		18,256.56	10.1425	912.83	136.92
C COAL CO		22,789.45		22,789.45	12.6608	1,139.47	170.92
D COAL CO	35,690.55			35,690.55	19.828	1,784.53	624.59
E COAL CO		1,234.91		1,234.91	0.6861	61.75	9.26
F COAL CO	67,964.11			67,984.11	37.7690	3,399.21	1,189.72
G CONST CO	9,987.06			9,967.06	5.5484	499.36	174.78
H COAL CO	4,512.12			4,512.12	2.5067	225.60	78.96
K CONST CO			1,247.65	1,247.65	0.6931	62.38	0.00
I COAL CO		287.39		287.39	0.1597	14.37	2.16
J COAL CO		2,331.75		2,331.75	1.29454	116.59	17.49
	133,852.29	44,900.06	1,247.65	180,000.00	100.0001	9,000.02 (Total tons to be allocated)	2,679.18
Percent of total			74.36		24.94	0.69	
Allocated tons			6,692.62		$2,245.01	$62.38	
			X.35		X.15	X.0	
			$2,342.42		$336.75	$0.00	
Total liability							$2,679.17

D. Section 870.15—Reclamation fee payment

In § 870.15, paragraph (a) is revised to require a person operating a coal preparation plant to pay reclamation fees owed on calendar quarter tonnage not later than 30 days after the end of the calendar quarter in which it is owed. This schedule for fee payment would implement the requirements of section 402(b) of SMCRA. Paragraph § 870.15(b) is amended to require a person operating a coal preparation plant to submit a form OSM–1 each quarter and to report tonnages sold, transferred or used in excess of tonnage purchased during the calendar quarter. Subparagraph § 870.15(c) is amended to add the requirement that a person operating a coal preparation plant must submit an OSM–1 form together with any payment due not later than 30 days after the calendar quarter in which the fee was owed, and to provide that late submissions will be subject to interest requirements in section 402(e) of SMCRA. Paragraph § 870.15(d) is amended to require a person operating a coal preparation plant who owes total quarterly reclamation fees of $100,000 or more to use the Treasury Financial Communications System to forward its payments electronically. The requirement for electronic transfer of funds of $100,000 or more would be consistent with the existing requirements for payments by operators.

E. Section 870.16—Production records

The proposed rule would amend § 870.16(a) to add recordkeeping requirements for a person operating a coal preparation plant. Both a coal operator and person operating a coal preparation plant would be required to maintain specific records to document the basis of coal purchases, transfers and sales. These documents would include the maintenance of invoices, remittance advices, canceled checks and receipts that are commonly used in coal transactions (see illustration I).

Section 870.16(a)(2) would be renumbered as § 870.16(a)(1) and amended to require a person operating a coal preparation plant to document the quantity of coal used and the date it is consumed. This requirement would ensure that a person operating a coal preparation plant maintains a complete record of all coal that moves through its operation. Section 870.16(a)(1) would be renumbered as § 870.16(a)(2) and revised to specify the records of coal transactions that must be maintained by a coal operator or a person operating a coal preparation plant. A new requirement is added to provide for specifying the permit number under which the coal was produced which will help to ensure the accuracy of the Applicant Violator System. Section 870.16(a)(3) is renumbered as § 870.16(a)(2)(i) to clarify that records of stockpiled or inventoried tonnage that is not classified as sold must be maintained by the operator. A person operating a coal preparation plant is not required to maintain records of stockpile or inventory tonnage.

A new § 870.16(a)(3) is added to incorporate specific recordkeeping and maintenance requirements to be met by a person operating a coal preparation plant, including records of coal tonnage delivered and purchased, the amount paid for each ton, the name and address of the person or entity from whom the coal was purchased or delivered, and the person or entity to whom the coal was sold, shipped or delivered, as appropriate, and the date of each purchase, delivery, or shipment; exempt coal purchases, purchases of run-of-mine coal, and clean coal that is sold, transferred or used. Section 870.16(b) is amended to state the authority of OSM's fee compliance officers to audit a coal preparation plant. Section 870.16(c) is amended to require a person operating a coal preparation plant to allow OSM fee compliance officers to inspect and copy books and records that document the basis for reclamation fee payments. Section 870.16(d) is revised to add a six year recordkeeping requirement for persons operating a coal preparation plant.

Illustration I

The example below illustrates documentation of coal purchases to be maintained by a person operating a coal preparation plant to meet the requirements of § 870.16(a).

ABC PREPARATION PLANT

Remittance Advice

TO: A COAL Company
Some Street
Some City, TN 37754

Tonnage adjustment for sales from July 1, 1992 through September 30, 1992:

783.93 clean tons × $25.50=$19,990.22

signed

Person Operating ABC
Preparation Plant

enclosure: check no. 176899 for $19,990.22

Section 870.16(e)(2) is revised and renumbered as § 870.16(e)(3). A new § 870.16(e)(2) is added to require a person operating a coal preparation plant to pay reclamation fees on the weight of run-of-mine tonnage as delivered to the coal preparation plant, in excess of the tonnage for which available records document that reclamation fees have been properly paid. This provision would apply when a person operating a coal preparation plant fails to maintain records to support the basis for estimated clean coal transactions.

Section 870.16(e)(3) is amended to allow a person operating a coal preparation plant to request a revision to an OSM estimate when that person provides documentation demonstrating the amount of a run-of-mine tonnage estimate to be incorrect.

IV. Procedural Matters

Federal Paperwork Reduction Act

The collection of information contained in this rule has been submitted to the Office of Management and Budget for approval as required by 44 U.S.C. 3501 *et seq.* The collection of this information will not be required until it has been approved by the Office of Management and Budget.

Public reporting burden for this collection of information is estimated to average 16.4 minutes per response, including the time for reviewing instructions, searching existing data sources, and reviewing the collection of information. Send comments regarding this burden estimate or any other aspects of this collection of information, including suggestions for reducing the burden, to the Office of Surface Mining Reclamation and Enforcement, Information Collection Clearance Officer, 1951 Constitution Ave., rm 640 N.C., Washington, DC 20240 and the Office of Management and Budget, Paperwork Reduction Project (1029–0063), Washington, DC 20503.

Executive Order 12778, Civil Justice Reform Certification

This rule has been reviewed under the applicable standards of Section 2(b)(2) of Executive Order 12778, Civil Justice Reform (56 FR 55195). In general, the requirements of Section 2(b)(2) of Executive Order 12778 are covered by the preamble discussion of this rule. Additional remarks follow concerning individual elements of the Executive Order:

A. What is the preemptive effect, if any, to be given to the regulation?

The rule will have no preemptive effect. It provides for AML reclamation fee liability of the party that receives economic benefit from the first sale, transfer, or use of coal; and provides fairness to small coal operators by providing for payment of federal reclamation fees on a basis consistent with the coal industry's business practices. It also establishes recordkeeping requirements necessary to support the reclamation fee provisions. The fees in question are provided for by section 402 of SMCRA and do not affect or preempt any state reclamation fee provisions.

B. What is the effect on existing Federal law or regulation, if any, including all provisions repealed or modified?

This rule modifies the implementation of SMCRA as described herein, and is not intended to modify the implementation of any other Federal statute. The preceding discussion of this rule specifies the Federal Regulatory provisions that are affected by this rule.

C. Does the rule provide a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction?

The standards established by this rule are as clear and certain as practicable, given the complexity of topics covered and the mandates of SMCRA. As noted above, the rule will promote fairness to the small coal operators through the application of a reclamation fee payment requirement that is harmonious with the coal industry's long established business practices. The rule will afford these small coal operators the opportunity to pay reclamation fees on the same estimated weight basis for which they are compensated for their coal. The rule also establishes a reclamation fee reporting and payment liability for persons operating a coal preparation plant when they sell more coal than they purchased through the estimated weight process. The rule is not expected to be burdensome to persons operating a coal preparation plant, since initial estimation of tonnage is under the preparation plant owner's control, and reasonably accurate estimation of clean coal tonnages should minimize the need for adjustment of tonnages upon resale by the preparation plant owner.

D. What is the retroactive effect, if any, to be given to the regulation?

Section 870.12(b)(3) of this rule would have a retroactive effective date of October 1, 1990. This retroactivity would have no adverse retroactive effect on the coal industry since it would allow coal operators to begin calculating their reclamation fee liability based on estimated clean coal weight as of that 1990 date, and to request a refund from OSM for any overpayment of reclamation fees that may have been paid subsequent to October 1, 1990. That date was established to coincide with the date OSM began reviewing the coal weight determination issue. This date is also the date OSM began suspending any debt relating to this issue that was identified through audit. Reclamation fee calculations and payments for any period prior to October 1, 1990 must be based on the then-current regulations, and any debts established through audit, including applicable interest and penalties, will be pursued by OSM.

E. Are administrative proceedings required before parties may file suit in court? Which proceedings apply? Is the exhaustion of administrative remedies required?

No administrative proceedings are required before parties may file suit in court challenging the provisions of this rule under section 526(a) of SMCRA, 30 U.S.C. 1276(a). Similarly, no administrative proceedings are required before filing suit to challenge enforcement of this rule.

F. Does the rule define key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items?

Terms which are important to the understanding of this rule are already defined in 30 CFR 701.5, and OSM's policy on the interpretation of those terms is set forth in previous rulemakings, as described in the preceding discussion of this rule. No new key terms are used.

G. Does the rule address other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget, that are determined to be in accordance with the purposes of the Executive Order?

As of December 29, 1992 the Attorney General and the Director of the Office of Management and Budget have not issued any guidance on this requirement.

Executive Order 12291 and Regulatory Flexibility Act

The Department of the Interior has determined that this document is not a major rule under the criteria of Executive Order 12291 and certifies that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility

Act, 5 U.S.C. *et seq.* The rules would mandate that a person operating a coal preparation plant pay reclamation fees on all clean coal tons sold, transferred or used in excess of coal purchased as estimated clean coal tonnage. The rules would specify records to be maintained by operators and a person operating a coal preparation plant to document clean coal sales and purchases. The rules recognize industry practice and allow an operator who is paid for run-of-mine coal on an estimated clean coal basis to pay reclamation fees on the same basis.

The economic effects of the proposed rule are not estimated to be significant because the cost of fee payment would be assumed by the person operating an independent preparation plant who would realize an economic benefit from the sale of a greater quantity of clean coal than the amount of its estimated purchases. Consequently, it is expected that the total cost to industry would be substantially less than the threshold criteria for determining when a rule is major. The rule does not distinguish between small and large entities. However, the cost for a small entity should be less than the average because of its less complex business structure.

National Environmental Policy Act

OSM has prepared a draft environmental assessment [EA] of this proposed rule and has made a tentative finding that the proposed rule would not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). It is anticipated that a finding of No Significant Impact (FONSI) will be approved for the final rule in accordance with OSM procedures under NEPA. The EA is on file in the OSM Administrative Record at the address specified previously (see "ADDRESSES"). An EA will be completed on the final rule and a finding made on the significance of any resulting impacts prior to promulgation of the final rule.

Author

The principal author of this proposed rule is Jane E. Robinson, Program Analyst, Division of Compliance Management, Directorate of Finance and Accounting, U.S. Department of the Interior, 1951 Constitution Ave., NW., Washington, DC 20240. Inquiries with respect to the proposed rule should be directed to Ms. Robinson at the address and telephone specified under "FOR FURTHER INFORMATION CONTACT."

List of Subjects in 30 CFR Part 870

Reclamation fee, Fee computations, Determination of percentage-based fees, Reclamation fee payment, Production records, Compliance authority, Excess moisture content allowance.

Accordingly, it is proposed to amend 30 CFR part 870 as set forth below:

Dated: October 29, 1992.

Richard Roldan,

Deputy Assistant Secretary, Land and Minerals Management.

PART 870—ABANDONED MINE RECLAMATION FUND—FEE COLLECTION AND COAL PRODUCTION REPORTING, RECLAMATION FEE, BASIS FOR COAL WEIGHT DETERMINATION

1. The authority citation for part 870 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, as amended; and Public Law 100–34.

1a. The title of part 870 is revised to read as set forth above.

2. In § 870.11 the introductory text is revised to read as follows:

§ 870.11 Applicability.

The regulations in this part apply to all surface and underground coal mining operations, and all coal preparation plants except—

* * * * *

3. Section 870.12 is amended by revising paragraph b(3) introductory text and (b)(3)(iii); and adding new paragraphs (b)(3)(iv) and (d) to read as follows:

§ 870.12 Reclamation Fee.

* * * * *

(b) * * *

(3) The weight of each ton shall be determined by the actual gross weight or the estimated clean weight of the coal for which the operator is paid.

* * * * *

(iii) The estimated clean weight of the coal may be used by the operator as the basis for fee payment when the following conditions are met: The title to the coal has transferred from the operator who sold the coal to the person operating a coal preparation plant who bought the coal; the operator was paid on an estimated clean coal basis; and the person operating the coal preparation plant actually cleans the coal.

(iv) Failure to maintain the necessary records as specified in § 870.16 shall subject the operator to fees based on run-of-mine tonnage data.

(c) * * *

(d) A person operating a coal preparation plant which purchases coal for resale on the basis of clean coal tonnage, shall pay reclamation fees on the actual weight of all processed coal sold, transferred or used by the coal preparation plant in excess of the estimated clean coal purchased from other operators.

(1) The formula used to compute tonnage subject to reclamation fee payment shall be based on quarterly purchases and sales.

(2) A person operating a coal preparation plant shall pay reclamation fees pursuant to paragraph (d) of this section, effective [THE FIRST DAY OF THE FIRST COMPLETE CALENDAR QUARTER AFTER THE EFFECTIVE DATE OF THE FINAL RULE].

(3) Failure to maintain the necessary records as specified in § 870.16 shall subject the person operating the preparation plant to fees based on run-of-mine tonnage purchased.

4. In § 870.13 paragraph (e) is added to read as follows:

§ 870.13 Fee computation.

* * * * *

(e) *Coal preparation plant allocation.* A person operating a coal preparation plant that combines surface mined coal, including reclaimed coal, with underground coal, and/or coal that is exempt under § 870.11, prior to final sale, transfer or use shall pay a reclamation fee at the higher rate for each ton of coal sold or shipped in each quarter in which the tonnage of coal sold, transferred or used exceeds the purchased tonnage, unless records are kept as a basis for the allocation of coal sales to purchases and deliveries by source and all tonnage sold or delivered are allocated to the initial purchase or delivery.

5. Section 870.15 is amended by revising paragraphs (a), (b), (c) and the first sentence of paragraph (d) to read as follows:

§ 870.15 Reclamation fee payment.

(a) Each operator and person operating a coal preparation plant shall pay the reclamation fee based on calendar quarter tonnage no later than thirty days after the end of each calendar quarter.

(b) Each operator and person operating a coal preparation plant shall use mine report form OSM–1 (or OSM–1A approved by OSM) to report tonnage of coal sold, used, or ownership transferred during the applicable calendar quarter, or in the case of a person operating a coal preparation plant, shall report the tonnage sold, transferred or used in excess of the tonnage purchased. A person operating a coal preparation plant may carry over

from previous calendar quarters the net difference between estimated clean coal tonnage purchased and the actual tonnage sold, to the extent cumulative tonnage purchased exceeds cumulative tonnage sold, transferred or used.

(c) As of April 1, 1983, delinquent reclamation fee payments are subject to interest at the rate established quarterly by the U.S. Department of the Treasury for use in applying late charges on late payments to the Federal Government, pursuant to Treasury Fiscal Requirements Manual 6–8020.20. The Treasury current value of funds rate is published by the Fiscal Service in the Notices section of the **Federal Register**. Interest on unpaid reclamation fees shall begin to accrue on the 31st day following the end of the calendar quarter for which the fee payment is owed and will run until the date of payment. OSM will bill delinquent operators on a monthly basis and initiate whatever action is necessary to secure full payment of all fees and interest. All operators or persons operating a coal preparation plant who receive a Coal Reclamation Fee Report (Form OSM–1 or OSM–1A), including those with zero production, must submit a completed Form OSM–1, as well as any fee payment due. Fee payments postmarked later than thirty days after the calendar quarter for which the fee was owed will be subject to interest.

(d) An operator or person operating a coal preparation plant who owes total quarterly reclamation fees of $100,000 or more for one or more mines must use the Treasury Financial Communications System, forward its payments by electronic transfer, and use OSM's approved form(s) to report production to the Denver address below. * * *

* * * * *

6. Section 870.16 is revised to read as follows:

§ 870.16 Production Records.

(a) Any person engaging in or conducting a surface coal mining operation or operating a coal preparation plant shall maintain, on a current basis, records such as invoices, remittance advices, canceled checks and receipts that contain at least the following information as specified below:

(1) Tons of coal used by the operator or person operating a coal preparation plant and date of consumption.

(2) Tons of coal produced, bought, sold, transferred, or shipped, amount received or paid per ton, name and address of the person from whom or to whom sold or purchased, transferred or shipped, the date of each sale or purchase, shipment or transfer, and the permit number from which the coal was produced.

(3) Tons of coal stockpiled or inventoried by the operator which are not classified as sold for fee computation purposes under 0870.12.

(4) A person operating a coal preparation plant must meet the applicable requirements in § 870.16(a)(1), (2) and (3) and must also maintain records of exempt coal purchases, purchases of run-of-mine coal, and tons of clean coal sold, transferred, shipped, or used.

(5) For in situ coal mining operations, total BTU value of gas produced, the BTU value of a ton of coal in place certified at least semiannually by an independent laboratory, and the amount received for gas sold, transferred, or used.

(b) OSM fee compliance officers and other authorized representatives shall have access to records of any surface coal mining operation or coal preparation plant for the purpose of determining compliance of that or any other such operation with this part.

(c) Any person engaging in or conducting a surface coal mining operation or operating a coal preparation plant shall make available any book or record necessary to substantiate the accuracy of reclamation fee reports and payments at reasonable times for inspection and copying by OSM fee compliance officers. If the fee is paid at the maximum rate, the fee compliance officers shall not copy information relative to price All copied information shall be protected to the extent authorized or required by the Privacy Act and the Freedom of Information Act (5 U.S.C. 552(a), (b)).

(d) Any person engaging in or conducting a surface coal mining operation or operating a coal preparation plant shall maintain books and records for a period of 6 years from the end of the calendar quarter in which the fee was due or paid, whichever is later.

(e) (1) If an operator of a surface coal mining operation fails to maintain or make available the records as required in this section, OSM shall make an estimate of fee liability under this part through use of average production figures based upon the nature and acreage of the coal mining operation in question, then assess the fee at the amount estimated to be due, plus a 20 percent upward adjustment for possible error.

(2) If a person operating a coal preparation plant fails to maintain or make available the records that support the basis for an estimated clean coal transaction, as required in this section, a reclamation fee will be assessed on the weight of the raw tonnage delivered to the coal preparation plant, in excess of the tonnage for which available records document that reclamation fees have been properly paid.

(3) Following an OSM action, as specified in paragraph (e) (1) or (2) of this section, as applicable, an operator or person operating a coal preparation plant may request OSM to revise the estimate, or raw tonnage amounts based upon information provided by the operator or person operating a coal preparation plant. The operator or person operating a coal preparation plant has the burden of demonstrating that the estimate or amount of raw tonnage is incorrect by providing documentation acceptable to OSM, and comparable to information required in § 870.16(a).

[FR Doc. 92–31398 Filed 12–28–92; 8:45 am]
BILLING CODE 4310–05–M

federal register

Tuesday
December 29, 1992

Part VIII

Environmental Protection Agency

Premanufacture Notices; Monthly Status Report for November 1992

ENVIRONMENTAL PROTECTION AGENCY

[OPPT-53161; FRL-4181-1]

Premanufacture Notices; Monthly Status Report for November 1992

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(d)(3) of the Toxic Substance Control Act (TSCA) requires EPA to issue a list in the **Federal Register** each month reporting the premanufacture notices (PMNs) and exemption request pending before the Agency and the PMNs and exemption requests for which the review period has expired since publication of the last monthly summary. This is the report for November 1992.

Nonconfidential portions of the PMNs and exemption request may be seen in the TSCA Public Docket Office, NE-G004 at the address below between 8 a.m. and noon and 1 p.m. and 4 p.m., Monday through Friday, excluding legal holidays.

ADDRESSES: Written comments, identified with the document control number "(OPPT-53161)" and the specific PMN and exemption request number should be sent to: Document Processing Center (TS-790), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Rm. 201ET, Washington, DC 20460 (202) 260-1532.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (TS-799), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E-545, 401 M St., SW., Washington, DC 20460 (202) 260-3725.

SUPPLEMENTARY INFORMATION: The monthly status report published in the **Federal Register** as required under section 5(d)(3) of TSCA (90 Stat. 2012 (15 U.S.C. 2504)), will identify: (a) PMNs received during November; (b) PMNs received previously and still under review at the end of November; (c) PMNs for which the notice review period has ended during November; (d) chemical substances for which EPA has received a notice of commencement to manufacture during November; and (e) PMNs for which the review period has been suspended. Therefore, the November 1992 PMN Status Report is being published.

Dated: December 16, 1992

Frank V. Caesar,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics

Premanufacture Notice Monthly Status Report for NOVEMBER 1992.

I. 124 Premanufacture notices and exemption requests received during the month

PMN No

P 93-0096 P 93-0097 P 93-0098 P 93-0099 P 93-0100 P 93-0101 P 93-0102 P 93-0103 P 93-0104 P 93-0105 P 93-0106 P 93-0107 P 93-0108 P 93-0109 P 93-0110 P 93-0111 P 93-0112 P 93-0113 P 93-0114 P 93-0115 P 93-0116 P 93-0117 P 93-0118 P 93-0119 P 93-0120 P 93-0121 P 93-0122 P 93-0123 P 93-0124 P 93-0125 P 93-0126 P 93-0127 P 93-0128 P 93-0129 P 93-0130 P 93-0131 P 93-0132 P 93-0133 P 93-0134 P 93-0135 P 93-0136 P 93-0137 P 93-0138 P 93-0139 P 93-0140 P 93-0141 P 93-0142 P 93-0143 P 93-0144 P 93-0145 P 93-0146 P 93-0147 P 93-0148 P 93-0149 P 93-0150 P 93-0151 P 93-0152 P 93-0153 P 93-0154 P 93-0156 P 93-0157 P 93-0158 P 93-0159 P 93-0160 P 93-0161 P 93-0162 P 93-0163 P 93-0164 P 93-0165 P 93-0166 P 93-0167 P 93-0168 P 93-0169 P 93-0170 P 93-0171 P 93-0172 P 93-0173 P 93-0174 P 93-0175 P 93-0176 P 93-0177 P 93-0178 P 93-0179 P 93-0180 P 93-0181 P 93-0182 P 93-0183 P 93-0184 P 93-0185 P 93-0186 P 93-0187 P 93-0188 P 93-0189 P 93-0190 P 93-0191 P 93-0192 P 93-0193 P 93-0194 P 93-0195 P 93-0196 P 93-0197 P 93-0198 P 93-0199 P 93-0200 P 93-0201 P 93-0202 P 93-0203 P 93-0204 P 93-0205 Y 93-0010 Y 93-0011 Y 93-0012 Y 93-0013 Y 93-0014 Y 93-0015 Y 93-0016 Y 93-0017 Y 93-0018 Y 93-0019 Y 93-0020 Y 93-0021 Y 93-0022 Y 93-0023 Y 93-0025

II. 283 Premanufacture notices received previously and still under review at the end of the month:

PMN No.

P 84-0660 P 84-0704 P 84-1145 P 85-0619 P 85-1331 P 86-0066 P 86-1315 P 86-1489 P 86-1662 P 87-0323 P 88-0998 P 88-0999 P 88-1272 P 88-1460 P 88-1616 P 88-1937 P 88-1938 P 88-1980 P 88-1982 P 88-1984 P 88-1985 P 88-1999 P 88-2000 P 88-2001 P 88-2212 P 88-2213 P 88-2228 P 88-2229 P 88-2230 P 88-2236 P 88-2484 P 88-2518 P 88-2529 P 88-2540 P 89-0321 P 89-0396 P 89-0632 P 89-0721 P 89-0769 P 89-0775 P 89-0836 P 89-0837 P 89-0867 P 89-0957 P 89-0958 P 89-0959 P 89-1038 P 89-1058 P 89-1093 P 90-0009 P 90-0158 P 90-0211 P 90-0261 P 90-0262 P 90-0263 P 90-0372 P 90-0441 P 90-0550 P 90-0564 P 90-0581 P 90-0608 P 90-1280 P 90-1318 P 90-1319 P 90-1320 P 90-1321 P 90-1322 P 90-1358 P 90-1422 P 90-1527 P 90-1564 P 90-1592 P 90-1687 P 90-1731 P 90-1732 P 90-1745 P 90-1893 P 91-0043 P 91-0051 P 91-0107 P 91-0108 P 91-0109 P 91-0110 P 91-0111 P 91-0112 P 91-0113 P 91-0228 P 91-0242 P 91-0243 P 91-0244 P 91-0245 P 91-0246 P 91-0247 P 91-0248 P 91-0503 P 91-0548 P 91-0572 P 91-0619 P 91-0659 P 91-0689 P 91-0701 P 91-0818 P 91-0826 P 91-0914 P 91-0915 P 91-0939 P 91-0940 P 91-0941 P 91-1000 P 91-1009 P 91-1010 P 91-1011 P 91-1012 P 91-1013 P 91-1014 P 91-1015 P 91-1116 P 91-1117 P 91-1118 P 91-1131 P 91-1163 P 91-1190 P 91-1191 P 91-1206 P 91-1210 P 91-1297 P 91-1298 P 91-1299 P 91-1321 P 91-1324 P 91-1367 P 91-1368 P 91-1369 P 91-1371 P 91-1386 P 91-1394 P 91-1409 P 92-0003 P 92-0031 P 92-0032 P 92-0033 P 92-0044 P 92-0048 P 92-0066 P 92-0067 P 92-0068 P 92-0129 P 92-0168 P 92-0177 P 92-0217 P 92-0244 P 92-0245 P 92-0246 P 92-0247 P 92-0248 P 92-0249 P 92-0250 P 92-0251 P 92-0314 P 92-0343 P 92-0344 P 92-0396 P 92-0412 P 92-0471 P 92-0477 P 92-0478 P 92-0545 P 92-0546 P 92-0547 P 92-0548 P 92-0549 P 92-0550 P 92-0551 P 92-0552 P 92-0595 P 92-0599 P 92-0606 P 92-0624 P 92-0625 P 92-0649 P 92-0652 P 92-0660 P 92-0688 P 92-0714 P 92-0755 P 92-0776 P 92-0777 P 92-0787 P 92-0804 P 92-0813 P 92-0918 P 92-0919 P 92-0998 P 92-0999 P 92-1003 P 92-1009 P 92-1029 P 92-1048 P 92-1055 P 92-1079 P 92-1086 P 92-1102 P 92-1112 P 92-1113 P 92-1116 P 92-1117 P 92-1118 P 92-1119 P 92-1125 P 92-1136 P 92-1222 P 92-1255 P 92-1294 P 92-1295 P 92-1296 P 92-1298 P 92-1303 P 92-1304 P 92-1305 P 92-1306 P 92-1307 P 92-1308 P 92-1313 P 92-1316 P 92-1324 P 92-1337 P 92-1345 P 92-1352 P 92-1357 P 92-1364 P 92-1369 P 92-1377 P 92-1378 P 92-1394 P 92-1398 P 92-1399 P 92-1413 P 92-1447 P 92-1449 P 92-1454 P 92-1455 P 92-1456 P 92-1457 P 92-1467 P 92-1468 P 92-1472 P 92-1474 P 92-1485 P 92-1488 P 92-1489 P 92-1503 P 92-1504 P 92-1505 P 92-1506 P 93-0002 P 93-0014 P 93-0015 P 93-0017 P 93-0020 P 93-0021 P 93-0022 P 93-0023 P 93-0024 P 93-0025 P 93-0026 P 93-0035 P 93-0036 P 93-0037 P 93-0038 P 93-0040 P 93-0048 P 93-0050 P 93-0065 P 93-0066 P 93-0067 P 93-0068 P 93-0072 P 93-0073 P 93-0075 P 93-0076 P 93-0083 P 93-0094 P 93-0095

III. 151 Premanufacture notices and exemption request for which the notice review period has ended during the month (Expiration of the notice review period does not signify that the chemical has been added to the Inventory).

PMN No.

P 88-2212 P 88-2213 P 88-2228 P 88-2229 P 88-2230 P 88-2236 P 88-2518 P 88-2529 P 89-0721 P 90-1745 P 90-

1840 P 91-0689 P 91-1210 P 91-1371 P 92-0044 P 92-0048 P 92-0168 P 92-0599 P 92-0655 P 92-0656 P 92-0657 P 92-0658 P 92-0714 P 92-1086 P 92-1091 P 92-1134 P 92-1188 P 92-1192 P 92-1193 P 92-1282 P 92-1283 P 92-1284 P 92-1285 P 92-1286 P 92-1287 P 92-1288 P 92-1289 P 92-1290 P 92-1291 P 92-1292 P 92-1293 P 92-1297 P 92-1299 P 92-1300 P 92-1301 P 92-1303 P 92-1304 P 92-1305 P 92-1306 P 92-1309 P 92-1310 P 92-1311 P 92-1312 P 92-1314 P 92-1315 P 92-1316 P 92-1317 P 92-1318 P 92-1319 P 92-1320 P 92-1321 P 92-1322 P 92-1323 P 92-1325 P 92-1326 P 92-1327 P 92-1328 P 92-1329 P 92-1330 P 92-1331 P 92-1332 P 92-1333 P 92-1334 P 92-1335 P 92-1336 P 92-1338 P 92-1339 P 92-1340 P 92-1341 P 92-1342 P 92-1343 P 92-1344 P 92-1346 P 92-1347 P 92-1348 P 92-1349 P 92-1350 P 92-1351 P 92-1352 P 92-1353 P 92-1354 P 92-1355 P 92-1356 P 92-1358 P 92-1359 P 92-1360 P 92-1361 P 92-1362 P 92-1363 P 92-1364 P 92-1365 P 92-1366 P 92-1367 P 92-1368 P 92-1370 P 92-1371 P 92-1372 P 92-1373 P 92-1374 P 92-1375 P 92-1376 P 92-1379 P 92-1380 P 92-1381 P 92-1382 P 92-1383 P 92-1384 P 92-1385 P 92-1386 P 92-1387 P 92-1388 P 92-1389 P 92-1390 P 92-1391 P 92-1392 P 92-1393 P 92-1395 P 92-1396 P 92-1397 P 92-1398 P 92-1399 P 92-1400 P 92-1401 P 92-1402 P 92-1403 P 92-1404 P 92-1405 P 92-1406 P 92-1407 P 92-1408 P 92-1409 P 92-1410 Y 93-0004 Y 93-0005 Y 93-0006 Y 93-0007 Y 93-0008 Y 93-0009 Y 93-0010 Y 93-0011 Y 93-0012

IV. 76 Chemical Substances for Which EPA Has Received Notices of Commencement To Manufacture

PMN No.	Identity/Generic Name	Date of Commencement
P 88-0389	G Metal alkyl	October 13, 1992.
P 88-0652	G Hexol polyol	October 29, 1992.
P 88-0998	G Fluorene-containing diaromatic amine	March 3, 1992.
P 88-1753	G Bis(substituted)carbomonocyclic azo)-carbomonocyclicol	February 14, 1990.
P 88-1977	G *N*-Substituted amino naphthalene sulfonic acid, potassium salt	October 28, 1992
P 88-1978	G *N*-Substituted amino naphthalene sulfonic acid, ammonium salt	October 28, 1992
P 89-0460	Mixed esters of 1,6-hexanedioic acid, isodecyl alcohol and alkenes, C'-C' products high boiling	November 5, 1992
P 89-1072	G Acrylic acid ester	January 7, 1991.
P 89-1093	G Halogenated alkane	November 20, 1990.
P 90-0002	G Disubstituted diheteropolycle, metal salt	September 19, 1990.
P 90-0260	G Fatty alcohol,alkoxylated	October 26, 1992.
P 90-0558	G (4-(1-Methylbutoxy)phenyl)hydrazine monohydrochloride	October 17, 1991.
P 91-0375	G Amphoteric polydimethylsiloxane	September 21, 1992.
P 91-0389	Zirconium IV 2,2 (Bis-2-Ti-Propenolato-Methyl) butanolato, Tris 2-Propenoato-0	October 7, 1992.
P 91-0481	G Ester of maleic modified, hydrocarbon rosin, fatty acid copolymer	November 9, 1992.
P 91-0765	G Polyfulfide polymer	September 29, 1992.
P 91-0819	G Polymethacrylate derivative with reactive blue 2	October 5, 1992.
P 91-0820	G Polymethacrylate derivative with reactive red 120	September 29, 1992.
P 91-0831	G Halogenated alkane	October 15, 1992.
P 91-1102	G Glycol borate	October 30, 1992.
P 91-1217	1,2-Cyclohexanedicarboxylic acid, mon(2-((2-methyl-1-oxo- 2-propanyl)oxy)ethyl)oxy)ethyl)ester	October 15, 1992.
P 91-1228	G Dihydroheterpolycycle	October 21, 1992.
P 91-1321	G Methyl polychloro aliphatic ketone	August 29, 1992.
P 91-1322	G Dimethyl-3-substituted heteromonocycle	August 29, 1992.
P 91-1323	G Dimethyl substituted heteromonocycle amine	August 29, 1992.
P 91-1416	G Tall oil functions, vegetable oil, dibasic acids modified amide reaction product with a polyhydric alocohol	November 4, 1992.
P 92-0001	Fatty acids, C_{8-18} and C_{18} unsat., methyl esters, reaction products with *N,N*-dimethyl amino propyl amine	October 14, 1992.
P 92-0002	1-Propanaminum, 3-amino-*N*-(carboxy methyl)-*N,N*-dimethyl-, *N*-(C_{8-18} and C_{18} unsat,) acyl, chlorides, inner salts	October 15, 1992.
P 92-0022	G Substituted guaiacol	October 12, 1992.
P 92-0028	G Phosphorothioic acid ester btranched amine salts	October 18, 1992.
P 92-0435	G Substituted naphthalene disulfonic acid	November 3, 1992.
P 92-0505	G Nitroaromatic ether	October 6, 1992.
P 92-0644	G Perrylene diimide	October 29, 1992.
P 92-0651	G Rosin, fumerated, polymer with pentaerythritol, a polyol and a polymer	October 18, 1992.
P 92-0671	2-Methylpropanoic acid, sodium salt	November 5, 1992.
P 92-0675	G Alkyd resin	October 6, 1992.
P 92-0688	G Quaternary ammonium salt of fluorinated alkiyl-aryl amide	September 6, 1992.
P 92-0689	G Aliphatic d-ester	October 19, 1992
P 92-0693	G Acrylic resin	July 14, 1992.
P 92-0778	G Acrylic polymer	October 6, 1992.
P 92-0785	G Alkylarylethoxylate derivative	September 28, 1992.
P 92-0794	G Water dispersible aliphatic isocyanate	September 30, 1992.
P 92-0856	G Modified styrene polymer	October 9, 1992.
P 92-0870	G Metharrylic acid copolymer salt	October 20, 1992
P 92-0871	G Methacrylic acid copolymer salt	October 13, 1992
P 92-0920	G Substituted phenyl azo phenyl dye	October 23, 1992.
P 92-0980	G Acrylated urethane	October 9, 1992.
P 92-0986	2-Propenoic acid,2-ethylhexyl ester, polymer with ethenylbenzene and 2-methyl-2-((-oxo-2-propenyl)amino)-1-propanesulfonic acid, 2,2'-azobis(2-methylbutanenitrile)-initiated	October 9, 1992.
P 92-1000	G Acrylic terpolymer	October 15, 1992
P 92-1022	G Modified acrylate polymer	October 1, 1992.
P 92-1028	G Acid functional polyurethane polyester	October 9, 1992.
P 92-1049	G Alkoxy terminated polyethylene glycol, aromatic and aliphate acid polyester	October 26, 1992
P 92-1057	G Unsaturated polyester resin	October 14, 1992
P 92-1058	G Isoindolone	October 5, 1992.

IV. 76 CHEMICAL SUBSTANCES FOR WHICH EPA HAS RECEIVED NOTICES OF COMMENCEMENT TO MANUFACTURE—Continued

PMN No.	Identity/Generic Name	Date of Commencement
P 92-1080	G Vinyltoluene methacrylate resin	October 31, 1992.
P 92-1090	G Perfluoroalkylethylacrylate copolymer	October 14, 1992.
P 92-1097	G Poly(acrylonitrile-co-styrene)	October 1, 1992.
P 92-1099	G Rubber modified polyamide	October 3, 1992.
P 92-1128	G Substituted azo triazine	October 14, 1992.
P 92-1130	G Acrylic resin	October 14, 1992.
P 92-1144	G Organic silicon polymer	November 9, 1992.
P 92-1150	G Acrylic copolymers	October 14, 1992.
P 92-1157	G Trisubstituted naphthalene sulfonic acid	October 20, 1992.
P 92-1165	G Trisubstituted naphthalene disulfonic acid	October 20, 1992.
P 92-1166	G Trisubstituted naphthalene disulfonic acid	October 20, 1992.
P 92-1167	G Trisubstituted naphthalene disulfonic acid	October 20, 1992.
P 92-1191	G Biphenol A polyether terephthalate	October 20, 1992.
P 92-1202	G Amino-functional alkoxysilane	November 7, 1992.
P 92-1207	Silsequioxanes, (3-(2-aminoethyl)amino)propyl Me, methoxy-terminated	October 21, 1992.
Y 91-0086	G Aromatic polyester polyether urethane	October 29, 1992.
Y 91-0188	G Aliphatic-aromatic polyurethane	October 26, 1992.
Y 92-0140	G Styrene-acrylic copolymer	October 9, 1992.
Y 92-0176	G Polymethacrylic acid-fish oil sulfonated sodium salt copolymer	October 29, 1992.
Y 92-0177	G Alkyd resin	October 7, 1992.
Y 92-0181	G 1Aliphatic polyester	October 19, 1992.
Y 92-0194	G Polyester polymer	October 22, 1992.
Y 92-0200	G Styreneacrylic copolymer, sodium salt	October 8, 1992.

V. 14 Premanufacture notices for which the period has been suspended.

PMN No.

P 89-1038 P 92-1055 P 92-1307 P 92-1308 P 92-1316 P 92-1324 P 92-1337 P 92-1345 P 92-1357 P 92-1369 P 92-1377 P 92-1378 P 92-1394 P 93-0083

[FR Doc. 92-31445 Filed 12-28-92; 8:45 am]

BILLING CODE 6560-50-F

federal register

Tuesday
December 29, 1992

Part IX

Department of Housing and Urban Development

Office of the Assistant Secretary for Housing
Federal Housing Commissioner

Section 8 Assistance Under the Loan Management Set-Aside (LMSA) Program; Notice of Fund Availability

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

[Docket No. N-92-3534; FR-3356-N-01]

Section 8 Assistance under the Loan Management Set-Aside (LMSA) Program; Fund Availability

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice of fund availability for fiscal year 1993.

SUMMARY: This Notice of Fund Availability (NOFA) announces the availability of up to $202 million in section 8 funds for Loan Management Set-Aside (LMSA) assistance. In the body of this document is information concerning the following:

(a) The purpose of the NOFA and information regarding eligibility, available LMSA assistance, and selection criteria;

(b) Application processing, including how to apply and how selections will be made; and

(c) A checklist of steps and exhibits involved in the application process.

DATES: Applications for consideration under the General LMSA Funding procedures are due on or before February 12, 1993. If submitted on the application deadline date, the completed application package must be received by 4 p.m. (local time) in the HUD Field Office having jurisdiction over the applicant project. The above-stated application deadline is firm as to date and hour. In the interest of fairness to all competing applicants, the Department will treat as ineligible for consideration any application that is received after the deadline, except for applications made under Emergency procedures described below. Applicants should take this practice into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by unanticipated delays or other delivery-related problems. It is not sufficient for the application to bear a postage date with the submission time period. Applications must be submitted in an envelope, package, or binding which includes all parts of the application in their entirety as they are described in the Application Checklist Section of this NOFA. Applications submitted by facsimile are not acceptable.

FOR FURTHER INFORMATION CONTACT: The Loan Management Branch in the local HUD Field Office having jurisdiction over the project(s) in question for application materials and project-specific guidance. Policy questions of a general nature may be referred to William Schick, Chief, Program Support Branch, Office of Multifamily Housing Management, Department of Housing and Urban Development, room 6164, 451 Seventh Street, SW., Washington, DC 20410. Telephone (202) 708-2654. TDD number (202) 708-4594. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

Information Collection Requirements

The Office of Management and Budget has approved the Loan Management Set-Aside Program under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520) and has assigned it OMB control number 2502-0407.

I. Purpose and Substantive Description

(a) Authority

The Loan Management Set-Aside ("LMSA") program provides special allocations of Housing Assistance Payments ("HAP") under section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f. Title 24 of the Code of Federal Regulations, part 886, subpart A sets forth rules for administration of the LMSA program. Matters addressed in the LMSA regulation include: (1) Application contents (§ 886.105), (2) requirements for HUD approval of applications (§ 886.107), (3) owner responsibilities under the program (§ 886.119), and (4) rules governing Federal preferences in the selection of tenants (§ 886.132).

(b) Purpose

The primary purpose of the LMSA program is to reduce claims on the Department's insurance fund by aiding those FHA-insured or Secretary-held projects with presently or potentially serious financial difficulties. First priority is given to insured projects with presently or potentially serious financial problems which are likely to result in a claim on the insurance fund in the near future. To the extent that resources remain available, assistance also may be provided to HUD-Held and 202 projects with present or potentially serious financial problems which, on the basis of financial and/or management analysis, appear to have a high probability of producing within approximately the next five years either a claim on the insurance fund or a lost of direct loan investment in the case of a 202 loan.

(c) Allocation Amounts

This Notice of Funding Availability (NOFA) announces availability of up to $202 million from Fiscal Year 1993 section 8 LMSA program funds for purposes of avoiding claims on the Department's insurance fund. Pursuant to this Notice, HUD is accepting applications for assistance under the LMSA program from owners of FHA-insured or Secretary-held multifamily projects with presently or potentially serious financial difficulties. All LMSA assistance awarded from these Fiscal Year 1993 program funds will have a term of five years, with no contractual provision for renewal of the contract at the end of the five-year term. This NOFA does not govern noncompetitive assistance awards under the section 8 LMSA program pursuant to specific regulatory authority (e.g., LMSA assistance as a prepayment plan of action incentive under § 248.231(e) or such assistance under § 219.325(b)(4) to alleviate the effect of rent increases resulting from debt service on capital improvement loans).

(d) Eligibility.

Projects eligible for LMSA assistance include: (1) any existing subsidized or unsubsidized multifamily residential project subject to a mortgage insured under any section of the National Housing Act; (2) any such project subject to a mortgage that has been assigned to the Secretary; (3) any such mortgage acquired by the Secretary and thereafter sold under a Secretary-held purchase money mortgage; and (4) a project for the elderly financed under section 202 of the Housing Act of 1959 (except projects receiving assistance under 24 CFR part 885). References to HUD-Held or Secretary-Held projects throughout this Notice include any project which meets one of the descriptions in (2)-(4) above.

Owners meeting these criteria who applied for assistance in a prior year but did not receive the desired number of units are eligible to reapply under this NOFA. The FY 1993 application must contain current information and conform to all requirements outlined in this notice.

(e) Selection Criteria/Ranking Factors

(1) *Application Review:* Each application for assistance under the LMSA program will be reviewed by the HUD Field Office having jurisdiction over the project in question. Within 10 days of receipt of each application involving more than 12 units, the HUD Field Office must notify the chief executive of the unit of general local

government in which the project is located and provide the opportunity for non-binding comments on the application (see 24 CFR 886.106 and 24 CFR part 791). These comments will be considered by the Field Office in determining whether the application meets regulatory approval requirements in § 886.107 and described in detail in HUD Handbook 4350.2 REV-1. The Field Office's review of the application will be based on the following determinations:

(i.) HUD's Fair Housing requirements (24 CFR 886.107(a) and 886.114) are met;

(ii.) The HUD-approved unit rents are approvable within the limitations described in § 886.110, which are based on HUD's Fair Market Rents;

(iii.) The residential units meet the housing quality standards set forth in § 886.113, except for such variations as HUD may approve;

(iv.) A significant number of residents, or potential residents in the case of projects having a vacancy rate over 10 percent, are eligible for and in need of section 8 assistance;

(v.) The proposed section 8 assistance would not affect other HUD-related multifamily housing within the same neighborhood in a substantially adverse manner. Examples of such adverse effects are substantial move-outs from nearby HUD-related multifamily housing, or substantial diversion of prospective applicants from such projects to the subject project;

(vi.) The project has serious current financial problems, which are likely to result in a claim on the insurance fund in the near future, or the project has potentially serious financial problems which, on the basis of financial and/or management analysis, appear to have a high probability of producing a claim on the insurance fund within approximately the next five years;

(vii.) The proposed section 8 assistance for the project would solve an identifiable problem and provide a reasonable assurance of long-term project viability. A determination of long-term viability must be based on the following findings:

(A) The project is not subject to any serious problems that are non-economic in nature. Examples of such problems are poor location, structural deficiencies or disinterested ownership;

(B) The owner is in substantial compliance with the Regulatory Agreement. Owners have not or are not diverting project funds for personal use. No dividends have been paid during any period of financial difficulty;

(C) The current management agent has been approved by HUD and is in substantial compliance with the management agreement. Financial records are adequately kept. Occupancy requirements are being met. Marketing and maintenance programs are being carried out in an adequate manner, based upon available financial resources;

(D) The project's problems are primarily the result of factors beyond the control of the present ownership and management;

(E) The major problems are traceable to an inadequate cash flow;

(F) The proposed section 8 assistance would solve the cash flow problem by: (1) Making it possible to grant needed rent increases; and (2) reducing turnover, vacancies and collection losses;

(G) The owner's plan for remedying any deferred maintenance, financial problems, or other problems is realistic and achievable; there is positive evidence that the owner will carry out the plan. Examples of such evidence are the owner's past performance in correcting problems and, in the case of profit-motivated owners, any cash contributions made to correct project problems.

(viii.) For projects with a history of financial default, financial difficulties or deferred maintenance, any plan for remedying defaulted or deferred obligations submitted pursuant to § 886.105(d) must be adequate in HUD's determination.

In its review of an application, the HUD Field Office will consider recent physical inspections, management reviews, and tenant complaints and comments. If there is no report of a detailed HUD physical inspection conducted by either the mortgagee, HUD, or a third-party contractor of HUD dated within one year of the date an application for LMSA assistance is received in the reviewing office and containing a description and estimated cost of required repairs, the HUD Field Office will schedule a physical inspection and Housing Quality Standards (HQS) inspection in conjunction with its review and approval of the application for LMSA assistance. Execution of a subsidy contract in such case will be contingent upon satisfactory modification of the owner's plan to include solutions for all additional problems discovered in the scheduled review(s).

After HUD Field and Regional Offices, as appropriate, have determined which applications meet LMSA program requirements, the projects which are both eligible for, and in need of, new or additional LMSA assistance shall be reported to HUD Headquarters for further consideration under the competitive selection procedures outlined in this Notice. Projects awarded subsidy from Fiscal Year 1993 LMSA program funds shall be selected in accordance with "general" or "emergency" procedures as described below. If an application can be approved only on certain conditions, the HUD Field Office will notify the owner of the conditions and specify a time limit by which those conditions must be met. A project recommended for a conditional approval may be reported to Headquarters by the HUD Field Office for further processing under procedures set forth below; however, execution of an LMSA contract for any units which may be allocated to the project in the Headquarters process, will be contingent upon the owner's compliance with the approval conditions. If the HUD Field Office concludes that an application will not meet LMSA program requirements, processing of the application is discontinued, and the applicant will be notified by the Field Office as soon as possible of the reasons for disapproval.

(2) *General LMSA Funding Round:*

(i.) Annual needs survey:

Fiscal Year 1993 general funding awards will be made from projects recommended by HUD Field Offices to HUD Headquarters in response to the Fiscal Year 1993 annual needs survey. The Field Offices' needs survey responses will be forwarded to HUD Headquarters after the due date announced in this Notice for program applications. HUD Field Office staff shall determine and report to Headquarters the minimum number of LMSA units needed to cure each project's vacancy and cash flow problems, subject to limitations as described below.

(ii.) Limitations on Units:

(A) An allocation may not exceed the difference between total units in the project and the number of units already assisted under project-based tenant subsidy contracts (project-based section 8 subprograms, Rent Supplement and Rental Assistance Payments).

(B) For both subsidized and unsubsidized projects, if the Field Office's recommendation exceeds the sum of vacant units plus the number of tenants paying more than 40 percent of income for rent, the respective HUD Regional Office must review and concur in the number of LMSA units recommended.

(C) Total project-based section 8 assistance for projects with unsubsidized mortgages is limited to 40 percent of total units in the project. If

the respective HUD Field Office determines that a project with an unsubsidized mortgage needs section 8 assistance above the 40 percent level, or if the project was developed as a retirement service center, a recommendation by the Field Office will be subject to further review by the Regional Office and the Headquarters Desk Officer in a process similar to the review of applications submitted under the emergency procedures described in paragraph (3) below. In all such cases, the Field Office's justification for LMSA units must document that project management has an aggressive and workable plan in place for leasing the market rate units in the project. A project is considered unsubsidized for the purpose of LMSA funding selections if the HUD mortgage is unsubsidized. The definition of subsidized project for purposes of section 203 of the Housing and Community Development Amendments of 1978, which includes projects with over 50 percent of total units assisted under certain section 8 subprograms, pertains to management and disposition of projects which have been acquired by HUD and is not applicable to projects eligible for LMSA assistance.

(iii.) Determination of Priority Category:

HUD Field Offices will include in their needs survey reports, data needed by HUD Headquarters to classify approved projects into six priority categories and to establish a funding score for each project.

Fiscal Year 1993 LMSA funds will be allocated in the following order of priority:

(A) Insured projects with presently serious financial problems likely to result in a mortgage insurance claim in the near future;

(B) Insured projects with potentially serious financial problems which appear to have a high probability of producing a mortgage insurance claim within approximately the next five years;

(C) HUD-held and section 202 projects with presently serious financial problems; and

(D) HUD-held and section 202 projects with potentially serious financial problems.

The Department of Housing and Urban Development never intended to provide relief in the form of Loan Management Set Aside Assistance for Retirement Service Centers (RESC) or formerly coinsured projects. However, it is recognized that if LMSA assistance could be made available for those types of projects some additional claims on the FHA Fund might be avoided. Accordingly, the following priority categories of eligible projects are included in FY 1993.

(E) Insured Retirement Service Centers and insured formerly coinsured projects (i.e., projects whose mortgages have been converted from coinsurance to full insurance), with presently serious financial problems likely to result in a mortgage insurance claim in the near future.

(F) HUD-held Retirement Service Centers and HUD-held formerly coinsured projects with presently serious financial problems.

(iv.) Determining the "presently serious" classification:

For purposes of determining classification, HUD will consider a project to have "presently serious financial problems" if both of the following two financial ratios are less than zero:

Income/Expense Ratio, defined as follows:
(Net Income or Loss Before Depreciation LESS Annual Debt Service and Reserve Payments) Times 100
Divided by:
Total Annual Cost of Operating the Project

and,

Ratio of Surplus Cash (or Deficiency) to Monthly Mortgage Payment, defined as follows:
Total Cash LESS Total Current Obligations
Divided by:
Total Monthly Mortgage Payment

A negative income/expense ratio occurs when there was a net loss during the period or when net income before deprecation was less than annual debt service plus reserve payments. The project did not generate sufficient cash flow from operations in the previous year to cover its cash requirements, suggesting cash flow difficulties which were possibly severe and, if left unresolved, are likely to result in financial problems in the current year. Comparison to the total cost of operating the project provides an indication of the seriousness of any negative cash flow, since the size of the problem generally varies directly with the absolute value of the ratio.

The second ratio approximates the project's Mortgage Payment Coverage Ratio and is negative when there is a cash deficiency, i.e., the surplus cash calculation is less than zero. A cash deficiency means that cash available to the project at the end of the period, including any subsidy vouchers due for the period, is less than the amount needed to cover current obligations. A cash deficiency points to a severe liquidity problem since the project cannot even meet its past obligations without some form of relief. Calculation of the ratio of surplus cash (deficiency) to the total mortgage payment provides an indication of the project's ability to make the next mortgage payment after past obligations are met, without depending upon the next month's rent collections.

The two ratios defined above will be calculated using financial data contained in the project's annual audited financial statement for calendar year 1992, except for projects with fiscal year end dates later than December 31, 1992 where the most recent annual audited financial statement for a fiscal year period ending in 1991 or later will be used.

A result of zero or less on the two ratios suggests that the project has a present financial problem. These ratios were selected because they provide a straightforward means of identifying projects with cash flow difficulties. Projects with either ratio in the positive range may be added to Category A for insured projects or Category C for HUD-held projects based on written justifications by HUD Field Offices documenting appropriate circumstances. For example, a substantial increase in vacancies in recent months may warrant elevating the project's priority category. The justifications will be reviewed by Headquarters staff in the Office of Multifamily Housing Management, who will resolve any issues with the respective HUD Regional and Field Offices and approve, or disapprove, the change in priority.

(v.) Determination of Ranking Within Priority Category:

The number of projects which can be funded from Fiscal Year 1993 resources will depend upon the units and budget authority designated in Field Office recommendations. If LMSA program funds are available to fund some, but not all of the projects in a given priority category (after funding all projects in higher priority categories), any project selections from the given category will follow from a ranking of projects within that category using a funding score. A maximum score of 115 points (110 points for HUD-held projects) may be accumulated on the basis of the following project characteristics and maximum point potentials:

(A) Occupancy—25 points.
Calculation: No. of occupied units Divided by Total units in the project. Lower values yield higher points.

(B) Owner advances or contributions since October 1, 1990—25 points.
Calculation: Total of owner advances or contributions during the period Divided

by Total Units in the project. Larger values yield higher points.

(C) Tenants paying in excess of 40 percent of their income for rent—15 points. Calculation: No. of units occupied by tenants paying over 40 percent of their income for rent Divided by Total units in the project. Larger values yield higher points.

(D) Income/Expense Ratio—15 points. Calculation: As defined above. Smaller values yield higher points.

(E) Ratio of Surplus Cash (Deficiency) to Total Monthly Mortgage Payment—15 points. Calculation: As defined above. Smaller values yield higher points.

(F) For HUD-insured projects only, Mortgage balance per dollar of additional subsidy—5 points. Calculation: Mortgage principal balance Divided By Proposed LMSA annual contract authority. Larger values yield higher points.

(G) Resident Initiatives—15 points. Evidence in the form of a contract, or other written commitment, to transfer title to the property to a resident organization, cooperative association, non-profit entity, public body including an instrumentality thereof, public housing agency or Indian Housing Authority, for the purpose of resident ownership of the project.

(vi.) LMSA/Flexible Subsidy Program Coordination

Pursuant to section 405(f) of the Housing and Community Development Act of 1992 (Pub. L. 102–550), assistance under this NOFA will be coordinated with assistance made available under the forthcoming NOFA for the Flexible Subsidy Program.

(vii.) Funding for Selected Projects:

If Headquarters confirms that all program requirements have been met and selects the project for funding, the number of additional section 8 units allocated will be equal to the number of LMSA units recommended by the HUD Field Office in accordance with limitations previously set forth in paragraph (2)(ii).

If approved, notification of a general funding award will be made through the HUD Field Office. If an application can be approved only on certain conditions, HUD will notify the owner of the conditions and specify a time limit by which those conditions must be met. Disapproved applicants will also be notified with a statement of the grounds for disapproval.

(3) *Emergency LMSA Funding:* Up to five percent of the LMSA funds announced in this Notice may be made available to fund projects recommended to HUD Headquarters by the respective HUD Field Office subsequent to the Annual Needs Survey reporting deadline for the general funding round. After this deadline, only emergency requests will be accepted. In all cases governed by these emergency procedures, consideration will be given to the extent that sufficient resources are available.

To qualify for emergency LMSA assistance, the project must be insured with presently serious financial problems (as described in paragraph (2)(iii) above), and must meet one of the conditions listed below:

(i.) The applications (or corrections to the applications) were received too late by the Field Office to be included in the Annual Needs Survey.

(ii.) Projects which were recommended by the Field Office during this general funding round, but were not approved in Headquarters or did not score a sufficient number of points in the ranking process.

All application and Field Office review procedures pertaining to the LMSA program will be followed for emergency recommendations. In addition, an emergency recommendation must have written concurrence from the Director of Housing in the appropriate HUD Regional Office. HUD Field Offices are required to demonstrate that provision of the proposed LMSA units is likely to avert a mortgage default or assignment in the near future, and the request to HUD Headquarters will explain why funds are needed on an emergency basis. Headquarters will not consider any emergency funding request which does not have written Regional Office concurrence.

HUD Headquarters will review Field Office justifications and will determine whether provision of LMSA units is an appropriate response to the circumstances documented by HUD Field staff. If an emergency request is approved, notification of the subsidy award will be made through the HUD Field Office.

II. Application Process

(a) Completed applications must be submitted to the HUD Field Office having jurisdiction over the multifamily property for which assistance is requested. Application kits containing copies of required HUD forms and Notices are available from HUD Field Offices.

(b) For consideration under the General LMSA Funding procedures set forth previously in this Notice, a completed LMSA application must be submitted within 45 days from the date of publication of this Notice. If submitted on the application deadline date, the completed application package must be received by the deadline cited previously in this NOFA.

Applications received after the due date and time specified in this NOFA will be considered for LMSA assistance only if the Secretary determines that such assistance is needed immediately in response to emergency circumstances and only to the extent that sufficient Fiscal Year 1993 LMSA budget authority remains to satisfy the subsidy requirement.

III. Checklist of Application Submission Requirements

(a) LMSA applications must meet the requirements set forth in § 886.105 of the LMSA regulations and HUD Handbook 4350.2 REV–1 (6/92). All requirements have been incorporated into form HUD–52530, Application for Loan Management Set-Aside, Section 8 Program, and the ancillary forms cited therein. The application form is reproduced in this NOFA. Regulatory requirements are cited below.

(1) Information on gross income, family size and amount of rent paid to the project by families currently in residence;

(2) Information on vacancies and turnover;

(3) Total number of units by unit size (by bedroom count) for which section 8 assistance is requested;

(4) Affirmative Fair Housing Marketing Plan on Form HUD–935.2.

(5) Estimate of effect of the availability of the requested section 8 LMSA assistance on marketability of units in the project;

(6) For projects having a history of financial default, financial difficulties or deferred maintenance, a plan and a schedule for remedying such defaulted or deferred obligations. To be credible, the owner must clearly state each problem being addressed and enumerate proposed actions for curing each problem. Proposed actions must be presented in trackable form, with the specific dates that each action would begin and end if the requested LMSA subsidy were awarded.

(7) A Statement of the Sources and Uses of all financial resources needed to complete the plan, including any cash contributions from the owner.

(8) Since HUD's approval must be based in part on evidence that the plan will be carried out, the owner must certify that the plan will be executed as presented and that sources of funds identified in the plan, other than the LMSA assistance applied for, will be available by the scheduled dates (any

conditions must be stated, e.g. "subject to HUD approval of Flexible Subsidy").

(9) The owner must also certify that every effort has been made to secure funding from all possible funding sources; supporting documentation of those efforts must be attached.

(10) The owner must agree to modify the plan, prior to execution of an LMSA contract, for the purpose of including any changes which the HUD Field Office determines are necessary to address problems not identified or inadequately addressed in the plan, as indicated by recent HUD physical inspections, management reviews or records of tenant complaints and comments, or by HUD physical inspections and/or management reviews which may be scheduled in conjunction with review of the LMSA application. Changes required by HUD may also include requirements for carrying out Resident Initiatives activities where it is determined that it could be beneficial to the management of the project.

(11) All documentation required by HUD Notice 90–17, Combining Low-Income Housing Tax Credits (LIHTC) with HUD Programs, and by the Notice of administrative guidelines to be applied to assistance programs of the Office of Housing published on April 9, 1991 (56 FR 14436). Requirements may be affected by section 911 of the Housing and Community Development Act of 1992, Pub. L. 102–550. The local HUD Field Office should be contacted for the latest documentation requirements.

(12) Form HUD–2880, Applicant/Recipient Disclosure/Update Report, as required under subpart C of 24 CFR part 12, Accountability in the Provision of HUD Assistance.

(13) Disclosures and verification requirements for Social Security and Employer Identification Numbers, as required by 24 CFR part 750.

(14) Certification and disclosure according to HUD Notice H–90–27 entitled "OMB's Guidance on New Government-wide Restrictions on Lobbying" issued April 13, 1990.

(15) Form HUD–2530, Previous Participation Certificate(s) for all principals requiring clearance under those procedures.

(16) A certification stating that the owner will comply with the provisions of the Fair Housing Act, title VI of the Civil Rights Act of 1964, Executive Orders 11063 and 11246, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, section 3 of the Housing and Urban Development Act of 1968, as well as with all regulations issued pursuant to these authorities.

(17) Certification that the applicant will comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (URA), implementing regulations at 49 CFR Part 24, and HUD Handbook 1378, Tenant Assistance, Relocation and Real Property Acquisition.

IV. Corrections to Deficient Applications

(a) After the submission date for applications, no owner—initiated changes to application documents will be accepted, except for correction of technical deficiencies which do not alter the substance of the application materials. Examples include a missing certification or missing signature, and clarification of details included in the application as requested by HUD as a part of its review. (Reasonable changes to the owner's corrective plan resulting from negotiations with the HUD Field Office during the application review period are not governed by this section.)

(b) HUD will notify an applicant in writing, shortly after the application response deadline, of any technical deficiencies in the application. The applicant must submit corrections to the Field Office within 14 calendar days from the date of HUD's letter notifying the applicant of any such deficiency. The applicant must submit the corrected document(s) with a separate written summary of all changes from the original submission.

V. Other Matters

(a) National Environmental Policy Act of 1969

HUD regulations in 24 CFR part 50, implementing Section 102(2)(C) of the National Environmental Policy Act of 1969, contain categorical exclusions from their requirements for the actions, activities, and programs specified in § 50.20. Since the activities set forth in this Notice are within the exclusion set forth in § 50.20(d), no environmental assessment is required, and no environmental finding has been prepared.

(b) Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that this NOFA does not have "federalism implications" because it does not have substantial direct effects on the States (including their political subdivisions), or on the distribution of power and responsibilities among the various levels of government.

(c) Executive Order 12606, the Family

The General Counsel, as the Designated Official under Executive Order 12606, the Family, has determined that this NOFA does not have potential significant impact on family, formation, maintenance, and general well-being.

(d) Section 13 of the Department of Housing and Urban Development Act contains two provisions dealing with efforts to influence HUD's decisions with respect to financial assistance. The first imposes disclosure requirements on those who are typically involved in these efforts—those who pay others to influence the award of assistance or the taking of a management action by the Department and those who are paid to provide the influence. The second restricts the payment of fees to those who are paid to influence the award of HUD assistance, if the fees are tied to the number of housing units received or are based on the amount of assistance received, or if they are contingent upon the receipt of assistance.

Section 13 was implemented by final rule published in the **Federal Register** on May 17, 1991 (56 FR 22912). If readers are involved in any efforts to influence the Department in these ways, they are urged to read the final rule, particularly the examples contained in Appendix A of the rule.

Any questions regarding the rule should be directed to the Office of Ethics, room 2158, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. Telephone: (202) 708–3815; TDD: (202) 708–1112. (These are not toll-free numbers.) Forms necessary for compliance with the rule may be obtained from the local HUD office.

(e) HUD's regulation implementing section 103 of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3537a) was published May 13, 1991 (56 FR 22088) and became effective on June 12, 1991. That regulation, codified as 24 CFR part 4, applies to the funding competition announced today. The requirements of the rule continue to apply until the announcement of the selection of successful applicants.

HUD employees involved in the review of applications and in the making of funding decisions are restrained by part 4 from providing advance information to any person (other than an authorized employee of HUD) concerning funding decisions, or from otherwise giving any applicant an unfair competitive advantage. Persons who apply for assistance in this competition should confine their

inquiries to the subject areas permitted under 24 CFR part 4.

Applicants who have questions should contact the HUD Office of Ethics (202) 708–3815. (This is not a toll-free number.) The Office of Ethics can provide information of a general nature to HUD employees, as well. However, a HUD employee who has specific program questions, such as whether particular subject matter can be discussed with persons outside the Department, should contact his or her Regional or Field Office Counsel, or Headquarters counsel for the program to which the question pertains.

(f) Applicant/Recipient Disclosures; Subsidy-Layering: HUD Reform Act

Documentation and public access. HUD will ensure that documentation and other information regarding each application submitted pursuant to this NOFA are sufficient to indicate the basis upon which assistance was provided or denied. This material, including any letters of support, will be made available for public inspection for a five-year period beginning not less than 30 days after the award of the assistance. Material will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15. In addition, HUD will include the recipients of assistance pursuant to this NOFA in its quarterly **Federal Register** notice of all recipients of HUD assistance awarded on a competitive basis. (See 24 CFR 12.14(a) and 12.16(b), and the notice published in the **Federal Register** on January 16, 1992 (57 FR 1942), for further information on these requirements.)

Disclosures. HUD will make available to the public for five years all applicant disclosure reports (HUD Form 2880) submitted in connection with this NOFA. Update reports (also Form 2880) will be made available along with the applicant disclosure reports, but in no case for a period generally less than three years. All reports—both applicant disclosures and updates—will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15. (See 24 CFR part 15, subpart C, and the notice published in the **Federal Register** on January 16, 1992 (57 FR 1942), for further information on these disclosure requirements.)

Subsidy-layering determinations. 24 CFR 12.52 requires HUD to certify that the amount of HUD assistance is not more than is necessary to make the assisted activity feasible after taking account of other government assistance. HUD will make the decision with respect to each certification available to the public free of charge, for a three-year period. (See the notice published in the **Federal Register** on January 16, 1992 (57 FR 1942) for further information on requesting these decisions.) Additional information about applications, HUD certifications, and assistance adjustments, both before assistance is provided or subsequently, are to be made under the Freedom of Information Act (24 CFR part 15).

Authority: Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f.

Dated: December 3, 1992.

Arthur J. Hill,

Assistant Secretary for Housing-Federal Housing Commissioner.

BILLING CODE 4210-27-C

Application for Loan Management Set-Aside

Section 8 Program

U.S. Department of Housing and Urban Development
Office of Housing
Federal Housing Commissioner

OMB Approval No 2502-0407 (exp 11/30/94)

Public Reporting Burden for this collection of information is estimated to average 20 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 Reports Management Officer - Office of Information Policies and Systems U S Department of Housing and Urban Development, Washington D C 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0407) Washington, D C 20503. Do not send this completed form to either of these addressees

Privacy Act Notice: The Department of Housing and Urban Development (HUD) is authorized to collect this information by Section 104(d) of the Housing and Community Development Act of 1974 as amended The Housing and Community Development Act of 1987 42 U S C. 3543 authorizes HUD to collect the Social Security Number (SSN) The information you provide will enable HUD to use SSN's to help decrease the incidence of fraud, waste and abuse in specific HUD programs HUD may disclose certain information to Federal, State, and local agencies when relevant to civil criminal, or regulatory investigations and prosecutions It will not be otherwise disclosed or released outside of HUD except as required and permitted by law. Failure to provide this information, including the SSN, will result in denial of further consideration of the application for benefits

Attach the following to this application:

- ☐ **Affirmative Fair Housing Marketing Plan**, form HUD 935.2
- ☐ **Budget Worksheet, Income & Expenses Projections,** form HUD 92547A or HUD-approved equivalent (Section I of this application)
- ☐ **Funding Sources Documentation** (Section J of this application)
- ☐ **Applicant/Recipient Disclosure/Update Report**, form HUD-2880 HUD considers the aggregate assistance from the Department and all other sources that are necessary to ensure the feasibility of the assistance.
- ☐ **Previous Participation Certification,** form HUD 2530 The past performance of all principals associated with the project for which application for Section 8 Loan Management Set-Aside is being made is reviewed to determine whether participation in additional activity should be allowed.
- ☐ **"Certification for Contracts, Grants, Loans, and Cooperative Agreements"** All applicants for assistance greater than $100,000 must attach this certification. Recipients of Section 8 Loan Management Set-Aside assistance are prohibited by Section 319 of 31 USC 1352 — the "Byrd Amendment" — and 24CFR 87 from using appropriated funds for lobbying the Executive or Legislative branches of the Federal Government.
- ☐ **Disclosure of Lobbying Activities, Standard Form LLL** if non-appropriated funds are utilized

Owner(s) Name and Full Address	Social Security Number(s)
	Employer Identification Number
Management Agent Name and Address	Project Name
	Project Number

Owner Certifications

I agree to comply with the provisions of the Fair Housing Act, title VI of the Civil Rights Act of 1964, Executive Orders 11063 and 11246, section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Age Discrimination Act of 1975, section 3 of the Housing and Urban Development Act of 1968, as well as with all regulations issued pursuant to these authorities.

I agree to comply with the governmentwide rule implementing the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA), as amended (49 CFR 24).

I agree to carry out the plan described in this application and any modifications thereto as required by the HUD Field Office.

I hereby certify that all the information stated herein, as well as any information provided in the accompaniment herewith, is true and accurate. **Warning:** HUD will prosecute false claims and statements. Conviction may result in criminal and/or civil penalties. (18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802)

Owner Signature (or authorized agent). Date

X

Note: If additional space is needed on any section, attach separate page.

A. Project Description (check one)

- ☐ Existing subsidized or unsubsidized multifamily residential project subject to a mortgage insured under any section of the National Housing Act.
- ☐ Any such project subject to a mortgage that has been assigned to the Secretary.
- ☐ Any such project acquired by the Secretary and thereafter sold under a Secretary-held purchase money mortgage.
- ☐ A project for the elderly financed under section 202 of the Housing Act of 1959 (except projects receiving assistance under 24 CFR part 885).

B. Family Income and Size Per Unit for the Project

Provide the information below for all units in the project. For vacant units, enter "vacant" under the column marked "Family Size." For subsidized tenants, obtain monthly family income from last certification. For unsubsidized tenants, use income reported at move-in unless more recent information is available **A typewritten or computer-generated equivalent is acceptable for this section.**

Unit Number	Unit Size	Gross Monthly Family Income	Family Size	Unit Rent	Total Monthly Tenant Payment

C. Summary of Gross Family Income Provide the number of eligible individuals or families whose monthly rent is:

30—39 percent of gross monthly income _____

40—49 percent of gross monthly income _____

50 percent or more of gross monthly income _____

D. Unit Marketing

1 Is there a project waiting list for very low-income residents eligible for Section 8 assistance? If so, provide the number of eligible individuals or families on the waiting list by requested unit size. If not, explain how the units will be marketed.

2. For unsubsidized projects requesting LMSA for vacant units, describe past efforts to lease market rate units.

3. How many tenants use vouchers / certificates?

E. Information on Vacancies and Turnover

Provide move-in, move-out and end-of-month vacancy information for the past 24 months.

	Month/Yr	Number of Move-in's	Number of Move-out's	Number of Vacancies		Month/Yr	Number of Move-in's	Number of Move-out's	Number of Vacancies
1					13				
2					14				
3					15				
4					16				
5					17				
6					18				
7					19				
8					20				
9					21				
10					22				
11					23				
12					24				

F. Units Requested for Section 8 Assistance

Unit rent should reflect any planned rent increases.

Bedroom Size	Number of Units Requested	Unit Rent
0 bedroom		
1 bedroom		
2 bedroom		
3 bedroom		
4 bedroom		
Other (specify)		

G. Project's Problem Statement and Proposed Action to Cure the Problem

State the type of problems the project is experiencing (e.g. financial difficulties, deferred maintenance, high vacancy rate) and proposed actions for curing the problem.

H. Tracking of Management Improvement Plan

Provide below each management goal necessary to correct the problems of the project (e.g. reduce vacancies to less than 5 percent). Indicate a target date when each goal will be completed.

Goal No.	Description of Management Goal	Target Date

I. Proposed Budget With the Use of LMSA Funds An operating budget must be submitted with this application. Attach Budget Worksheet, Income & Expense Projections, form HUD 92547A, or other HUD-approved owner-generated form. Include in account 5121 the contract rent potential for any LMSA units under contract plus units for which application is made. Also indicate the use of these funds under the expense categories.

J. Statement of Sources and Uses Describe the financial resources that will be available to complete the plan. Identify the uses planned for the resources. Specify any conditions to receipt of identified resources.

Sources	Amount	Date Available	Conditions to Receipt of Identified Resources
Owner Contributions			
Requested LMSA			
Low Income Housing Tax Credit Proceeds (LIHTC)*			
Bank Financing			
Other Types of Funding (state source; be specific)			
Total Sources			
Uses			
Physical Improvements to Project			
Cure Financial Difficulties			
Other Uses (state type)			
Total Uses			

* If LIHTC's are involved the Sources and Uses format may be different. Requirements are under revision as a result of the Housing & Community Development Act of 1992. Contact the HUD Field Office for the latest instructions.

K. Describe efforts to secure funding from all possible sources. Attach any supporting documentation such as correspondence or similar records.

[FR Doc. 92-31429 Filed 12-28-92; 8:45 am]
BILLING CODE 4210-27-M

federal register

Tuesday
December 29, 1992

Part X

Department of Housing and Urban Development

24 CFR Part 2003

Privacy Act of 1974; Implementation; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Inspector General

24 CFR Part 2003

[Docket No. R-92-1611; FR-3259-F-02]

RIN 2508-AA07

Implementation of the Privacy Act of 1974

AGENCY: Office of the Inspector General, HUD.

ACTION: Final rule.

SUMMARY: This final rule implements the requirements of the Privacy Act of 1974 in the Office of the Inspector General by creating a new part 2003 to 24 CFR chapter XII. It supplements the Department's existing Privacy Act regulations at 24 CFR part 16.

DATES: Effective date: January 28, 1993.

FOR FURTHER INFORMATION CONTACT: Philip A. Kesaris, Deputy Assistant General Counsel, Inspector General and Administrative Proceedings Division, Office of General Counsel, room 10251, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410, (202) 708-2350. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION:

Background

The Inspector General Act of 1978 (5 U.S.C. App.) was enacted to create independent and objective units to perform various investigative and monitoring functions in several Executive agencies of the Federal Government, including the Department of Housing and Urban Development (HUD). This Act confers broad authority upon the Inspector General to conduct independent investigations and audits. Consistent with its statutory independence, the Inspector General of HUD has adopted separate regulations at 24 CFR chapter XII which are applicable only to the Office of Inspector General (OIG). Currently, Chapter XII concerns such OIG matters as organization, functions, and delegations of authority (part 2000), availability of information to the public (part 2002), and production in response to subpoenas or demands of courts or other authorities (part 2004). See 57 FR 2225, January 21, 1992.

On August 27, 1992 (57 FR 38804), the Department published a proposed rule to implement, at 24 CFR part 2003, the requirements of the Privacy Act of 1974 (5 U.S.C. 552a) in the OIG. Interested parties were given 60 days, until October 26, 1992, to comment on the proposed rule. No comments were received on the proposed rule, and the text of this final rule is the same as that of the proposed rule.

This new part 2003 to chapter XII of title 24 generally incorporates the Department's existing Privacy Act regulations (24 CFR part 16) with some modifications of a mostly technical nature.

However, §§ 2003.8 (General Exemptions) and 2003.9 (Specific Exemptions) of this rule constitute a significant revision to the OIG's exemption regulations found at 24 CFR 16.14 and 16.15. Sections 2003.8 and 2003.9 clarify the scope of the exemptions applicable to the OIG system of records entitled "Investigative Files of the Office of Inspector General" by providing reasons for exemptions from particular subsections of the Privacy Act that are more detailed than those found at 24 CFR 16.14 and 16.15. In addition, §§ 2003.8 and 2003.9 set forth the exemptions that are applicable to two new OIG systems of records, "Hotline Complaint Files of the Office of Inspector General" and "Name Indices System of the Office of Inspector General."

Other Matters

Environmental Review

In accordance with 40 CFR 1508.4 of the regulations of the Council on Environmental Quality and 24 CFR 50.20(k) of the HUD regulations, the policies and procedures in this document are determined not to have the potential of having a significant impact on the quality of the human environment, and, therefore, are categorically excluded from the requirements of the National Environmental Policy Act of 1969. Accordingly, a Finding of No Significant Impact is not required.

Impact on Economy

This rule does not constitute a "major rule" as that term is defined in section 1(b) of the Executive Order on Federal Regulation issued by the President on February 17, 1981. Analysis of the rule indicates that it does not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule does not have a significant economic impact on a substantial number of small entities because there are no anti-competitive discriminatory aspects of the rule with regard to small entities nor are there any unusual procedures that would need to be complied with by small entities.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 12606, The Family

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this rule does not have potential for significant impact on family, maintenance, and general well-being, and, thus, is not subject to review under the Order.

Regulatory Agenda

This rule appeared as Item 1491 in the Department's Semiannual Agenda of Regulations published on November 3, 1992 (57 FR 51392), pursuant to Executive Order 12291 and the Regulatory Flexibility Act.

List of Subjects in 24 CFR part 2003

Privacy.

Accordingly, 24 CFR chapter XII is amended by adding a new part 2003, to read as follows:

PART 2003—IMPLEMENTATION OF THE PRIVACY ACT OF 1974

Sec.

2003.1 Scope of the part and applicability of other HUD regulations.
2003.2 Definitions.
2003.3 Requests for records.
2003.4 Officials to receive requests and inquiries.
2003.5 Initial denial of access to records.
2003.6 Disclosure of a record to a person other than the individual to whom it pertains.
2003.7 Authority to make law enforcement-related requests for records maintained by other agencies.
2003.8 General Exemptions.
2003.9 Specific Exemptions.

Authority: 5 U.S.C. 552a; 5 U.S.C. App. (Inspector General Act of 1978); 42 U.S.C. 3535(d).

§ 2003.1 Scope of the part and applicability of other HUD regulations.

(a) *General.* This part contains the regulations of the Office of Inspector General ("OIG") implementing the Privacy Act of 1974 (5 U.S.C. 552a). The regulations inform the public that the Inspector General has the responsibility for carrying out the requirements of the Privacy Act and for issuing internal OIG orders and directives in connection with the Privacy Act. These regulations apply to all records that are contained in systems of records maintained by the OIG and that are retrieved by an individuals's name or personal identifier.

(b) *Applicability of part 16.* In addition to these regulations, the provisions of 24 CFR part 16 apply to the OIG, except that appendix A to part 16 is not applicable. The provisions of this part shall govern in the event of any conflict with the provisions of part 16.

§ 2003.2 Definitions.

Certain terms used in 24 CFR part 16 have the following meanings for purposes of this part:

Department. The term "Department," as used in 24 CFR part 16, means the OIG for purposes of this part, except that, as used in §§ 16.1(d), 16.11(b) (1), (3), and (4) and 16.12(e), the term means the Department of Housing and Urban Development.

Privacy Act Officer. The term "Privacy Act Officer," as used in 24 CFR part 16, means the Assistant Inspectors General described in § 2000.5 of this chapter.

Privacy Appeals Officer. The term "Privacy Appeals Officer," as used in 24 CFR part 16, means the Inspector General for purposes of this part. The Secretary of HUD has delegated to the Inspector General the authority to act as the Privacy Appeals Officer for denials of requests for records maintained by the OIG.

§ 2003.3 Requests for records.

(a) A request from an individual for an OIG record about that individual which is not contained in an OIG system of records will be considered to be a Freedom of Information Act (FOIA) request and will be processed under 24 CFR part 2002.

(b) A request from an individual for an OIG record about that individual which is contained in an OIG system of records will be processed under both the Privacy Act and the FOIA in order to ensure maximum access under both statutes. This practice will be undertaken regardless of how an individual characterizes the request.

(1) The procedures for inquiries and requirements for access to records under the Privacy Act are more specifically set forth in 24 CFR part 16, except that appendix A to part 16 does not apply to the OIG.

(2) An individual will not be required to state a reason or otherwise justify his or her request for access to a record.

§ 2003.4 Officials to receive requests and inquiries.

Officials to receive requests and inquiries for access to, or correction of, records in OIG systems of records are the Privacy Act Officers described in § 2003.2 of this part. Written requests may be addressed to the appropriate Privacy Act Officer at: Office of Inspector General, Department of Housing and Urban Development, Washington, DC 20410, or to a particular Regional Office listed in § 2000.6(d) of this chapter, for referral to the appropriate Privacy Act Officer.

§ 2003.5 Initial denial of access to records.

(a) Access by an individual to a record about that individual which is contained in an OIG system of records will be denied only upon a determination by the Privacy Act Officer that:

(1) The record was compiled in reasonable anticipation of a civil action or proceeding; or the record is subject to a Privacy Act exemption under §§ 2003.8 or 2003.9 of this part; and

(2) The record is also subject to a FOIA exemption under § 2002.21(b) of this chapter.

(b) If a request is partially denied, any portions of the responsive record that can be reasonably segregated will be provided to the individual after deletion of those portions determined to be exempt.

(c) The provisions of 24 CFR 16.6(b) and 16.7, concerning notification of an initial denial of access and administrative review of the initial denial, apply to the OIG, except that:

(1) The final determination of the Inspector General, as Privacy Appeals Officer for the OIG, will be in writing and will constitute final action of the Department on a request for access to a record in an OIG system of records; and

(2) If the denial of the request is in whole or in part upheld, the final determination of the Inspector General will include notice of the right to judicial review.

§ 2003.6 Disclosure of a record to a person other than the individual to whom it pertains.

(a) The OIG may disclose an individual's record to a person other than the individual to whom the record pertains in the following instances:

(1) Upon written request by the individual, including authorization under 24 CFR 16.5(e);

(2) With the prior written consent of the individual;

(3) To a parent or legal guardian of the individual under 5 U.S.C. 552a(h); or

(4) When permitted by the provisions of 5 U.S.C. 552a(b) (1) through (12).

(b) [Reserved].

§ 2003.7 Authority to make law enforcement-related requests for records maintained by other agencies.

(a) The Inspector General is authorized by written delegation from the Secretary of HUD and under the Inspector General Act to make written requests under 5 U.S.C. 552a(b)(7) for transfer of records maintained by other agencies which are necessary to carry out an authorized law enforcement activity under the Inspector General Act.

(b) The Inspector General delegates the authority under paragraph (a) of this section to the following OIG officials:

(1) Deputy Inspector General;

(2) Assistant Inspector General for Audit;

(3) Assistant Inspector General for Investigation; and

(4) Assistant Inspector General for Management and Policy.

(c) The officials listed in paragraph (b) of this section may not redelegate the authority described in paragraph (a) of this section.

§ 2003.8 General exemptions.

(a) The systems of records entitled "Investigative Files of the Office of Inspector General," "Hotline Complaint Files of the Office of Inspector General," and "Name Indices System of the Office of Inspector General" consist, in part, of information compiled by the OIG for the purpose of criminal law enforcement investigations. Therefore, to the extent that information in these systems falls within the scope of Exemption (j)(2) of the Privacy Act, 5 U.S.C. 552a(j)(2), these systems of records are exempt from the requirements of the following subsections of the Privacy Act, for the reasons stated below.

(1) From subsection (c)(3), because release of an accounting of disclosures to an individual who is the subject of an investigation could reveal the nature and scope of the investigation and could result in the altering or destruction of

evidence, improper influencing of witnesses, and other evasive actions that could impede or compromise the investigation.

(2) From subsection (d)(1), because release of investigative records to an individual who is the subject of an investigation could interfere with pending or prospective law enforcement proceedings, constitute an unwarranted invasion of the personal privacy of third parties, reveal the identity of confidential sources, or reveal sensitive investigative techniques and procedures.

(3) From subsection (d)(2), because amendment or correction of investigative records could interfere with pending or prospective law enforcement proceedings, or could impose an impossible administrative and investigative burden by requiring the OIG to continuously retrograde its investigations attempting to resolve questions of accuracy, relevance, timeliness and completeness.

(4) From subsection (e)(1), because it is often impossible to determine relevance or necessity of information in the early stages of an investigation. The value of such information is a question of judgment and timing; what appears relevant and necessary when collected may ultimately be evaluated and viewed as irrelevant and unnecessary to an investigation. In addition, the OIG may obtain information concerning the violation of laws other than those within the scope of its jurisdiction. In the interest of effective law enforcement, the OIG should retain this information because it may aid in establishing patterns of unlawful activity and provide leads for other law enforcement agencies. Further, in obtaining evidence during an investigation, information may be provided to the OIG which relates to matters incidental to the main purpose of the investigation but which may be pertinent to the investigative jurisdiction of another agency. Such information cannot readily be identified.

(5) From subsection (e)(2), because in a law enforcement investigation it is usually counterproductive to collect information to the greatest extent practicable directly from the subject thereof. It is not always feasible to rely upon the subject of an investigation as a source for information which may implicate him or her in illegal activities. In addition, collecting information directly from the subject could seriously compromise an investigation by prematurely revealing its nature and scope, or could provide the subject with an opportunity to conceal criminal activities, or intimidate potential sources, in order to avoid apprehension.

(6) From subsection (e)(3), because providing such notice to the subject of an investigation, or to other individual sources, could seriously compromise the investigation by prematurely revealing its nature and scope, or could inhibit cooperation, permit the subject to evade apprehension, or cause interference with undercover activities.

(b) [Reserved].

§ 2003.9 Specific exemptions.

(a) The systems of records entitled "Investigative Files of the Office of Inspector General," "Hotline Complaint Files of the Office of Inspector General" and "Name Indices System of the Office of Inspector General" consist, in part, of investigatory material compiled by the OIG for law enforcement purposes. Therefore, to the extent that information in these systems falls within the coverage of exemption (k)(2) of the Privacy Act, 5 U.S.C. 552a(k)(2), these systems of records are exempt from the requirements of the following subsections of the Privacy Act, for the reasons stated below.

(1) From subsection (c)(3), because release of an accounting of disclosures to an individual who is the subject of an investigation could reveal the nature and scope of the investigation and could result in the altering or destruction of evidence, improper influencing of witnesses, and other evasive actions that could impede or compromise the investigation.

(2) From subsection (d)(1), because release of investigative records to an individual who is the subject of an investigation could interfere with pending or prospective law enforcement proceedings, constitute an unwarranted invasion of the personal privacy of third parties, reveal the identity of confidential sources, or reveal sensitive investigative techniques and procedures.

(3) From subsection (d)(2), because amendment or correction of investigative records could interfere with pending or prospective law enforcement proceedings, or could impose an impossible administrative and investigative burden by requiring the OIG to continuously retrograde its investigations attempting to resolve questions of accuracy, relevance, timeliness and completeness.

(4) From subsection (e)(1), because it is often impossible to determine relevance or necessity of information in the early stages of an investigation. The value of such information is a question of judgment and timing; what appears relevant and necessary when collected may ultimately be evaluated and viewed as irrelevant and unnecessary to an investigation. In addition, the OIG may obtain information concerning the violation of laws other than those within the scope of its jurisdiction. In the interest of effective law enforcement, the OIG should retain this information because it may aid in establishing patterns of unlawful activity and provide leads for other law enforcement agencies. Further, in obtaining evidence during an investigation, information may be provided to the OIG which relates to matters incidental to the main purpose of the investigation but which may be pertinent to the investigative jurisdiction of another agency. Such information cannot readily be identified.

(b) The systems of records entitled "Investigative Files of the Office of Inspector General," "Hotline Complaint Files of the Office of Inspector General" and "Name Indices System of the Office of Inspector General" consist in part of investigatory material compiled by the OIG for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or Federal contracts, the release of which would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence. Therefore, to the extent that information in these systems falls within the coverage of Exemption (k)(5) of the Privacy Act, 5 U.S.C. 552a(k)(5), these systems of records are exempt from the requirements of subsection (d)(1), because release would reveal the identity of a source who furnished information to the Government under an express promise of confidentiality. Revealing the identity of a confidential source could impede future cooperation by sources, and could result in harassment or harm to such sources.

Dated: December 11, 1992.

John J. Connors,

Deputy Inspector General.

[FR Doc. 92-31479 Filed 12-28-92; 8:45 am]

BILLING CODE 4210-01-M

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