1–9–95
Vol. 60 No. 5
Pages 2321–2492

federal register

Monday
January 9, 1995

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

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(TWO BRIEFINGS)

WHEN:	January 25 at 9:00 am and 1:30 pm
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RESERVATIONS:	202–523–4538

Printed on recycled paper containing 100% post consumer waste

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The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 92–139–8]

Pine Shoot Beetle

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the pine shoot beetle regulations by adding Adams and Jay Counties, IN, to the list of quarantined areas. This action is necessary on an emergency basis to prevent the spread of the pine shoot beetle, a highly destructive pest of pine trees, into noninfested areas of the United States.

DATES: Interim rule effective December 29, 1994. Consideration will be given only to comments received on or before March 10, 1995.

ADDRESSES: Please send an original and three copies of your comments to Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, P.O. Drawer 810, Riverdale, MD 20738. Please state that your comments refer to Docket No. 92–139–8. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690–2817 to facilitate entry into the comment reading room.

FOR FURTHER INFORMATION CONTACT: Mr. C. David McNeal, Operations Officer, Plant Protection and Quarantine, APHIS, USDA, P.O. Drawer 810, Riverdale, MD 20738. The telephone number for the agency contact will change when agency offices in Hyattsville, MD, move to Riverdale, MD, during January. Telephone: (301) 436–8247 (Hyattsville); (301) 734–8247 (Riverdale).

SUPPLEMENTARY INFORMATION:

Background

The pine shoot beetle is a highly destructive pest of pine trees. The pine shoot beetle can cause damage in weak and dying trees, where reproduction and immature stages of pine shoot beetle occur, and in the new growth of healthy trees. The ''maturation feeding'' of young beetles takes the form of boring up the center of pine shoots (usually of the current year's growth), causing stunted and distorted growth in the host trees. The pine shoot beetle is also a vector of several diseases of pine trees. Adults can fly at least 1 kilometer, and the wood, nursery stock, and Christmas trees they infest are often transported long distances. This pest damages urban trees, and can cause economic losses to the timber, Christmas tree, and nursery industries.

The regulations in 7 CFR 301.50 (referred to below as the regulations) impose restrictions on the interstate movement of regulated articles from quarantined areas in order to prevent the spread of the pine shoot beetle into noninfested areas of the United States.

Surveys recently conducted by State and Federal inspectors revealed that Adams and Jay Counties, IN, are infested with the pine shoot beetle. The regulations in § 301.50–3 provide that the Administrator of the Animal and Plant Health Inspection Service (APHIS) will list as a quarantined area each State, or each portion of a State, in which the pine shoot beetle has been found by an inspector, in which the Administrator has reason to believe the pine shoot beetle is present, or that the Administrator considers necessary to regulate because of its inseparability for quarantine enforcement purposes from localities in which the pine shoot beetle has been found.

In accordance with these criteria, we are designating Adams and Jay Counties, IN, as quarantined areas, and adding them to the list of quarantined areas in § 301.50–3(c).

Emergency Action

The Administrator of the Animal and Plant Health Inspection Service has determined that an emergency situation exists that warrants publication of this interim rule without prior opportunity for public comment. Immediate action is necessary to prevent the pine shoot beetle from spreading to noninfested areas of the United States.

Because prior notice and other public procedures with respect to this action are impracticable and contrary to the public interest under these conditions, we find good cause under 5 U.S.C. 553 to make it effective upon signature. We will consider comments that are received within 60 days of publication of this rule in the **Federal Register**. After the comment period closes, we will publish another document in the **Federal Register**. It will include a discussion of any comments we receive and any amendments we are making to the rule as a result of the comments.

Executive Order 12866 and Regulatory Flexibility Act

This interim rule has been reviewed under Executive Order 12866.

For this action, the Office of Management and Budget has waived its review process required by Executive Order 12866.

In Adams County, IN, there are four nurseries and one logging operation; in Jay County, IN, there are four nurseries and two Christmas tree producers. All could probably be classified as small entities by Small Business Administration criteria (for nurseries, annual gross receipts of $150,000 or less; for loggers, annual gross receipts of $3.5 million or less; for Christmas tree producers, annual gross receipts of $0.5 million or less). The logging operation in Adams County harvests only deciduous trees.

This action will restrict the movement of certain pine products from quarantined areas to nonquarantined areas. If inspected and found to be infested with the pine shoot beetle, these pine products can be either diverted for sale within local markets or treated in accordance with § 301.50–10 prior to shipment to a nonquarantined area. Based on information acquired from extension agents, we estimate that, in the newly quarantined counties, most producers of regulated pine products make approximately 90 percent of their sales locally or to buyers within the county or other quarantined areas in Indiana and thus will not be affected by this action. Producers can treat the small amount of regulated pine products

sold interstate with an approved methyl bromide treatment at a reasonable cost (approximately $1 per tree).

We anticipate, therefore, that this action will not have a significant economic impact on small nurseries, Christmas tree farmers, or other forest product producers in the two newly quarantined counties.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12778

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this rule have been approved by the Office of Management and Budget (OMB), and there are no new requirements. The assigned OMB control number is 0579–0088.

National Environmental Policy Act

An environmental assessment and finding of no significant impact have been prepared for this rule. The assessment provides a basis for the conclusion that the treatment of regulated articles, under the conditions specified in this rule, will not present a risk of introducing or disseminating plant pests and will not have a significant impact on the quality of the human environment. Based on the finding of no significant impact, the Administrator of the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

The environmental assessment and finding of no significant impact were prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), (2) Regulations of the Council on Environmental Quality for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), (3) USDA Regulations Implementing NEPA (7 CFR part 1b), and (4) APHIS Guidelines Implementing NEPA (44 FR 50381–50384, August 28, 1979, and 44 FR 51272–51274, August 31, 1979).

Copies of the environmental assessment and finding of no significant impact are available for public inspection at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 690–2817 to facilitate entry into the reading room. In addition, copies may be obtained by writing to the individual listed under **FOR FURTHER INFORMATION CONTACT.**

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

Accordingly, 7 CFR part 301 is amended as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C. 150bb, 150dd, 150ee, 150ff, 161, 162, and 164–167; 7 CFR 2.17, 2.51, and 371.2(c).

2. In § 301.50–3, paragraph (c), under Indiana, new counties are added, in alphabetical order; and paragraph (d) is revised to read as set forth below:

§ 301.50–3 Quarantined areas.

* * * * *

(c) * * *

Indiana

Adams County. The entire county.

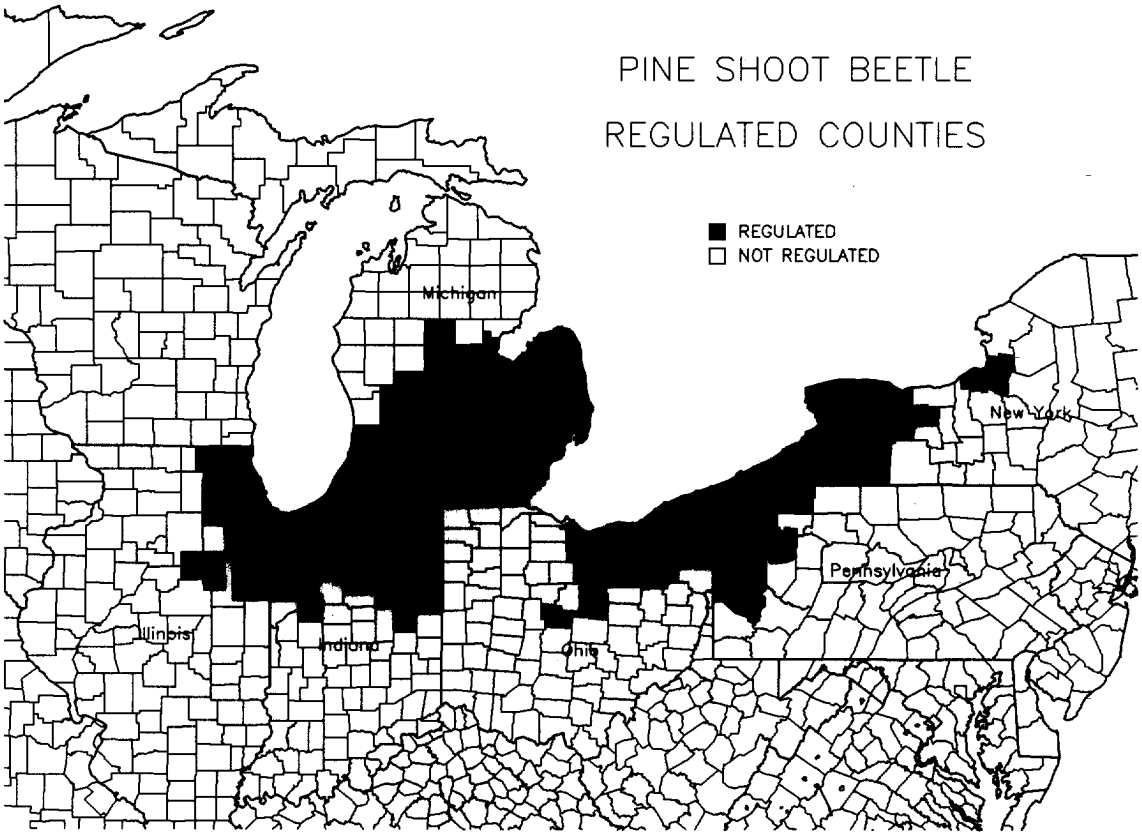
* * * * *

Jay County. The entire county.

* * * * *

(d) A map of the quarantined areas follows:

BILLING CODE 3410–34–P



Done in Washington, DC, this 29th day of December 1994.

Terry L. Medley,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 95–424 Filed 1–6–95; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 94–NM–247–AD; Amendment 39–9117; AD 95–01–06]

Airworthiness Directives; Boeing Model 737–200 and –300 Series Airplanes Equipped With Cargo Doors Installed in Accordance With Supplemental Type Certificate (STC) SA2969SO

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 Boeing Model 737–200 and –300 series airplanes. This action requires inspections to detect cracking in the radii on the support angles on the lower jamb (latch lug fittings) of the main deck cargo door, and replacement of cracked parts. This amendment is prompted by reports of premature fatigue cracking on the support angles on the lower jamb of the main deck cargo door. The actions specified in this AD are intended to prevent in-flight separation of the main deck cargo door from the airplane due to fatigue cracking on the support angles on the lower door jamb.

DATES: Effective January 24, 1995.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the **Federal Register** as of January 24, 1995.

Comments for inclusion in the Rules Docket must be received on or before March 10, 1995.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 94–NM–247–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

The service information referenced in this AD may be obtained from Pemco Aeroplex, Inc., P.O. Box 2287, Birmingham, Alabama 35201–2287. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, Campus Building, 1701 Columbia Avenue, Suite 2–160, College Park, Georgia; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Curtis Jackson, Aerospace Engineer, Airframe Branch, ACE–120A; FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, Campus Building, 1701 Columbia Avenue, Suite 2–160, College Park, Georgia 30337–2748; telephone (404) 305–7358; fax (404) 305–7348; or Della Swartz, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–2785; fax (206) 227–1181.

SUPPLEMENTARY INFORMATION: Recently, an operator reported that it experienced difficulty in pressurizing a Boeing Model 737–300 series airplane. Investigation revealed that the airplane could not be pressurized because the main deck cargo door would not seal properly. Further investigation revealed that 13 of the 16 support angles on the lower jamb of the main deck cargo door

had failed due to premature fatigue cracking.

Following this incident, the FAA has received additional reports from operators of Boeing Model 737–200 and –300 series airplanes of fatigue cracking on the support angles on the lower jamb of the main deck cargo door.

Pemco Aeroplex installed main deck cargo doors on all of these airplanes in accordance with supplemental type certificate (STC) SA2969SO. Several of these airplanes had accumulated less than 4,000 total flight cycles since installation of the main deck cargo door.

Such cracking, if not detected and corrected in a timely manner, could result in in-flight separation of the main deck cargo door from the airplane.

The FAA has reviewed and approved Pemco Alert Service Letter 737–53–0003, Revision 3, dated December 22, 1994, which describes procedures for repetitive visual inspections to detect cracking in the radii on the support angles on the lower jamb of the main deck cargo door and replacement of cracked parts with new parts. This service letter permits further flight with parts that are cracked within certain limits.

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design, this AD is being issued to prevent in-flight separation of the main deck cargo door from the airplane. This AD requires repetitive visual inspections to detect cracking in the radii on the support angles on the lower jamb of the main deck cargo door and replacement of cracked parts with new parts. The actions are required to be accomplished in accordance with the service letter described previously. However, unlike the service letter, this AD does not permit further flight with cracked parts. The FAA has determined that all cracked parts must be replaced prior to further flight.

This is considered to be interim action until final action is identified, at which time the FAA may consider further rulemaking.

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

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 rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 94–NM–247–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 that must be issued immediately to correct an unsafe condition in aircraft, and that it is not a ''significant regulatory action'' under Executive Order 12866. 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 part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

95–01–06 Boeing: Amendment 39–9117. Docket 94–NM–247–AD.

Applicability: Model 737–200 and –300 series airplanes equipped with main deck cargo doors installed in accordance with supplemental type certificate (STC) SA2969SO, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must use the authority provided in paragraph (b) to request approval from the FAA. This approval may address either no action, if the current configuration eliminates the unsafe condition; or different

actions necessary to address the unsafe condition described in this AD. Such a request should include an assessment of the effect of the changed configuration on the unsafe condition addressed by this AD. In no case does the presence of any modification, alteration, or repair remove any airplane from the applicability of this AD.

Compliance: Required as indicated, unless accomplished previously.

To prevent in-flight separation of the main deck cargo door from the airplane, accomplish the following:

Note 2: This AD references Pemco Alert Service Letter 737–53–0003, Revision 3, dated December 22, 1994, for information concerning inspection and replacement procedures. In addition, this AD specifies replacement requirements different from those included in the service letter. Where there are differences between the AD and the service letter, the AD prevails.

(a) Within 50 flight cycles after the effective date of this AD or within 50 flight cycles after installation of STC SA2969SO, whichever occurs later, perform a visual inspection to detect cracking in the radii on the support angles on the lower jamb of the main deck cargo door, in accordance with Pemco Alert Service Letter 737–53–0003, Revision 3, dated December 22, 1994.

(1) If no cracking is detected, repeat the visual inspection thereafter at intervals not to exceed 450 flight cycles.

(2) If any cracking is detected, prior to further flight, replace the cracked part with a new part in accordance with the service letter. Repeat the visual inspection thereafter at intervals not to exceed 450 flight cycles.

(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, FAA, Transport Airplane Directorate, Seattle Aircraft Certification (ACO). 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 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

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

(d) The inspection and replacement procedures shall be done in accordance with Pemco Alert Service Letter 737–53–0003, Revision 3, dated December 22, 1994. 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 Pemco Aeroplex, Incorporated, P.O. Box 2287, Birmingham, Alabama 35201–2287. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, Campus Building, 1701 Columbia Avenue, Suite 2–160, College Park, Georgia; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on January 24, 1995.

Issued in Renton, Washington, on December 29, 1994.

S.R. Miller,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 95–199 Filed 1–6–95; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 400, 405, 410, 484, 485, 486, and 498

[BPD–798–FC]

Medicare Program; Providers and Suppliers of Specialized Services: Technical Amendments

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

ACTION: Final rule with comment period.

SUMMARY: This rule reorganizes Medicare regulations that pertain to providers and suppliers of specialized services, in order to facilitate the incorporation of future rules in logical order.

The rule also makes minor technical and editorial changes to clarify the rules and eliminate duplication without substantive change.

DATES: *Effective date:* These rules are effective February 8, 1995.

Comment date: We will consider comments received by March 10, 1995.

ADDRESSES: Please mail written comments (an original and 3 copies) to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: BPD–798–FC, P.O. Box 26676, Baltimore, Maryland 21207.

If you prefer, you may deliver your written comments (an original and 3 copies) to one of the following addresses:

Room 309–G, Hubert H. Humphrey Building, 200 Independence Avenue, S.W., Washington, D.C. 20201, or

Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, Maryland 21207.

Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code BPD–798–FC. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in Room 309–G of the Department's offices at 200 Independence Avenue, SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone: (202) 690–7890).

FOR FURTHER INFORMATION CONTACT: Luisa V. Iglesias, (202) 690–6383.

SUPPLEMENTARY INFORMATION: This rule is part of an ongoing process of relocating the content of part 405 to separate parts devoted to particular aspects of the Medicare program. In this case, the rule—

1. Transfers to part 485 the regulations that pertain to institutional providers of physical therapy and speech-language pathology services that were in subpart Q of part 405; and

2. Establishes a new part 486 for suppliers of specialized services, including—

- Suppliers of portable X-Ray services (from subpart N of part 405); and
- Physical therapists in independent practice (from subpart Q of part 405).

The following subparts, which also pertain to specialized services, are not relocated at this time for the reasons indicated:

- Subpart D of part 485—Conditions for Coverage: Organ Procurement Organizations—A final rule that makes substantive changes is currently in clearance.
- Subpart B of part 494—Conditions for Coverage of Screening Mammography Services—Recent statutory amendments require substantive changes.

The rule also—

- Simplifies and clarifies regulations, without substantive change, by removing extensive (and unnecessary) verbatim statutory citations and separating true definitions from personnel qualification requirements; and
- In § 400.310, which lists the regulation sections for which OMB control numbers have been assigned, conforms those section numbers to changes made by this rule.

Collection of Information Requirements

This rule contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Response to Comments

Although this is a final rule, we will consider timely comments from anyone who believes that the reorganization of

content and the clarifying technical and editorial changes affect the substance of the rules. If we revise this rule as a result of comments, we will discuss all timely comments in the preamble to the revised rule.

Waiver of Proposed Rulemaking

The changes made by this rule are purely technical and editorial and have no substantive impact. Accordingly, we find that there is good cause to waive proposed rulemaking procedures as unnecessary.

Regulatory Flexibility Analysis

Consistent with the Regulatory Flexibility Act (RFA) and section 1102(b) of the Social Security Act, we prepare a regulatory flexibility analysis for each rule, unless the Secretary certifies that the particular rule will not have a significant economic impact on a substantial number of small entities, or a significant impact on the operation of a substantial number of small rural hospitals.

The RFA defines ''small entity'' as a small business, a nonprofit enterprise, or a governmental jurisdiction (such as a county, city, or township) with a population of less than 50,000. We also consider all providers and suppliers of services to be small entities. For purposes of section 1102(b) of the Act, we define small rural hospital as a hospital that has fewer than 50 beds, and is located anywhere but in a metropolitan statistical area.

We have not prepared a regulatory flexibility analysis because we have determined, and the Secretary certifies, that these rules will not have a significant economic impact on a substantial number of small entities or a significant impact on the operation of a substantial number of small rural hospitals.

In accordance with the provisions of Executive Order 12866, this rule was not reviewed by the Office of Management and Budget.

List of Subjects

42 CFR Part 400

Grant programs-health, Health facilities, Health maintenance organizations (HMO), Medicaid, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 405

Administrative practice and procedure, Health facilities, Health professions, Kidney diseases, Medicare, Reporting and recordkeeping requirements, Rural areas, X-rays.

42 CFR Part 410

Health facilities, Health professions, Kidney diseases, Laboratories, Medicare, Rural areas, X-rays.

42 CFR Part 484

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

42 CFR Part 485

Grant programs-health, Health facilities, Medicaid, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 486

Health professionals, Medicare, Organ procurement, X-rays.

42 CFR Part 498

Administrative practice and procedure, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR chapter IV is amended as set forth below:

PART 400—INTRODUCTION; DEFINITIONS

A. Part 400 is amended as set forth below:

1. The authority citation for part 400 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395(hh)) and 44 U.S.C. Chapter 35.

§ 400.310 [Amended]

2. In the left-hand column of § 400.310, the following changes are made:

a. ''405.1716, 405.1717, 405.1720, 405.1721, 405.1722, 405.1724, 405.1725, 405.1726'' is revised to read ''485.709, 485.711, 485.717, 485.719, 485.721, 485.725, 485.727, 485.729.''

b. ''405.1733, 405.1736, 405.1737'' is revised to read ''486.155, 486.161, 486.163''.

PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

Part 405 is amended as set forth below:

§§ 405.1411, 405.1412, 405.1413, 405.1414, 405.1415, 1405.1416 [Redesignated]

1. Subpart N, consisting of §§ 405.1411 through 405.1416 is redesignated as subpart C under a new part 486, in accordance with the following redesignation table:

Old section (subpart N of part 405)	New section (subpart C of part 486)
405.1411	486.100
405.1412	486.102
405.1413	486.104
405.1414	486.106
405.1415	486.108
405.1416	486.110

§§ 405.1701, 405.1730 [Amended]

2. In subpart Q, the undesignated centered headings preceding § 405.1701 and § 405.1730, respectively, are removed.

§§ 405.1701, 405.1702, 405.1715–405.1726 [Redesignated]

3. Subpart G to part 485 is added and reserved and §§ 405.1701, 405.1702, and 405.1715 through 405.1726 of subpart Q in part 405 are redesignated as new subpart H under part 485 in accordance with the following redesignation table:

Old section (subpart Q of part 405)	New section (subpart H of part 485)
405.1701	485.701
405.1702, introductory text	Removed.
405.1702(a)	485.705(a)
405.1702(b)	485.703(a)
405.1702(c)	485.703(b)
405.1702(d)	485.705(b)
405.1702(e)	485.705(c)
405.1702(f)	485.705(d)
405.1702(g)	485.705(e)
405.1702(h)	485.703(c)
405.1702(i)	485.703(d)
405.1702(j)	485.705(f)
405.1702(k)	485.705(g)
405.1702(l)	485.703(e)
405.1702(m)	485.705(h)
405.1715	485.707
405.1716	485.709
405.1717	485.711
405.1718	485.713
405.1719	485.715
405.1720	485.717
405.1721	485.719
405.1722	485.721
405.1723	485.723
405.1724	485.725
405.1725	485.727
405.1726	485.729

§§ 405.1730–405.1737 [Redesignated]

4. Sections 405.1730 through 405.1737 are redesignated as subpart D under a new part 486, in accordance with the following redesignation table:

Old section (subpart Q of part 405)	New section (subpart D of part 486)
405.1730	486.150
405.1731	486.151
405.1732	486.153
405.1733	486.155
405.1734	486.157
405.1735	486.159
405.1736	486.161
405.1737	486.163

PART 485—CONDITIONS OF PARTICIPATION AND CONDITIONS FOR COVERAGE: SPECIALIZED PROVIDERS

C. Part 485 is amended as set forth below.

1. The authority citation for part 485 is revised to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395(hh).

2. The heading of part 485 is revised to read as follows:

PART 485—CONDITIONS OF PARTICIPATION: SPECIALIZED PROVIDERS

§ 485.70 [Amended]

3. In § 485.70, the following changes are made:

a. In § 485.70(e), ''§ 485.70(d) and (e) of this chapter.'' is revised to read ''paragraphs (b) and (c) of § 485.705.''

b. In § 485.70(m), ''§ 405.1702(j) of this chapter.'' is revised to read ''§ 485.705(f).''.

4. The heading and table of contents of newly designated subpart H read as follows:

Subpart H—Conditions of Participation for Clinics, Rehabilitation Agencies, and Public Health Agencies as Providers of Outpatient Physical Therapy and Speech-Language Pathology Services

Sec.

485.701 Basis and scope.
485.703 Definitions.
485.705 Personnel qualifications.
485.707 Condition of participation: Compliance with Federal, State, and local laws.
485.709 Condition of participation: Administrative management.
485.711 Condition of participation: Plan of care and physician involvement.
485.713 Condition of participation: Physical therapy services.
485.715 Condition of participation: Speech pathology services.
485.717 Condition of participation: Rehabilitation program.
485.719 Condition of participation: Arrangements for physical therapy and speech-language pathology services to be performed by other than salaried organization personnel.
485.721 Condition of participation: Clinical records.
485.723 Condition of participation: Physical environment.
485.725 Condition of participation: Infection control.
485.727 Condition of participation: Disaster preparedness.
485.729 Condition of participation: Program evaluation.

§§ 485.707, 485.715, 485.723, 485.727, 485.729 [Amended]

5. In newly designated subpart H, in the following sections, the section heading is amended to change the dash to a colon and to capitalize the first word after the colon:

§§ 485.707, 485.715, 485.721, 485.723, 485.727, and 485.729.

6. Newly designated § 485.701 is revised to read as follows:

§ 485.701 Basis and scope.

This subpart implements section 1861(p)(4) of the Act, which—

(a) Defines outpatient physical therapy and speech pathology services;

(b) Imposes requirements with respect to adequate program, facilities, policies, staffing, and clinical records; and

(c) Authorizes the Secretary to establish by regulation other health and safety requirements.

§ 485.703 [Amended]

7. In newly designated § 485.703, the heading is revised to read *Definitions.*, and the paragraph designations are removed.

§ 485.705 [Amended]

8. In newly designated § 485.705, a section heading and introductory text are added, to read as follows:

§ 485.705 Personnel qualifications.

The training, experience, and membership requirements for personnel involved in the furnishing of outpatient physical therapy and speech-language pathology services are as follows:

* * * * *

§ 485.707 [Amended]

9. In newly designated § 485.707, the following changes are made:

a. In the introductory text and paragraph (a), ''clinic, rehabilitation agency, or public health agency'' and the plural version of that phrase are revised to read ''organization'' and ''organizations'', respectively.

b. In paragraph (a), ''pursuant to such law'' is revised to read ''in accordance with applicable laws''.

§ 485.709 [Amended]

10. In newly designated § 485.709, the following changes are made:

a. Paragraph (b) is revised to read as set forth below.

b. In paragraph (c), second sentence, ''where'' is revised to ''if''.

c. In paragraph (d), second sentence, ''which'' is revised to ''that''.

§ 485.709 Condition of participation: Administrative management.

* * * * *

(b) *Standard: Administrator.* The governing body—

(1) Appoints a qualified full-time administrator;

(2) Delegates to the administrator the internal operation of the clinic or rehabilitation agency in accordance with written policies;

(3) Defines clearly the administrator's responsibilities for procurement and direction of personnel; and

(4) Designates a competent individual to act during temporary absence of the administrator.

* * * * *

§ 485.711 [Amended]

11. In newly designated § 485.711, the following changes are made:

a. In paragraph (a), introductory text, ''prior to'' is revised to read ''before''.

b. Paragraph (b)(1) is revised to read as set forth below.

c. In paragraph (b)(3), the parenthetical statement, ''at least every 30 days'' is inserted immediately before ''in accordance'', and ''§ 424.25(e)'' is revised to read ''§ 410.61(e)''.

d. Paragraph (b)(4) is revised to read as set forth below.

e. In paragraph (c), second sentence, ''There are'' is revised to read ''The'', and ''that covers'' is revised to read ''cover''.

§ 485.711 Condition of participation: Plan of care and physician involvement.

* * * * *

(b) *Standard: Plan of care*—(1) For each patient there is a written plan of care established by the physician or by the physical therapist or speech-language pathologist who furnishes the services.

* * * * *

(4) Changes in the plan of care are noted in the clinical record. If the patient has an attending physician, the therapist or speech-language pathologist who furnishes the services promptly notifies him or her of any change in the patient's condition or in the plan of care.

* * * * *

§ 485.713 [Amended]

12. In newly designated § 485.713, the following changes are made:

a. The introductory text is revised to read as set forth below.

b. In paragraph (a)(1) introductory text, ''will be'' is revised to read ''is''.

c. In paragraph (a)(1)(i), ''utilizing'' is revised to ''using''.

d. Paragraph (a)(2) is revised to read as set forth below.

e. In paragraph (b), ''accepted'' is revised to read ''it accepts''.

f. In paragraph (d), ''such'' is revised to ''these''.

§ 485.713 Conditions of participation: Physical therapy services.

If the organization offers physical therapy services, it provides an adequate program of physical therapy and has an adequate number of qualified personnel and the equipment necessary to carry out its program and to fulfill its objectives.

(a) *Standard: Adequate program.* * * *

(2) A qualified physical therapist is present or readily available to offer supervision when a physical therapist assistant furnishes services.

(i) If a qualified physical therapist is not on the premises during all hours of operation, patients are scheduled so as to ensure that the therapist is present when special skills are needed, for example, for evaluation and reevaluation.

(ii) When a physical therapist assistant furnishes services off the organization's premises, those services are supervised by a qualified physical therapist who makes an onsite supervisory visit at least once every 30 days.

* * * * *

§ 485.715 [Amended]

13. In newly designated § 485.715, the following changes are made:

a. In paragraph (a), ''will be'' is revised to read ''is''.

b. In paragraph (b), ''accepted'' is revised to read ''it accepts''.

c. In paragraph (c), ''rendered'' is revised to read ''furnished''.

§ 485.717 [Amended]

14. In newly designated § 485.717, the following changes are made:

a. The undesignated introductory text is revised to read as set forth below.

b. In paragraph (a), ''rendered, as applicable'' is revised to read ''furnished as appropriate''.

c. Paragraph (b) is revised to read as set forth below.

§ 485.717 Condition of participation: Rehabilitation program.

This condition and its standards apply only to a rehabilitation agency's own patients, not to patients of hospitals, skilled nursing facilities (SNFs), or Medicaid nursing facilities (NFs) to whom the agency furnishes services. (The hospital, SNF, or NF is responsible for ensuring that qualified staff furnish services for which they arrange or contract for their patients.) The rehabilitation agency provides, in addition to physical therapy and speech-language pathology services, social or vocational adjustment services to all of its patients who need them. The agency provides for special qualified staff to evaluate the social and vocational factors, to counsel and advise on the social or vocational problems that arise from the patient's illness or injury, and to make appropriate referrals for needed services.

* * * * *

(b) *Standard: Arrangements for social or rehabilitation services*—(1) If a rehabilitation agency does not provide social or vocational adjustment services through salaried employees, it may provide those services through a written contract with others who meet the requirements and responsibilities set forth in this subpart for salaried personnel.

(2) The contract must specify the term of the contract and the manner of termination or renewal and provide that the agency retains responsibility for the control and supervision of the services.

§ 485.719 [Amended]

15. In newly designated § 485.719, the following changes are made:

a. In paragraph (a), ''when'' is revised to ''if''; ''and/or'' is revised to read ''or''; ''such'' is revised to ''the''(twice); ''provides for retention by the organization'' is revised to read ''provides that the organization retains''; and ''responsibility form and control and supervision of'' is corrected to read ''responsibility for, and control and supervision of,''.

b. Paragraph (b) is revised to read as set forth below:

§ 485.719 Condition of participation: Arrangements for physical therapy and speech-language pathology services to be performed by other than salaried organization personnel.

* * * * *

(b) *Standard: Contract provisions.* The contract—

(1) Specifies the term of the contract and the manner of termination or renewal;

(2) Requires that personnel who furnish the services meet the requirements that are set forth in this subpart for salaried personnel; and

(3) Provides that the contracting outside resource may not bill the patient or Medicare for the services. This limitation is based on section 1861(w)(1) of the Act, which provides that—

(i) Only the provider may bill the beneficiary for covered services furnished under arrangements; and

(ii) Receipt of Medicare payment by the provider, on behalf of an entitled individual, discharges the liability of the individual or any other person to pay for those services.

§ 485.721 [Amended]

16. In newly designated § 485.721, the following changes are made:

a. In paragraph (b), the commas at the end of paragraphs (b)(1) through (b)(6) are changed to periods; in paragraph (b)(1), ''provided'' is revised to ''furnished''; and the ''and'' at the end of paragraph (b)(6) is removed.

b. In paragraph (c), the last sentence is revised to read as set forth below.

c. In paragraph (d), the commas at the end of the paragraphs (d)(1) and (d)(2)(1) are changed to semicolons, and in the introductory text, ''a period of time of not less than'' is revised to read ''at least''.

d. In paragraph (d)(1), ''That'' is revised to ''The period''.

e. In paragraph (d)(2), introductory text, the colon is changed to a dash.

§ 485.721 Condition of Participation: Clinical records.

* * * * *

(c) *Standard: Completion of records and centralization of reports.* * * * Each physician signs the entries that he or she makes in the clinical record.

* * * * *

§ 485.723 [Amended]

17. In newly designated § 485.723, the following changes are made:

a. In paragraph (a)(2), ''organization'' is revised to ''premises'' (twice).

b. In paragraph (b), at the end of the introductory text, the colon is removed and ''that—'' is inserted.

c. In paragraph (b)(1), ''That'' is revised to ''The'', and the comma is changed to a semicolon.

d. In paragraph (b)(2), ''That the'' is revised to read ''The'', and ''which'' is revised to ''that''.

e. In paragraph (c)(2), ''utilization'' is revised to ''use''.

§ 485.725 [Amended]

18. In newly designated § 485.725, the following changes are made:

a. Paragraph (b) is revised to read as set forth below.

b. In paragraph (c), the designation ''(1)'' is inserted immediately before the first sentence; ''such'' is revised to ''housekeeping''; the designation ''(2)'' is inserted immediately before the third sentence; ''and/or'' is revised to read ''or'', and ''meets'' is revised to read ''or both meet''.

c. In paragraph (e), ''The organization is maintained'' is revised to read ''The organization's premises are maintained''.

§ 485.725 Condition of participation: Infection control.

* * * * *

(b) All personnel follow written procedures for effective aseptic techniques. The procedures are reviewed annually and revised if necessary to improve them.

§ 485.727 [Amended]

19. In newly designated § 485.727, in the introductory text, ''such disasters'' is revised to read ''a disaster''.

§ 485.729 [Amended]

20. In newly designated § 485.729, the following changes are made:

a. In the introductory text, ''which'' is revised to ''that'', and ''assure'' is revised to ''ensure''.

b. In paragraph (a), ''assure'' is revised to ''ensure''.

c. In paragraph (b) ''such statistical data as'' is revised to read ''statistical data such as''.

D. A new part 486 is added.

1. The heading and the table of contents of the new part 486 read as follows:

PART 486—CONDITIONS FOR COVERAGE OF SERVICES OF SPECIALIZED SUPPLIERS

Subparts A and B—[Reserved]

Subpart C—Conditions for Coverage: Portable X-Ray Services

Sec.
486.100 Condition for coverage: Compliance with Federal, State, and local laws and regulations.
486.102 Condition for coverage: Supervision by a qualified physician.
486.104 Condition for coverage: Qualifications, orientation, and health of technical personnel.
486.106 Condition for coverage: Referral for service and preservation of records.
486.108 Condition for coverage: Safety standards.
486.110 Condition for coverage: Inspection of equipment.

Subpart D—Conditions for Coverage: Outpatient Physical Therapy Services Furnished by Physical Therapists in Independent Practice

486.150 Condition for coverage: General requirements.
486.151 Condition for coverage: Supervision.
486.153 Condition for coverage: Compliance with Federal, State, and local laws.
486.155 Condition for coverage: Plan of care.
486.157 Condition for coverage: Physical therapy services.
486.159 Condition for coverage: Coordination of services with other organizations, agencies, or individuals.
486.161 Condition for coverage: Clinical records.
486.163 Condition for coverage: Physical environment.

Authority: Sections 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

2. In newly designated subpart D, in the following sections, the section heading is revised to change the dash to a colon and capitalize the first word after the colon: §§ 486.153, 486.155, 486.157, and 486.161.

3. Newly designated §§ 486.150 and 486.151 are revised to read as follows:

§ 486.150 Condition for coverage: General requirements.

In order to be covered under Medicare as a supplier of outpatient physical therapy services, a physical therapist in independent practice must meet the following requirements:

(a) Be licensed in the State in which he or she practices.

(b) Meet one of the personnel qualifications specified in § 485.705(b).

(c) Furnish services under the circumstances described in § 410.60 of this chapter.

(d) Meet the requirements of this subpart.

§ 486.151 Condition for coverage: Supervision.

The services are furnished by or under the direct supervision of a qualified physical therapist in independent practice.

§ 486.155 [Amended]

4. In newly designated § 486.155, the following changes are made:

a. In paragraph (a), introductory text, ''The following information is obtained by the physical therapist prior to'' is revised to read ''The physical therapist obtains the following information before''.

b. In paragraph (b)(4), the second sentence is revised to read: ''If the patient has an attending physician, the therapist who furnishes the services promptly notifies him or her of any change in the patient's condition or in the plan of care.''.

c. In the parenthetical statement in paragraph (b)(4), ''§ 424.25(e)'' is revised to read ''§ 410.61(e)''.

5. Newly designated § 486.159 is revised to read as follows:

§ 486.159 Condition for coverage: Coordination of services with other organizations, agencies, or individuals.

The physical therapist coordinates her physical therapy services with the health and medical services the patient receives from organizations or agencies or other individual practitioners through exchange of information that meets the following standard:

If a patient is receiving or has recently received, from other sources, services related to the physical therapy program, the physical therapist exchanges pertinent documented information with those other sources—

(a) On a regular basis;

(b) Subject to the requirements for protection of the confidentiality of medical records, as set forth in § 485.721 of this chapter; and

(c) With the aim of ensuring that the services effectively complement one another.

§ 486.163 [Amended]

6. In newly designated § 486.163, the following changes are made:

a. In the introductory text, ''and/or'' is revised to read ''or''.

b. In paragraph (b), first sentence, the word ''established'' is removed.

c. In paragraph (c), second sentence, ''such'' is changed to ''the''.

d. Paragraph (d) is revised to read as follows:

§ 486.163 Condition for coverage: Physical environment.

* * * * *

(d) The physical therapist is alert to the possibility of fire and other nonmedical emergencies and has written plans that include—

(1) The means for leaving the office and the building safely, demonstrated, for example, by fire exit signs; and

(2) Other provisions necessary to ensure the safety of patients.

E. Technical corrections.

PART 410—[AMENDED]

1. In part 410, the following changes are made:

a. the authority citation of part 410 is revised to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395 (hh)) unless otherwise indicated.

b. In § 410.60(a)(3)(ii), ''§ 405.1702(d) of this chapter'' is revised to read ''§ 485.705(b) of this chapter''.

PART 484—[AMENDED]

2. In part 484, the following changes are made:

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

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395 (hh)) unless otherwise indicated.

§ 484.38 [Amended]

b. In § 484.38, ''§§ 405.1717 through 405.1719, 405.1721, 405.1723, and 405.1725 of this chapter'' is revised to read ''subpart H of part 485 of this chapter''.

PART 498—[AMENDED]

3. In part 498, the following changes are made:

a. The authority citation for part 498 is revised to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395(hh)) unless otherwise indicated.

§ 498.3 [Amended]

b. In § 498.3(b)(6), ''§§ 405.1730 through 405.1737, or in § 410.22 of this chapter, respectively,'' is revised to read ''subpart D of part 486 of this chapter and § 410.22 of this chapter, respectively.''

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

Dated: September 2, 1994.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

Dated: October 12, 1994.

Donna E. Shalala,

Secretary.

[FR Doc. 95–485 Filed 1–6–95; 8:45 am]

BILLING CODE 4120–01–P

LEGAL SERVICES CORPORATION

45 CFR Part 1607

Governing Bodies; Correction

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This rule corrects the final regulation that was published on Monday, December 19, 1994 (59 FR 65249). The regulation revised part 1607 of the Legal Services Corporation's (''LSC'' or ''Corporation'') regulations relating to governing bodies of recipients of LSC funds.

EFFECTIVE DATE: January 18, 1995.

FOR FURTHER INFORMATION CONTACT: Victor M. Fortuno, General Counsel, at (202) 336–8810.

SUPPLEMENTARY INFORMATION: As published, § 1607.5(b) of the final regulation refers to a waiver granted under § 1607.6(c)(1). This reference is incorrect.

Accordingly, the publication on December 19, 1994, of the final regulation which was the subject of FR Doc. 94–31043 is corrected as follows:

§ 1607.5 [Corrected]

On page 65256, in the first column, in § 1607.5, paragraph (b) is corrected to read as follows:

''Pursuant to a waiver granted under § 1607.6(b)(1), a recipient may adopt policies that would permit partners or associates of attorney members to participate in any compensated private attorney involvement activities supported by the recipient.''

Dated: January 3, 1995.

Victor M. Fortuno,

General Counsel.

[FR Doc. 95–378 Filed 1–6–95; 8:45 am]

BILLING CODE 7050–01–P

DEPARTMENT OF DEFENSE

48 CFR Part 231

Defense Federal Acquisition Regulation Supplement; Allowable Individual Compensation

AGENCY: Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: The Director of Defense Procurement has issued an interim rule that places a ceiling on allowable individual compensation under DoD contracts.

DATES: *Effective date:* December 14, 1994.

Comment date: Comments on the interim rule should be submitted in writing at the address shown below on or before March 10, 1995, to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: Defense Acquisition Regulations Council, ATTN: Mr. Eric R. Mens, PDUSD(A&T)DP/DAR, IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telefax number (703) 602–0350. Please cite DFARS Case 94–D318 in all correspondence.

FOR FURTHER INFORMATION CONTACT: Mr. Eric R. Mens, (703) 602–0131.

SUPPLEMENTARY INFORMATION:

A. Background

Section 8117 of the Department of Defense Appropriations Act, 1995 (Public Law 103–335), limits allowable costs for individual compensation to $250,000 per year. This restriction applies to DoD contracts awarded after April 15, 1995, when payments are from funds appropriated in fiscal year 1995.

The interim DFARS rule revises DFARS Subpart 231.2, Contracts with Commercial Organizations; Subpart 231.3, Contracts with Educational Institutions; Subpart 231.6, Contracts with State, Local, and Federally Recognized Indian Tribal Governments; and Subpart 231.7, Contracts with Nonprofit Organizations to implement the statutory ceiling on allowable individual compensation costs. In supplementing the cost principle at FAR 31.205–6, this DFARS rule relies upon the same definition of compensation found in the FAR cost principle, i.e., ''all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees to the contractor.''

B. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense to issue this rule as an interim rule. Compelling reasons exist to promulgate this rule without prior opportunity for public comment because section 8117 of the Defense Appropriations Act for Fiscal Year 1995 (Public Law 103–335) applies to DoD contracts awarded after April 15, 1995, using funds appropriated in FY 1995. An interim rule will ensure that DoD contracting activities become aware of the statutory ceiling on allowable individual compensation costs when forward pricing contracts which will be awarded after April 15, 1995, using FY 1995 funds. However, comments received in response to the publication of this rule will be considered in formulating the final rule.

C. Regulatory Flexibility Act

The interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because most small entities are not subject to the contract cost principles in FAR Part 31 or DFARS Part 231. The contract cost principles normally apply where contract award exceeds $500,000 and the price is based on certified cost or pricing data. Most contracts awarded to small entities are awarded on a competitive, fixed-price basis. This interim DFARS rule applies only to DoD contractors which incur individual compensation costs in excess of $250,000 per year in performing new contracts awarded after April 15, 1995, using funds appropriated in FY 1995. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small business entities and other interested parties. Comments from small entities concerning the affected DFARS Subparts will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite DFARS Case 94–D318 in correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96–511) does not apply because the interim rule does not impose any additional reporting or recordkeeping requirements which require the approval of OMB under 44 U.S.C. 3501 *et seq.*

List of Subjects in 48 CFR Part 231

Government procurement.

Claudia L. Naugle,

Deputy Director, Defense Acquisition Regulations Council.

Therefore, 48 CFR Part 231 is amended as follows:

1. The authority citation for 48 CFR Part 231 continues to read as follows:

PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

2. Section 231.205–6 is amended by adding a new paragraph (a)(2) preceding the existing paragraph (g)(2)(i) to read as follows:

231.205–6 Compensation for personal services.

(a)(2) Costs for individual compensation in excess of $250,000 per year are unallowable under DoD contracts that are awarded after April 15, 1995, and are funded by fiscal year 1995 appropriations (Public Law 103–335).

* * * * *

3. Section 231.303 is amended by adding paragraph (3) to read as follows:

231.303 Requirements.

(1) * * *

(2) * * *

(3) The limitation on allowable individual compensation at 231.2205–6(a)(2) also applies to this subpart.

4. Section 231.603 is amended by redesignating paragraphs (1) through (15) as (i) through (xv) and redesignating paragraphs (11) (i) and (ii) as paragraphs (xi) (A) and (B); designating the introductory text as paragraph (1); and adding a new paragraph (2) to read as follows:

231.603 Requirements.

* * * * *

(2) The limitation on allowable individual compensation at 231.205–6(a)(2) also applies to this subpart.

5. Section 231.703 is revised to read as follows:

231.703 Requirements.

(1) Under 10 U.S.C. 2324(e), the costs cited in 231.603(a) are unallowable.

(2) The limitation on allowable individual compensation at 231.205–6(a)(2) also applies to this subpart.

[FR Doc. 95–312 Filed 1–6–95; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 611 and 663

[Docket No. 941265–4365; I.D. 121694D]

RIN 0648–AH50

Foreign Fishing; Pacific Coast Groundfish Fishery; Annual Specifications and Management Measures

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic Atmospheric Administration (NOAA), Commerce.

ACTION: 1995 groundfish fishery specifications and management measures; request for comments.

SUMMARY: NMFS announces the 1995 fishery specifications and management measures for groundfish taken in the U.S. exclusive economic zone and state waters off the coasts of Washington, Oregon, and California as authorized by the Pacific Coast Groundfish Fishery Management Plan (FMP). The specifications include the level of the acceptable biological catch (ABC) and harvest guidelines including the distribution between domestic and foreign fishing operations. The harvest guidelines are allocated between the limited-entry and open-access fisheries. The management measures for 1995 are designed to keep landings within the harvest guidelines, for those species for which there are harvest guidelines, and to achieve the goals and objectives of the FMP and its implementing regulations. The intended effect of these actions is to establish allowable harvest levels of Pacific Coast groundfish and to implement management measures designed to achieve, but not exceed those harvest levels, while extending fishing and processing opportunities as long as possible during the year.

DATES: Effective January 4, 1995 until the 1996 annual specifications and management measures are filed for public inspection with the Office of the Federal Register, unless modified, superseded, or rescinded. All landings between January 1, 1995, and January 4, 1995, inclusive, will be counted toward cumulative trip limits. Comments will be accepted until February 8, 1995.

ADDRESSES: Comments on these specifications should be sent to Mr. William Stelle, Jr., Director, Northwest Region, National Marine Fisheries Service, 7600 Sand Point Way N.E., BIN C15700, Bldg. 1, Seattle, WA 98115–0070; or Ms. Hilda Diaz-Soltero, Director, Southwest Region, National Marine Fisheries Service, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213. Information relevant to these specifications and management measures, including the SAFE report, has been compiled in aggregate form and is available for public review during business hours at the office of the Director, Northwest Region, NMFS (Regional Director), or may be obtained from the Pacific Fishery Management Council (Council), by writing the Council at 2130 SW Fifth Avenue, Suite 224, Portland, OR 97201.

FOR FURTHER INFORMATION CONTACT: William L. Robinson (Northwest Region, NMFS) 206–526–6140; or Rodney R. McInnis (Southwest Region, NMFS) 310–980–4040.

SUPPLEMENTARY INFORMATION: The FMP requires that fishery specifications for groundfish be evaluated each calendar year, that harvest guidelines or quotas be specified for species or species groups in need of additional protection, and that management measures designed to achieve the harvest guidelines or quotas be published in the **Federal Register** and made effective by January 1, the beginning of the next fishing year. This action announces and makes effective the final 1995 fishery specifications and the management measures designed to achieve them. These specifications and measures were considered by the Council at two meetings and were recommended to NMFS by the Council at its October 1994 meeting.

I. Final Specifications

ABCs and Harvest Guidelines; Apportionments to Foreign and Joint Venture Fisheries; Open Access and Limited-Entry Allocations.

The fishery specifications include ABCs, the designation of harvest guidelines or quotas for species that need individual management, the apportionment of the harvest guidelines or quotas between domestic and foreign fisheries, and allocation between the open-access and limited-entry segments of the domestic fishery.

The final 1995 specifications for ABCs, harvest guidelines, and limited-entry and open-access allocations are listed in Table 1, followed by a discussion of each 1995 specification that differs from 1994 levels. The

apportionment between foreign and domestic fisheries is explained separately at the end of this section. As in the past, the specifications include fish caught in state ocean waters (0–3 nautical miles offshore) as well as fish caught in the exclusive economic zone (EEZ) (3–200 nautical miles offshore).

TABLE 1.—1995 SPECIFICATIONS OF ACCEPTABLE BIOLOGICAL CATCH (ABC), HARVEST GUIDELINES, AND LIMITED-ENTRY AND OPEN-ACCESS ALLOCATIONS, BY INTERNATIONAL NORTH PACIFIC FISHERIES COMMISSION (INPFC) SUBAREAS

Species	Acceptable Biological Catch (ABC) (×1,000 mt)						Harvest Guideline (×1,000 mt)	Allocations (×1,000 mt)			
	Vancouver [a]	Columbia	Eureka	Monterey	Conception	Total ABC		Limited entry		Open access	
								1000 mt	Percent	1000 mt	Percent
Roundfish:											
Lingcod [b]	1.3		0.3	0.7	0.1	2.4	2.4	1.21	80.9	0.29	19.1
Pacific cod	3.2		(c)	(c)	(c)	3.2	.....	.....	.....	.....	.....
Pacific whiting [d]	223.0					223.0	178.4	.....	.....	.....	.....
Sablefish [e, f]	8.7				0.425	9.1	7.1	5.90	93.4	0.42	6.6
Jack mackerel [g]	52.6					52.6	52.6	.....	.....	.....	.....
Rockfish:											
POP [h]	0.0	0.0	(c)	(c)	(c)	0.0	1.3	.....	.....	.....	.....
Shortbelly	23.5					23.5	23.5	.....	.....	.....	.....
Widow [i]	7.7					7.7	6.5	6.26	96.3	0.24	3.7
Thornyheads:	8.0				.....	8.0	.....	.....	.....	.....	.....
Shortspine [e, j]	1.0				.....	1.0	1.5	.....	.....	.....	.....
Longspine [e, j]	7.0				.....	7.0	6.0	.....	.....	.....	.....
Sebastes complex: [k]	11.9		13.2			11.9 N, 13.2 S	11.8 N 13.2 S	10.67 8.76	90.4 67.4	1.13 4.24	9.6 32.6
Bocaccio [l]	(c)	(c)	1.7			1.7	1.7	1.01	67.4	0.49	32.6
Canary [m]	1.0		0.25	(c)	(c)	1.25	0.85	0.78	91.2	0.07	8.8
Chilipepper	(c)	(c)	4.0			4.0	.....	.....	.....	.....	.....
Yellowtail [n]	1.19	2.97	2.58	(c)	(c)	6.74	4.16 N 2.58 S	3.76 2.33	90.4 90.4	0.40 0.25	9.6 9.6
Remaining rockfish	0.8	3.7	7.0			11.5	.....	.....	.....	.....	.....
Flatfish:											
Dover sole [e, o]	2.4	3.0	2.9	5.0	1.0	14.3	13.6 WOC, 2.85 Col	.....	.....	.....	.....
English sole	2.0		1.1			3.1	.....	.....	.....	.....	.....
Petrale sole	1.2		0.5	0.8	0.2	2.7	.....	.....	.....	.....	.....
Arrowtooth Flounder	5.8					5.8	.....	.....	.....	.....	.....
Other flatfish	0.7	3.0	1.7	1.8	0.5	7.7	.....	.....	.....	.....	.....
Other fish [p]	2.5	7.0	1.2	2.0	2.0	14.7	.....	.....	.....	.....	.....

[a] U.S. Vancouver only, except for Pacific whiting.

[b] The lingcod stock assessment covers the entire Vancouver INPFC area, including Canada, and the Columbia subarea north of Cape Falcon. The U.S. ABC is based on 50 percent of the ABC for this assessment area plus 400 mt for the Columbia subarea south of Cape Falcon. The coastwide harvest guideline equals the sum of the ABCs and includes a recreational harvest of 900 mt.

[c] These species are not common nor important in the areas footnoted. Accordingly, for convenience, Pacific cod is included in the ''other fish'' category for the areas footnoted, and rockfish species are included in the ''remaining rockfish'' category for the areas footnoted only.

[d] Coastwide ABC including Canadian waters. The U.S. harvest guideline is 80 percent of the U.S./Canada ABC. The shore-based reserve is 71,400 mt in 1995, 40 percent of the harvest guideline.

[e] Dover sole, thornyheads, and trawl-caught sablefish are managed together as the ''DTS complex'' (formerly called the deepwater complex). There is no harvest guideline for the DTS complex.

[f] The 7,100 mt sablefish harvest guideline is the 8,700 mt ABC north of the Conception subarea (north of 36° N. latitude) reduced by 900 mt for estimated discards and 700 mt for projected harvest above the 1994 harvest guideline. The 7,100 mt harvest guideline is reduced by 780 mt for the treaty tribes before dividing the remaining 6,320 mt between the limited entry (5,900 mt) and open access (420 mt) fisheries. The limited entry allocation is further divided 58 percent (3,420 mt) trawl, 42 percent (2,480 mt) nontrawl allocations which also are harvest guidelines. (See the section on trawl and nontrawl sablefish management for 1994.)

[g] Only jack mackerel north of 39°00′ N. latitude are managed by the FMP. The ABC and harvest guideline include area beyond 200 nm.

[h] The POP harvest guideline applies to the Vancouver/Columbia subareas combined. A discard factor of 16 percent was used in setting the harvest guideline for landed catch.

[i] The 6,500 mt harvest guideline is derived by subtracting an estimate of discards (1,200 mt) from the ABC (7,700 mt).

[j] The thornyhead ABCs and harvest guidelines apply north of Point Conception, CA. The harvest guideline represents landed catch.

[k] The *Sebastes*-North harvest guideline (11,800 mt) applies to the Vancouver and Columbia subareas and equals the sum of the ABCs as follows: canary (1,000 mt), yellowtail rockfish (6,740 mt coastwide minus 300 mt for the Eureka subarea), and remaining rockfish (4,500 mt), minus 150 mt for estimated discards of canary rockfish. Within the *Sebastes*-North harvest guideline are two small harvest guidelines for commercial harvest of black rockfish by the Makah, Quileute, Hoh, and Quinault Indian tribes: 20,000 pounds (9,072 kg) for the EEZ north of Cape Alava (48°09′30′′ N. latitude) and 10,000 pounds (4,536 kg) between Destruction Island (47°40′00′′ N. latitude) and Leadbetter Point (46°38′10′′ N. latitude). The *Sebastes*-South harvest guideline is the sum of the ABCs for the species in the Eureka/Monterey/Conception subareas: bocaccio (1,700 mt), canary (250 mt), chilipepper (4,000 mt), yellowtail rockfish (300 mt), and remaining rockfish (7,000 mt).

[l] The bocaccio harvest guideline applies to the Eureka, Monterey, and Conception subareas; as trip-limit induced discards are believed to be minimal, there is no deduction for discards. The open access and limited entry allocation percentages for bocaccio are applied only to the commercial portion of the harvest guideline, which is 1,500 mt in 1995 (1,700 mt harvest guideline minus 200 mt estimated recreational harvest).

[m] The canary rockfish harvest guideline for the Vancouver/Columbia area is the sum of the ABCs minus 150 mt for estimated discards.

[n] The 1993 yellowtail rockfish assessment addressed three separate areas: U.S. Vancouver; Columbia north of Cape Falcon; and Columbia south of Cape Falcon plus Eureka. For this table, the 2,970 mt Columbia ABC is for north Columbia only, and the Eureka ABC is for the Eureka subarea plus south Columbia. The total ABC for yellowtail rockfish is divided into two harvest guidelines: 4,160 mt for the northern area (Vancouver plus Columbia north of Cape Lookout, close to Cape Falcon) and 2,580 mt for the southern area (Eureka plus Columbia area south of Cape Lookout). The harvest guidelines for the *Sebastes* complex apply to different areas, north and south of the Columbia/Eureka border at 43°00′00′′ N. latitude. For calculating the *Sebastes* complex harvest guidelines, 300 mt of yellowtail rockfish is estimated for the Eureka subarea. Therefore, 300 mt of the yellowtail rockfish southern harvest guideline is included in the southern *Sebastes* complex harvest guideline, and the remainder of the yellowtail rockfish southern harvest guideline is included in the northern *Sebastes* complex harvest guideline.) A 16 percent discard factor will be added to certain landings of yellowtail rockfish inseason. This will affect inseason landings estimates for the *Sebastes* complex also.

[o] The 13,600 mt coastwide harvest guideline for Dover sole (14,300 mt ABC minus 700 mt estimated discards) includes a 2,850 mt harvest guideline for the Columbia subarea (3,000 mt ABC minus 150 mt estimated discards).

[p] Includes sharks, skates, rays, ratfish, morids, grenadiers, and other groundfish species noted above in footnote [c].

Changes to the ABCs and Harvest Guidelines

The 1995 final ABCs are changed from the 1994 levels for the following species: lingcod, Pacific whiting (whiting), sablefish, widow rockfish, shortspine thornyheads, longspine thornyheads, bocaccio, canary rockfish and Dover sole. These changes are based on the best available scientific information. The ABCs represent the total catch—amounts that are discarded as well as that are retained. Information considered in determining the ABCs is available from the Council and was made available to the public, before the Council's October 1994 meeting, in the Council's stock assessment and fishery evaluation (SAFE) document (see **ADDRESSES**).

Those species or species groups with harvest guidelines in 1994 will continue to be managed with harvest guidelines in 1995. As in 1994, no quotas are established. The 1995 harvest guidelines differ from those in 1994 for: lingcod, whiting, sablefish, *Sebastes* complex—north and south of 43°00′00″ N. lat. (the Columbia/Eureka subarea boundary), bocaccio, and Dover sole. Harvest guidelines are established for the first time for canary rockfish and individually for shortspine thornyheads and longspine thornyheads; the harvest guideline for thornyheads combined is no longer needed. In 1995, most of the species harvest guidelines represent only that portion of the catch that is landed. Where information is available, a discard factor is subtracted from the ABC to determine the harvest guideline. More detailed information is found in the Council's SAFE document.

The changes to the ABCs and harvest guidelines are described briefly below. All other ABC and annual harvest guideline specifications announced for 1994 (Table 1 at 59 FR 685, January 6, 1994) will apply again in 1995 and are included in Table 1. More detailed information appears in the Council's SAFE document, the ''Groundfish Management Team (GMT) Final Recommendations for 1995 Acceptable Biological Catches (ABC) and Harvest Guidelines'' (GMT Report F.3.) from the October 1994 Council meeting, and the Council's newsletters for its August and October 1994 meetings (see **ADDRESSES**).

Lingcod. A new stock assessment for lingcod resulted in severe reductions to its ABC, from 7,000 mt in 1994 to 2,400 mt in 1995, based on reductions in each subarea: From 1,000 mt (Vancouver) and 4,000 mt (Columbia) in 1994 to 1,300 mt for both subareas combined in 1995; from 500 mt in 1994 to 300 mt in 1995 in the Eureka subarea; from 1,100 mt in 1994 to 700 mt in 1995 in the Monterey subarea; and from 400 mt in 1994 to 100 mt in 1995 in the Conception subarea. These reductions result from a comprehensive assessment based on fishery and survey data between Cape Falcon, OR, and 49°00′00″ N. lat. off Vancouver Island, Canada, between 1979–93. The average yield of 2,736 mt in this area during 1989–1993 is just below the overfishing level. South of Cape Falcon, there is concern that the young average age in the catch indicates a substantial level of fishing mortality. The ABCs are set at 63 percent of the average catch during 1989–93, proportional to the reduction of catch recommended north of Cape Falcon, to reduce catch until a full stock assessment can be conducted. The harvest guideline is equal to the coastwide ABC; there is no estimate for discards at this time. Reductions in catch are expected to occur through imposition of a cumulative trip limit and a size limit in 1995. Lingcod management is complicated by harvest in Canadian waters and by recreational fisheries. Coordination with Canada on assessment and management of this species is necessary.

Whiting. The ABC for whiting in 1994 (325,000 mt for the United States and Canada combined) was substantially higher than in previous years, predominantly because the 1992 hydroacoustic survey utilized new, more sensitive equipment, and extended farther offshore and farther north to encompass the species' range. To provide for cautious exploitation until the survey results can be confirmed (in 1995–96), a conservative harvest rate policy was adopted to minimize the risk to the resource if the ABC were later found to be too high. The Council also felt it prudent to acknowledge the possibility that the total U.S. and Canadian harvest in 1994 might exceed the U.S.-Canada ABC, as occurred in 1992 and 1993.

The U.S.-Canada ABC for whiting in 1995 is much lower, 223,000 mt, due to the anticipated decline in stock level following the very large 1980 and 1984 year classes, which for the most part, are no longer available to the fishery. The Council recommended that the U.S. harvest guideline be set at 80 percent of the U.S.-Canada ABC, unless agreement for a different share were reached at the U.S.-Canada discussions to be held after the Council meeting. Agreement was not reached between the two countries. Therefore, the 80-percent share is used again in 1995, resulting in the U.S. harvest guideline of 178,400 mt.

If Canada continues to calculate its share in the same manner as in 1992–94, the U.S. and Canadian total harvest will be 14 percent above the coastwide ABC in 1995. These overages have not caused a biological problem, particularly given the large increase in the ABC in 1994 and use of a conservative exploitation rate. The total harvest in 1995 would be lower than the overfishing level, and lower than the amount that would have been taken if the Council had chosen to use a moderate harvest rate level, as in 1993, in determining the ABC. Bilateral discussions with Canada are expected to continue.

The regulations at 50 CFR 663.23(b)(4) set aside 40 percent of the U.S. harvest guideline for priority use by vessels delivering shoreside. In 1995, this reserve is 71,400 mt.

Sablefish. The 1995 ABC in the Conception area remains at 425 mt. The ABC for sablefish north of the Conception subarea (36°00′00″ N. lat.) is increased from 7,000 mt in 1994 to 8,700 mt in 1995, based on the results of a new stock assessment and by including expected discards in the ABC. However, the 1995 harvest guideline (north of 36°00′00″ N. lat.) is 7,100 mt (considerably lower than the combined ABC), only 100 mt higher than the harvest guideline in 1994. An estimate of discards (900 mt) is subtracted from the ABC for the area north of Conception to derive a harvest guideline that represents only landed catch. A further reduction of 780 mt is made for treaty tribes. The harvest guideline for 1995 was reduced further to compensate for 700 mt the Council expected to be taken above the harvest guideline in 1994. After the October meeting, it was discovered that landings were projected to be 700 mt over the limited entry gear allocations, rather than the species' harvest guideline. Therefore, because the open-access allocation would not be reached, the harvest guideline would be exceeded by only about 328 mt (5 percent). The Council is expected to address this error at its March 1995 meeting and may recommend an increase to the sablefish harvest guideline in 1995.

Widow rockfish. No new stock assessment was prepared for widow rockfish, but the ABC is increased from 6,500 mt in 1994 to 7,700 mt in 1995 to include an estimate of discards in the fishery. The harvest guideline remains the same as in 1994, 6,500 mt, representing only the landed catch.

Shortspine and longspine thornyheads. Based on new stock assessments, the ABCs for shortspine and longspine thornyheads are reduced in 1995: from 1,900 mt to 1,000 mt for shortspine thornyheads and from 10,100

mt to 7,000 mt for longspine thornyheads. The 1995 ABCs apply north of Point Conception, CA (34°30′00″ N. lat.), whereas in 1994 they applied only to the Monterey, Eureka, and Columbia subareas (36°00′00″–47°30′00″ N. lat.). The reductions occurred primarily because the survey area was enlarged, revealing an overestimate of the coastwide biomass in the previous stock assessment, particularly for shortspine thornyheads. Shortspine thornyheads are fully exploited, but did not reach the overfishing level in 1994. Longspine thornyheads are being fished down to the level that would produce maximum sustainable yield (MSY).

For the first time, separate harvest guidelines are set for shortspine and longspine thornyheads. In previous years, they were combined because it had been thought that the two species, which often are caught together, were too difficult to tell apart. However, the industry has testified that the species can be differentiated, and certain areas can be avoided to decrease excessive harvest of shortspine thornyheads. Consequently, the Council recommended harvest guidelines of 1,500 mt for shortspine thornyheads (above its ABC) and 6,000 mt for longspine thornyheads (below its ABC). Even though longspine thornyheads are above the level that would produce MSY, its harvest guideline is less than ABC to protect shortspine thornyheads, and in anticipation of future declines in the longspine thornyhead ABC as it is reduced to its MSY level. The shortspine thornyhead harvest guideline is set above its ABC because of the uncertainty in the assessment; the 1,500-mt harvest guideline is less than the overfishing level under the preferred assessment scenario and is similar to the ABC level that would result from plausible assessments with higher levels of natural mortality or lower levels of survey catchability. These harvest guidelines, which apply only north of Point Conception, will result in a small increase in the longspine thornyhead catch and a large decrease in the shortspine thornyhead catch.

Bocaccio. The ABC and harvest guideline for bocaccio are increased from 1,540 mt in 1994 to 1,700 mt in 1995. This increase is due entirely to removal of an assumed discard level. The discard factor is removed because only a small number of vessels are constrained by current trip limits. As in the past, the harvest guideline applies only to the Eureka, Monterey, and Conception subareas (the EEZ south of 43°00′00″ N. lat.), and, because discards are assumed to be negligible, the harvest guideline represents total catch. An estimate of discards will be added to inseason projections of the catch if new information indicates that discarding is occurring.

Canary rockfish. A new assessment for canary rockfish in the Vancouver and Columbia subareas (north of 43°00′00″ N. lat.) indicates that the stock has undergone a substantial decline and that continuation of current catch levels, which are at the ABC levels set in 1990, would be overfishing. Therefore, the 1994 ABCs of 800 mt in the Vancouver subarea and 1,500 mt in the Columbia subarea are reduced to 1,000 mt for both areas combined in 1995. The survey trend in the Eureka area indicates an even more severe decline, so the ABC is reduced from 600 mt in 1994 to 250 mt in 1995, close to the recent average catch in this area. Therefore, the coastwide ABC is reduced from 2,900 mt in 1994 to 1,250 mt in 1995. A harvest guideline is set for the first time in 1995, at 850 mt, for the combined Vancouver/Columbia area, which is equal to the subarea ABCs minus 150 mt of estimated discards.

Sebastes complex. The *Sebastes* complex includes all rockfish except widow, shortbelly, Pacific ocean perch (POP), and thornyheads.

North: The harvest guideline for the *Sebastes* complex in the Vancouver-Columbia area (the EEZ north of 43°00′00″ N. lat.) is 11,800 mt in 1995, 1,440 mt lower than the 13,240 mt harvest guideline in 1994. It is calculated by adding the ABCs for canary and remaining rockfish in the Vancouver and Columbia subareas, and for yellowtail rockfish in the Vancouver, Columbia, and Eureka subareas and then subtracting 450 mt (300 mt for an estimate of the yellowtail ABC in the Eureka subarea, and 150 mt for estimated discards of canary rockfish). The reduction in 1995 reflects the reduction in the ABC for canary rockfish in the same area. Inseason estimates of yellowtail rockfish discards are counted toward this harvest guideline.

South: The harvest guideline for the *Sebastes* complex in the Eureka, Monterey, and Conception subareas (the EEZ south of 43°00′00″ N. lat.) is 13,200 mt in 1995, slightly lower than 13,440 mt in 1994. It is based on the sum of the ABCs of the species in those subareas (bocaccio, chilipepper, yellowtail rockfish, and remaining rockfish); no estimate for discards is subtracted because trip-limit induced discards are believed to be negligible for these species in this area. The decrease reflects the net change in the ABCs for bocaccio and canary rockfish in the southern area.

Note: As in 1994, the 1995 ABCs and harvest guidelines for the *Sebastes* complex and yellowtail rockfish apply to different areas due to differences in stock assessment areas. The ABCs and harvest guidelines for the *Sebastes* complex apply north and south of 43°00′00″ N. lat. (the Columbia/Eureka subarea boundary). The yellowtail rockfish ABCs in the Columbia area are divided at Cape Falcon (45°46′00″ N. lat.) and the harvest guidelines are divided at Cape Lookout (40°20′15″ N. lat.). Further explanation is found in the October 1993 SAFE document and at 59 FR 691, January 6, 1994. Trip limits are applied to the same areas as the harvest guidelines.

Dover sole. Based on a new stock assessment, the ABC for Dover sole in the Eureka subarea is reduced from 3,500 mt in 1994 to 2,900 mt in 1995, and in the Columbia subarea from 4,000 mt in 1994 to 3,000 mt in 1995. The Vancouver, Monterey, and Conception subarea ABCs are not changed, so the coastwide ABC is reduced from 15,900 mt in 1994 to 14,300 mt in 1995, which is similar to the catch in 1993; landings in 1994 are expected to be less than 9,000 mt. The reduction in the Eureka ABC appears to be due to declining recruitment. There is some uncertainty in Dover sole biomass estimates due to the catchability coefficient applied to the survey data, especially in the Columbia area. The Columbia ABC is believed to be a realistic upper estimate.

The coastwide harvest guideline for Dover sole is reduced from 16,900 mt in 1994 to 13,600 mt in 1995, equal to the sum of the subarea ABCs minus 5 percent for estimated discards. As in the past, a separate harvest guideline is set for the Columbia subarea. In 1992, the Columbia subarea harvest guideline was set higher than the ABC and was scheduled to be reduced by 1,000 mt annually until it equaled 4,000 mt, the expected ABC in 1995. However, the 1995 ABC has been reduced to 3,000 mt, and the Council maintained its original intent to set the harvest guideline equal to the ABC by 1995. Therefore, the Columbia area harvest guideline is reduced from 5,000 mt in 1994 to 2,850 mt in 1995 (the 3,000-mt Columbia ABC minus 150 mt for estimated discards).

Setting Harvest Guidelines Greater Than ABC

In most cases, harvest guidelines are less than or equal to the ABCs, or prorated ABCs, for specific areas. However, for 1995 as in 1994, the Council recommended harvest guidelines that exceed the ABCs for two species, POP and shortspine thornyheads. The FMP requires that the Council consider certain factors when setting a harvest guideline above an ABC. These factors were analyzed by

the Council's GMT and considered at the Council's October 1994 meeting before recommending the 1995 harvest guidelines. These factors also were considered when establishing the 20-year rebuilding schedule for POP in the 1981 FMP, in the most recent stock assessments for POP (in the August 1992 SAFE document) and shortspine thornyheads (in the October 1994 SAFE document), and in the GMT's recommendations for 1995 (GMT Report F.3., October 1994).

Overfishing. The FMP defines ''overfishing'' as a fishing mortality rate that would, in the long-term, reduce the spawning biomass per recruit below 20 percent of what it would have been if the stock had never been exploited (unless the species is above the level that would produce MSY). The rate is defined in terms of the percentage of the stock removed per year. Therefore, high catch rates can cause overfishing at any stock abundance level. Conversely, overfishing does not necessarily occur for stocks at low abundance levels if the catch can be kept to a sufficiently small fraction of that stock level. The target rate of exploitation for Pacific Coast groundfish typically is the rate that would reduce spawning biomass per recruit to 35 percent of its unfished level. This desired rate of fishing will always be less than the overfishing rate, so there is a buffer between the management target and the level that could harm the stock's long-term potential productivity. If the overfishing level is reached, the Guidelines for Fishery Management Plans at 50 CFR part 602 require the Council to identify actions to be undertaken to alleviate overfishing.

None of the ABCs for 1995 exceeds the level of overfishing. However, for those species whose harvest guideline exceeds ABC (POP and shortspine thornyheads), the harvest guideline approaches overfishing. In addition, new assessments for Dover sole in the Columbia area, lingcod, and canary rockfish indicate that the overfishing level for these species may have been reached in the recent past. Further discussion appears in the GMT Supplemental Report F.3.(1) (October 1994). Efforts have been taken to avoid overfishing by establishment or reduction of harvest guidelines in 1995 (discussed above) and by more restrictive trip limit management for these species.

Discards. In 1995, the ABCs represent total catch, and most of the harvest guidelines, except for yellowtail rockfish and Pacific whiting, represent only that portion of the catch that is landed. Stock assessments and inseason catch monitoring are designed to account for all fishing mortality, including that resulting from fish discarded at sea. Discards of rockfish and sablefish in the fishery for whiting processed at sea are well monitored and are accounted for inseason as they occur. In the other fisheries, discards caused by trip limits are not monitored, so discard factors have been developed to account for this extra catch. A level previously measured for widow rockfish (16 percent) in a scientific study is assumed to be appropriate for the commercial fisheries for widow rockfish, yellowtail rockfish, and POP. A lower level of 8 percent is used for the deepwater thornyhead fishery. The discard factors are typically applied by setting the harvest guideline for landed catch at a level that is equal to the ABC minus expected discard. More detailed information is found in the Council's SAFE document.

Foreign and domestic fisheries. For those species needing individual management that will not be fully utilized by domestic processors or harvesters, and that can be caught without severely affecting species that are fully utilized by domestic processors or harvesters, foreign or joint venture operations may occur. A joint venture is U.S. vessels delivering their catch to foreign processing vessels in the EEZ. The harvest guidelines or quotas for these species may be apportioned to domestic annual harvest (DAH, which includes domestic annual processing (DAP) and joint venture processing (JVP)) and the total allowable level of foreign fishing (TALFF). In 1995, there initially are no surplus groundfish available for joint venture or foreign fishing operations. Consequently, all the harvest guidelines in 1995 are designated entirely for DAP (which also equals DAH), and JVP and TALFF are set at zero.

In the unlikely event that fish are reallocated inseason and a foreign or joint venture fishery should occur, the incidental catch levels for a whiting fishery would be the same as announced at Table 2, footnote 1 of 58 FR 2990 (January 7, 1993), and for a jack mackerel joint venture, initially would be the same as those suggested in section 12.5.2 of the FMP, but could be changed during the year.

II. The Limited-Entry Program

Amendment 6 to the FMP established a limited-entry program which, on January 1, 1994, divided the commercial groundfish fishery into two components, the limited-entry fishery and the open-access fishery, each of which has its own allocations and management measures. The limited-entry and open-access allocations are calculated according to a formula specified at section II.E. of the appendix to 50 CFR part 663. At its October 1994 meeting, the Council recommended the species and areas subject to open-access and limited-entry allocations in 1995, and the Regional Director calculated the amounts of the allocations, that are presented in Table 1. Unless otherwise specified, the limited-entry and open-access allocations are treated as harvest guidelines in 1995.

Open-Access Allocations

The open-access fishery means the fishery composed of vessels using (1) exempt gear, or (2) longline or pot (trap) gear used pursuant to the harvest guidelines, quotas, and other management measures governing the open-access fishery. Exempt gear means all types of fishing gear except groundfish trawl, longline, and pots. (Exempt gear includes trawls used to harvest pink shrimp or spot or ridgeback prawns (shrimp trawls), and, south of Point Arena, CA, California halibut or sea cucumbers.)

The open-access allocation is derived by applying the open-access allocation percentage to the annual harvest guideline or quota after subtracting any set asides for recreational fishing or treaty Indians (see sections II.E. (b) and (c) of the Appendix to 50 CFR part 663). For those species in which the open-access share would have been less than 1 percent, no open-access allocation is specified because significant open-access effort is not anticipated. At the time the calculations were made, the status of some vessels (whether they would receive a limited-entry permit) was not certain. The catch by these vessels was divided equally between the limited-entry and open-access allocations. These amounts are minor and would not affect the level of trip limits for the limited-entry or open-access fisheries.

Limited-Entry Allocations

The limited-entry fishery means the fishery composed of vessels using limited-entry gear fished pursuant to the harvest guidelines, quotas, and other management measures governing the limited-entry fishery. Limited-entry gear means longline, pot, or groundfish trawl gear used under the authority of a valid limited-entry permit, issued under 50 CFR part 663, affixed with an endorsement for that gear. (Groundfish trawl gear excludes shrimp trawls used to harvest pink shrimp, spot prawns, or ridgeback prawns, and other trawls used

to fish for California halibut or sea cucumbers south of Point Arena, CA.)

The limited-entry allocation is the allowable catch (harvest guideline or quota) reduced by: (1) Set asides, if any, for treaty Indian fisheries or recreational fisheries; and (2) the open-access allocation.

III. 1995 Management Measures

Most of the 1995 management measures announced in this document have been designated as ''routine'' under the procedures contained in Amendment 4 to the FMP (56 FR 736, January 8, 1991). The ''routine'' designation means that a measure is likely to need adjustment on an annual or more frequent basis, and that it may be implemented and adjusted for a specified species or species group and gear type after consideration at a single Council meeting. However, the effects of the particular measure must have been analyzed previously, the purpose of the measure must be the same as when it was designated as routine, and the measure must be announced in the **Federal Register**.

Those management measures announced in this document that are not yet designated ''routine'' at 50 CFR 663.23 are: For the limited entry fishery, trip landing and frequency limits for canary rockfish, lingcod, shortspine thornyheads, and longspine thornyheads, which are managed individually for the first time in 1995, and size limits for lingcod; and, for the open access fishery, trip landing and frequency limits for all groundfish species, separately or in any combination. These management measures will be proposed as routine measures in a separate **Federal Register** document.

In the following discussion, the projections of landings in 1994 are based on the information available to the Council at its October 1994 meeting (Supplemental GMT Report F.2., October 1994).

A. Limited-Entry Fishery

The following management measures apply to vessels operating in the limited-entry fishery after January 1, 1995, and are designed to keep landings within the harvest guidelines or limited-entry allocations.

Widow Rockfish. In 1994, the cumulative trip limit for widow rockfish continued at 30,000 lb (13,608 kg) per month until December 1, when it was reduced to 3,000 lb (1,361 kg) per trip. Landings are projected to exceed the 6,500-mt harvest guideline by about 3 percent in 1994. Because the harvest guideline is not changed, the 30,000-lb cumulative monthly trip limit will again be implemented in January 1995.

The Sebastes Complex (Including Yellowtail Rockfish, Canary Rockfish, and Bocaccio). In 1994, the cumulative monthly trip limit for the *Sebastes* complex was 80,000 lb (36,287 kg) coastwide, until September, when it was increased to 100,000 lb (45,359 kg) south of Cape Mendocino, CA (40°30′00″ N. lat.). Within these limits for the *Sebastes* complex were cumulative monthly trip limits for yellowtail rockfish and bocaccio, that did not change during the year: 14,000 lb (6,350 kg) of yellowtail rockfish north of Cape Lookout, OR (45°20′15″ N. lat.); 30,000 lb (13,608 kg) of yellowtail rockfish south of Cape Lookout; and 30,000 lb (13,608 kg) of bocaccio south of Cape Mendocino. Neither of the harvest guidelines for the *Sebastes* complex (north and south of 43°00′00″ N. lat.), nor for bocaccio, will be reached in 1994. The harvest guidelines for yellowtail rockfish north and south of Cape Lookout are expected to be exceeded by about 1 percent.

To provide for reasonable levels of harvest of other species in the *Sebastes* complex while protecting yellowtail rockfish, canary rockfish, and bocaccio, the Council recommended starting the year with three different cumulative monthly trip limits for the *Sebastes* complex: 35,000 lb (15,876 kg) north of Cape Lookout, 50,000 lb (22,680 kg) between Cape Lookout and Cape Mendocino, and 100,000 lb (45,359 kg) south of Cape Mendocino. The yellowtail and bocaccio cumulative monthly trip limits remain the same as in 1994, except in 1995, the 30,000-lb (13,608 kg) southern trip limit for yellowtail rockfish extends only to Cape Mendocino, rather than to the U.S.-Mexico border. For the first time, a separate cumulative monthly trip limit for canary rockfish is implemented (within the *Sebastes* complex trip limit), at 6,000 lb (2,722 kg) coastwide.

The declaration procedures implemented by the States of Washington and Oregon for vessels operating north and south of Cape Lookout remain in effect, except in 1995 they will apply to the *Sebastes* complex as well as to yellowtail rockfish. The declarations enable a vessel to operate both north and south of Cape Lookout during the month, and to take and retain the more liberal, southern limits of the *Sebastes* complex and yellowtail rockfish, but only if the state is notified, as required by state law.

POP. The 1994 trip limit for POP was the same as in 1991–93: 3,000 lb (1,361 kg) or 20 percent of all fish on board, whichever is less, in landings of POP above 1,000 lb (454 kg). Landings of POP are projected to be 17 percent below its 1,300-mt harvest guideline in 1994. However, because the trip limit is intended to allow only incidental catches to be landed, it is not increased to achieve the harvest guideline.

The Council recommended a change from the ''per trip'' limit in 1994 to a cumulative trip limit in 1995 of 6,000 lb (2,722 kg) per month. Public testimony and landing records confirmed that some fishermen were targeting POP even under the 1994 ''per trip'' limit, resulting in discards of fish in excess of the trip limit. Also, because the number of trips was not restricted, total landings in a month could be well above 6,000 lb (2,722 kg) per vessel. The cumulative trip limit is intended to reduce the level of discards induced by the ''per trip'' limit, and to accommodate only unavoidable incidental catches. It will not be increased to achieve the harvest guideline.

Sablefish. The sablefish harvest guideline is subdivided among several fisheries. The tribal fishery allocation is set aside prior to dividing the balance of the harvest guideline between the commercial limited-entry and open-access fisheries. These three fisheries are managed differently. The limited-entry allocation is further subdivided into trawl (58 percent) and nontrawl (42 percent) allocations. Trawl-caught sablefish are managed together with Dover sole and thornyheads as the DTS (or deepwater) complex because they often are caught together. Landings of sablefish are expected to exceed the harvest guideline by about 5 percent in 1994.

Washington Coastal Tribal Fisheries for Sablefish. From 1991 through 1994, the Washington coastal treaty tribes have conducted a tribal sablefish fishery of 300 mt that was recognized in these annual management measures. In 1994, the U.S. Government formally recognized the treaty right to fish for groundfish of the four Washington Coastal Treaty tribes (the Makah, Hoh, Quileute, and Quinault), and concluded that, in general terms, the quantification of the right is 50 percent of the harvestable surplus of groundfish available in the tribes' usual and accustomed fishing areas (marine waters under U.S. jurisdiction north of 46°53′18″ N. lat. and east of 125°44′00″ W. long.). For 1995, the tribes' treaty right to sablefish is determined to be 780 mt. The treaty Indian fishery for this amount of sablefish will be managed by the tribes. The treaty Indian fishery for sablefish is a separate fishery, and is not governed by the limited-entry or open-access regulations or allocations.

DTS Complex (Dover sole, Thornyheads, and Trawl-Caught Sablefish). In January 1994, the cumulative monthly trip limit for the DTS complex was 50,000 lb (22,680 kg) per month, including no more than 30,000 lb (13,608 kg) of thornyheads and 12,000 lb (5,443 kg) of trawl-caught sablefish. On July 1, the cumulative monthly limits were reduced to 30,000 lb (13,608 kg) of the DTS complex, including no more than 8,000 lb (3,629 kg) of thornyheads and 6,000 lb (2,722 kg) of trawl-caught sablefish. The sablefish ''per trip'' limit of 1,000 lb (454 kg) or 33.333 percent of the Dover sole and thornyheads (equivalent to 25 percent of the DTS complex), whichever is greater, continued throughout 1994, as did the 5,000-lb (2,268-kg) trip limit on sablefish smaller than 22 inches (56 cm). Even though the sablefish harvest guideline applied only north of the Conception subarea (36°00′00″ N. lat.), these trip limits were applied coastwide to avoid effort shifts into the Conception area. At the October Council meeting, the trawl allocation was projected to be exceeded by 15 percent. Consequently, on December 1, north of the Conception subarea (36°00′00″ N. lat.), all landings of sablefish were prohibited; the thornyhead trip limit was reduced to 1,500 lb (680 kg) per month and a Dover sole trip limit was imposed of 6,000 lb (2,722 kg) per month, removing the need for an overall DTS cumulative limit. At year's end, the limited-entry trawl allocation for sablefish was expected to be exceeded by about 15 percent; thornyheads were expected to exceed their combined harvest guideline by about 2 percent, and Dover sole was far below its harvest guidelines (42 percent below its coastwide harvest guideline and 30 percent below its Columbia subarea harvest guideline). These ''underages'' were not addressed by increasing the trip limits for Dover sole because of the species' association with sablefish and new information supporting more cautious management of Dover sole.

For 1995, the Council recommended two cumulative monthly trip limits for the DTS complex: 35,000 lb (15,876 kg) north of Cape Mendocino and 50,000 lb (22,680 kg) south of Cape Mendocino. This differential trip limit is intended to provide additional protection for shortspine thornyheads, the most valuable and least abundant species in the DTS complex, while encouraging the harvest of Dover sole in more southern areas. Further protection for shortspine thornyheads is intended by managing the two thornyhead species separately in 1995. A cumulative trip limit is set for both shortspine and longspine thornyheads combined of 20,000 lb (9,072 kg) per month, of which no more than 4,000 lb (1,814 kg) may be shortspine thornyheads. The trip limits for trawl-caught sablefish remain the same as established in July 1994 (6,000 lb (2,722 kg) cumulative per month, and 1,000 lb (454 kg) or 33.333 percent of the Dover sole and thornyheads per trip). The exception is that the trip limit for sablefish smaller than 22 inches (56 cm) is reduced to 500 lb (227 kg) to reflect the lower overall trip limits for sablefish in recent years.

Nontrawl Sablefish. Small daily trip limits were applied to the nontrawl fishery again in 1994, until 72 hours before, and 72 hours after, the regular (''open'') season, that started on May 15, 1994. A 250-lb (113-kg) daily trip limit was applied only north of the Conception subarea (36°00′00″ N. lat.), the same area covered by the harvest guideline. In the Conception area, where there is no harvest guideline and landings had been below the 425-mt ABC, the daily trip limit was 350 lb (159 kg) to accommodate most landings without encouraging excessive effort shifts into that area. The trip limit for sablefish smaller than 22 inches (56 cm) (1,500 lb (680 kg) or 3 percent of all legal sablefish on board, whichever is greater) remained in effect. All further landings of sablefish caught north of 36°00′00″ N. lat. were prohibited on December 1, 1994. In 1994, the nontrawl allocation is expected to be exceeded by 28 percent.

The Council recommended continuing the 350-lb (159-kg) daily trip limit in the Conception area for 1995, and increasing the northern daily trip limit for sablefish to 300 lb, slightly increasing the amount that could be taken outside the regular season for the nontrawl limited-entry fishery. The same daily trip limit is applied to the limited-entry and open-access fisheries to avoid effort shifts into the open-access fishery. This increase is intended primarily to bring landings closer to the open-access allocation, that was not achieved in 1994. These trip limits for the limited-entry fishery will apply outside the regular season and any subsequent ''mop-up'' fishery.

Under current regulations at 50 CFR 663.23(b)(2), the start of the regular nontrawl sablefish fishery is 3 days before the first opening in Alaska. The implementation of an individual quota (IQ) system in Alaska in 1995 would radically change the opening date of the regular season, from mid-May to late February, off Washington, Oregon, and California. The Council has discussed this problem and recommended the following new management regime for the nontrawl sablefish fishery for implementation in 1995: (1) A delay in the regular season until August 6; (2) before the regular season, a 72-hour closure during which all nontrawl groundfish gear, both open-access and limited-entry, must be out of the water and sablefish landings are prohibited; (3) an exception which, 24 hours before the regular season begins, allows pot gear (both open-access and limited-entry) to be set and baited; (4) removal of the 72-hour closure at the end of the regular season, and instead resume the same daily trip limits used before the regular season; (5) a 1-month mop-up fishery, about 3 weeks after the end of the regular season, under cumulative trip limits; followed by (6) resumption of the daily trip limits. Trip limits for nontrawl sablefish smaller than 22 inches (56 cm) would remain in effect during the regular and mop-up fisheries. The States may require inspections of vessel holds before the regular and mop-up fisheries.

Whiting. The Council recommended continuation of the 10,000-lb (4,536-kg) trip limit for whiting taken before and after the regular whiting season and inside the 100-fathom (183-m) contour in the Eureka subarea (40°30′00″–43°00′00″ N. lat.). In 1995 as in 1994, the regular season begins on March 1 between 42°00′00″–40°30′00″ N. lat., and on April 15 north of 42°00′00″ N. lat. and south of 40°30′00″ N. lat., as stated at 50 CFR 663.23(b)(3)(i). Additional regulations, including the allocation of whiting to vessels that deliver shoreside and those that deliver at-sea, are found at 50 CFR 663.23(b) (3) and (4).

Lingcod. The harvest guideline for lingcod was first established in 1994, but specific trip limits were not recommended until 1995. The Council recommended a cumulative trip limit of 20,000 lb (9,072 kg) per month. A minimum size limit of 22 inches (56 cm), which previously had been implemented in the California recreational fishery, is applied coastwide for both commercial and recreational fisheries. The size limit is intended to minimize harvest of immature fish, that are needed to sustain the reproductive potential of the stock.

Black Rockfish. Black rockfish off the State of Washington continue to be managed under the regulations at 50 CFR 663.23(b)(1)(iii). The Council has considered trip limits off the State of Oregon but has not yet submitted its recommendation to NMFS for review.

B. Open-Access Fishery

In 1994, open-access trip limits were established for the first time. The trip limits are all designed to keep landings within the open-access allocation, while allowing the fisheries to operate for as long as possible during the year. Any more restrictive limits imposed on the limited-entry vessels also apply to the open-access vessels.

All Open-Access Gear Except Trawls. In 1994, for all open-access gear except trawls, the Council recommended: (1) A cumulative trip limit for rockfish of 40,000 lb (18,144 kg) per month, including a 10,000-lb (4,536-kg) ''per trip'' limit, which was removed for the set net fishery in May 1994; and (2) a sablefish trip limit of the same amounts and areas as for the limited-entry nontrawl fishery before the regular season: Daily trip limits of 250 lb (113 kg) north of 36°00′00″ N. lat. and 350 lb (159 kg) south of 36°00′00″ N. lat.

The Council recommended continuation of most of the same trip limits in 1995 as were in place at the end of 1994 for the open-access fishery, with two changes for all open-access gears except the nongroundfish trawls: (1) The cumulative trip limit for rockfish is reduced to 35,000 lb (15,876 kg) north of Cape Lookout to be consistent with the limited-entry limit for the *Sebastes* complex in the same area, but remains at 40,000 lb (18,144 kg) south of Cape Lookout; and (2) the daily trip limit for sablefish north of 36°00′00″ N. lat. is increased to 300 lb (136 kg) to promote achievement of the open-access allocation for sablefish. The limited-entry trip limit was modified to be consistent with the open-access trip limit.

Shrimp/Prawn Fisheries. The bycatch of groundfish also is regulated in the shrimp/prawn fishery. In 1994, the trip limit in the spot and ridgeback prawn fishery continued at 1,000 lb (454 kg) of groundfish per trip. The trip limit in the pink shrimp fishery (1,500 lb (680 kg) of groundfish per day times the number of days in the fishing trip) also remained the same as in past years, except there was no exclusion for whiting, shortbelly rockfish, and arrowtooth flounder. The Council recommended continuation of these limits in 1995, except it clarified that these trip limits also apply to pot gear, as in the past, not just trawl gear. This allowance is not intended to supersede any state law that is more restrictive regarding retention of groundfish caught in shrimp or prawn pots or traps.

California Halibut/Sea Cucumber Trawl. For 1995, the Council recommended continuation of the 500-lb (227-kg) ''per trip'' limit on the bycatch of all groundfish species taken while fishing in the California halibut and sea cucumber trawl fisheries south of Point Arena, CA (38°57′30″ N. lat.).

C. Operating in Both Limited-entry and Open-Access Fisheries

Vessels using open-access gear are subject to the management measures for the open-access fishery, whether or not the vessel has a valid limited-entry permit endorsed for any other gear. In addition, a vessel operating in the open-access fishery must not exceed any trip limit, frequency limit, and/or size limit for the same gear and/or subarea in the limited-entry fishery (as announced in this **Federal Register** document in paragraphs titled ''limited-entry''). A vessel that operates in both the open-access and limited-entry fisheries is not entitled to two separate trip limits for the same species. Fish caught with open-access gear will also be counted toward the limited-entry trip limit. For example: In 1 month, a trawl vessel catches 5,000 lb (2,268 kg) of POP in the limited-entry fishery, and in the same month catches 3,000 lb (1,361 kg) of POP with hook-and-line (open access) gear. Because the open-access landings are counted toward the limited-entry limit, the vessel would have exceeded its limited-entry, cumulative trip limit of 6,000 lb (2,722 kg) by 2,000 lb (907 kg).

D. Operating in Areas With Different Trip Limits

Additional management lines have been added in 1995, meaning that trip limits may differ for a species or species complex at different locations on the coast. Unless otherwise stated (as for yellowtail rockfish, black rockfish, and the *Sebastes* complex), the cross-over provisions utilized in the bocaccio fishery in 1994 will apply.

E. Changes to Trip Limits; Closures

The Council confirmed at its October 1994 meeting that, unless otherwise stated, a vessel must have initiated offloading its catch before the fishery is closed or before a more restrictive trip limit becomes effective. As in the past, all fish on board the vessel when offloading begins are counted toward the landing limits (50 CFR 663.2, the definition of ''landing'').

F. Designated Species B Permits

Designated species B permits may be issued if the limited-entry fleet will not fully utilize the harvest guideline for Pacific whiting, shortbelly rockfish, or jack mackerel. (Only jack mackerel north of 39°00′00″ N. lat. are governed by the FMP.) The limited-entry fleet has requested the full use of the harvest guideline for Pacific whiting and shortbelly rockfish. At the October 1994 Council meeting, NMFS announced its determination that, based on the best information available at that time, only 30,500 mt of the 52,600-mt harvest guideline for jack mackerel was likely to be used in 1995, leaving about 20,000 mt available for designated species B permits, should applications for that amount be received. NMFS also stated that its determination could be revised if additional information were received before the annual specifications were published in the **Federal Register**. Additional responses to NMFS' ''Survey of Intent to Harvest Underutilized Species'' were received. Consequently, NMFS has revised its determination and finds that 49,000 mt of the jack mackerel harvest guideline may be used by the limited-entry fleet in 1995, leaving 3,600 mt available for designated species B permits.

There is virtually no information regarding bycatch in a jack mackerel fishery north of 39°00′00″ N. lat. The Council recommended bycatch limits, which may be changed during the year, based on the open-access limits and guidance in the FMP regarding a jack mackerel joint venture. These limits are intended to enable information to be obtained about levels and species of bycatch in this fishery. If designated species B permits for jack mackerel are issued in 1995, the Council initially recommended the following bycatch limits, which may be changed during the year: (1) Rockfish, 40,000 lb (18,144 kg) cumulative per month, not to exceed any limited-entry limit; (2) sablefish, 300 lb (136 kg) per day, consistent with the Council's final recommendation for the open-access daily trip limit (and slightly higher than the 250-lb (113-kg) daily trip limit initially discussed by the Council in October); (3) whiting—3 percent of the monthly cumulative delivery of jack mackerel, unless at-sea processing of whiting is prohibited, in which case no whiting could be retained.

G. Recreational Fishing

Lingcod. In 1994, the recreational daily bag limits for lingcod were five fish 22 inches (56 cm) or larger off California, and three fish of any size off Oregon and Washington. In 1995, the daily bag limits are continued, but the 22-inch (56-cm) minimum size limit is applied to Oregon and Washington as well.

Rockfish. The 1994 recreational daily bag limits for rockfish continue in 1995: In California, 15 fish; in Oregon, 15 fish

of which no more than 10 may be black rockfish; in Washington, 15 fish south of Leadbetter Point (46°38'10'' N. lat.) and 12 fish north of Leadbetter Point.

The State of California allows possession of multi-day limits according to State law.

IV. NMFS Actions

For the reasons stated above, the Assistant Administrator for Fisheries, NOAA (Assistant Administrator), concurs with the Council's recommendations and announces the following management actions for 1995, including those that are the same as in 1994.

A. General Definitions and Provisions

The following definitions and provisions apply to the 1995 management measures, unless otherwise specified in a subsequent notice:

(1) *Trip limits.* Trip limits are used in the commercial fishery to specify the amount of fish that a vessel may legally land per fishing trip or cumulatively per unit of time, or the number of landings that may be made by a vessel in a given period of time, as explained below.

(a) *A trip limit* is the total allowable amount of a groundfish species or species complex, by weight, or by percentage of fish on board, that may be taken and retained, possessed, or landed per vessel from a single fishing trip.

(b) *A daily trip limit* is the maximum amount that may be taken and retained, possessed, or landed per vessel in 24 consecutive hours, starting at 0001 hours local time. Only one landing of groundfish may be made in that 24-hour period. Daily trip limits may not be accumulated during multiple day trips.

(c) *A cumulative trip limit* is the maximum amount that may be taken and retained, possessed, or landed per vessel in a specified period of time, without a limit on the number of landings or trips. Cumulative trip limits for 1995 initially apply to calendar months.

(2) Unless the fishery is closed, a vessel that has landed its cumulative or daily limit may continue to fish on the limit for the next legal period, so long as no fish (including but not limited to groundfish with no trip limits, shrimp, prawns, or other nongroundfish species or shellfish) are landed (offloaded) until the next legal period. As stated in the regulations at 50 CFR 663.2, once offloading of any species begins, all fish aboard the vessel are counted as part of the landing.

(3) All weights are round weights or round-weight equivalents.

(4) Percentages are based on round weights, and, unless otherwise specified, apply only to legal fish on board.

(5) ''Legal fish'' means fish legally taken and retained, possessed, or landed in accordance with the provisions of 50 CFR part 663, the Magnuson Act, any notice issued under subpart B of part 663, and any other regulation promulgated or permit issued under the Magnuson Act.

(6) *Size limits and length measurement.* Total length is measured from the tip of the snout (mouth closed) to the tip of the tail (pinched together) without mutilation of the fish or the use of additional force to extend the length of the fish. No fish with a size limit may be retained, if it is in such condition that its length has been extended or cannot be determined by these methods.

(7) ''Closure,'' when referring to closure of a fishery, means that taking and retaining, possessing, or landing the particular species or species group is prohibited. (See the regulations at 50 CFR 663.2.) Unless otherwise announced in the **Federal Register**, offloading must begin before the time the fishery closes.

(8) The fishery management area for these species is the EEZ off the coasts of Washington, Oregon, and California between 3 and 200 nautical miles offshore, bounded on the north by the Provisional International Boundary between the United States and Canada, and bounded on the south by the International Boundary between the United States and Mexico. All groundfish possessed between 0–200 nautical miles offshore, or landed in, Washington, Oregon, or California are presumed to have been taken and retained from the fishery management area, unless otherwise demonstrated by the person in possession of those fish.

(9) Inseason changes to trip limits are announced in the **Federal Register**. Most trip and bag limits in the groundfish fishery have been designated ''routine,'' which means they may be changed rapidly after a single Council meeting. Information concerning changes to trip limits is available from the NMFS Northwest and Southwest Regional Offices (see ADDRESSES above). Changes to trip limits are effective at the times stated in the **Federal Register**. Once a change is effective, it is illegal to take and retain, possess, or land more fish than allowed under the new trip limit. This means, unless otherwise announced in the **Federal Register**, offloading must begin before the time a fishery closes or a more restrictive trip limit takes effect.

(10) It is unlawful for any person to take and retain, possess, or land groundfish in excess of the landing limit for the open-access fishery without having a valid limited-entry permit for the vessel affixed with a gear endorsement for the gear used to catch the fish (50 CFR 663.7(t)).

(11) *Operating in both limited-entry and open-access fisheries.* The open-access trip limit applies to any fishing conducted with open-access gear, even if the vessel has a valid limited-entry permit with an endorsement for another type of gear. A vessel that operates in both the open-access and limited-entry fisheries is not entitled to two separate trip limits for the same species. Fish caught with open-access gear will also be counted toward the limited-entry trip limit.

(12) *Operating in areas with different trip limits.* Trip limits for a species or species complex may differ in different geographic areas along the coast. The following ''crossover'' provisions apply to vessels operating in different geographical areas that have different cumulative or ''per trip'' trip limits for the same species or species complex. They do not apply to species that are only subject to daily trip limits, or to the trip limits for black rockfish off the State of Washington (see 50 CFR 663.23(b)(1)(iii)). They also do not apply to the trip limits for yellowtail rockfish and the *Sebastes* complex when the vessel is in compliance with paragraph IV.C.(2)(c) below.

If a vessel fishes, for any species, in an area where a more restrictive trip limit applies, then that vessel is subject to the more restrictive trip limit, for the entire period to which that trip limit applies, no matter where the fish are taken and retained, possessed, or landed. Similarly, if a vessel takes and retains a species (or species complex) in an area where a higher trip limit (or no trip limit) applies, and possesses or lands that species (or species complex) in an area where a more restrictive trip limit applies, then that vessel is subject to the more restrictive trip limit for that trip limit period.

(13) *Sorting.* Regulations at 50 CFR 663.7(l) make it unlawful for any person to ''fail to sort, prior to the first weighing after offloading, those groundfish species or species groups for which there is a trip limit, if the weight of the total delivery exceeds 3,000 lb (1,361 kg) (round weight or round weight equivalent).'' This provision applies to both the limited-entry and open-access fisheries.

Note: The Council has recommended that this regulation be changed to require all species or species groups with a trip limit, harvest guideline, or quota to be sorted. There would be no exception for landings under 3,000 lb (1,361 kg). The States of

Washington and Oregon already have the same or similar requirements. If approved, the regulation is expected to be implemented in 1995.

(14) *Experimental fisheries.* U.S. vessels operating under an experimental fishing permit issued under 50 CFR 663.10 also are subject to these restrictions, unless otherwise provided in the permit.

(15) Paragraphs IV.B. through IV.I. below pertain to the commercial groundfish fishery. The provisions in paragraphs IV.B. through IV.I. that are not covered under the headings ''limited-entry'' or ''open-access'' apply to all vessels in the commercial fishery that take and retain groundfish, unless otherwise stated. Paragraph IV.J. pertains to the recreational fishery.

B. Widow Rockfish

(1) *Limited-entry fishery.* The cumulative trip limit for widow rockfish is 30,000 lb (13,608 kg) per vessel per month. (Widow rockfish also are called brownies.)

(2) *Open-access fishery.* See paragraph IV.I. below.

C. Sebastes Complex (Including Bocaccio, Yellowtail, and Canary Rockfish)

(1) *General.* (a) *Sebastes* complex means all rockfish managed by the FMP except Pacific ocean perch (*Sebastes alutus*), widow rockfish (*S. entomelas*), shortbelly rockfish (*S. jordani*), and *Sebastolobus* spp. (also called thornyheads, idiot, or channel rockfish). Yellowtail rockfish (*S. flavidus*) are commonly called greenies. Bocaccio (*S. paucispinis*) are commonly called rock salmon. Canary rockfish (*S. pinniger*) are commonly called orange rockfish.

(b) Cape Lookout means 45°20′15″ N. lat.

(c) Cape Mendocino means 40°30′00″ N. lat.

(2) *Limited-entry fishery*—(a) *Cumulative trip limits*—(i) *North of Cape Lookout.* The cumulative trip limit for the *Sebastes* complex taken and retained north of Cape Lookout is 35,000 lb (15,876 kg) per vessel per month. Within this cumulative trip limit for the *Sebastes* complex, no more than 14,000 lb (6,350 kg) may be yellowtail rockfish taken and retained north of Cape Lookout, and no more than 6,000 lb (2,722 kg) may be canary rockfish.

(ii) *Cape Lookout to Cape Mendocino.* The cumulative trip limit for the *Sebastes* complex taken and retained between Cape Lookout and Cape Mendocino is 50,000 lb (22,680 kg) per vessel per month. Within this cumulative trip limit for the *Sebastes* complex, no more than 30,000 lb (13,608 kg) may be yellowtail rockfish taken and retained between Cape Lookout and Cape Mendocino, and no more than 6,000 lb (2,722 kg) may be canary rockfish.

(iii) *South of Cape Mendocino.* The cumulative trip limit for the *Sebastes* complex taken and retained south of Cape Mendocino is 100,000 lb (45,359 kg) per vessel per month. Within this cumulative trip limit for the *Sebastes* complex, no more than 30,000 lb (13,608 kg) may be bocaccio taken and retained south of Cape Mendocino, and no more than 6,000 lb (2,722 kg) may be canary rockfish.

(b) For operating in areas with different trip limits for the same species, see paragraph IV.A.(12) above.

(c) *State declarations.* The provisions of paragraph IV.A.(12) do not apply to vessels fishing in conformance with this paragraph. The States of Oregon and Washington are implementing declaration procedures that enable a vessel that fishes or transits both north and south of Cape Lookout during a month to retain the larger cumulative limit for the *Sebastes* complex and yellowtail rockfish taken and retained south of Cape Lookout. Declarations must be made, according to state law, to the state where the fish will be landed. To make a declaration or for further information, contact: Washington Department of Fish and Wildlife, Montesano, WA, at 206–249–4628; or Oregon Department of Fish and Wildlife, Newport, OR, at 503–867–4741 or 503–867–0300.

(3) *Open-access fishery.* See paragraph IV.I. below. The State declaration procedures are available to all vessels, whether in the limited-entry or open-access fishery.

D. POP

(1) *Limited-entry fishery.* The cumulative trip limit for POP is 6,000 lb (2,722 kg) per vessel per month.

(2) *Open-access fishery.* See paragraph IV.I. below.

E. Sablefish and the DTS Complex (Dover Sole, Thornyheads, and Trawl-Caught Sablefish

(1) *1995 Management goal.* The sablefish fishery will be managed to achieve the 7,100-mt harvest guideline in 1995.

(2) *Washington coastal tribal fisheries.* The U.S. Government recognizes that the Makah, Hoh, Quileute, and Quinault tribes have treaty rights to fish for groundfish. Each tribe has such right in its usual and accustomed fishing grounds. The tribal treaty allocation for sablefish for 1995 is 780 mt. The tribes will regulate their fisheries so as not to exceed this allocation.

(3) *Limited-entry fishery*—(a) *Gear allocations.* After subtracting the tribal-imposed catch limit and the open-access allocation from the harvest guideline, the remainder will be allocated 58 percent to the trawl fishery and 42 percent to the nontrawl fishery.

Note: The 1995 harvest guideline for sablefish north of 36° N. lat. is 7,100 mt. The 780-mt tribal allocation is subtracted, and the limited-entry and open-access allocations are based on the remaining 6,320 mt. The limited-entry allocation for 1995 of 5,900 mt is allocated 3,420 mt (58 percent) to the trawl fishery and 2,480 mt (42 percent) to the nontrawl fishery. The trawl and nontrawl gear allocations are harvest guidelines in 1995, which means the fishery will be managed so that the harvest guidelines are not exceeded, but will not necessarily be closed if they are reached.

(b) *Trip and size limits.* These provisions apply to Dover sole and thornyheads caught with any limited-entry gear and to sablefish caught with limited-entry trawl gear.

(i) ''DTS complex'' means Dover sole (*Microstomus pacificus*), thornyheads (*Sebastolobus* spp.), and trawl-caught sablefish (*Anoplopoma fimbria*). Sablefish also are called blackcod. Thornyheads, also called idiots, channel rockfish, or hardheads, include two species, shortspine thornyheads (*S. alascanus*) and longspine thornyheads (*S. altivelis*).

(ii) *Trip limits.* (*A*) *North of Cape Mendocino.* The cumulative trip limit for the DTS complex taken and retained north of Cape Mendocino is 35,000 lb (15,876 kg) per vessel per month. Within this cumulative trip limit, no more than 6,000 lb (2,722 kg) may be sablefish, and no more than 20,000 lb (9,072 kg) may be thornyheads. No more than 4,000 lb (1,814 kg) of the thornyheads may be shortspine thornyheads.

(*B*) *South of Cape Mendocino.* The cumulative trip limit for the DTS complex taken and retained south of Cape Mendocino is 50,000 lb (22,680 kg) per vessel per month. Within this cumulative trip limit, no more than 6,000 lb (2,722 kg) may be sablefish, and no more than 20,000 lb (9,072 kg) may be thornyheads. No more than 4,000 lb (1,814 kg) of the thornyheads may be shortspine thornyheads.

(*C*) In any trip, no more than 1,000 lb (454 kg) or 33.333 percent of the legal thornyheads and Dover sole, whichever is greater, may be trawl-caught sablefish; and no more than 500 lb (227 kg) may be trawl-caught sablefish smaller than 22 inches (56 cm) total length.

Note: One third of thornyheads and Dover sole (the DTS complex excluding sablefish) is equivalent to 25 percent of the DTS complex (including sablefish). As stated in paragraph IV.A.(4), percentages are based on round weights, and, unless otherwise specified, apply only to legal fish on board.

(*D*) For operating in areas with different trip limits for the same species, see paragraph IV. A.(12) above.

(c) *Nontrawl trip and size limits.* These daily trip limits, which apply to sablefish of any size, apply until the closed period before the start of the regular season, as specified at 50 CFR 663.23(b)(2).

(i) *North of 36°00′00″ N. lat.* The daily trip limit for sablefish taken and retained with nontrawl gear north of 36°00′00″ N. lat. is 300 lb (136 kg).

(ii) *South of 36°00′00″ N. lat.* The daily trip limit for sablefish taken and retained with nontrawl gear south of 36°00′00″ N. lat. is 350 lb (159 kg).

Note: The Council recommended that the regular season be delayed until August 6, with a closure to all nontrawl gear 72 hours before it begins. This change must be approved by NMFS and then implemented by a regulation published in the **Federal Register**. The Council's recommendation is more fully discussed earlier in this document.

(iii) During the ''regular'' season, the only trip limit in effect applies to sablefish smaller than 22 inches (56 cm) total length, which may comprise no more than 1,500 lb (680 kg) or 3 percent of all legal sablefish on board, whichever is greater. (See paragraph IV.A.(6) regarding length measurement.)

(iv) Following the regular season, on a date to be announced in the **Federal Register**, the daily trip limits will be reimposed for sablefish (of any size) caught with nontrawl gear.

(d) For processed (''headed'') sablefish:

(i) The minimum size limit, which corresponds to 22 inches (56 cm) total length for whole fish, is 15.5 inches (39 cm) measured from the origin of the first dorsal fin (where the front dorsal fin meets the dorsal surface of the body closest to the head) to the tip of the upper lobe of the tail; the dorsal fin and tail must be left intact; and

(ii) The product recovery ratio (PRR) established by the state where the fish is or will be landed will be used to convert the processed weight to round weight for purposes of applying the trip limit. (The PRR currently is 1.6 in Washington, Oregon, and California. However, the state PRRs may differ and fishermen should contact fishery enforcement officials in the state where the fish will be landed to determine that state's official PRR.)

(4) *Open-access fishery.* See paragraph IV.I. below.

F. Whiting

(1) *Limited-entry fishery.* Additional regulations that apply to the whiting fishery are found at 50 CFR 663.7 and 663.23(b) (3) and (4).

(a) No more than 10,000 lb (4,536 kg) of whiting may be taken and retained, possessed, or landed, per vessel per fishing trip until the regular season for whiting begins, as specified at 50 CFR 663.23(b)(3). This includes any whiting caught shoreward of 100 fathoms (183 m) in the Eureka subarea (see paragraph IV.F.(1)(b)).

(b) No more than 10,000 lb (4,536 kg) of whiting may be taken and retained, possessed, or landed by a vessel that, at any time during a fishing trip, fished in the fishery management area shoreward of the 100-fathom (183 m) contour (as shown on NOAA Charts 18580, 18600, and 18620) in the Eureka subarea (from 43°00′00″ N. lat. to 40°30′00″ N. lat.).

(2) *Open-access fishery.* See paragraph IV.I. below.

G. Lingcod

(1) *Limited-entry fishery.* The cumulative trip limit for lingcod is 20,000 lb (907 kg) per vessel per month. All lingcod must be greater than 22 inches (56 cm) total length. Length measurement is explained at paragraph IV.A.(6).

(2) *Open-access fishery.* See paragraph IV.I. below.

H. Black Rockfish

The regulations at 50 CFR 663.23(b)(1)(iii) state: ''The trip limit for black rockfish (*Sebastes melanops*) for commercial fishing vessels using hook-and-line gear between the U.S.-Canada border and Cape Alava (48°09′30″ N. lat.), and between Destruction Island (47°40′00″ N. lat.) and Leadbetter Point (46°38′10″ N. lat.), is 100 lb or 30 percent by weight of all fish on board, whichever is greater, per vessel per fishing trip. This trip limit does not apply to coastal treaty Indian fishermen operating under harvest guidelines established under paragraph (b)(1)(ii) of this section [§ 663.23].'' The provisions at paragraphs IV.A.(12) and IV.C.(2)(c) do not apply.

I. Trip Limits in the Open-Access Fishery

A vessel operating in the open-access fishery must not exceed any trip limit, frequency limit, and/or size limit for the open-access fishery (announced in this paragraph IV.I.), or for the same gear and/or subarea in the limited-entry fishery (as announced in this **Federal Register** document in paragraphs titled ''limited-entry''). The cross-over provisions at paragraph IV.A.(12) that apply to the limited-entry fishery apply to the open-access fishery as well.

(1) *Hook-and-line and pot gear:*

(a) *Rockfish.* Rockfish means all rockfish as defined at 50 CFR 663.2, which includes the *Sebastes* complex (including yellowtail rockfish, bocaccio, and canary rockfish), shortbelly rockfish, widow rockfish, POP, and thornyheads.

(i) *North of Cape Lookout.* The cumulative monthly trip limit for rockfish taken and retained north of Cape Lookout is 35,000 lb (15,876 kg) per vessel per month.

(ii) *South of Cape Lookout.* The cumulative monthly trip limit for rockfish taken and retained south of Cape Lookout is 40,000 lb (18,144 kg) per vessel per month.

(iii) *Coastwide.* Within the cumulative trip limits, there is a 10,000-lb (4,536-kg) trip limit for rockfish that applies per vessel per fishing trip.

(iv) For operating in areas with different trip limits for the same species, see paragraph IV.A.(12) above.

(b) *Sablefish.*

(i) *North of 36°00′00″ N. lat.* The daily trip limit for sablefish taken and retained north of 36°00′00″ N. lat. is 300 lb (136 kg).

(ii) *South of 36°00′00″ N. lat.* The daily trip limit for sablefish taken and retained south of 36°00′00″ N. lat. is 350 lb (159 kg).

Note: Under current regulations, the ''regular'' season and 72-hour closures specified at 50 CFR 663.23(b)(2) do not apply to the open-access fishery. This may change, however, if the Council recommendations are approved and the regulations revised for 1995.

(2) *Set net and trammel net:* The trip limits are the same as for hook-and-line and pot gear (paragraph IV.I.(1)), except that the 10,000-lb (4,536-kg) ''per trip'' limit for rockfish does not apply (at paragraph IV.I.(1)(a)(iii)).

(3) *Shrimp trawl or pot (trap)* (used to catch pink shrimp or spot or ridgeback prawns):

(a) *Pink shrimp.* The trip limit for a vessel engaged in fishing for pink shrimp is 1,500 lb (680 kg) (multiplied by the number of days of the fishing trip) of groundfish species listed at 50 CFR 663.2.

(b) *Spot and ridgeback prawns.* The trip limit for a vessel engaged in fishing for spot or ridgeback prawns is 1,000 lb (454 kg) of groundfish species per fishing trip.

(c) No groundfish landing by shrimp or prawn trawl may be in excess of the limited-entry trip limit for groundfish

trawl gear. No groundfish landing by shrimp or prawn pot (trap) gear may be in excess of the limited-entry trip limit for nontrawl gear.

(d) This rule is not intended to supersede any more restrictive State law relating to the retention of groundfish taken in shrimp or prawn pots or traps.

(4) *California halibut or sea cucumber trawl.* The trip limit for a vessel participating in the California halibut fishery or in the sea cucumber fishery south of Point Arena, CA (38°57′30″ N. lat.) is 500 lb (227 kg) of groundfish per vessel per fishing trip.

(a) A trawl vessel will be considered participating in the California halibut fishery if:

(i) It is not fishing under a valid limited-entry permit issued under 50 CFR part 663 for trawl gear;

(ii) All fishing on the trip takes place south of Point Arena; and

(iii) The landing includes California halibut of a size required by California Fish and Game Code section 8392(a), which states: ''No California halibut may be taken, possessed or sold which measures less than 22 inches in total length, unless it weighs four pounds or more in the round, three and one-half pounds or more dressed with the head on, or three pounds or more dressed with the head off. Total length means the shortest distance between the tip of the jaw or snout, whichever extends farthest while the mouth is closed, and the tip of the longest lobe of the tail, measured while the halibut is lying flat in natural repose, without resort to any force other than the swinging or fanning of the tail.''

(b) A trawl vessel will be considered participating in the sea cucumber fishery if:

(i) It is not fishing under a valid limited-entry permit issued under 50 CFR part 663 for trawl gear;

(ii) All fishing on the trip takes place south of Point Arena; and

(iii) The landing includes sea cucumbers taken in accordance with California Fish and Game Code section 8396, which requires a permit issued by the State of California.

(c) No groundfish landing by California halibut or sea cucumber trawl may be in excess of the limited-entry trip limit for groundfish trawl gear.

J. Recreational Fishery

(1) *California.* The bag limits for each person engaged in recreational fishing seaward of the State of California are: five lingcod per day, which may be no smaller than 22 inches (56 cm) total length; and 15 rockfish per day. Multi-day limits are authorized by a valid permit issued by the State of California and must not exceed the daily limit multiplied by the number of days in the fishing trip.

(2) *Oregon.* The bag limits for each person engaged in recreational fishing seaward of the State of Oregon are: Three lingcod per day, which may be no smaller than 22 inches (56 cm) total length; and 15 rockfish per day, of which no more than 10 may be black rockfish (*Sebastes melanops*).

(3) *Washington.* The bag limits for each person engaged in recreational fishing seaward of the State of Washington are: three lingcod per day no smaller than 22 inches (56 cm) total length, and either 15 rockfish per day south of Leadbetter Point (46°38′10″ N. lat.) or 12 rockfish per day north of Leadbetter Point.

Classification

The final specifications and management measures for 1995 are issued under the authority of and are in accordance with 50 CFR parts 611 and 663, the regulations implementing the FMP.

Much of the data necessary for these specifications and management measures come from the current fishing season. Because of the timing of the receipt, development, review, and analysis of the fishery information necessary for setting the initial specifications and management measures, and the need to have these specifications and management measures in effect at the beginning of the fishing year, there is good cause under section 553(b) of the Administrative Procedure Act to waive prior notice and opportunity for public comment for the specifications and management measures. Amendment 4 to the FMP, implemented on January 1, 1991, recognized these timeliness considerations, and set up a system by which the interested public was notified, through **Federal Register** publication and Council mailings, of meetings and of the development of these measures, and was provided the opportunity to comment during the Council process. The public participated in GMT, Groundfish Advisory Subpanel, Scientific and Statistical Committee, and Council meetings in August and October 1994 where these recommendations were formulated. Additional public comments will be accepted for 30 days after publication of this document in the **Federal Register**. The Assistant Administrator will consider all comments made during the public comment period and may propose modifications as appropriate.

Because this rule is being issued without prior notice and opportunity for public comment, preparation of a Regulatory Flexibility Analysis is not required and none has been prepared.

The Administrative Procedure Act requires that publication of an action be made not less than 30 days before its effective date unless the Assistant Administrator finds and publishes with the rule good cause for an earlier effective date. These specifications announce the harvest goals and the management measures designed to achieve those harvest goals in 1995. A delay in implementation could compromise the management strategies that are based on the projected landings from these trip limits. Therefore, a delay in effectiveness is contrary to the public interest and these actions are effective on January 4, 1995.

Dated: January 4, 1995.

Charles Karnella,

Acting Program Management Officer, National Marine Fisheries Service.

[FR Doc. 95–465 Filed 1–4–95; 2:58 pm]

BILLING CODE 3510–22–P

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50 CFR Part 677

[Docket No. 940412–4360; I.D. 102094A]

RIN 0648–AD80

North Pacific Fisheries Research Plan

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to clarify and make minor changes to the regulations implementing the North Pacific Fisheries Research Plan (Research Plan). This action clarifies 1995 observer coverage requirements, revises the definition of the term ''processor,'' specifies who is and is not included in the definition of processor, and exempts certain processors included in the definition from the requirement to have a Federal Processor Permit. These clarifications are incorporated as minor revisions to the instructions accompanying the Federal Processor Permit Application. In addition, the definition of ''round weight'' is revised to conform it to recent regulatory changes. This final rule is consistent with the intent of the regulations implementing the Research Plan and is intended to reduce confusion during the first year of the fee-collection program authorized under the Research Plan.

EFFECTIVE DATE: January 4, 1995.

ADDRESSES: Copies of the Research Plan and the environmental assessment/regulatory impact review (EA/RIR) prepared for the Research Plan may be obtained from the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510. Copies of the Observer Plan may be obtained from Fisheries Management Division, Alaska Region, NMFS, 709 West 9th Street, Juneau, AK 99801, or P.O. Box 21668, Juneau, AK 99802–1668, Attn: Lori J. Gravel.

FOR FURTHER INFORMATION CONTACT: Susan Salveson, 907–586–7228.

SUPPLEMENTARY INFORMATION:

Background

Regulations implementing the Research Plan became effective October 6, 1994 (59 FR 46126, September 6, 1994). The purpose, and description of, the Research Plan are contained in the preamble of the **Federal Register** action publishing the implementing regulations. A correction subsequently was published in the **Federal Register** that delayed specified parts of the regulations until January 1, 1995 (59 FR 51874, October 13, 1994).

A proposed rule was published in the **Federal Register** November 21, 1994 (59 FR 59983) that would revise the regulations implementing the Research Plan to remove regulatory ambiguity and inconsistency identified by NMFS. Comments on the proposed rule were invited through December 3, 1994. No written comments were received during the comment period.

NMFS has determined that the following changes to the regulations implementing the Research Plan are consistent with the intent of the Research Plan, and consequently approves them:

1. The 1995 observer coverage requirements set out at § 677.10(a)(1)(i)(C) are clarified to continue to exempt from observer coverage any vessel that delivers unsorted codends to a processor.

2. The definition of ''processor'' under the Research Plan is amended to make clear NMFS' interpretation that buying stations are not considered processors for purposes of the Research Plan, and that fishermen who transfer fish to persons outside of the United States are included in the definition.

3. The requirement for a Federal Processor Permit is also revised. Certain persons, although considered processors under the definition of that term, are not required to obtain this permit. Fishermen who sell fish directly to a restaurant or to another individual for use as bait or personal consumption or fishermen who transfer fish to a person outside the United States are not required to have a processor permit.

4. The Federal Processor Permit Application (Form FPP–1) is revised to reflect changes referenced in items 2. and 3., above; and

5. The definition of ''round weight or round-weight equivalent'' is revised to reflect the recent amendment of the definition of this term in 50 CFR 672.2 and 675.2 (59 FR 50699, October 5, 1994).

A further description of and justification for these regulatory amendments are explained in the preamble to the proposed rule.

As presented in the preamble to the proposed rule, NMFS also notes that the following sections of the Observer Plan remain effective during the first year of the Research Plan (1995): (1) Standards of observer conduct (attachment number 3); and (2) the description, specifications, and work statement for certified domestic observer contractors, including conflict of interest standards for NMFS-certified observers and contractors and conditions for contractor and observer certification revocation (attachment number 4). Copies of the Observer Plan dated May 1994 are available from NMFS (see **ADDRESSES**).

After the first year of the Research Plan, standards and criteria for conduct, certification, conflict of interest, and revocation of certification of observers and observer contractors will be included as part of the contractual arrangements between NMFS and observer contractors.

Changes in the Final Rule From the Proposed Rule

NMFS has implemented one change in the final rule from the proposed rule to address more effectively the need for revision of the definition of ''processor.'' The proposed rule clarified that tender vessels are not processors for purposes of the Research Plan, because these vessels are used to simply receive unprocessed groundfish from a vessel for delivery to a shoreside processor or mothership and do not process that fish. However, NMFS is aware of operations other than tender vessels that provide this delivery service and, therefore, also should be excluded from the definition of ''processor'' for purposes of the Research Plan. As a result, the term ''tender vessel'' is replaced with the term ''buying station'' at § 677.2 in order to exclude these other operations from the definition of ''processor.''

Classification

This final rule includes minor revisions to the instructions accompanying the collection of information approved by the Office of Management and Budget (OMB), OMB control number 0648–0206 (Processor Permit Application). No new information is being collected. The number of persons required to comply with the collection-of-information requirements is reduced.

The North Pacific Fishery Management Council, NMFS, and the Alaska Department of Fish and Game prepared a final Regulatory Flexibility Analysis as part of the RIR prepared for the Research Plan. A copy of this analysis is available from the Council (see **ADDRESSES**).

NMFS finds that this final action should be implemented as soon as possible so that clear instructions may be sent out to the industry that reflect what will be in place for the 1995 fee collection program authorized under the Research Plan. Delay in implementing the revisions would create unnecessary confusion within the fishing industry concerning implementation of the Research Plan during 1995. Because this is a substantive rule that relieves a restriction on catcher vessel owners to apply for a Federal Processor Permit, the 30-day delayed effectiveness provision of the Administrative Procedure Act, 5 U.S.C. 53(d), does not apply.

This final rule has been determined to be not significant for purposes of E.O. 12866.

List of Subjects in 50 CFR Part 677

Fisheries, Reporting and recordkeeping requirements.

Dated: December 30, 1994.

Gary Matlock,

Program Management Officer, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 677 is amended as follows:

PART 677—NORTH PACIFIC FISHERIES RESEARCH PLAN

1. The authority citation for part 677 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 677.2, the definitions of ''processor'' and paragraph (1) of ''round-weight or round-weight equivalent'' are revised and the definition of ''buying station'' is added, in alphabetical order, to read as follows:

§ 677.2 Definitions.

* * * * *

Buying station means a person or vessel that receives unprocessed fish from a vessel for delivery to a shoreside processing facility or mothership processor vessel and that does not process those fish.

* * * * *

Processor means any shoreside processing facility or vessel that processes fish, any person who receives fish from fishermen for commercial purposes, any fisherman who transfers fish outside of the United States, and any fisherman who sells fish directly to a restaurant or to an individual for use as bait or personal consumption. Processor does not include a buying station or a restaurant, or a person who receives fish from fishermen for personal consumption or bait.

* * * * *

Round weight or round-weight equivalent means:

(1) *For groundfish or halibut*—the weight of fish calculated by dividing the weight of the primary product made from that fish by the standard product recovery rate for that primary product as listed in § 672.20(j) of this chapter, or, if not listed, the weight of fish calculated by dividing the weight of a primary product by the standard product recovery rate as determined using the best available evidence on a case-by-case basis.

* * * * *

3. In § 677.4, paragraph (a) is revised to read as follows:

§ 677.4 Permits.

(a) *General.* In addition to the permit and licensing requirements at § 301.3 of this title and §§ 672.4, 675.4, and § 676.13 of this chapter, a processor of fish from a Research Plan fishery must have a Federal Processor Permit issued by the Regional Director under this section, except that this requirement does not apply to any fisherman who transfers fish outside of the United States, or any fisherman who sells fish directly to a restaurant or to an individual for use as bait or personal consumption. Federal Processor Permits will be issued without charge.

* * * * *

4. In § 677.7, paragraph (e) is revised to read as follows:

§ 677.7 General prohibitions.

* * * * *

(e) Process or receive fish from a Research Plan fishery without a valid permit issued pursuant to this part.

* * * * *

5. In § 677.10, paragraph (a)(1)(i)(C) is revised to read as follows:

§ 677.10 General requirements.

(a) * * *

(1) * * *

(i) * * *

(C) A catcher/processor or catcher vessel 125 ft. (38.1 m) LOA or longer must carry a NMFS-certified observer during 100 percent of its fishing days while fishing for groundfish, except for a vessel fishing for groundfish with pot gear as provided in paragraph (a)(1)(i)(F) of this section.

* * * * *

Figure 1 to Part 677 [Amended]

6. Figure 1 to part 677, Federal Processor Permit Application (Form FPP–1), is revised to read as follows:

BILLING CODE 3510–22–W

NOAA 88-155

OMB No. 0648-0206, expires 4/30/97

FEDERAL FISHERIES PERMIT APPLICATION FEDERAL PROCESSOR PERMIT APPLICATION (FPP-1)	United States Department of Commerce National Oceanic and Atmospheric Administration National Marine Fisheries Service Alaska Region P.O. Box 21668 Juneau, Alaska 99802-1668

BLOCK A - PERMIT AMENDMENT INFORMATION

If this is an application for an amended permit, provide your current Federal Fisheries Permit number and/or Federal Processor Permit number: _____

Check the item(s) that have changed:

[ ] Vessel information (Block B)
[ ] Shoreside processor information (Block C)
[ ] Owner information (Block D)
[ ] Federal Fisheries Permit information (Block E)
[ ] Federal Processor Permit information (Block F)

BLOCK B - VESSEL INFORMATION

1. Vessel Name		
2. ADF&G Number	3. Coast Guard Number	7. Vessel Telephone Number
4. Homeport (City, state)		8. Vessel FAX Number
5. Length Overall (Feet)	6. Net Tonnage	9. INMARSAT Number

BLOCK C - SHORESIDE PROCESSOR INFORMATION

1. Processor Name	
2. Business Street Address (Street, city, state, zip code)	4. Telephone Number
3. ADF&G Processor Code	5. FAX Number

BLOCK D - OWNER INFORMATION

1. Owner Name(s)	
2. Business Mailing Address (Street or box, city, state, zip code)	4. Telephone Number
3. Managing Company, if any	5. FAX Number

BLOCK E - FEDERAL FISHERIES PERMIT INFORMATION

FEDERAL FISHERIES PERMITS MUST BE RENEWED ANNUALLY.

FISHERIES: The following fisheries in the 3-200 mile zone off Alaska require vessels to have a Federal Fisheries Permit pursuant to 16 USC 1801-1882. Check one, or both, as appropriate:

[ ] Gulf of Alaska Groundfish [ ] Bering Sea and Aleutian Islands Groundfish

VESSEL OPERATIONS CATEGORIES: Indicate the type of operations you conduct in the groundfish fishery. Check Support Vessel OR check any combination of the other four categories.

[ ] Catcher Vessel
[ ] Catcher/Processor (complete Block F also)
[ ] Mothership (complete Block F also)
[ ] Tender Vessel
[ ] Support Vessel

CATCHER VESSELS AND CATCHER/PROCESSORS ONLY:

GEAR TYPE: Check ONLY the gears used for GROUNDFISH fishing:

[ ] Trawl [ ] Hook and line [ ] Pots [ ] Jig/troll

CATCHER VESSELS ONLY:

[ ] Check here if the only groundfish you expect to retain is bycatch during halibut, crab, or salmon fisheries.
[ ] Check here if you expect to target on groundfish, but only on sablefish (blackcod) in the Gulf of Alaska.

BLOCK F - FEDERAL PROCESSOR PERMIT INFORMATION

FEDERAL PROCESSOR PERMITS MUST BE RENEWED SEMI-ANNUALLY.

Federal Processor Permits are required for certain processors of the following fisheries. Check one, or any combination, as appropriate. (See instructions for definition of processors required to obtain a permit.)

[ ] Gulf of Alaska Groundfish (GOA, 3-200 mile zone) *
[ ] Bering Sea and Aleutian Islands Groundfish (BSAI, 3-200 mile zone) *
[ ] Bering Sea and Aleutian Islands King and Tanner Crab (3-200 mile zone)
[ ] North Pacific Halibut (Convention waters off Alaska, i.e. State and Federal waters)

* Groundfish Catcher/Processors and Mothership Processor Vessels that operate inside the 3-200 mile zone off Alaska are also required to have a Federal Fisheries Permit (see Block E).

Indicate the semi-annual permitting period for which you are applying: [ ] January 1 to June 30 Year: _____
[ ] July 1 to December 31

BLOCK G - SIGNATURE

Under penalties of perjury, I declare that I have examined this application, and to the best of my knowledge and belief, the information presented here is true, correct and complete.

Applicant's name (please print or type)	Signature	Date

BILLING CODE 3510–22–C

Instructions

A separate application must be completed for each vessel or processor. Type or print legibly in ink; retain a copy of completed application. Completed forms should be mailed to: NMFS Alaska Region, P.O. Box 21668, Juneau, AK 99802–1668. If you have any questions, please call Enforcement at 907–586–7225.

Block A—Permit Amendment Information

If you already have a valid Federal permit, but the information originally provided on your application has changed, you should fill out this block. Provide your current Federal Fisheries Permit number and/or your Federal Processor Permit number, and check the item(s) that have changed. Written notification of changes must be received within 10 days of the date of the change.

Block B—Vessel Information

Complete Block B if the permit is for a vessel.

Vessel Name—Enter complete vessel name as displayed in official documentation.

ADF&G Number—Enter 5-digit State of Alaska Department of Fish & Game (ADF&G) number (example: 51233).

Coast Guard Number—Enter Coast Guard documentation number (example 566722) or state registration number (example: AK3456C).

Homeport—Enter homeport (city and state) as recorded in official documentation.

Length Overall—Enter the vessel's length overall in feet, which is defined as the horizontal distance, rounded to the nearest foot, between the foremost part of the stem and the aftermost part of the stern, excluding bowsprits, rudders, outboard motor brackets, and similar fittings or attachments.

Net Tonnage—Enter registered net tonnage (U.S. tons) as stated in official documentation.

Vessel Telephone, FAX, and INMARSAT Numbers—Enter telephone, FAX, and INMARSAT (satellite communication) numbers used onboard the vessel.

Block C—Shoreside Processor Information

Complete Block C if the permit is for a shoreside processor, which is defined as any person, that receives unprocessed fish, except Catcher/Processors, Mothership Processor Vessels, Buying stations, restaurants, or persons buying fish from fishermen for use as bait or personal consumption.

Processor Name—Enter complete name as displayed in official documentation.

Business Street Address—Enter complete street address of the shoreside processing facility, including street number, city, state and zip code.

ADF&G Processor Code—Enter the Alaska Department of Fish and Game Processor Number assigned to the processor.

Telephone and FAX Numbers—Enter telephone and FAX numbers used at the shoreside processor.

Block D—Owner Information

Enter information on the owner of the vessel listed in block B or the shoreside processor listed in block C.

Owner Name(s)—Enter the full name(s) of the vessel or processor owner(s). If there is more than one owner, list the principal owner first; the permit will be issued to the first owner listed, with an ET AL. notation. The permit MUST be issued to the owner of the vessel or processor, not operators or lessees.

Business Mailing Address—Enter your complete PERMANENT business mailing address, including state and zip code. Your permit will be sent to this address. If you need to have your permit sent to a different address, please enter your PERMANENT business address on the application and attach a note with your alternate address.

Managing Company—Enter the name of any company (other than the owner) that manages the operations of your vessel or processor.

Telephone and FAX Numbers—Enter telephone and FAX numbers used by the vessel or processor owner. It is very important that you provide a telephone number where we can contact you, or where we can leave messages for you; if questions arise concerning your application and we cannot contact you by telephone, issuance of your permit will be delayed.

Block E—Federal Fisheries Permit Information

Federal Fisheries Permits are required for all vessels conducting groundfish operations in the 3–200 mile zone off Alaska. This includes vessels fishing for groundfish, vessels processing groundfish, and support vessels assisting other groundfish vessels. ''Groundfish'' means pollock, Pacific cod, sablefish, Atka mackerel, rockfish, smelt, eulachon, capelin, sharks, skates, sculpins, octopus, squid, and any species of flatfish except Pacific halibut.

Fisheries—Indicate the fishery or fisheries for which you are applying. You may apply for a single fishery or both.

Vessel Operations Categories—Indicate the type of operations you conduct in the groundfish fishery. Check Support Vessel, or any combination of Catcher Vessel, Catcher/Processor, Mothership, and Tender Vessel. (A vessel permitted as a Catcher Vessel, Catcher/Processor, Mothership, and/or Tender Vessel may conduct all operations authorized for a Support Vessel.) These categories are defined as follows:

Catcher Vessel—A vessel that is used for catching fish and that does not process onboard.

Catcher/Processor—A vessel that is used for catching fish and processing that fish.

Mothership—A vessel that receives and processes fish from other vessels.

Tender Vessel—A vessel that is used to transport *unprocessed* fish received from another vessel to a shoreside processor, mothership, or buying station.

Support Vessel—Any vessel that is used in support of a permitted vessel, including, but not limited to, supplying a fishing vessel with water, fuel, provisions, fishing equipment, fish processing equipment or other supplies, or transporting *processed* fish. This category does not include processors or Tender Vessels.

Processing is defined as the preparation of fish to render it suitable for human consumption, industrial uses, or long-term storage, including but not limited to cooking, canning, smoking, salting, drying, freezing, or rendering into meal or oil, but does not mean icing, bleeding, or gutting.

Gear Type—Groundfish Catcher Vessels and Catcher/Processors need to indicate the gear type(s) used for groundfish operations.

Catcher Vessels Only—Indicate whether the only groundfish you retain is bycatch from halibut, crab, or salmon fisheries, or whether the only groundfish you expect to target on is blackcod in the Gulf of Alaska. Your answers will not restrict you from participating in other groundfish fisheries; they will only be used to determine whether NMFS will send you a 25-page Catcher Vessel logbook, or a 50-page logbook.

Block F—Federal Processor Permit Information

Any shoreside facility or vessel that processes fish from Research Plan fisheries for commercial use or consumption and any person, except restaurants or buying stations, who receives fish from fishermen for commercial purposes must have a Federal Processor Permit.

Indicate the fishery or fisheries for which you are applying. You may apply for a single fishery or any combination.

Indicate the semi-annual period for which you are applying. You may not apply for both periods. Processors who receive permits for January 1–June 30 will receive renewal applications for permits for the second half of the year. All Research Plan fees must be paid before the next semi-annual processor permit will be issued.

Block G—Signature

The owner must sign and date the application certifying that all information is true, correct, and complete to the best of the owner's knowledge and belief. The application will be considered incomplete without this signature.

Logbooks

If you apply for a Federal Fisheries Permit, you will receive a logbook for each Vessel Operations Category that you check. For example, if you check Catcher Vessel and Catcher/Processor, you will receive a Catcher Vessel Daily Fishing Logbook AND a Catcher/Processor Daily Cumulative Production Logbook. There are two exceptions:

Support Vessels do not receive logbooks.

Vessels under 5 net tons do not receive logbooks.

A Shoreside Processor logbook will also be sent with each Federal Processor Permit for groundfish issued to a shoreside processor. A Mothership logbook will be sent with each Federal Processor Permit for groundfish issued to a vessel that does not also have a Federal Fisheries Permit.

Special Handling of Permits

Please allow at least 10 days for processing your permit. *Do not wait until right before an opening to apply for your permit*—we may not be able to get it to you in time. You may fax your permit application to us at 907–586–7313, but we cannot fax your permit back to you.

We cannot pay for express mailing if you do apply late. We can express mail your permit to you only if you send us an express mail envelope with the correct amount of postage prepaid. *Please send the largest envelope available, approximately 12″×18″ or send express mail stamps UNATTACHED to an envelope. If the express mail envelope you send is too small or does not have enough postage attached, we will be required to send your permit and logbooks to you by regular U.S. mail.* Keep in mind that we send the appropriate logbook(s) WITH Federal Fisheries Permits for groundfish and with Federal Processor Permits. See *Logbooks* on the preceding page to determine what logbook(s) you will be sent, if any. Following is the approximate size and weight of each logbook:

	Dimensions	Weight
Catcher Vessel logbook.	9″×12.5″	3 lbs. 9 oz.
Catcher/Processor logbook.	9″×12.5″	4 lbs. 2 oz.
Mothership logbook.	9″×12.5″	2 lbs.
Buying Station logbook.	9″×12.5″	3 lbs. 11 oz.
Shoreside Processor logbook.	11″×17″	4 lbs. 10 oz.

Other Fisheries and Licenses

Salmon Power Troll—State of Alaska Interim Use and Limited Entry Power Troll licenses serve as a Federal permit. If you do not currently possess either State license, a Federal permit may be issued *provided* that sometime during the years 1975–1977, you: a) operated a vessel in the 3–200 mile zone off Alaska; b) engaged in commercial fishing for salmon from that vessel in the 3–200 mile zone off Alaska; AND c) landed salmon caught with power troll gear. If you believe that you meet these conditions, please contact NMFS at 907–586–7225. You will be required to provide fish tickets or other landing receipts showing compliance with the above requirements.

Halibut—A Federal Processor Permit is required for anyone that processes Pacific halibut off Alaska. In addition, vessels that *fish* for halibut are required to have a license from the International Pacific Halibut Commission (IPHC). Questions regarding IPHC licenses should be directed to: International Pacific Halibut Commission, P.O. Box 95009, Seattle, WA 98145–2009. Phone: 206–634–1838.

Tanner Crab and King Crab—State of Alaska area registration serves as the required Federal area registration.

State of Alaska Permits—Contact the Commercial Fisheries Entry Commission at 907–789–6150 for information on State of Alaska permits and regulations.

Public Reporting Burden Statement

NMFS estimates that the public reporting burden will average 0.33 hour per response for completing the Federal Fisheries Permit and Federal Processor Permit application, 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 these burden estimates or any other aspect of the data requirements, including suggestions for reducing the burden, to Ronald J. Berg, Chief, Fisheries Management Division, Alaska Region, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK 99802 (Attn: Lori Gravel), and to the Office of Management and Budget, Paperwork Reduction Project (0648–0206), Washington, DC 20503 (Attn: NOAA Desk Officer).

[FR Doc. 95–407 Filed 1–4–95; 1:25 pm]

BILLING CODE 3510–22–W

Proposed Rules

Federal Register
Vol. 60, No. 5
Monday, January 9, 1995

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 HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 600, 601, 606, 607, 610, 640, and 660

[Docket Nos. 94N–0066 and 94N–0080]

Review of Regulations for General Biologics and Licensing and for Blood Establishments and Blood Products; Public Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; request for comments.

SUMMARY: The Food and Drug Administration (FDA) is announcing a public meeting for interested persons to express their comments regarding the biologics regulations that the agency intends to review (21 CFR parts 600, 601, 606, 607, 610, 640, and 660). In the **Federal Register** of June 3, 1994 (59 FR 28821 and 28822, respectively), FDA issued two documents, ''Review of General Biologics and Licensing Regulations'' (Docket No. 94N–0066) and ''Review of Regulations for Blood Establishments and Blood Products'' (Docket No. 94N–0080), that announced that FDA was intending to review certain biologics regulations and requested public comments regarding those regulations. The comment periods have been extended twice and will close on February 13, 1995. The purpose of the public meeting is to allow additional opportunity for public comment concerning the biologics regulations that the agency is reviewing.

DATES: The public meeting will be held on January 26, 1995, from 1:30 p.m. to 5:30 p.m. Submit written notices of participation and written copies or summaries of oral presentations and the approximate amount of time needed for the presentation by January 19, 1995. Submit written comments regarding the biologics regulations under review by February 13, 1995.

ADDRESSES: The public meeting will be held at the Parklawn Bldg., conference rooms D and E, 5600 Fishers Lane, Rockville, MD 20857. Submit written notices of participation and written copies or summaries of oral presentations and the approximate amount of time needed for the presentation to Timothy W. Beth, Center for Biologics Evaluation and Research (HFM–635), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448 or FAX at 301–443–3874. Submit written comments regarding the review of general biologics and licensing regulations identified with docket number 94N–0066 and written comments regarding the review of regulations for blood establishments and blood products identified with docket number 94N–0080 to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Timothy W. Beth or Jean M. Olson, Center for Biologics Evaluation and Research (HFM–635), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–594–3074.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of June 3, 1994 (59 FR 28821 and 28822 respectively), FDA issued two documents, ''Review of General Biologics and Licensing Regulations'' (Docket No. 94N–0066) and ''Review of Regulations for Blood Establishments and Blood Products'' (Docket No. 94N–0080). The documents announced the agency's intent to review biologics regulations, 21 CFR parts 600, 601, 606, 607, 610, 640, and 660, and requested written comments from the public. Interested persons were given until August 17, 1994, to respond to the documents. In the **Federal Register** of August 17, 1994 (59 FR 42193), FDA extended the comment periods to November 15, 1994, in response to requests to allow for additional time for public comment. In the **Federal Register** of November 14, 1994 (59 FR 56448), FDA extended the comment periods to February 13, 1995, based on requests to hold a public meeting regarding the biologics regulations under review.

The Biotechnology Industry Organization and the Pharmaceutical Research and Manufacturers of America requested a public meeting to allow for the presentation of comments regarding the agency's intent to review the biologics regulations. FDA agrees that a public meeting would be useful, and therefore, is holding a public meeting to allow all interested persons to present their comments. Representatives from the Center for Biologics Evaluation and Research (CBER) will chair the public meeting.

Every effort will be made to accommodate each person who wants to participate in the public meeting. However, each person who wants to ensure his or her participation in the meeting is encouraged, by close of business on January 19, 1995, to: (1) File a written notice of participation containing the name, address, phone number, facsimile number, affiliation, if any, of the participant, topic of the presentation, and approximate amount of time requested for the presentation; and (2) submit a copy or summary of their presentation. The requested information, including the written notice of participation, may be submitted to the contact person (address above).

Before the meeting, CBER will determine the amount of time assigned to each person and the approximate scheduled time for each presentation. A schedule showing the persons making presentations will be filed with the Dockets Management Branch (address above) and mailed or FAX'ed to each participant before the meeting. Interested persons attending the meeting who did not request an opportunity to make a presentation will be given the opportunity to make an oral presentation at the conclusion of the meeting, as time permits.

All public comments received at the public meeting and all written comments submitted to the Dockets Management Branch by February 13, 1995, will be considered in the review of the regulations to determine whether they should be revised, rescinded, or continued without change. After careful review of the public comments, FDA intends to publish a proposed rule to amend those regulations that FDA deems appropriate.

Interested persons may, on or before February 13, 1995, submit written comments regarding the biologics regulations the agency intends to review (21 CFR parts 600, 601, 606, 607, 610,

640, and 660) to the Dockets Management Branch (address above). Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the appropriate docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Transcripts of the public meeting may be requested in writing from the Freedom of Information Office (HFI–35), Food and Drug Administration, rm. 12A–16, 5600 Fishers Lane, Rockville, MD 20857, approximately 15 working days after the meeting, at a cost of 10 cents per page. The transcript of the public meeting and copies of information and comments submitted to the meeting record will be available for examination at the Dockets Management Branch (address above) approximately 15 working days after the meeting, between 9 a.m. and 4 p.m., Monday through Friday.

Dated: January 4, 1995.

William K. Hubbard,

Interim Deputy Commissioner for Policy.

[FR Doc. 95–460 Filed 1–4–95; 3:01 pm]

BILLING CODE 4160–01–F

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[PS–76–92]; [PS–51–93]

RIN 1545–AR48; RIN 1545–AR93

Recognition of Gain or Loss by Contributing Partner on Distribution of Contributed Property or Other Property

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to the recognition of gain or loss on certain distributions of contributed property by a partnership under section 704(c)(1)(B) of the Internal Revenue Code of 1986 (Code). This document also contains proposed regulations relating to the recognition of gain on certain distributions to a contributing partner under section 737. Changes to the applicable law were made by the Revenue Reconciliation Act of 1989 and the Energy Policy Act of 1992. The proposed regulations affect partnerships and their partners and are necessary to provide guidance for complying with the applicable tax law.

DATES: Written comments must be received by April 10, 1995. Requests to speak (with outlines of oral comments) at a public hearing scheduled for June 19, 1995, at 10 a.m. must be received by May 29, 1995.

ADDRESSES: Send submissions to: CC:DOM:CORP:T:R (PS–76–92; PS–51–93), Room 5228, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC. 20044. In the alternative, submissions may be hand delivered between the hours of 8:00 a.m. and 5:00 p.m. to: CC:DOM:CORP:T:R (PS–76–92; PS–51–93), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC. The public hearing has been scheduled to be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Stephen J. Coleman, (202) 622–3060; concerning submissions and the hearing, Michael Slaughter, (202) 622–7190 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Introduction

This document proposes to add new §§ 1.704–4, 1.737–1, 1.737–2, 1.737–3, 1.737–4, and 1.737–5 to the Income Tax Regulations (26 CFR part 1) under sections 704(c)(1)(B), 704(c)(2), and 737 of the Code.

Background

Section 704(c)(1)(A) of the Internal Revenue Code (Code) requires that gain or loss with respect to property contributed to a partnership by a partner be shared among the partners so as to take into account any built-in gain or loss in the property at the time of the contribution. Prior to its amendment by the Revenue Reconciliation Act of 1989 (1989 Act), section 704(c) did not require the recognition of built-in gain or loss by a contributing partner on a distribution of contributed property by the partnership. The 1989 Act added sections 704(c)(1)(B) and 704(c)(2) to the Code. Section 704(c)(1)(B) provides that in the case of a distribution of contributed property to another partner within five years of its contribution to the partnership, the contributing partner must recognize gain or loss in an amount equal to the gain or loss the partner would have been allocated under section 704(c)(1)(A) on a sale of the property by the partnership at its fair market value at the time of the distribution. Section 704(c)(2) provides for an exception for distributions of certain like-kind property. The legislative history of the 1989 Act indicates that Congress intended section 704(c)(1)(B) to eliminate the inconsistent treatment of sales and distributions by a partnership and thereby prevent partners from circumventing the rule requiring pre-contribution gain or loss on contributed property to be allocated to the contributing partner by distributing the property to another partner. H.R. Rep. No. 101–247, 101st Cong., 1st Sess. 406 (1989).

Prior to the enactment of the Energy Policy Act of 1992 (1992 Act), a partner who contributed appreciated property to a partnership did not recognize gain on a distribution to the distributee partner of partnership property other than money. The 1992 Act added section 737 to the Code to require a contributing partner to recognize gain to the extent of the lesser of (i) the net precontribution gain on property contributed to the partnership by the partner, or (ii) the excess of the value of the distributed property over the adjusted basis of the partner's interest in the partnership. H.R. Rep. No. 102–1018, 102d Cong., 2d Sess. 428 (1992).

Explanation of Provisions

A. Overview

Section 704(c)(1)(B) generally requires a contributing partner to recognize gain or loss when the property contributed by that partner is distributed to another partner within five years of its contribution to the partnership. Section 737 generally requires a contributing partner to recognize gain when the partner receives, within five years of the contribution, a distribution of other property with a fair market value in excess of the partner's adjusted basis in the partnership. Both sections apply only to distributions made to a partner in the partner's capacity as a partner. Section 704(c)(1)(B) and section 737 do not apply to transactions or distributions in which the partner is not acting in the capacity of a partner (e.g., transactions or distributions subject to section 707(a) or section 751(b)).

The proposed regulations provide rules for determining when section 704(c)(1)(B) and section 737 apply and the amount of gain or loss that must be recognized by the contributing partner under the applicable section. The proposed regulations also provide rules for determining the character of such gain or loss and for making the necessary basis adjustments. The proposed regulations contain several exceptions that are based on the

statutory language and the legislative history. The proposed regulations also contain special rules dealing with specific situations such as the partnership's exchange of the contributed property for other property in a nonrecognition transaction and the transfer of a contributing partner's interest in the partnership. The proposed regulations also provide for coordination between section 704(c)(1)(B) and section 737 in situations in which both sections may apply to a distribution or distributions by a partnership. In fashioning these specific rules, the proposed regulations focus on the purpose of section 704(c)(1)(B) and section 737, rather than simply relying on the literal language of the provisions in situations that would be inconsistent with the underlying purpose of the provisions.

The proposed regulations under section 704(c)(1)(B) and section 737 contain an anti-abuse rule providing that the rules of the applicable section must be applied in a manner consistent with its purpose. Accordingly, the anti-abuse rules contained in the proposed regulations provide that, if a principal purpose of a transaction is to achieve a tax result inconsistent with the purpose of the applicable section, the Commissioner can recast the transaction for federal tax purposes as appropriate to achieve tax results that are consistent with such purpose.

Whether a tax result is inconsistent with the purpose of the applicable section is determined based on all the facts and circumstances. The proposed regulations also provide examples illustrating how these anti-abuse rules apply.

B. Section 704(c)(1)(B)

In General

Under the proposed regulations, the contributing partner must recognize gain or loss on a distribution of the contributed property to another partner within five years of its contribution to the partnership. The amount of gain or loss recognized is the amount that would have been allocated to the contributing partner under section 704(c)(1)(A) and § 1.704–3 if the distributed property had been sold by the partnership to the distributee partner at its fair market value at the time of the distribution. The amount of gain or loss recognized may vary depending on the particular method used by the partnership in making allocations under section 704(c)(1)(A) and § 1.704–3 because the amount of remaining built-in gain or loss may vary depending on the particular method of allocation adopted. In addition, because the property is treated as having been sold by the partnership to the distributee partner, the proposed regulations provide that any loss that would have been disallowed under section 707(b)(1) if the distributed property had actually been sold to the distributee partner is disallowed.

Five-Year Period

Section 704(c)(1)(B) applies only to property distributed within five years of its contribution to the partnership. The proposed regulations provide that a new five-year period begins for property deemed contributed to a new partnership following a termination of the partnership under section 708(b)(1)(B), but only to the extent that the pre-termination gain or loss on such property was not already required to be allocated to the original contributor under section 704(c)(1)(A) and § 1.704–3. The effect of this provision is to begin a new five-year period for post-contribution changes in the value of partnership property whenever there is a termination of the partnership under section 708(b)(1)(B). This provision is consistent with the legislative history of section 704(c)(1)(B).

Character of Gain or Loss

The proposed regulations provide that the character of the contributing partner's gain or loss is the same as the character that would have been recognized if the property had been sold by the partnership to the distributee partner. Thus, if the distributee partner holds more than a 50 percent capital or profits interest in the partnership, any gain recognized by the contributing partner may be ordinary income under section 707(b)(2).

Exceptions and Special Rules

The proposed regulations provide that section 704(c)(1)(B) does not apply to (i) a distribution of property contributed to the partnership on or before October 3, 1989, or (ii) a distribution of property in connection with a termination of the partnership under section 708(b)(1)(B). The proposed regulations also provide that section 704(c)(1)(B) does not apply to a distribution of a portion of contributed property to a noncontributing partner in a complete liquidation of the partnership if a portion of the contributed property is distributed to the contributing partner and that portion has unrecognized gain or loss in the hands of the contributing partner, determined immediately after the distribution, at least equal to the built-in gain or loss that would have been allocated to the contributing partner under section 704(c)(1)(A) on a sale of the contributed property by the partnership at the time of the distribution. This exception is consistent with the purpose of section 704(c)(1)(B) to prevent the shifting of built-in gain or loss among partners because no shift has occurred in this limited situation.

The proposed regulations provide that property received by a partnership in exchange for contributed property in a nonrecognition transaction is treated as the contributed property. This result is consistent with the rule under § 1.704–3(a)(8) of the regulations. The proposed regulations also provide that the transferee of a contributing partner is treated as the contributing partner to the extent of the built-in gain or loss allocated to the transferee partner. The gain or loss allocated to the transferee partner may be offset, however, by the basis adjustments to partnership property by a partnership with a section 754 election in effect. This result is consistent with the result under § 1.704–3(a)(7) of the regulations.

The proposed regulations also provide a special rule under section 704(c)(2) for cases in which the contributing partner receives like-kind property no later than the earlier of: (1) 180 days following the date of the distribution of contributed property to another partner, or (2) the due date (determined with regard to extensions) of the contributing partner's income tax return for the taxable year of the distribution to the other partner. Under this rule, the contributing partner's gain that otherwise would be recognized under section 704(c)(1)(B) is reduced by the amount of built-in gain or loss in the distributed like-kind property in the hands of the contributing partner. The amount of the built-in gain or loss is determined by reference to the contributing partner's basis in the property immediately after the distribution under section 732(a) or (b). The proposed regulations provide that the basis in the distributed like-kind property in this situation is determined without taking into account any increase in the basis of the contributing partner's partnership interest for any gain recognized under section 704(c)(1)(B). This special rule implements the statutory objective of not requiring gain or loss on distributions where gain or loss would not have been recognized outside of a partnership. When gain or loss is not recognized in exchanges of like-kind property outside of partnerships, the built-in gain or loss on the exchanged property is generally preserved in the property received in the exchange. To the extent that this built-in gain or loss

is not preserved in the case of a distribution of property by the partnership, the exception does not apply.

Basis Adjustments

The contributing partner's basis in the partnership interest and the partnership's basis in the distributed property are increased or decreased by the amount of gain or loss recognized by the contributing partner. These adjustments are taken into account in determining (1) the noncontributing partner's basis in the property distributed to that partner, (2) the contributing partner's basis in any property distributed to that partner in the same transaction (except to the extent that the distributed property is like-kind property subject to the special rule discussed above), (3) the basis adjustments, if any, to partnership property by a partnership with a section 754 election in effect, and (4) the amount of the contributing partner's gain under section 731 or section 737 on a related distribution of money or property, respectively, to the contributing partner.

C. Section 737

In General

Under the proposed regulations, a partner that contributes property with built-in gain to a partnership and receives a distribution of property other than money within five years of that contribution must recognize gain in an amount equal to the lesser of (1) the excess (if any) of the fair market value of the distributed property over the adjusted basis of the partner's interest in the partnership (excess distribution); or (2) the net precontribution gain of the partner.

Excess Distribution

In determining the amount of the excess distribution, the proposed regulations provide that the distributee partner's adjusted basis in the partnership interest is first adjusted for all basis adjustments resulting from the distribution subject to section 737 (for example, basis adjustments under section 752) and any basis adjustments resulting from any other distribution that is part of the same plan or arrangement (for example, basis adjustments required under sections 704(c)(1)(B) and 751(b)). Two basis adjustments, however, are not taken into account in determining whether there is an excess distribution: (1) the partner's basis is not increased for the gain recognized under section 737, and (2) is not decreased by the adjustment required under section 733 for property distributed to the distributee partner in the transaction (other than property previously contributed to the partnership by the partner). The first exception is consistent with section 737(c)(1) and the second is necessary to prevent an inappropriate decrease in the partner's basis (and corresponding increase in the partner's gain) under section 737. The reduction in the partner's adjusted basis for a distribution of property previously contributed to the partnership by the partner is necessary to give effect to the statutory requirement that a distribution of previously contributed property not be taken into account in determining the amount of an excess distribution.

The proposed regulations also provide that, in determining the amount of an excess distribution, the fair market value of distributed property is not reduced by the amount of any liability assumed or taken subject to by the partner. The distributee partner's basis in the partnership interest, however, is increased by the amount of any liability assumed or taken subject to by the distributee partner and this increase is taken into account in determining the amount of the excess distribution. (The partner's basis is also adjusted for the decrease in the partner's share of partnership liabilities as a result of the distribution for this purpose.) As a result, the gross fair market value of the property will be offset by the basis increase in the partner's interest in the partnership under section 752 and, as a result, the amount of the excess distribution should be limited to the net value of the distributed property.

Net Precontribution Gain

The distributee partner's net precontribution gain is the net gain (if any) that the partner would have recognized under section 704(c)(1)(B) if the partnership had distributed to another partner all property contributed to the partnership by the distributee partner within five years of the date of the distribution. The amount of gain or loss that the distributee partner would recognize under section 704(c)(1)(B) is determined under the proposed regulations to section 704(c)(1)(B) contained in this notice.

The proposed regulations under section 737 provide special rules for determining the amount of the partner's net precontribution gain. Property contributed on or before October 3, 1989, is not included in determining the amount of net precontribution gain because net precontribution gain is determined by reference to section 704(c)(1)(B), and that section does not apply to property contributed to the partnership on or before October 3, 1989.

Net precontribution gain is reduced as a result of a basis increase to the contributed property under section 734(b)(1)(A) to reflect gain recognized by the partner under section 731 on a distribution of money in the same plan or arrangement as the distribution of property subject to section 737. This reduction is appropriate because some or all of the precontribution gain is recognized by the contributing partner under section 731 on the distribution.

The proposed regulations also provide that a transferee partner succeeds to the transferor's net precontribution gain in an amount proportionate to the interest transferred. This provision is consistent with the provision in § 1.704–3(a)(7) (and § 1.704–4(d)(2) of the proposed regulations) requiring a transferee partner to succeed to all or a portion of the transferor's built-in gain or loss. The transferee partner, however, may not recognize the same amount of gain that the transferor partner would have recognized on a subsequent distribution because the transferee's basis in the partnership interest may be higher or lower than the transferor's basis, and the amount of gain allocated to the transferee partner under section 704(c)(1)(A) will be affected by any basis adjustment required under section 754.

Net precontribution gain is also reduced by the amount of gain recognized by the contributing partner under section 704(c)(1)(B) in a distribution of contributed property in a related distribution to another partner, and by the amount of gain that the partner would have recognized under section 704(c)(1)(B) on the distribution of contributed property to another partner but for the exception of section 704(c)(2). This reduction is necessary to avoid gain recognition under both section 704(c)(1)(B) and section 737 with respect to the same built-in gain. The reduction for gain not recognized as a result of the section 704(c)(2) exception only applies in situations where there is an actual distribution of contributed property to another partner.

Character of Gain

The character of the contributing partner's recognized gain is determined by reference to the character of the partner's net precontribution gain. The character of such gain is determined by netting all of the precontribution gains and losses according to the character that such property would have had on a sale by the partnership to an unrelated third party. The character of the

contributing partner's gain under section 737 is the same (and in the same proportion) as the character of any net positive amounts resulting from the netting of the precontribution gains and losses. Character for this purpose is broadly defined in the proposed regulations to include any item that the contributing partner would have been required to take into account separately under section 702(a) and § 1.702–1(a) had the partnership sold all the property contributed by that partner.

Because the contributed property is not actually transferred by the partnership to any particular partner, it is appropriate to treat the hypothetical dispositions by the partnership as occurring with an unrelated third party. As a result, the character conversion rule of section 707(b)(2) does not apply for purposes of determining the character of the distributee partner's gain. (Compare section 704(c)(1)(B) and § 1.704–4(b)(1) in which the character conversion rule does apply because the contributed property is actually distributed to another partner.)

Exceptions and Special Rules

The proposed regulations provide that section 737 does not apply to a deemed distribution of property on a termination of the partnership under section 708(b)(1)(B). As noted above (with respect to the discussion of the proposed regulations under section 704(c)(1)(B)), however, a new five-year period begins for property to the extent that the pre-termination gains and losses, if any, were not already required to be allocated to the original contributor under section 704(c)(1)(A) and § 1.704–3.

A transferee partner in a transfer that causes a termination under section 708(b)(1)(B) will generally not have any net precontribution gain immediately after the deemed formation of the new partnership. The basis of the property deemed contributed by the transferee partner to the new partnership is determined under section 732 and, as a result, the transferee partner may be treated as having contributed built-in gain and built-in loss property to the new partnership. These built-in gain and loss properties, however, should net to zero, assuming that the transferee partner's total basis in the properties is equal to their total fair market value. Section 737, however, does apply to the transferee partner and could result in gain recognition on a subsequent distribution if the distribution occurs at a time when the partner has a net precontribution gain. The transferee partner could have a net precontribution gain on a subsequent distribution if, for example, the partnership sells some or all of the built-in loss property (that is deemed contributed by that partner to the new partnership in the section 708(b)(1)(B) termination) and retains the built-in gain property.

The proposed regulations also provide that section 737 does not apply to partnership mergers and similar transactions because the partners have merely converted their interests in the transferor partnership to an interest in the transferee partnership. As a result of this treatment, however, distributions by the transferee partnership are subject to section 737 to the same extent that distributions from the transferor partnership would have been subject to section 737.

Under the proposed regulations, section 737 applies to an incorporation of the partnership involving an actual distribution of property by the partnership to the partners followed by a contribution to a corporation. (As discussed below, however, section 737 does not apply to the extent that the property actually distributed to a partner was previously contributed to the partnership by that partner.) Section 737 does not apply to an incorporation of a partnership by methods not involving an actual distribution of partnership property to the partners, provided that the incorporation is followed by a complete liquidation of the partnership as part of the same plan or arrangement as the incorporation. Section 737 does not apply in these situations because the partners are converting their partnership interests into a stock interest in the corporation in a nonrecognition transaction and, under the rules of either sections 732 or 358, the built-in gain in a partner's partnership interest is preserved in the stock received by the contributing partner. This exception is similar to the general carry-over treatment provided in § 1.704–3(a)(8) for section 704(c) property exchanged in a nonrecognition transaction. Incorporation by means of a distribution of partnership property to the partners also results in the same conversion of a partnership interest into stock of a corporation, but that method of incorporation involves an actual distribution of property to the partners and the form of incorporation chosen by the partners governs the tax consequences of incorporation, including the application of section 737.

The proposed regulations provide that a related distribution of property previously contributed to the partnership by the distributee partner is not taken into account in determining the amount of the excess distribution or the partner's net precontribution gain. The proposed regulations also provide, consistent with section 737(d)(1), for a limitation in the case of a distribution of a previously contributed interest in an entity. This limitation is intended to prevent a partner from avoiding section 737 by contributing an interest in an entity to the partnership and having the partnership contribute property to that entity, followed by a distribution of an interest in the entity to the contributing partner under the previously contributed property exception. This limitation does not apply to the extent that the property contributed by the partnership to the entity was contributed by the same partner that contributed the interest in the entity because, in that case, the distributee partner is receiving only a distribution of property that it previously contributed to the partnership.

The proposed regulations also provide that any property received by the partnership in exchange for previously contributed property is treated as previously contributed property to the extent such property is treated as section 704(c) property with regard to the contributing partner under § 1.704–3(a)(8). This provision is consistent with the general treatment of nonrecognition transactions involving section 704(c) property under § 1.704–3(a)(8).

Basis Adjustments

The contributing partner's basis in the partnership interest is increased by the amount of gain recognized by the partner. This increase is taken into account in determining a partner's basis in property received by that partner, but is not taken into account in determining the amount of gain recognized by the partner under section 737 or the amount of gain recognized under section 731 on any distribution of money in the same distribution as the distribution of property subject to section 737.

The partnership's basis in property contributed by the partner is also increased by the gain recognized by the partner. The basis increase is limited to built-in gain property held by the partnership after the distribution with the same character as the character of the gain recognized by the contributing partner under section 737. No basis increase is allocated to any previously contributed property that is part of the distribution to which section 737 applied. This previously contributed property is not taken into account in determining the amount of net precontribution gain and therefore it is not appropriate to increase the basis of that property. There is also no basis increase to any property distributed to another partner in a related distribution

to which section 704(c)(1)(B) applies. The basis in the distributed property in that case will be increased or decreased for any gain or loss recognized by the contributing partner under section 704(c)(1)(B) and therefore should not be adjusted for gain recognized under section 737.

The basis increase is allocated to built-in gain property with the same character as the character of the gain recognized by the partner. The amount of the basis increase allocated to property of a particular character is allocated to the property in the order contributed to the partnership, starting with the earliest contributed property. This ordering rule preserves the effect of the five-year rule to the extent possible. Allocating the adjustment to all property of a similar character based on any other rule would reduce the net precontribution gain attributable to later-contributed property before such gain was entirely eliminated on earlier contributed property.

Any increase to the adjusted tax basis of partnership property under the proposed regulations is recovered using any applicable recovery period and depreciation (or other cost recovery) method (including first-year conventions) available to the partnership for newly purchased property (of the type adjusted) placed in service at the time of the distribution.

Proposed Effective Date

These regulations are proposed to apply to distributions of property by a partnership to a partner on or after January 9, 1995.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment 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 Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its 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 (a signed original and eight (8) copies) that are timely submitted to the IRS. All comments will be available for public inspection and copying.

A public hearing has been scheduled for June 19, 1995, at 10 a.m. in the auditorium of the Internal Revenue Building. Because of access restrictions, visitors will not be admitted beyond the Internal Revenue Building lobby more than 15 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons that wish to present oral comments at the hearing must submit written comments by April 10, 1995 and submit an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by May 22, 1995.

A period of 10 minutes will be allotted for each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

Several persons from the Office of Chief Counsel and the Treasury Department participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

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 TAXES

Paragraph 1. The authority citation for part 1 is amended by adding the following citation:

Authority: 26 U.S.C. 7805 * * *
Section 1.704–4 also issued under 26 U.S.C. 704(c) * * *

Par. 2. Section 1.704–4 is added to read as follows:

§ 1.704–4 Distribution of contributed property.

(a) *Determination of gain*—(1) *In general.* A partner that contributes section 704(c) property to a partnership must recognize gain or loss under section 704(c)(1)(B) and this section on the distribution of such property to another partner within five years of its contribution to the partnership, in an amount equal to the gain or loss that would have been allocated to such partner under section 704(c)(1)(A) and § 1.704–3 if the distributed property had been sold by the partnership to the distributee partner for its fair market value at the time of the distribution. See § 1.704–3(a)(3)(i) for a definition of section 704(c) property.

(2) *Transactions to which section 704(c)(1)(B) applies.* Section 704(c)(1)(B) and this section apply only to a distribution that is properly characterized as a distribution to a partner acting in the capacity of a partner within the meaning of section 731 and section 737. Section 704(c)(1)(B) and this section do not apply to a transaction or distribution that is subject to provisions other than section 731(a) or section 737 (for example, a transaction or distribution subject to sections 707(a), 736(a), or 751(b)).

(3) *Fair market value of property.* The fair market value of the distributed section 704(c) property is the price at which the property would change hands between a willing buyer and a willing seller at the time of the distribution, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. The fair market value that a partnership assigns to distributed section 704(c) property will be regarded as correct, provided that the value is reasonably agreed to among the partners in an arm's-length negotiation and the partners have sufficiently adverse interests.

(4) *Determination of five-year period*—(i) *General rule.* The five-year period specified in paragraph (a)(1) of this section begins on and includes the date of contribution.

(ii) *Section 708(b)(1)(B) terminations.* A termination of the partnership under section 708(b)(1)(B) begins a new five-year period for each partner with respect to the built-in gain and built-in loss property that the partner is deemed to recontribute to a new partnership following the termination, but only to the extent that the pre-termination built-in gain or loss, if any, on such property was not already required to be allocated to the original contributor under section 704(c)(1)(A) and § 1.704–3. See § 1.704–3(a)(3)(ii) for the definitions of built-in gain and built-in loss on section 704(c) property.

(5) *Examples.* The following examples illustrate the rules of this paragraph (a). Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 704(c)(1)(B), and all partners are unrelated.

Example 1. Recognition of gain. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes $10,000 cash and Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $4,000. Thus, there is a built-in gain of $6,000 on Property A at the time of contribution. B contributes $10,000 cash and Property B, nondepreciable real property with a fair market value and adjusted tax basis of $10,000. C contributes $20,000 cash.

(ii) On December 31, 1998, Property A and Property B are distributed to C in complete liquidation of C's interest in the partnership.

(iii) A would have recognized $6,000 of gain under section 704(c)(1)(A) and § 1.704–3 on the sale of Property A at the time of the distribution ($10,000 fair market value less $4,000 adjusted tax basis). As a result, A must recognize $6,000 of gain on the distribution of Property A to C. B would not have recognized any gain or loss under section 704(c)(1)(A) and § 1.704–3 on the sale of Property B at the time of distribution because Property B was not section 704(c) property. As a result, B does not recognize any gain or loss on the distribution of Property B.

Example 2. Effect of post-contribution depreciation deductions. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Property A, depreciable property with a fair market value of $30,000 and an adjusted tax basis of $20,000. Therefore, there is a built-in gain of $10,000 on Property A. B and C each contribute $30,000 cash. ABC uses the traditional method of making section 704(c) allocations described in § 1.704–3(b) with respect to Property A.

(ii) Property A is depreciated using the straight-line method over its remaining 10-year recovery period. The partnership has book depreciation of $3,000 per year (10 percent of the $30,000 book basis), and each partner is allocated $1,000 of book depreciation per year (one-third of the total annual book depreciation of $3,000). The partnership has a tax depreciation deduction of $2,000 per year (10 percent of the $20,000 tax basis in Property A). This $2,000 tax depreciation deduction is allocated equally between B and C, the noncontributing partners with respect to Property A.

(iii) At the end of the third year, the book value of Property A is $21,000 ($30,000 initial book value less $9,000 aggregate book depreciation) and the adjusted tax basis is $14,000 ($20,000 initial tax basis less $6,000 aggregate tax depreciation). A's remaining section 704(c)(1)(A) built-in gain with respect to Property A is $7,000 ($21,000 book value less $14,000 adjusted tax basis).

(iv) On December 31, 1998, Property A is distributed to B in complete liquidation of B's interest in the partnership. If Property A had been sold for its fair market value at the time of the distribution, A would have recognized $7,000 of gain under section 704(c)(1)(A) and § 1.704–3(b). Therefore, A recognizes $7,000 of gain on the distribution of Property A to B.

Example 3. Effect of remedial method. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Property A1, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $5,000, and Property A2, nondepreciable real property with a fair market value and adjusted tax basis of $10,000. B and C each contribute $20,000 cash. ABC uses the remedial method of making section 704(c) allocations described in § 1.704–3(d) with respect to Property A1.

(ii) On December 31, 1998, when the fair market value of Property A1 has decreased to $7,000, Property A1 is distributed to C in partial liquidation of C's interest in the partnership. If Property A1 had been sold by the partnership at the time of the distribution, ABC would have recognized the $2,000 of remaining built-in gain under section 704(c)(1)(A) on the sale (fair market value of $7,000 less $5,000 adjusted tax basis). All of this gain would have been allocated to A. ABC would also have recognized a book loss of $3,000 ($10,000 original book value less $7,000 current fair market value of the property). Book loss in the amount of $2,000 would have been allocated equally between B and C. Under the remedial method, $2,000 of tax loss would also have been allocated equally to B and C to match their share of the book loss. As a result, $2,000 of gain would also have been allocated to A as an offsetting remedial allocation. A would have recognized $4,000 of total gain under section 704(c)(1)(A) on the sale of Property A1 ($2,000 of section 704(c) recognized gain plus $2,000 remedial gain). Therefore, A recognizes $4,000 of gain on the distribution of Property A1 to C under this section.

(b) *Character of gain or loss*—(1) *General rule.* Gain or loss recognized by the contributing partner under section 704(c)(1)(B) and this section has the same character as the gain or loss that would have resulted if the distributed property had been sold by the partnership to the distributee partner at the time of the distribution.

(2) *Example.* The following example illustrates the rule of this paragraph (b). Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 704(c)(1)(B), and all partners are unrelated.

Example. Character of gain. (i) On January 1, 1995, A and B form partnership AB. A contributes $10,000 and Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $4,000, in exchange for a 25 percent interest in partnership capital and profits. B contributes $60,000 cash for a 75 percent interest in partnership capital and profits.

(ii) On December 31, 1998, Property A is distributed to B in partial liquidation of B's interest in the partnership. Property A is used in a trade or business of B.

(iii) A would have recognized $6,000 of gain under section 704(c)(1)(A) on a sale of Property A at the time of the distribution (the difference between the fair market value ($10,000) and the adjusted tax basis ($4,000) of the property at that time). Because Property A is not a capital asset in the hands of Partner B and B holds more than 50 percent of partnership capital and profits, the character of the gain on a sale of Property A to B would have been ordinary income under section 707(b)(2). Therefore, the character of the gain to A on the distribution of Property A to B is ordinary income.

(c) *Exceptions*—(1) *Property contributed on or before October 3, 1989.* Section 704(c)(1)(B) and this section do not apply to property contributed to the partnership on or before October 3, 1989.

(2) *Certain complete liquidations.* Section 704(c)(1)(B) and this section do not apply to a distribution of an interest in section 704(c) property to a partner other than the contributing partner in a complete liquidation of the partnership if—

(i) The contributing partner receives an interest in the contributed section 704(c) property; and

(ii) The built-in gain or loss in the interest distributed to the contributing partner, determined immediately after the distribution, is equal to or greater than the built-in gain or loss on the property that would have been allocated to the contributing partner without regard to this paragraph (c)(2).

(3) *Section 708(b)(1)(B) termination.* Section 704(c)(1)(B) and this section do not apply to a deemed distribution of property caused by a termination of the partnership under section 708(b)(1)(B). See paragraph (a)(4)(iii) of this section for a special rule regarding a new five-year period for certain property deemed contributed to a new partnership following a termination of the partnership under section 708(b)(1)(B). See also § 1.737–2(a) for a similar rule in the context of section 737.

(4) *Example.* The following example illustrates the rule of paragraph (c)(2) of this section. Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 704(c)(1)(B), and all partners are unrelated.

Example. Complete liquidation. (i) On January 1, 1995, A and B form partnership AB, as equal partners. A contributes Property A, nondepreciable real property with a fair market value and adjusted tax basis of $20,000. B contributes Property B, nondepreciable real property with a fair market value of $20,000 and an adjusted tax basis of $10,000. Property B therefore has a

built-in gain of $10,000 at the time of contribution.

(ii) On December 31, 1998, the partnership completely liquidates when the fair market value of Property A has not changed, but the fair market value of Property B has increased to $40,000.

(iii) In the liquidation, A receives Property A and a 25 percent interest in Property B. This interest in Property B has a fair market value of $10,000 to A, reflecting the fact that A was entitled to 50 percent of the $20,000 post-contribution appreciation in Property B. The partnership distributes to B a 75 percent interest in Property B with a fair market value of $30,000. B's basis in this portion of Property B is $10,000 under section 732(b). As a result, B has a built-in gain of $20,000 in this portion of Property B immediately after the distribution ($30,000 fair market value less $10,000 adjusted tax basis). This built-in gain is greater than the $10,000 of built-in gain in Property B at the time of contribution to the partnership. B therefore does not recognize any gain on the distribution of a portion of Property B to A under this section.

(d) *Special rules*—(1) *Nonrecognition transactions.* Property received by the partnership in exchange for section 704(c) property in a nonrecognition transaction is treated as the section 704(c) property for purposes of section 704(c)(1)(B) and this section to the extent that the property received is treated as section 704(c) property under § 1.704–3(a)(8). See § 1.737–2(d)(3) for a similar rule in the context of section 737.

(2) *Transfers of a partnership interest.* The transferee of all or a portion of the partnership interest of a contributing partner is treated as the contributing partner for purposes of section 704(c)(1)(B) and this section to the extent of the share of built-in gain or loss allocated to the transferee partner. See § 1.704–3(a)(7).

(3) *Distributions of like-kind property.* If section 704(c) property is distributed to a partner other than the contributing partner and like-kind property (within the meaning of section 1031) is distributed to the contributing partner no later than the earlier of (i) 180 days following the date of the distribution to the non-contributing partner, or (ii) the due date (determined with regard to extensions) of the contributing partner's income tax return for the taxable year of the distribution to the noncontributing partner, the amount of gain or loss, if any, that the contributing partner would otherwise have recognized under section 704(c)(1)(B) and this section is reduced by the amount of built-in gain or loss in the distributed like-kind property in the hands of the contributing partner immediately after the distribution. The contributing partner's basis in the distributed like-kind property is determined as if the like-kind property were distributed in an unrelated distribution prior to the distribution of any other property distributed as part of the same plan or arrangement and is determined without regard to the increase in the contributing partner's adjusted tax basis in the partnership interest under section 704(c)(1)(B) and this section.

(4) *Example.* The following example illustrates the rules of this paragraph (d). Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 704(c)(1)(B), and all partners are unrelated.

Example. Distribution of like-kind property. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Property A, nondepreciable real property with a fair market value of $20,000 and an adjusted tax basis of $10,000. B and C each contribute $20,000 cash. The partnership subsequently buys Property X, nondepreciable real property of a like-kind to Property A with a fair market value and adjusted tax basis of $8,000. The fair market value of Property X subsequently increases to $10,000.

(ii) On December 31, 1998, Property A is distributed to B in partial liquidation of B's interest in the partnership. At the same time, Property X is distributed to A in partial liquidation of A's interest in the partnership. A's basis in Property X is $8,000 under section 732(a)(1). A therefore has $2,000 of built-in gain in Property X ($10,000 fair market value less $8,000 adjusted tax basis).

(iii) A would generally recognize $10,000 of gain under section 704(c)(1)(B) on the distribution of Property A, the difference between the fair market value ($20,000) of the property and its adjusted tax basis ($10,000). This gain is reduced, however, by the amount of the built-in gain of Property X in the hands of A. As a result, A recognizes only $8,000 of gain on the distribution of Property A to B under section 704(c)(1)(B) and this section.

(e) *Basis adjustments*—(1) *Contributing partner's basis in the partnership interest.* The basis of the contributing partner's interest in the partnership is increased by the amount of the gain, or decreased by the amount of the loss, recognized by the partner under section 704(c)(1)(B) and this section. This increase or decrease is taken into account in determining (i) the contributing partner's adjusted tax basis under section 732 for any property distributed to the partner in a distribution that is part of the same plan or arrangement as the distribution of the contributed property, other than like-kind property described in paragraph (d)(3) of this section (pertaining to the special rule for distributions of like-kind property), and (ii) the amount of the gain recognized by the contributing partner under section 731 or section 737, if any, on a distribution of money or property to the contributing partner that is part of the same plan or arrangement as the distribution of the contributed property. For a determination of basis in a distribution subject to section 737, see § 1.737–3(a).

(2) *Partnership's basis in partnership property.* The partnership's adjusted tax basis in the distributed section 704(c) property is increased or decreased immediately before the distribution by the amount of gain or loss recognized by the contributing partner under section 704(c)(1)(B) and this section. Any increase or decrease in basis is therefore taken into account in determining the distributee partner's adjusted tax basis in the distributed property under section 732. For a determination of basis in a distribution subject to section 737, see § 1.737–3(b).

(3) *Section 754 adjustments.* The basis adjustment to partnership property made pursuant to paragraph (e)(2) of this section is not elective and must be made regardless of whether the partnership has an election in effect under section 754. Any adjustments to the bases of partnership property (including the distributed section 704(c) property) under section 734(b) pursuant to a section 754 election must be made after (and must take into account) the adjustments to basis made under paragraph (e)(2) of this section. See § 1.737–3(c)(4) for a similar rule in the context of section 737.

(4) *Example.* The following example illustrates the rules of this paragraph (e). Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 704(c)(1)(B), and all partners are unrelated.

Example. Basis adjustment. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes $10,000 cash and Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $4,000. B and C each contribute $20,000 cash.

(ii) On December 31, 1998, Property A is distributed to B in partial liquidation of B's interest in the partnership.

(iii) Under paragraph (a) of this section, A recognizes $6,000 of gain on the distribution of Property A because that is the amount of gain that would have been allocated to A under section 704(c)(1)(A) and § 1.704–3 on

a sale of Property A for its fair market value at the time of the distribution (fair market value of Property A ($10,000) less its adjusted tax basis at the time of distribution ($4,000)). The adjusted tax basis of A's partnership interest is increased from $14,000 to $20,000 to reflect this gain. The partnership's adjusted tax basis in Property A is increased from $4,000 to $10,000 immediately prior to its distribution to B. B's adjusted tax basis in Property A is therefore $10,000 under section 732(a)(1).

(f) *Anti-abuse rule*—(1) *In general.* The rules of section 704(c)(1)(B) and this section must be applied in a manner consistent with the purpose of section 704(c)(1)(B). Accordingly, if a principal purpose of a transaction is to achieve a tax result that is inconsistent with the purpose of section 704(c)(1)(B), the Commissioner can recast the transaction for federal tax purposes as appropriate to achieve tax results that are consistent with the purpose of section 704(c)(1)(B) and this section. Whether a tax result is inconsistent with the purpose of section 704(c)(1)(B) and this section must be determined based on all the facts and circumstances. See § 1.737–4 for an anti-abuse rule and examples in the context of section 737.

(2) *Examples.* The following examples illustrate the anti-abuse rule of this paragraph (f). The examples set forth below do not delineate the boundaries of either permissible or impermissible types of transactions. Further, the addition of any facts or circumstances that are not specifically set forth in an example (or the deletion of any facts or circumstances) may alter the outcome of the transaction described in the example. Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 704(c)(1)(B), and all partners are unrelated.

Example 1. Distribution in substance made within five-year period; results inconsistent with the purpose of section 704(c)(1)(B). (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $1,000. B and C each contributes $10,000 cash.

(ii) On December 31, 1998, the partners tentatively agree to distribute Property A to B in complete liquidation of B's interest in the partnership. If Property A were distributed at that time, A would recognize $9,000 of gain under section 704(c)(1)(B), the difference between the $10,000 fair market value and the $1,000 adjusted tax basis of Property A, because Property A was contributed to the partnership less than five years before December 31, 1998. On becoming aware of this potential gain recognition, and with a principal purpose of avoiding such gain, the partners amend the partnership agreement on December 31, 1998, and take any other steps necessary to provide that substantially all of the economic risks and benefits of Property A are allocated to B as of December 31, 1998, and that substantially all of the economic risks and benefits of all other partnership property are allocated to A and C. The partnership holds Property A until January 5, 2000, at which time it is distributed to B in complete liquidation of B's interest in the partnership.

(iii) The distribution of Property A occurred more than five years after the contribution of the property to the partnership. The steps taken by the partnership on December 31, 1998, however, are the functional equivalent of an actual distribution of Property A to B in complete liquidation of B's interest in the partnership as of that date. Section 704(c)(1)(B) requires recognition of gain when contributed section 704(c) property is in substance distributed to another partner within five years of its contribution to the partnership. Allowing a contributing partner to avoid section 704(c)(1)(B) through arrangements such as those in this *Example 1* that have the effect of a distribution of property within five years of the date of its contribution to the partnership would effectively undermine the purpose of section 704(c)(1)(B) and this section. As a result, the steps taken by the partnership on December 31, 1998, are treated as causing a distribution of Property A to B for purposes of section 704(c)(1)(B) on that date, and A recognizes gain of $9,000 under section 704(c)(1)(B) and this section at that time.

(iv) Alternatively, if on becoming aware of the potential gain recognition to A on a distribution of Property A on December 31, 1998, the partners had instead agreed that B would continue as a partner with no changes to the partnership agreement or to B's economic interest in partnership operations, the distribution of Property A to B on January 5, 2000, would not have been inconsistent with the purpose of section 704(c)(1)(B) and this section. In that situation, Property A would not have been distributed until after the expiration of the five-year period specified in section 704(c)(1)(B) and this section. Deferring the distribution of Property A until the end of the five-year period for a principal purpose of avoiding the recognition of gain under section 704(c)(1)(B) and this section is not inconsistent with the purpose of section 704(c)(1)(B). Therefore, A would not have recognized gain on the distribution of Property A in that case.

Example 2. Suspension of five-year period in manner consistent with the purpose of section 704(c)(1)(B). (i) A, B, and C form partnership ABC on January 1, 1995, to conduct bona fide business activities. A contributes Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $1,000, in exchange for a 49.5 percent interest in partnership capital and profits. B contributes $10,000 in cash for a 49.5 percent interest in partnership capital and profits. C contributes cash for a 1 percent interest in partnership capital and profits. A and B are wholly owned subsidiaries of the same affiliated group and continue to control the management of Property A by virtue of their controlling interests in the partnership. The partnership is formed pursuant to a plan a principal purpose of which is to minimize the period of time that A would have to remain a partner with a potential acquiror of Property A.

(ii) On December 31, 1997, D is admitted as a partner to the partnership in exchange for $10,000 cash.

(iii) On January 5, 2000, Property A is distributed to D in complete liquidation of D's interest in the partnership.

(iv) The distribution of Property A to D occurred more than five years after the contribution of the property to the partnership. On these facts, however, a principal purpose of the transaction was to minimize the period of time that A would have to remain partners with a potential acquiror of Property A, and treating the five-year period of section 704(c)(1)(B) as running during a time when Property A was still effectively owned through the partnership by members of the contributing affiliated group of which A is a member is inconsistent with the purpose of section 704(c)(1)(B). Prior to the admission of D as a partner, the pooling of assets between A and B, on the one hand, and C, on the other hand, although sufficient to constitute ABC as a valid partnership for federal income tax purposes, is not a sufficient pooling of assets for purposes of running the five-year period with respect to the distribution of Property A to D. Allowing a contributing partner to avoid section 704(c)(1)(B) through arrangements such as those in this *Example 2* would have the effect of substantially nullifying the five-year requirement of section 704(c)(1)(B) and this section and elevating the form of the transaction over its substance. As a result, with respect to the distribution of Property A to D, the five-year period of section 704(c)(1)(B) is tolled until the admission of D as a partner on December 31, 1997. Therefore, the distribution of Property A occurred before the end of the five-year period of section 704(c)(1)(B), and A recognizes gain of $9,000 under section 704(c)(1)(B) on the distribution.

(g) *Effective date.* This section applies to distributions by a partnership to a partner on or after January 9, 1995.

Par. 3. Sections 1.737–1, 1.737–2, 1.737–3, 1.737–4, and 1.737–5 are added under the heading ''Distributions by a Partnership'' to read as follows:

§ 1.737–1 Recognition of precontribution gain.

(a) *Determination of gain*—(1) *In general.* A partner that receives a distribution of property (other than money) must recognize gain under section 737 and this section in an amount equal to the lesser of the excess distribution (as defined in paragraph (b) of this section) or the partner's net precontribution gain (as defined in

paragraph (c) of this section). Gain recognized under section 737 and this section is in addition to any gain recognized under section 731.

(2) *Transactions to which section 737 applies.* Section 737 and this section apply only to a distribution that is properly characterized as a distribution to a partner acting in the capacity of a partner within the meaning of section 731. Section 737 does not apply to a transaction or distribution that is subject to provisions other than sections 731(a) or 737 (for example, a transaction or distribution subject to sections 707(a), 736(a), or 751(b)).

(b) *Excess distribution*—(1) *Definition.* The excess distribution is the amount (if any) by which the fair market value of the distributed property (other than money) exceeds the distributee partner's adjusted tax basis in the partner's partnership interest.

(2) *Fair market value of property.* The fair market value of the distributed property is the price at which the property would change hands between a willing buyer and a willing seller at the time of the distribution, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. The fair market value that a partnership assigns to distributed property will be regarded as correct, provided that the value is reasonably agreed to among the partners in an arm's-length negotiation and the partners have sufficiently adverse interests.

(3) *Distributee partner's adjusted tax basis*—(i) *General rule.* In determining the amount of the excess distribution, the distributee partner's adjusted tax basis in the partnership interest includes any basis adjustment resulting from the distribution that is subject to section 737 (for example, adjustments required under section 752) and from any other distribution or transaction that is part of the same plan or arrangement, except for—

(A) The increase required under section 737(c)(1) for the gain recognized by the partner under section 737; and

(B) The decrease required under section 733(2) for any property distributed to the partner other than property previously contributed to the partnership by the distributee partner. See § 1.704–4(e)(1) for a rule in the context of section 704(c)(1)(B). See also § 1.737–3(b)(2) for a special rule for determining a partner's adjusted tax basis in distributed property previously contributed by the partner to the partnership.

(ii) *Advances or drawings.* The distributee partner's adjusted tax basis in the partnership interest is determined as of the last day of the partnership's taxable year if the distribution to which section 737 applies is properly characterized as an advance or drawing against the partner's distributive share of income. See § 1.731–1(a)(1)(ii).

(c) *Net precontribution gain*—(1) *General rule.* The distributee partner's net precontribution gain is the net gain (if any) that the partner would have recognized under section 704(c)(1)(B) and § 1.704–4 if, at the time of the distribution to which section 737 applies, the partnership had actually distributed to another partner all section 704(c) property contributed to the partnership by the distributee partner. See § 1.704–4 for provisions determining a contributing partner's gain or loss under section 704(c)(1)(B) on an actual distribution of contributed section 704(c) property to another partner.

(2) *Special rules*—(i) *Property contributed on or before October 3, 1989.* Property contributed to the partnership on or before October 3, 1989, is not taken into account in determining a partner's net precontribution gain. See § 1.704–4(c)(1) for a similar rule in the context of section 704(c)(1)(B).

(ii) *Section 734(b)(1)(A) adjustments.* For distributions to a distributee partner of money by a partnership with a section 754 election in effect that are part of the same plan or arrangement as the distribution of property subject to section 737, for purposes of paragraph (a) and (c)(1) of this section the distributee partner's net precontribution gain is reduced by the basis adjustments (if any) made to section 704(c) property contributed by the distributee partner under section 734(b)(1)(A). See § 1.737–3(c)(4) for rules regarding basis adjustments for partnerships with a section 754 election in effect.

(iii) *Transfers of a partnership interest.* The transferee of all or a portion of a contributing partner's partnership interest succeeds to the transferor's net precontribution gain, if any, in an amount proportionate to the interest transferred. See § 1.704–3(a)(7) and § 1.704–4(d)(2) for similar provisions in the context of section 704(c)(1)(A) and section 704(c)(1)(B).

(iv) *Section 704(c)(1)(B) gain recognized in related distribution.* A distributee partner's net precontribution gain is determined after taking into account any gain or loss recognized by the partner under section 704(c)(1)(B) and § 1.704–4 (or that would have been recognized by the partner except for the like-kind exception in section 704(c)(2) and § 1.704–4(d)(3)) on an actual distribution to another partner of section 704(c) property contributed by the distributee partner that is part of the same plan or arrangement as the distribution to the distributee partner.

(v) *Section 704(c)(2) disregarded.* A distributee partner's net precontribution gain is determined without regard to the provisions of section 704(c)(2) and § 1.704–4(d)(2) in situations in which the property contributed by the distributee partner is not actually distributed to another partner in a distribution related to the section 737 distribution.

(d) *Character of gain.* The character of the gain recognized by the distributee partner under section 737 and this section is determined by, and is proportionate to, the character of the partner's net precontribution gain. For this purpose, all gains and losses on section 704(c) property taken into account in determining the partner's net precontribution gain are netted according to their character. Any character with a net negative amount is disregarded. The character of the partner's gain under section 737 is the same as, and in proportion to, any character with a net positive amount. Character for this purpose is determined as if the section 704(c) property had been sold by the partnership to an unrelated third party at the time of the distribution and includes any item that would have been taken into account separately by the contributing partner under section 702(a) and § 1.702–1(a).

(e) *Examples.* The following examples illustrate the provisions of this section. Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 737, and all partners are unrelated.

Example 1. Calculation of excess distribution and net precontribution gain. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Property A, depreciable real property with a fair market value of $30,000 and an adjusted tax basis of $20,000. B contributes Property B, nondepreciable real property with a fair market value and adjusted tax basis of $30,000. C contributes $30,000 cash.

(ii) Property A has 10 years remaining on its cost recovery schedule and is depreciated using the straight-line method. The partnership uses the traditional method for allocating items under section 704(c) described in § 1.704–3(b)(1) for Property A. The partnership has book depreciation of $3,000 per year (10 percent of the $30,000 book basis in Property A) and each partner is allocated $1,000 of book depreciation per

year (one-third of the total annual book depreciation of $3,000). The partnership also has tax depreciation of $2,000 per year (10 percent of the $20,000 adjusted tax basis in Property A). This $2,000 tax depreciation is allocated equally between B and C, the noncontributing partners with respect to Property A.

(iii) At the end of 1997, the book value of Property A is $21,000 ($30,000 initial book value less $9,000 aggregate book depreciation) and its adjusted tax basis is $14,000 ($20,000 initial tax basis less $6,000 aggregate tax depreciation).

(iv) On December 31, 1997, Property B is distributed to A in complete liquidation of A's partnership interest. The adjusted tax basis of A's partnership interest at that time is $20,000. The amount of the excess distribution is $10,000, the difference between the fair market value of the distributed Property B ($30,000) and A's adjusted tax basis in A's partnership interest ($20,000). A's net precontribution gain is $7,000, the difference between the book value of Property A ($21,000) and its adjusted tax basis at the time of the distribution ($14,000). A recognizes gain of $7,000 on the distribution, the lesser of the excess distribution and the net precontribution gain.

Example 2. Determination of distributee partner's basis. (i) On January 1, 1995, A, B, and C form general partnership ABC as equal partners. A contributes Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $4,000. B and C each contribute $10,000 cash.

(ii) The partnership purchases Property B, nondepreciable real property with a fair market value of $9,000, subject to a $9,000 nonrecourse liability. This nonrecourse liability is allocated equally among the partners under section 752, increasing A's adjusted tax basis in A's partnership interest from $4,000 to $7,000.

(iii) On December 31, 1998, A receives $2,000 cash and Property B, subject to the $9,000 liability, in partial liquidation of A's interest in the partnership.

(iv) In determining the amount of the excess distribution, the adjusted tax basis of A's partnership interest is adjusted to take into account the distribution of money and the shift in liabilities. A's adjusted tax basis is therefore increased to $11,000 for this purpose ($7,000 initial adjusted tax basis, less $2,000 distribution of money, less $3,000 (decrease in A's share of the $9,000 partnership liability), plus $9,000 (increase in A's individual liabilities)). As a result of this basis adjustment, the adjusted tax basis of A's partnership interest ($11,000) is greater than the fair market value of the distributed property ($9,000) and therefore, there is no excess distribution. A recognizes no gain under section 737.

Example 3. Net precontribution gain reduced for gain recognized under section 704(c)(1)(B). (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Properties A1 and A2, nondepreciable real properties each with a fair market value of $10,000 and an adjusted tax basis of $6,000. B contributes Property B, nondepreciable real property, with a fair market value and adjusted tax basis of $20,000. C contributes $20,000 cash.

(ii) On December 31, 1998, Property B is distributed to A in complete liquidation of A's interest and, as part of the same distribution, Property A1 is distributed to B in partial liquidation of B's interest in the partnership.

(iii) A's net precontribution gain before the distribution is $8,000 ($20,000 fair market value of Properties A1 and A2 less $12,000 adjusted tax basis of such properties). A recognizes $4,000 of gain under section 704(c)(1)(B) and § 1.704–4 on the distribution of Property A1 to B ($10,000 fair market value of Property A1 less $6,000 adjusted tax basis of Property A1). This gain is taken into account in determining A's excess distribution and net precontribution gain. As a result, A's net precontribution gain is reduced from $8,000 to $4,000, and the adjusted tax basis in A's partnership interest is increased by $4,000 to $16,000.

(iv) A recognizes gain of $4,000 on the receipt of Property B under section 737, an amount equal to the excess distribution of $4,000 ($20,000 fair market value of Property B less $16,000 adjusted tax basis of A's interest in the partnership) and A's remaining net precontribution gain of $4,000.

Example 4. Character of gain. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes the following nondepreciable property to the partnership:

	Fair market value	Adjusted tax basis
Property A1	$30,000	$20,000
Property A2	30,000	38,000
Property A3	10,000	9,000

(ii) The character of gain or loss on Property A1 and Property A2 is long-term, U.S.-source capital gain or loss. The character of gain on Property A3 is long-term, foreign-source capital gain. B contributes Property B, nondepreciable real property with a fair market value and adjusted tax basis of $70,000. C contributes $70,000 cash.

(iii) On December 31, 1998, Property B is distributed to A in complete liquidation of A's interest in the partnership. A recognizes $3,000 of gain under section 737, an amount equal to the excess distribution of $3,000 ($70,000 fair market value of Property B less $67,000 adjusted tax basis in A's partnership interest) and A's net precontribution gain of $3,000 ($70,000 aggregate fair market value of properties contributed by A less $67,000 aggregate adjusted tax basis of such properties).

(iv) In determining the character of A's gain, all gains and losses on property taken into account in determining A's net precontribution gain are netted according to their character and allocated to A's recognized gain under section 737 based on the relative proportions of the net positive amounts. U.S.-source and foreign-source gains must be netted separately because A would have been required to take such gains into account separately under section 702. As a result, A's net precontribution gain of $3,000 consists of $2,000 of net long-term, U.S.-source capital gain ($10,000 gain on Property A1 and $8,000 loss on Property A2) and $1,000 of net long-term, foreign-source capital gain ($1,000 gain on Property A3).

(v) The character of A's gain under paragraph (d) of this section is therefore $2,000 long-term, U.S.-source capital gain ($3,000 gain recognized under section 737×$2,000 net long-term, U.S.-source capital gain/$3,000 total net precontribution gain) and $1,000 long-term, foreign-source capital gain ($3,000 gain recognized under section 737×$1,000 net long-term, foreign-source capital gain/$3,000 total net precontribution gain).

§ 1.737–2 Exceptions and special rules.

(a) *Section 708(b)(1)(B) terminations.* Section 737 and this section do not apply to a deemed distribution of property on a termination of the partnership under section 708(b)(1)(B). See § 1.704–4(c)(3) for a similar rule in the context of section 704(c)(1)(B).

(b) *Complete transfer to another partnership.* Section 737 and this section do not apply to a transfer by a partnership (transferor partnership) of all of its assets and liabilities to a second partnership (transferee partnership) in an exchange described in section 721, followed by a distribution of the interest in the transferee partnership in complete liquidation of the transferor partnership as part of the same plan or arrangement. In addition, section 737 and this section do not apply to any transaction, such as a partnership merger under section 708(b)(2)(A), that is treated in a similar manner. A subsequent distribution of property by the transferee partnership to the partners of the transferee partnership who were formerly partners of the transferor partnership is subject to section 737 to the same extent that a distribution from the transferor partnership would have been subject to section 737.

(c) *Incorporation of a partnership.* Section 737 and this section do not apply to an incorporation of a partnership by any method of incorporation (other than a method involving an actual distribution of partnership property to the partners followed by a contribution of that property to a corporation), provided that the partnership is completely liquidated as part of the same plan or arrangement as the incorporation transaction.

(d) *Distribution of previously contributed property—(1) General rule.* Any portion of the distributed property that consists of property previously contributed by the distributee partner (including property treated as contributed by the partner in connection with a termination of the partnership

under section 708(b)(1)(B)) *(previously contributed property)* is not taken into account in determining the amount of the excess distribution or the partner's net precontribution gain. See § 1.737–3(b)(2) for a special rule for determining the basis of previously contributed property in the hands of a distributee partner who contributed the property to the partnership.

(2) *Limitation for distribution of previously contributed interest in an entity.* An interest in an entity previously contributed to the partnership is not treated as previously contributed property to the extent that the value of the interest is attributable to property contributed to the entity after the interest was contributed to the partnership. The preceding sentence does not apply to the extent that the property contributed to the entity was contributed to the partnership by the partner that also contributed the interest in the entity to the partnership.

(3) *Nonrecognition transactions.* Property received by the partnership in exchange for contributed section 704(c) property in a nonrecognition transaction is treated as the contributed property with regard to the contributing partner for purposes of section 737 to the extent that the property received is treated as section 704(c) property under § 1.704–3(a)(8). See § 1.704–4(d)(1) for a similar rule in the context of section 704(c)(1)(B).

(e) *Examples.* The following examples illustrate the rules of this section. Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 737, and all partners are unrelated.

Example 1. Distribution of previously contributed property. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes the following nondepreciable real property to the partnership:

	Fair market value	Adjusted tax basis
Property A1	$20,000	$10,000
Property A2	10,000	6,000

(ii) A's total net precontribution gain on the contributed property is $14,000 ($10,000 on Property A1 plus $4,000 on Property A2). B contributes $10,000 cash and Property B, nondepreciable real property with a fair market value and adjusted tax basis of $20,000. C contributes $30,000 cash.

(iii) On December 31, 1998, Property A2 and Property B are distributed to A in complete liquidation of A's interest in the partnership. Property A2 was previously contributed by A and is therefore not taken into account in determining the amount of the excess distribution or A's net precontribution gain. The adjusted tax basis of Property A2 in the hands of A is also determined under section 732 as if that property were the only property distributed to A.

(iv) As a result of excluding Property A2 from these determinations, the amount of the excess distribution is $10,000 ($20,000 fair market value of distributed Property B less $10,000 adjusted tax basis in A's partnership interest). A's net precontribution gain is also $10,000 ($14,000 total net precontribution gain less $4,000 gain with respect to previously contributed Property A2). A therefore recognizes $10,000 of gain on the distribution, the lesser of the excess distribution and the net precontribution gain.

Example 2. Distribution of a previously contributed interest in an entity. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $5,000, and all of the stock of Corporation X with a fair market value and adjusted tax basis of $500. B contributes $500 cash and Property B, nondepreciable real property with a fair market value and adjusted tax basis of $10,000. Partner C contributes $10,500 cash. On December 31, 1996, ABC contributes Property B to Corporation X in a nonrecognition transaction under section 351.

(ii) On December 31, 1998, all of the stock of Corporation X is distributed to A in complete liquidation of A's interest in the partnership. The stock is treated as previously contributed property with respect to A only to the extent of the $500 fair market value of the Corporation X stock contributed by A. The fair market value of the distributed stock for purposes of determining the amount of the excess distribution is therefore $10,000 ($10,500 total fair market value of Corporation X stock less $500 portion treated as previously contributed property). The $500 fair market value and adjusted tax basis of the Corporation X stock is also not taken into account in determining the amount of the excess distribution and the net precontribution gain.

(iii) A recognizes $5,000 of gain under section 737, the amount of the excess distribution ($10,000 fair market value of distributed property less $5,000 adjusted tax basis in A's partnership interest) and A's net precontribution gain ($10,000 fair market value of Property A less $5,000 adjusted tax basis in Property A).

§ 1.737–3 Basis adjustments; Recovery rules.

(a) *Distributee partner's adjusted tax basis in the partnership interest.* The distributee partner's adjusted tax basis in the partnership interest is increased by the amount of gain recognized by the distributee partner under section 737 and this section. This increase is not taken into account in determining the amount of gain recognized by the partner under section 737(a)(1) and this section or in determining the amount of gain recognized by the partner under section 731(a) on the distribution of money in the same distribution or any related distribution. See § 1.704–4(e)(1) for a determination of the distributee partner's adjusted tax basis in a distribution subject to section 704(c)(1)(B).

(b) *Distributee partner's adjusted tax basis in distributed property*—(1) *In general.* The distributee partner's adjusted tax basis in the distributed property is determined under section 732(a) or (b) as applicable. The increase in the distributee partner's adjusted tax basis in the partnership interest under paragraph (a) of this section is taken into account in determining the distributee partner's adjusted tax basis in the distributed property other than property previously contributed by the partner. See § 1.704–4(e)(2) for a determination of basis in a distribution subject to section 704(c)(1)(B).

(2) *Previously contributed property.* The distributee partner's adjusted tax basis in distributed property that the partner previously contributed to the partnership is determined as if it were distributed in a separate and independent distribution prior to the distribution that is subject to section 737 and § 1.737–1.

(c) *Partnership's adjusted tax basis in partnership property*—(1) *Increase in basis.* The partnership's adjusted tax basis in eligible property is increased by the amount of gain recognized by the distributee partner under section 737.

(2) *Eligible property.* Eligible property is property that—

(i) Entered into the calculation of the distributee partner's net precontribution gain;

(ii) Has an adjusted tax basis to the partnership less than the property's fair market value at the time of the distribution;

(iii) Would have the same character of gain on a sale by the partnership to an unrelated party as the character of any of the gain recognized by the distributee partner under section 737; and

(iv) Was not distributed to another partner in a distribution subject to section 704(c)(1)(B) and § 1.704–4 that was part of the same plan or arrangement as the distribution subject to section 737.

(3) *Method of adjustment.* For the purpose of allocating the basis increase under paragraph (c)(2) of this section among the eligible property, all eligible property of the same character is treated as a single group. Character for this

purpose is determined in the same manner as the character of the recognized gain is determined under § 1.737–1(d). The basis increase is allocated among the separate groups of eligible property in proportion to the character of the gain recognized under section 737. The basis increase is then allocated among property within each group in the order in which the property was contributed to the partnership by the partner, starting with the property contributed first, in an amount equal to the difference between the property's fair market value and its adjusted tax basis to the partnership at the time of the distribution. For property that has the same character and was contributed in the same (or a related) transaction, the basis increase is allocated based on the respective amounts of unrealized appreciation in such properties at the time of the distribution.

(4) *Section 754 adjustments.* The basis adjustment to partnership property made pursuant to paragraph (c)(1) of this section is not elective and must be made regardless of whether the partnership has an election in effect under section 754. Any adjustments to the bases of partnership property (including eligible property as defined in paragraph (c)(2) of this section) under section 734(b) pursuant to a section 754 election (other than basis adjustments under section 734(b)(1)(A) described in the following sentence) must be made after (and must take into account) the adjustments to basis made under paragraph (a) and paragraph (c)(1) of this section. Basis adjustments under section 734(b)(1)(A) that are attributable to distributions of money to the distributee partner that are part of the same plan or arrangement as the distribution of property subject to section 737 are made before the adjustments to basis under paragraph (a) and paragraph (c)(1) of this section. See § 1.737–1(c)(2)(ii) for the effect, if any, of basis adjustments under section 734(b)(1)(A) on a partner's net precontribution gain. See also § 1.704–4(e)(3) for a similar rule regarding basis adjustments pursuant to a section 754 election in the context of section 704(c)(1)(B).

(d) *Recovery of increase to adjusted tax basis.* Any increase to the adjusted tax basis of partnership property under paragraph (c)(1) of this section is recovered using any applicable recovery period and depreciation (or other cost recovery) method (including first-year conventions) available to the partnership for newly purchased property (of the type adjusted) placed in service at the time of the distribution.

(e) *Examples.* The following examples illustrate the rules of this section. Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 737, and all partners are unrelated.

Example 1. Partner's basis in distributed property. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $5,000. B contributes Property B, nondepreciable real property with a fair market value and adjusted tax basis of $10,000. C contributes $10,000 cash.

(ii) On December 31, 1998, Property B is distributed to A in complete liquidation of A's interest in the partnership. A recognizes $5,000 of gain under section 737, an amount equal to the excess distribution of $5,000 ($10,000 fair market value of Property B less $5,000 adjusted tax basis in A's partnership interest) and A's net precontribution gain of $5,000 ($10,000 fair market value of Property A less $5,000 adjusted tax basis of such property).

(iii) A's adjusted tax basis in A's partnership interest is increased by the $5,000 of gain recognized under section 737. This increase is taken into account in determining A's basis in the distributed property. Therefore, A's adjusted tax basis in distributed Property B is $10,000 under section 732(b).

Example 2. Partner's basis in distributed property in connection with gain recognized under section 704(c)(1)(B). (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes the following nondepreciable real property to the partnership:

	Fair market value	Adjusted tax basis
Property A1	$10,000	$5,000
Property A2	10,000	2,000

(ii) B contributes $10,000 cash and Property B, nondepreciable real property, with a fair market value and adjusted tax basis of $10,000. C contributes $20,000 cash.

(iii) On December 31, 1998, Property B is distributed to A in partial liquidation of A's interest in the partnership and Property A1 is distributed to B in partial liquidation of B's interest in the partnership. A recognizes $5,000 of gain under section 704(c)(1)(B) and § 1.704–4 on the distribution of Property A1 to B, the difference between the fair market value of such property ($10,000) and the adjusted tax basis in distributed Property A1 ($5,000). The adjusted tax basis of A's partnership interest is increased by this $5,000 of gain under section 704(c)(1)(B) and § 1.704–4(e)(1) .

(iv) The increase in the adjusted tax basis of A's partnership interest is taken into account in determining the amount of the excess distribution. As a result, there is no excess distribution because the fair market value of Property B ($10,000) is less than the adjusted tax basis of A's interest in the partnership at the time of distribution ($12,000). A therefore recognizes no gain under section 737 on the receipt of Property B. A's adjusted tax basis in Property B is $10,000 under section 732(a)(1). The adjusted tax basis of A's partnership interest is reduced from $12,000 to $2,000 under section 733. *See Example 3* of § 1.737–1(e).

Example 3. Partnership's basis in partnership property after a distribution with section 737 gain. (i) On January 31, 1995, A, B, and C form partnership ABC as equal partners. A contributes the following nondepreciable property to the partnership:

	Fair market value	Adjusted tax basis
Property A1	$1,000	$500
Property A2	4,000	1,500
Property A3	4,000	6,000
Property A4	6,000	4,000

(ii) The character of gain or loss on Properties A1, A2, and A3 is long-term, U.S.-source capital gain or loss. The character of gain on Property A4 is long-term, foreign-source capital gain. B contributes Property B, nondepreciable real property with a fair market value and adjusted tax basis of $15,000. C contributes $15,000 cash.

(iii) On December 31, 1998, Property B is distributed to A in complete liquidation of A's interest in the partnership. A recognizes gain of $3,000 under section 737, an amount equal to the excess distribution of $3,000 ($15,000 fair market value of Property B less $12,000 adjusted tax basis in A's partnership interest) and A's net precontribution gain of $3,000 ($15,000 aggregate fair market value of the property contributed by A less $12,000 aggregate adjusted tax basis of such property).

(iv) $2,000 of A's gain is long-term, foreign-source capital gain ($3,000 total gain under section 737×$2,000 net long-term, foreign-source capital gain/$3,000 total net precontribution gain). $1,000 of A's gain is long-term, U.S.-source capital gain ($3,000 total gain under section 737×$1,000 net long-term, U.S.-source capital gain/$3,000 total net precontribution gain).

(v) The partnership must increase the adjusted tax basis of the property contributed by A by $3,000. All property contributed by A is eligible property. Properties A1, A2, and A3 have the same character and are grouped into a single group for purposes of allocating this basis increase. Property A4 is in a separate character group.

(vi) $2,000 of the basis increase must be allocated to long-term, foreign-source capital assets because $2,000 of the gain recognized by A was long-term, foreign-source capital gain. The adjusted tax basis of Property A4 is therefore increased from $4,000 to $6,000. $1,000 of the increase must be allocated to Properties A1 and A2 because $1,000 of the gain recognized by A is long-term, U.S.-source capital gain. No basis increase is allocated to Property A3 because its fair market value is less than its adjusted tax

basis. The $1,000 basis increase is allocated between Properties A1 and A2 based on the unrealized appreciation in each asset before such basis adjustment. As a result, the adjusted tax basis of Property A1 is increased by $167 ($1,000×$500/$3,000) and the adjusted tax basis of Property A2 is increased by $833 ($1,000×$2,500/3,000).

§ 1.737–4 Anti-abuse rule.

(a) *In general.* The rules of section 737 and §§ 1.737–1, 1.737–2, and 1.737–3 must be applied in a manner consistent with the purpose of section 737. Accordingly, if a principal purpose of a transaction is to achieve a tax result that is inconsistent with the purpose of section 737, the Commissioner can recast the transaction for federal tax purposes as appropriate to achieve tax results that are consistent with the purpose of section 737. Whether a tax result is inconsistent with the purpose of section 737 must be determined based on all the facts and circumstances. See § 1.704–4(f) for an anti-abuse rule and examples in the context of section 704(c)(1)(B). The anti-abuse rule and examples under section 704(c)(1)(B) and § 1.704–4(f) are relevant to section 737 and §§ 1.737–1, 1.737–2, and 1.737–3 to the extent that the net precontribution gain for purposes of section 737 is determined by reference to section 704(c)(1)(B).

(b) *Examples.* The following examples illustrate the rules of this section. The examples set forth below do not delineate the boundaries of either permissible or impermissible types of transactions. Further, the addition of any facts or circumstances that are not specifically set forth in an example (or the deletion of any facts or circumstances) may alter the outcome of the transaction described in the example. Unless otherwise specified, partnership income equals partnership expenses (other than depreciation deductions for contributed property) for each year of the partnership, the fair market value of partnership property does not change, all distributions by the partnership are subject to section 737, and all partners are unrelated.

Example 1. Increase in distributee partner's basis by temporary contribution; results inconsistent with the purpose of section 737. (i) On January 1, 1995, A, B, and C form partnership ABC as equal partners. A contributes Property A1, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $1,000. B contributes Property B, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $10,000. C contributes $10,000 cash.

(ii) On January 1, 1999, pursuant to a plan a principal purpose of which is to avoid gain under section 737, A contributes to the partnership Property A2, nondepreciable real property with a fair market value and adjusted tax basis of $9,000. A, therefore, increased the adjusted tax basis of A's partnership interest from $1,000 to $10,000. The partnership agreement is amended and all other necessary steps are taken so that substantially all of the economic risks and benefits of Property A2 are retained by A. On February 1, 1999, Property B is distributed to A in partial liquidation of A's interest in the partnership. If the contribution of Property A2 is taken into account for purposes of section 737, there is no excess distribution because the fair market value of distributed Property B ($10,000) does not exceed the adjusted tax basis of A's interest in the partnership ($10,000), and therefore section 737 does not apply. A's adjusted tax basis in distributed Property B is $10,000 under section 732(a)(1) and the adjusted tax basis of A's partnership interest is reduced to zero under section 733.

(iii) On March 1, 2000, A receives Property A2 from the partnership in complete liquidation of A's interest in the partnership. A recognizes no gain on the distribution of Property A2 because the property was previously contributed property. See § 1.737–2(d).

(iv) Although the contribution of Property A2 increases the adjusted tax basis of A's interest in the partnership (assuming it was a valid contribution to the partnership under section 721), it would be inconsistent with the purpose of section 737 to recognize the contribution of Property A2 to the partnership as in substance a bona fide contribution of an asset used in the conduct of joint business activity. Section 737 requires recognition of gain when the value of distributed property exceeds the distributee partner's adjusted tax basis in the partnership interest. Section 737 assumes that any contribution or other transaction that affects a partner's adjusted tax basis in the partnership interest is not a transitory contribution or transaction engaged in with a principal purpose of avoiding recognition of gain under section 737. Because the contribution of Property A2 was a transitory contribution made with a principal purpose of avoiding recognition of gain under section 737, the Commissioner can disregard the contribution of Property A2 for this purpose. As a result, A recognizes gain of $9,000 under section 737 on the receipt of Property B, an amount equal to the lesser of the excess distribution of $9,000 ($10,000 fair market value of distributed Property B less the $1,000 adjusted tax basis of A's partnership interest, determined without regard to the transitory contribution of Property A2) or A's net precontribution gain of $9,000 on Property A1.

Example 2. Increase in distributee partner's basis; section 752 liability shift; results consistent with the purpose of section 737. (i) On January 1, 1995, A and B form general partnership AB as equal partners. A contributes Property A, nondepreciable real property with a fair market value of $10,000 and an adjusted tax basis of $1,000. B contributes Property B, nondepreciable real property with a fair market value and adjusted tax basis of $10,000. The partnership also borrows $10,000 on a recourse basis and purchases Property C. The $10,000 liability is allocated equally between A and B under section 752, thereby increasing the adjusted tax basis in A's partnership interest to $6,000.

(ii) On December 31, 1998, the partners agree that A is to receive Property B in partial liquidation of A's interest in the partnership. If A were to receive Property B at that time, A would recognize $4,000 of gain under section 737, an amount equal to the lesser of the excess distribution of $4,000 ($10,000 fair market value of Property B less $6,000 adjusted tax basis in A's partnership interest) or A's net precontribution gain of $9,000 ($10,000 fair market value of Property A less $1,000 adjusted tax basis of Property A).

(iii) With a principal purpose of avoiding such gain, A and B agree that A will be solely liable for the repayment of the $10,000 partnership liability and take the steps necessary so that the entire amount of the liability is allocated to A under section 752. The adjusted tax basis in A's partnership interest is thereby increased from $6,000 to $11,000 to reflect A's share of the $5,000 of liability previously allocated to B. As a result of this increase in A's adjusted tax basis, there is no excess distribution because the fair market value of distributed Property B ($10,000) is less than the adjusted tax basis of A's partnership interest. Recognizing A's increased adjusted tax basis as a result of the shift in liabilities is consistent with the purpose of section 737 and this section. Section 737 requires recognition of gain only when the value of the distributed property exceeds the distributee partner's adjusted tax basis in the partnership interest. The $10,000 recourse liability is a bona fide liability of the partnership and A's and B's agreement that A will assume responsibility for repayment of that debt has substance. Therefore, the increase in A's adjusted tax basis in A's interest in the partnership due to the shift in partnership liabilities under section 752 is respected, and A recognizes no gain under section 737.

§ 1.737–5 Effective date.

Sections 1.737–1, 1.737–2, 1.737–3, and 1.737–4 apply to distributions by a partnership to a partner on or after January 9, 1995.

Margaret Milner Richardson,

Commissioner of Internal Revenue.

[FR Doc. 95–171 Filed 1–6–95; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 110

[CGD 86–079]

RIN 2115–AC96]

Anchorage Regulations; Regulated Navigation Areas and Limited Access Areas (CGD 86–079)

AGENCY: Coast Guard, DOT.

ACTION: Notice of termination.

SUMMARY: This rulemaking project was initiated to make various administrative changes to clarify the statutory authority and purposes of special anchorage areas and anchorage grounds; remove references to specific state and local ordinances governing special anchorage areas; relocate anchorage grounds (Subpart B) from Part 110 to a new Part 111; adopt a standardized anchorage description format using latitudes and longitudes; and establish a geographically oriented national numbering system for anchorages. Because Coast Guard resources have been devoted to higher priority issues, staff to complete this editorial effort has not been and will not be available in the foreseeable future to complete this initiative. Therefore, the Coast Guard is terminating further rulemaking under docket number 86–079.

FOR FURTHER INFORMATION CONTACT: Margie G. Hegy, Project Manager, Short Range Aids to Navigation Division, U.S. Coast Guard Headquarters, (202) 267–0415.

SUPPLEMENTARY INFORMATION: Responsibility for the administration and enforcement of anchorage regulations was transferred from the U.S. Army Corps of Engineers to the U.S. Coast Guard in 1967. Many of the regulations have remained basically unchanged since that time. In 1979, the authority to designate special anchorage areas and anchorage grounds and to issue regulations pertaining to anchorage grounds was delegated to Coast Guard district commanders. State and local governments have also promulgated ordinances which apply in some of these designated anchorages.

On March 11, 1988 (53 FR 7949) the Coast Guard proposed a number of editorial changes and a partial reorganization of the anchorage regulations in 33 CFR Part 110. After reviewing the comments received as a result of the NPRM, the Coast Guard published a Supplemental Notice of Proposed Rulemaking on December 5, 1988 (53 FR 48935) proposing to expand the editorial revision of Part 110 to include creating a new Part 111 and standardizing the format for anchorage descriptions by using latitudes and longitudes.

Because Coast Guard resources have been devoted to higher priority issues, staff to complete this extensive editorial effort has not been and will not be available in the foreseeable future to complete this initiative. Therefore, due to the time that has lapsed since the last section (1988) and the lack of resources to complete this rulemaking, the Coast Guard is terminating further rulemaking under docket number 86–079. This subject may be further reviewed and, as resources permit, future rulemaking projects initiated as needed.

Dated: December 30, 1994.

G.A. Penington,

Rear Admiral, U.S. Coast Guard Chief, Office of Navigation Safety and Waterway Services.

[FR Doc. 95–435 Filed 1–6–95; 8:45 am]

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 89–2A]

Cable Compulsory License: Notice of Inquiry Regarding Merger of Cable Systems and Individual Pricing of Broadcast Signals

AGENCY: Copyright Office, Library of Congress.

ACTION: Extension of comment period.

SUMMARY: The Copyright Office is reopening the comment period in Docket RM 89–2 (Merger of Cable Systems) to broaden the scope of this proceeding. Specifically, the Office seeks comment as to the copyright royalty implications of *a la carte* offerings of broadcast signals by cable operators and the permissibility of allocating gross receipts among subscriber groups for *a la carte* signals in computing royalties due under the cable compulsory license of the Copyright Act.

DATES: Initial comments should be received by February 23, 1995. Reply comments should be received by February 8, 1995.

ADDRESSES: Interested persons should submit fifteen copies of their written comments, if delivered by mail, to: Copyright GC/I&R, P. O. Box 70400, Southwest Station, Washington, D.C. 20024. If delivered by hand, fifteen copies should be brought to: Office of the General Counsel, James Madison Memorial Building, Room LM–407, 101 Independence Avenue, S.E., Washington, D.C. 20540.

FOR FURTHER INFORMATION CONTACT: Marilyn J. Kretsinger, Acting General Counsel, Copyright GC/I&R, P. O. Box 70400, Southwest Station, Washington, D.C. 20024. Telephone (202) 707–8380. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION:

I. Background

On September 18, 1989, the Copyright Office published a Notice of Inquiry (NOI) in Docket No. RM 89–2 to inform the public that it was examining the issues of merger and acquisition of cable systems and their impact on the computation and reporting of royalties under the cable compulsory license, 17 U.S.C. 111. 54 FR 38390 (1989). At the heart of the 1989 NOI were the royalty filing questions raised by the application of the ''contiguous communities'' provision of the section 111(f) definition of a cable system. That provision provides that two or more cable facilities are considered as one cable system if the facilities are either in contiguous communities under common ownership or control or operating from one headend. *See also* 37 CFR 201.17(b)(2).

The Office highlighted some of the difficulties created by cable systems in contiguous communities becoming a single system through either merger or acquisition by a common owner:

> For example, assume a situation where there are two completely independent but contiguous cable systems. System A carries two non-permitted (3.75% rate) independent station signals and System B, assigned a different television market, carries the same two independent station signals but on a permitted (base rate) basis, plus a superstation signal on a non-permitted (3.75% rate) basis. Systems A and B are purchased by the same parent company and apparently become a single cable system for purposes of the compulsory license. The purchase raises several problematic issues as to the calculation of the proper royalty fee. Should the independent stations be paid for at the 3.75% rate or the non-3.75% rate system-wide, or should the rates be allocated among subscribers within the system and, if so, on what basis? Furthermore, if allocation is the answer, what rate can be attributed to new subscribers to the merged system? Finally, there is the question of the superstation signal which is only carried by former cable System B. At the time of acquisition, should the superstation be attributed throughout the entire system, even though many subscribers do not receive the signal (a so-called 'phantom' signal)? And which system's market quota (A's or B's) should be used for the entire statement?

54 FR at 38391

Based on the above scenario, the Office also formally posed a set of further questions—many of which addressed the creation of subscriber groups for attributing signals and royalty rates. Among these questions were whether cable operators should be allowed to attribute distant signals among their subscribers in accordance with the conditions that existed prior to

the merger or acquisition, and whether cable operators should only be required to include in gross receipts the revenues generated from subscribers who actually received a broadcast signal. Id. at 38391–92.

Several parties, who commented on the 1989 NOI, proposed a possible ''solution'' to the above described scenario.[1] Their proposal is a two step approach: aggregation, and then allocation of gross receipts. Cable systems would first aggregate the gross receipts of all of their subscribers to determine which Copyright Office form (and hence royalty rates) to use; then cable systems would report carriage of distant signals according to subscriber groups. Thus, in the above example provided by the Office in the 1989 NOI, Systems A and B would aggregate their gross receipts to determine which form to use (either SA 1–2 or SA–3) and the corresponding royalty rates, and then continue to file separately (i.e. as they were filing prior to the merger/acquisition). Thus, if System A and B's aggregated gross receipts total was in excess of $292,000, both systems would file a separate form SA–3 with the corresponding royalty rates. System A would file an SA–3 and report two non-permitted independent signals at the 3.75% rate, based only on the gross receipts of the subscribers in the communities System A serves. System B would also file an SA–3 and report both the non-permitted 3.75% superstation signal and those same two independent signals on a permitted basis, based on the gross receipts of the subscribers in the communities System B serves. See comments of American Television and Communications Corp. at 10; comments of Baraff, Koerner, Olender & Hochberg, P.C. at 2–3; comments of Adelphia Communication Corp *et. al.* at 10; comments of National Cable Television Association at 13; comments of Program Suppliers at 7–9. But see comments of Joint Sports Claimants at 3. The referenced commentators argue that this approach is consistent with the ''contiguous communities'' provision of section 111(f) since that provision speaks only to how systems are to be classified, not how they are to report carriage, and sustains the purpose of the provision to prevent fragmentation of cable systems.[2]

The referenced commentators' proposal advocates the creation of ''subscriber groups'' within a single cable system, requiring allocation of gross receipts to specific groups of subscribers and application of varying royalty rates to those groups. Until now, the Copyright Office has looked with disfavor on allocation of gross receipts based on subscriber groups, since allocation among different subscribers, with one exception, is not specifically recognized by section 111 and creates problems in applying the royalty rates.[3] The only express allowance for allocation in section 111 is the partially local/partially distant provision of section 111(d)(1)(B). That section provides that ''in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter.'' There are now other ''subscriber group'' and gross receipts allocation issues beyond those of section 111(d)(1)(B) and those presented by the merger and acquisition of cable systems.

II. The 1992 Cable Act

In 1992 Congress passed the ''Cable Television Consumer Protection and Competition Act of 1992'' (1992 Cable Act) which, among other things, regulates the rates that cable operators may charge their subscribers for cable programming services. Although the 1992 Cable Act is telecommunications legislation, and not copyright, its passage has created additional issues related to creation of subscriber groups and allocation of gross receipts to those addressed in our 1989 NOI.

The 1992 Cable Act permits the Federal Communications Commission, and in some cases local franchising authorities, to regulate the rates charged by cable operators for both broadcast and nonbroadcast programming services. While packages or ''tiers'' of programming services are subject to rate regulation, Congress excluded per-channel service offerings from such regulation. These per-channel offerings are known as *a la carte* signals because, to be exempt from rate regulation, subscribers must have a ''realistic choice'' in deciding whether to receive the signal. Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92–266, 8 FCC Rcd. 5631 ¶¶327–328 & n. 808.

The exemption from rate regulation for *a la carte* signals encourages cable operators to offer some, if not all of their services (beyond the basic tier required by the 1992 Cable Act to be provided to all subscribers), on a subscriber choice basis. Thus, for example, a cable operator might offer subscribers three distant superstation signals (WTBS, WWOR, WGN, etc.) at $3 a month per signal. A subscriber could choose any combination of these signals, or none at all, and pay only the per signal charges for those signals selected. The result is a number of distant signal offerings by the cable operator, with varying numbers of subscribers within the system selecting, receiving, and paying separately for each signal.

With the increasing ability of cable operators to offer subscribers essentially ''one signal tiers'' of broadcast stations, issues arise as to the proper calculation and reporting of royalty fees under the section 111 cable compulsory license. If every distant signal offering is allocated to the entire subscriber base of the cable system, ''one signal tiers'' that are purchased by just a few of the cable system's subscribers could result in costing the cable system more in royalties than the income it gets from the few subscribers. As noted above, the Copyright Office has had a longstanding policy against creation of subscriber groups and allocation of gross receipts, except as provided for in section 111(d)(1)(B). By extending the comment period in this proceeding, the Office is now re-examining this policy in both the context of merger and acquisition of cable systems and *a la carte* broadcast signals.

III. Extension of Comment Period

Because the royalty issues presented by *a la carte* broadcast signals resemble many of those presented by the merger and acquisition of cable systems, the Copyright Office is reopening this proceeding to receive comment on how compulsory license royalty payments should be made for *a la carte* offerings of broadcast signals by cable operators. Specifically, the Office seeks comment on the following inquiries:

(a) As described in the ''System A and System B'' example in the 1989 NOI to this proceeding, a ''phantom'' signal problem occurs when the superstation carried by System B is attributed to all subscribers throughout the merged systems, even though the subscribers in former System A do not actually receive the signal. In the case of *a la carte* broadcast signals, should carriage of

[1] Although the Copyright Office has reviewed the comments, it has not reached any conclusions or decisions with regard to the suggestions proposed by the various commentators.

[2] ''Fragmentation'' is the practice whereby a cable system separates or ''fragments'' its system into as series of smaller systems filing separate forms, usually the SA 1–2, and corresponding lower royalty rates. The purpose of fragmentation its to reduce the operator's overall gross receipts and thereby create a substantially lower royalty payment under the cable license.

[3] The royalty rate problems include identifying the signals to which the 3.75% rate applies and in the case of permitted signals, what is the order of the DSE (first, second, third).

each distant broadcast signal be attributed throughout the entire subscription base, even if many subscribers do not actually receive the signal. The Copyright Office has historically required such attribution, based upon its interpretation that the Copyright Act permits only allocation of gross receipts among subscriber groups for partially local/partially distant signals. Does the 1992 Cable Act, or other circumstances, warrant a change in this interpretation? If so, on what basis?

(b) It has been suggested by some that the Copyright Office should permit creation of subscriber groups for *a la carte* broadcast signals, and allow cable operators to allocate gross receipts only to those subscribers who select and receive a particular signal. Thus, for example, if a cable system has 1000 subscribers and only 500 of them choose to receive superstation X, the distant signal equivalent (DSE) value generated by superstation X would only be applied against the gross receipts generated from the 500 subscribers who took the superstation, as opposed to applying it against the system's total gross receipts.[4]

One concern with allowing that would be that it would offer the cable system an incentive to pull its distant signals from its basic tier offering, and offer them only as *a la carte* signals, thus reducing the subscriber base from which the royalty is calculated.

The Cable Act of 1992 has made it more difficult for cable systems to restructure their distant signal offerings because it states that, for a basic tier subject to rate regulation, ''such basic service tier shall, at a minimum, consist of * * * (iii) any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.'' 47 USC 543 (b) (7) (iii).

Therefore, for distant signals that are imported by means other than satellite carrier, if the cable system offers it to one subscriber, it must offer it to all on the basic tier. In 1989, 48.2% of all instances of distant signal carriage on a Form 3 cable system were by means other than satellite carrier. 1989 Cable Royalty Distribution Proceeding, 57 FR 15286, 15294 (1992).

However, 51.8% of distant signal carriage in 1989 was by means of satellite carrier, and those signals could be pulled from the basic tier without violating the 1992 Cable Act. In addition, cable systems that are not subject to basic tier rate regulation because there is effective competition in the system's franchise area, are also free to restructure.

What would be the statutory basis for allowing *a la carte* allocation, and what effect would it have on the total amount of royalties paid?

(c) If the Copyright Office allowed the type of gross receipts allocation described in question (b), what is the proper royalty rate to assess against the gross receipts of each subscriber group? For example, if a cable system carried two distant signals on an *a la carte* basis, one a permitted signal and the other a non-permitted signal at the 3.75% rate, how can it be determined which subscriber group is receiving the less expensive base rate permitted signal, and which group is receiving the more expensive 3.75% rate non-permitted signal? Obviously, there is a powerful incentive for the cable operator to assign the 3.75% rate to the signal with the fewest subscribers, and hence the lowest amount of gross receipts. A similar problem occurs in applying the decreasing rates for permitted signals. Are there any fixed factors which the Copyright Office could apply to prevent the repeated occurrence of applying the lower rate against the higher gross receipts? What effect would that have on the total royalty pool generated by section 111?

The Copyright Office requests comment on the questions raised in this extended comment period, as well as any other issues related to compulsory license royalty payments for *a la carte* offerings of broadcast signals.

List of Subjects

Cable compulsory license; Cable television systems.

Dated: December 29, 1994.

Marybeth Peters,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

[FR Doc. 95–439 Filed 1–6–95; 8:45 am]

BILLING CODE 1410–31–P

[4] This example assumes the cable system is an SA–3 form system, and therefore makes royalty payments based on the number of DSE's carried.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[OAQPS No. CA–95–6639; FRL–5134–4]

Approval and Promulgation of Implementation Plans; California Implementation Plan Revision, San Joaquin Valley Unified Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: EPA is proposing to approve revisions to the California State Implementation Plan (SIP) which concern the control of volatile organic compound (VOC) emissions from polystyrene foam, polyethylene, and polypropylene manufacturing and polyester resin operations.

The intended effect of proposing approval of these rules is to regulate emissions of VOCs in accordance with the requirements of the Clean Air Act, as amended in 1990 (CAA or the Act). EPA's final action on this notice of proposed rulemaking (NPRM) will incorporate these rules into the federally approved SIP. EPA has evaluated each of these rules and is proposing to approve them under provisions of the CAA regarding EPA action on SIP submittals, SIPs for national primary and secondary ambient air quality standards and plan requirements for nonattainment areas.

DATES: Comments must be received on or before February 8, 1995.

ADDRESSES: Comments may be mailed to: Daniel A. Meer, Rulemaking Section [A–5–3], Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Copies of the new rules and EPA's evaluation report of each rule are available for public inspection at EPA's Region 9 office during normal business hours. Copies of the submitted rules are also available for inspection at the following locations:

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 ''L'' Street, Sacramento, CA 95814.

San Joaquin Valley Unified Air Pollution Control District 1999 Tuolumne Street, Fresno, CA 93721.

FOR FURTHER INFORMATION CONTACT: Christine Vineyard, Rulemaking Section [A–5–3], Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San

Francisco, CA 94105–3901, (415) 744–1197.

SUPPLEMENTARY INFORMATION:

Applicability

The rules being proposed for approval into the California SIP include: San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) Rule 4682, Polystyrene Foam, Polyethylene, and Polypropylene Manufacturing; and SJVUAPCD Rule 4684, Polyester Resin Operations. These rules were submitted by the California Air Resources Board (CARB) to EPA on July 13, 1994.

Background

On March 3, 1978, EPA promulgated a list of ozone nonattainment areas under the provisions of the Clean Air Act, as amended in 1977 (1977 CAA or pre-amended Act), that included the San Joaquin Valley Air Basin which includes the following eight air pollution control districts (APCDs): Fresno County APCD, Kern County APCD,[1] Kings County APCD, Madera County APCD, Merced County APCD, San Joaquin County APCD, Stanislaus County APCD, and Tulare County APCD. 43 FR 8964; 40 CFR 81.305. The SJVUAPCD has authority over the San Joaquin Valley Air Basin which includes all of the above eight counties except for the Southeast Desert Air Basin portion of Kern County. Because these areas were unable to meet the statutory attainment date of December 31, 1982, California requested under section 172(a)(2), and EPA approved, an extension of the attainment date to December 31, 1987.[2] 40 CFR 52.222. On May 26, 1988, EPA notified the Governor of California, pursuant to section 110(a)(2)(H) of the pre-amended Act, that the above districts' portions of the California SIP were inadequate to attain and maintain the ozone standard and requested that deficiencies in the existing SIP be corrected (EPA's SIP-Call). On November 15, 1990, the Clean Air Act Amendments of 1990 were enacted. Pub. L. 101–549, 104 Stat. 2399, codified at 42 U.S.C. 7401–7671q (CAA or Act). In amended sections 182(b)(2) (B) and (C) of the CAA, Congress statutorily required nonattainment areas to submit reasonably available control technology (RACT) rules for all major sources of VOCs by November 15, 1992. The San Joaquin Valley Air Basin is classified as serious [3]; therefore, this area was subject to the RACT catch-up requirement and the November 15, 1992 deadline.[4]

The State of California submitted many revised RACT rules for incorporation into its SIP on July 13, 1994, including the rules being acted on in this document. This document addresses EPA's proposed action for SJVUAPCD Rule 4682, Polystyrene Foam, Polyethylene, and Polypropylene Manufacturing; and SJVUAPCD Rule 4684, Polyester Resin Operations. The SJVUAPCD adopted Rules 4682 and 4684 on June 16, 1994 and May 19, 1994, respectively. These submitted rules were found to be complete on July 22, 1994 pursuant to EPA's completeness criteria, which are set forth in 40 CFR Part 51 Appendix V,[5] and are being proposed for approval into the SIP.

The SJVUAPCD Rule 4682, Polystyrene Foam, Polyethylene, and Polypropylene Manufacturing, controls VOC emissions from the manufacturing and processing of polystyrene foam, polyethylene, and polypropylene and from the storage of VOC blowing agents; and SJVUAPCD Rule 4684, Polyester Resin Operations, controls emissions from polyester resin operations. VOCs contribute to the production of ground level ozone and smog. The rules were adopted as part of each district's efforts to achieve the National Ambient Air Quality Standard (NAAQS) for ozone and in response to sections 182(b)(2) (B) and (C). The following is EPA's evaluation and proposed action for these rules.

EPA Evaluation and Proposed Action

In determining the approvability of a VOC rule, EPA must evaluate the rule for consistency with the requirements of the CAA and EPA regulations, as found in section 110 and Part D of the CAA and 40 CFR Part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans). The EPA interpretation of these requirements, which forms the basis for today's action, appears in various EPA policy guidance documents.[6] Among those provisions is the requirement that a VOC rule must, at a minimum, provide for the implementation of RACT for stationary sources of VOC emissions. This requirement was carried forth from the pre-amended Act.

For the purpose of assisting state and local agencies in developing RACT rules, EPA prepared a series of Control Technique Guideline (CTG) documents. The CTGs are based on the underlying requirements of the Act and specify the presumptive norms for what is RACT for specific source categories. Under the CAA, Congress ratified EPA's use of these documents, as well as other Agency policy, for requiring States to catch-up their RACT rules. See section 182(b)(2). The CTG applicable to SJVUAPCD Rule 4682 is entitled, ''Control of Volatile Organic Compound Emissions from Manufacture of High-Density Polyethylene, Polypropylene, and Polystyrene Resins'' (EPA–450/3–83–008). For some categories, such as polyester resin operations, EPA did not publish a CTG. In such cases, the district may determine what controls are required to satisfy the RACT requirement by reviewing the operations of facilities subject to the regulation and evaluating regulations for similar sources in other areas. Further interpretations of EPA policy are found in the Blue Book, referred to in footnote 6. In general, these guidance documents have been set forth to ensure that VOC rules are fully enforceable and strengthen or maintain the SIP.

SJVUAPCD Rule 4682, Polystyrene foam, Polyethylene, and Polypropylene Manufacturing, is a new rule adopted to:

- Provide emissions reduction methods such as (1) use of a blowing agent other than a VOC; or (2) use of trichlorofluoromethane (CFC–11) or dichlorodifluoromethane (CFC–12).
- Require recordkeeping for product use and add-on control equipment.
- Provide test methods to determine compliance.

SJVUAPCD Rule 4684, Polyester Resin Operations, is a new rule adopted to:

[1] At that time, Kern County included portions of two air basins: the San Joaquin Valley Air Basin and the Southeast Desert Air Basin. The San Joaquin Valley Air Basin portion of Kern County was designated as nonattainment, and the Southeast Desert Air Basin portion of Kern County was designated as unclassified. See 40 CFR 81.305 (1991).

[2] This extension was not requested for the following counties: Kern, Kings, Madera, Merced and Tulare. Thus, the attainment date for these counties remained December 31, 1982.

[3] The San Joaquin Valley Air Basin retained its designations of nonattainment and was classified by operation of law pursuant to sections 107(d) and 181(a) upon the date of enactment of the CAA. See 55 FR 56694 (November 6, 1991).

[4] California did not make the required SIP submittals by November 15, 1992. On January 15, 1993, the EPA made a finding of failure to make a submittal pursuant to section 179(a)(1), which started an 18-month sanction clock. The rules being acted on in this NPRM were submitted in response to the EPA finding of failure to submit.

[5] EPA adopted the completeness criteria on February 16, 1990 (55 FR 5830) and, pursuant to section 110(k)(1)(A) of the CAA, revised the criteria on August 26, 1991 (56 FR 42216).

[6] Among other things, the pre-amendment guidance consists of those portions of the proposed post-1987 ozone and carbon monoxide policies that concerns RACT, 52 FR 45044 (November 24, 1987); ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations, Clarification to Appendix D of November 24, 1987 **Federal Register** Notice'' (Blue Book) (Notice of availability was published in the **Federal Register** on May 25, 1988); and the existing control technique guidelines (CTGs).

• Control emissions from polyester resin operations through the following set of control options: (1) use of resin material with no more than 35% monomer by weight; (2) use of low pigmented gel coats with no more than 45% monomer by weight; (3) use of resin containing a vapor suppressant, such that weight loss from the VOC emissions does not exceed 60 grams per meter of exposed surface during resin polymerization; (4) use of a closed-mold system; and (5) use of an emission control system.

• Provide recordkeeping requirements.

• Provide test methods to determine compliance.

EPA has evaluated the submitted rules and has determined that they are consistent with the CAA, EPA regulations, and EPA policy. Therefore, SJVUAPCD Rule 4682, Polystyrene Foam, Polyethylene, and Polypropylene Manufacturing; and SJVUAPCD Rule 4684, Polyester Resin Operations are being proposed for approval under section 110(k)(3) of the CAA as meeting the requirements of section 110(a) and Part D.

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

Regulatory Process

Under the Regulatory Flexibility Act, 5 U.S.C. Sections 600 et. seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. sections 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under sections 110 and 301 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 action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. U.S. E.P.A.*, 427 U.S. 246, 256–66 (S.Ct. 1976); 42 U.S.C. 7410(a)(2).

The OMB has exempted this action from review under Executive Order 12866.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compound.

Authority: 42 U.S.C. 7401–7671q.

Dated: December 14, 1994.

Felicia Marcus,

Regional Administrator.

[FR Doc. 95–461 Filed 1–6–95; 8:45 am]

BILLING CODE 6560–50–P

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40 CFR Part 60

[AD–FRL–5132–5]

Standards of Performance for New Stationary Sources; Appendix A—Reference Methods; Amendments to Method 24 for the Determination of Volatile Matter Content, Water Content, Density, Volume Solids, and Weight Solids of Surface Coatings

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This rule establishes procedures for the determination of volatile matter content, density, volume solids, and water content for ultraviolet radiation-cured coatings. Method 24 refers to the American Society for Testing and Materials (ASTM) procedures for the determination of volatile matter content, density, volume solids, weight solids, and water content of surface coatings. This ASTM method excluded ultraviolet radiation-cured coatings which was not EPA's intent. Therefore, EPA is revising Method 24 to apply to ultraviolet radiation-cured coatings.

A public hearing will be held, if requested, to provide interested persons an opportunity for oral presentation of data, views, or arguments concerning the proposed rule.

DATES: *Comments.* Comments must be received on or before March 7, 1995.

Public Hearing. If anyone contacts EPA requesting to speak at a public hearing by January 30, 1995, a public hearing will be held on February 8, 1995 beginning at 10 a.m. Persons interested in attending the hearing should call the contact mentioned under **ADDRESSES** to verify that a hearing will be held.

Request to Speak at Hearing. Persons wishing to present oral testimony must contact EPA by January 30, 1995.

ADDRESSES: *Comments.* Comments should be submitted (in duplicated if possible) to: Air Docket Section (LE–131), Attention: Docket Number A–94–37, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

Public Hearing. If anyone contacts EPA requesting a public hearing, it will be held at EPA's Emission Measurement Laboratory Building, Research Triangle Park, North Carolina. Persons interested in attending the hearing or wishing to present oral testimony should contact Candace Sorrell, Emission Measurement Branch (MD–19), Technical Support Division, U.S. Environmental Protection Agency, Research Triangle Park, N.C. 27711, telephone (919) 541–1064.

Docket. Docket Number A–94–37, containing materials relevant to this rulemaking, is available for public inspection and copying between 8:30 a.m. and Noon, and 1:30 and 3:30 p.m., Monday through Friday, at EPA's Air Docket Section, Room M1500, First Floor, Waterside Mall, Gallery 1, 401 M Street, S.W., Washington, D.C. 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Candace Sorrell at (919) 541–1064, Emission Measurement Branch (MD–19), Technical Support Division, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION:

I. The Rulemaking

Method 24 was intended to be used for measuring volatile organic compounds content of all coatings that are intended for either ambient or baking film foundation. When Method 24 was published in 1980 it referenced the American Society for Testing and Materials (ASTM) Method D 2369–81, which the Environmental Protection Agency believed would apply to all coatings. However, that method was not applicable to ultraviolet (UV) radiation-cured coatings and this amendment to Method 24 will incorporate ASTM Method D 5403–93, which does contain those procedures.

This rulemaking does not impose emission measurement requirements beyond those specified in the current regulation, nor does it change any emission standard. Rather, the rulemaking would simply amend an

existing test method associated with emission measurement requirements that would apply irrespective of this rulemaking.

II. Administrative Requirements

A. Public Hearing

A public hearing will be held if requested, to discuss the proposed test method in accordance with Section 307(d)(5) of the Clean Air Act. Persons wishing to make oral presentations should contact EPA at the address given in the **ADDRESSES** section of this preamble. Oral presentations will be limited to 15 minutes each. Any member of the public may file a written statement with EPA before, during, or within 30 days after the hearing. Written statements should be addressed to the Air Docket Section address given in the **ADDRESSES** section of this preamble.

B. Docket

The docket is an organized and complete file for all information submitted or otherwise considered by EPA in the development of this proposed rulemaking. The principle purposes of the docket are: (1) to allow interested parties to identify and locate documents so that they can effectively participate in the rulemaking process and (2) to serve as the record in case of judicial review (except for interagency review materials) [Section 307(d)(7)(A)].

C. Executive Order 12866

Under Executive Order 12866 [58 **Federal Register** 51735 (October 4, 1993)], the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

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

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

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

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

It has been determined that this action is not a ''significant regulatory action'' within the meaning of Executive Order 12866 and is therefore not subject to OMB review.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 requires the identification of potentially adverse impacts of Federal regulations upon small business entities. The Act specifically requires the completion of an RFA analysis in those instances where small business impacts are possible. Because this rulemaking imposes no adverse economic impacts, an analysis has not been conducted. Pursuant to the provision of 5 U.S.C. 605(b), I hereby certify that the promulgated rule will not have an impact on small entities because no additional costs will be incurred.

E. Paperwork Reduction Act

This rule does not change any information collection requirements subject to Office of Management and Budget under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

List of Subjects in 40 CFR Part 60

Environmental protection, Air pollution control, Intergovernmental relations, Surface coating of metal furniture, Automotive and light duty truck surface coating operations, Graphic arts industry publications, Rotogravure printing, Pressure sensitive tape and label surface coating, Industrial surface coating: Large appliances, Metal coil surface coating, Beverage can surface coating industry, Flexible vinyl and urethane coating and printing, Plastic parts for business machine coatings industry, Incorporation by reference, and Reporting and recordkeeping requirements.

Dated: December 23, 1994.

Carol M. Browner,

Administrator.

40 CFR Part 60 is proposed to be amended as follows:

1. The authority citation for part 60 continues to read as follows:

Authority: 42 U.S.C. 7401, 7411, 7414, 7416, and 7601.

2. In § 60.17 of Subpart A, by adding a paragraph (a)(63) to read as follows:

§ 60.17 Incorporation by reference.

* * * * *

(a) * * *

(63) ASTM D 5403–93 Standard Test Methods for Volatile Content of Radiation Curable Materials.

* * * * *

Appendix A—[Amended]

3. In Method 24 of Appendix A, Section 3.1 is amended by removing the words ''For all other coatings analyzed as follows:''

4. In Method 24 of Appendix A, Sections 3.2, 3.3, 3.4, 3.5, 3.6, 3.7 are redesignated as Sections 3.3, 3.4, 3.5, 3.6, 3.7, 3.8, respectively; Sections 2.6, 3.2 and 3.9 are added, to read as follows:

Method 24—[Amended]

* * * * *

2. * * *

2.6 ASTM D 5403–93 Standard Method for Volatile Content of Radiation Curable Materials (incorporated by reference—see § 60.17).

* * * * *

3.2 Ultraviolet Radiation-cured Coating. To determine volatile content of ultraviolet radiation-cured (UV-cured) coatings, follow the procedures in Section 3.9. Determine water content, density and solids content of the UV-cured coatings according to Sections 3.4, 3.5, and 3.6, respectively. The UV-cured coatings are coatings which contain unreacted monomers that are polymerized by exposure to ultraviolet light. For all other coatings not covered by Sections 3.1 or 3.2 analyzed as follows:

* * * * *

3.9 UV-cured Coating's Volatile Matter Content. Use the procedure in ASTM D5403–93 (incorporated by reference—see § 60.17) to determine the volatile matter content of the coating except the curing test described in NOTE 2 of ASTM D5403–93 is required.

* * * * *

[FR Doc. 95–462 Filed 1–6–95; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

48 CFR Parts 45 and 52

Federal Acquisition Regulation; Government Property

AGENCY: Department of Defense.

ACTION: Notice of public meeting.

SUMMARY: On September 16, 1994, (59 FR 47583) the Director of Defense Procurement, Department of Defense, announced an initiative to rewrite the Federal Acquisition Regulation (FAR) Part 45, Government Property, to make it easier to understand and to minimize the burdens imposed on contractors and contracting officers. The Director of Defense Procurement is providing a forum for an exchange of ideas and

information with government and industry personnel by holding public meetings, soliciting public comments, and publishing notices of the public meetings in the **Federal Register.** The topics to be discussed at the next public meeting include a proposed deviation from the current FAR Part 45 requirement to track certain government property, proposed revisions to the definitions currently located throughout FAR Part 45, and the priority for addressing the remaining topics. Prior to the public meeting, interested parties may obtain draft materials relating to these topics from the Office of the Assistant Secretary of Defense for Public Affairs.

DATES: *Public Meetings:* A public meeting will be conducted at the address shown below from 1:00 p.m. to 5:00 p.m., local time, on January 24, 1995, and from 9:30 a.m. to 5:00 p.m., local time, on January 25, 1995.

Draft Materials: Drafts of the materials to be discussed at the public meeting on January 24 and 25 will be available at the Office of the Assistant Secretary of Defense for Public Affairs as of January 12, 1995.

Statements: Statements for presentation should be submitted to the address below on or before January 20, 1995.

ADDRESSES: *Draft Materials:* Interested parties may obtain drafts of the materials to be discussed at the public meeting on January 24 and 25 from the Office of the Assistant Secretary of Defense for Public Affairs, Directorate for Public Communication, Room 1E794, Attn: Harold Heilsnis, 1400 Defense Pentagon, Washington, DC 20301–1400.

Public Meeting: The public meeting will be held in Suite 114, 1111 Jefferson Davis Highway, Crystal Gateway North (West Tower), Arlington, Virginia 22202. Individuals wishing to attend the meeting, including individuals wishing to make presentations on the topics scheduled for discussion, should contact Mrs. Linda W. Neilson, DAR Council, Attn: IMD 3D139, PDUSD(A&T)DP/DAR, 3062 Defense Pentagon, Washington, DC 20301–3062.

Please cite File 94–H028 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Mrs. Linda W. Neilson, telephone (703) 602–0131.

SUPPLEMENTARY INFORMATION: Interested parties were invited to provide written suggestions or comments in the notice of public hearing dated September 16, 1994 (59 FR 47583). Twenty-two commentors provided approximately 500 comments focusing on the following subject areas: definitions; general comments; classification; general policy; providing government property; providing facilities; software/intellectual property; motor vehicles; depreciation; competitive advantage; clauses; property control system; liability; records/accountability; physical inventory; reports, care, maintenance and use of government property; disposition of government property; demilitarization; storage agreements; and recommendations for related legislative reform. At the January 24 and 25 public meeting, interested parties are invited to present statements on the proposed deviation, revisions to the definitions, and/or the priority for addressing the remaining topics.

Claudia L. Naugle,

Executive Editor, Defense Acquisition Regulations Directorate.

[FR Doc. 95–437 Filed 1–6–95; 8:45 am]

BILLING CODE 5000–04–M

Notices

Federal Register
Vol. 60, No. 5
Monday, January 9, 1995

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 94–128–1]

Receipt of Permit Applications for Release Into the Environment of Genetically Engineered Organisms

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that 10 applications for permits to release genetically engineered organisms into the environment are being reviewed by the Animal and Plant Health Inspection Service. The applications have been submitted in accordance with 7 CFR part 340, which regulates the introduction of certain genetically engineered organisms and products.

ADDRESSES: Copies of the applications referenced in this notice, with any confidential business information deleted, are available for public inspection in room 1141, South Building, U.S. Department of Agriculture, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect an application are requested to call ahead on (202) 690–2817 to facilitate entry into the reading room. You may obtain copies of the documents by writing to the person listed under **FOR FURTHER INFORMATION CONTACT.**

FOR FURTHER INFORMATION CONTACT: Dr. Arnold Foudin, Deputy Director, Biotechnology Permits, BBEP, APHIS, USDA, P.O. Drawer 810, Riverdale, MD 20738. The telephone number for the agency contact will change when agency offices in Hyattsville, MD, move to Riverdale, MD, during January. Telephone: (301) 436–7612 (Hyattsville); (301) 734–7612 (Riverdale).

SUPPLEMENTARY INFORMATION: The regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests,'' require a person to obtain a permit before introducing (importing, moving interstate, or releasing into the environment) into the United States certain genetically engineered organisms and products that are considered ''regulated articles.'' The regulations set forth procedures for obtaining a permit for the release into the environment of a regulated article, and for obtaining a limited permit for the importation or interstate movement of a regulated article.

Pursuant to these regulations, the Animal and Plant Health Inspection Service has received and is reviewing the following applications for permits to release genetically engineered organisms into the environment:

Application No.	Applicant	Date received	Organisms	Field test location
94–306–01	Union Camp Corporation	11/02/94	American sweetgum trees genetically engineered to express a gene for tolerance to the herbicide 2, 4–D.	Georgia.
94–326–01	University of Chicago	11/22/94	Oilseed rape plants genetically engineered to express either a gene from *Bacillus thuringiensis* subsp. *kurstaki* (Btk) for resistance to lepidopteran insects or a gene from potato plants for resistance to certain chewing insects.	
94–326–02, renewal of permit 93–320–01, issued on 03–04–94.	U.S. Department of Agriculture, Agricultural Research Service.	11/22/94	Barley plants genetically engineered to express resistance to barley yellow dwarf virus, and tolerance to phosphinothricin herbicides.	Idaho, Illinois.
94–326–03, renewal of permit 94–055–01, issued on 04–13–94.	Upjohn Company	11/22/94	Tomato plants genetically engineered to express resistance to tomato spotted wilt virus.	Georgia.
94–326–04, renewal of permit 94–055–02, issued on 06–16–94.	Upjohn Company	11/22/94	Cucumber plants genetically engineered to express resistance to cucumber mosaic virus, watermelon mosaic virus 2, and zucchini yellow mosaic virus.	Michigan.
94–326–05, renewal of permit 94–055–03, issued on 05–06–94.	Upjohn Company	11/22/94	Watermelon plants genetically engineered to express resistance to watermelon mosaic virus 2 and zucchini yellow mosaic virus.	Michigan.
94–326–06, renewal of permit 94–090–04, issued on 06–30–94.	Upjohn Company	11/22/94	Cucumber plants genetically engineered to express resistance to cucumber mosaic virus, papaya ringspot virus, watermelon mosaic virus 2, zucchini yellow mosaic virus, and squash mosaic virus.	Georgia, Michigan.

Application No.	Applicant	Date received	Organisms	Field test location
94–326–07, renewal of permit 94–090–05, issued on 06–21–94.	Upjohn Company	11/22/94	Melon plants genetically engineered to express resistance to cucumber mosaic virus, watermelon mosaic virus 2, zucchini yellow mosaic virus, papaya ringspot virus, and squash mosaic virus.	California, Georgia, Michigan.
94–332–01, renewal of permit 94–060–01, issued on 6–03–94.	Upjohn Company	11/28/94	Lettuce plants genetically engineered to express resistance to tomato spotted wilt virus.	Georgia.
94–332–02, renewal of permit 93–074–03, issued on 07–12–93.	Upjohn Company	11/28/94	Cucumber plants genetically engineered to express resistance to cucumber mosaic virus, watermelon mosaic virus 2, and zucchini yellow mosaic virus.	Georgia.

Done in Washington, DC, this 28th day of December 1994.

Lonnie J. King,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 95–423 Filed 1–6–95; 8:45 am]

BILLING CODE 3410–34–P

ASSASSINATION RECORDS REVIEW BOARD

Notice

SUMMARY: The Assassination Records Review Board announces the commencement of its formal review of records. On January 3, 1995, the staff began the review of the records created by the House Select Committee on Assassinations. The Review Board will make determinations on postponements for these records during its meeting in late January.

CONTACT PERSON FOR MORE INFORMATION: David G. Marwell, Executive Director, Room 208, 600 E Street NW., Washington, DC 20530, Telephone: (202) 724–0088, FAX: (202) 724–0457.

David G. Marwell,

Executive Director.

[FR Doc. 95–446 Filed 1–6–95; 8:45 am]

BILLING CODE 6820–TD–M

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

ADAAG Review Advisory Committee; Meeting

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of meeting.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) gives notice, as required by the Federal Advisory Committee Act (5 U.S.C. App. 2), of the dates and location of the meetings of its ADAAG Review Advisory Committee.

DATES: The ADAAG Review Advisory Committee will meet on Thursday, January 26, 1995 (9 a.m.–5 p.m.); Friday, January 27, 1995 (9 a.m.–5 p.m.); and Saturday, January 28, 1995 (9 a.m.–12 p.m.).

ADDRESSES: The meetings on January 26 and 27, 1995 will be held at the National Institute of Building Sciences, 1201 L Street, NW., Washington, DC. The meeting on January 28, 1995 will be held at the Washington Vista Hotel, 1400 M Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: For further information regarding the meetings please contact Marsha Mazz, Office of Technical and Information Services, Architectural and Transportation Barriers Compliance Board, 1331 F Street, NW., suite 1000, Washington, DC 20004–1111. Telephone (202) 272–5434 ext. 21 (voice); (202) 272–5449 (TTY). This document is available in alternate formats (cassette tape, braille, large print, or computer disk) upon request.

SUPPLEMENTARY INFORMATION: The Access Board has established an advisory committee to review the Americans with Disabilities Act Accessibility Guidelines (ADAAG) for buildings and facilities. 36 CFR part 1191, appendix A. The advisory committee will make recommendations to the Access Board for updating ADAAG to ensure that the guidelines remain a state-of-the-art document which is generally consistent with technological developments and changes in national standards and model codes, and meets the needs of individuals with disabilities. The advisory committee is composed of organizations representing individuals with disabilities, model code organizations, professional associations, State and local governments, building owners and operators, and other organizations.

The ADAAG Review Advisory Committee has formed the following subcommittees to assist in its work: Editorial ad Format; Accessible Routes; Plumbing; Communications and Equipment; and Special Occupations. The subcommittees will meet on January 26 and 27, 1995 and the full committee will meet on January 28, 1995. Subcommittee and full committee meetings are open to the public. The meeting sites are accessible to individuals with disabilities. Sign language interpreters and assistive listening systems will be available for individuals with hearing impairments.

Lawrence W. Roffee,

Executive Director.

[FR Doc. 95–432 Filed 1–6–95; 8:45 am]

BILLING CODE 8050–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

Citizens Advisory Committee on Public Health Service; Activities and Research at Department of Energy (DOE) Sites: Hanford Health Effects Subcommittee

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Agency for Toxic Substances and Disease Registry (ATSDR) and the Centers for Disease Control and Prevention (CDC) announce the following subcommittee meeting.

Name: Citizens Advisory Committee on Public Health Service Activities and Research at DOE Sites: Hanford Health Effects Subcommittee (HHES).

Time and dates: 8 a.m.–5 p.m., January 25–26, 1995.

Place: Holiday Inn Crowne Plaza Hotel, 1113 Sixth Avenue, Seattle, Washington 98101, telephone (206) 464–1980, FAX (206) 340–1617.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 150 people.

Background: A Memorandum of Understanding (MOU) was signed in October 1990 and renewed in November 1992 between ATSDR and DOE. The MOU delineates the responsibilities and procedures for ATSDR's public health activities at DOE sites required under section 104, 107, and 120 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or ''Superfund''). These activities includes health consultations and public health assessments at DOE sites listed on, or proposed for, the Superfund National Priorities List and at sites that are the subject of petitions from the public; and other health-related activities such as epidemiologic studies, health surveillance, exposure and disease registries, health education, substance-specific applied research, emergency response, and preparation of toxicological profiles.

In addition, under an MOU signed in December 1990 with DOE, the Department of Health and Human Services (HHS) has been given the responsibility and resources for conducting analytic epidemiologic investigations of residents of communities in the vicinity of DOE facilities, workers at DOE facilities, and other persons potentially exposed to radiation or to potential hazards from non-nuclear energy production and uses. HHS delegated program responsibility to CDC.

Purpose: The purpose of the first HHES meeting is to convene the members and begin their work to update the public on the status of ATSDR's and CDC's community involvement plans, health research, and public health activities.

Matters to be discussed: Agenda items include presentations from technical experts on the history of the Hanford, Washington, site and current operations, as well as updates on the Hanford Environmental Dose Reconstruction Project findings and implications. HHES will address organizational issues relating to their future activities.

Agenda items are subject to change as priorities dictate.

Contact person for more information: Linda A. Carnes, ATSDR Health Council Advisor, 1600 Clifton Road, NE., Mailstop E–28, Atlanta, Georgia 30333, telephone 404/639–0730, FAX 404/639–0759.

Dated: January 3, 1995.

William H. Gimson,

Acting Associate Director for Policy Coordination, Centers for Disease Control and Prevention (CDC).

[FR Doc. 95–398 Filed 1–6–95; 8:45 am]

BILLING CODE 4163–70–M

DEPARTMENT OF COMMERCE

Agency Forms Under Review by the Office of Management and Budget

DOC has submitted to the Office of Management and Budget for clearance the following proposals for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Export Administration (BXA).

Title: Service Supply Procedure.

Agency Form Number: BXA 6026P.

OMB Approval Number: 0694–0002.

Type of Request: Revision of a currently approved collection.

Burden: 67 reporting and recordkeeping hours.

Number of Respondents: 13 Service Supply License holders.

Avg Hours Per Response: Varies between 5 minutes and 2 hours depending on the specific requirement.

Needs and Uses: This special license provides U.S. firms with a means to render prompt service for equipment (a) previously exported from the U.S., (b) produced abroad by a subsidiary, affiliate or branch of a U.S. firm, or (c) produced with U.S. parts included in the manufactured product. Without this special license, exporters would be required to apply for individual validated licenses.

Affected Public: Businesses or other for–profit institutions.

Frequency: Annually and recordkeeping.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Don Arbuckle, (202) 395–7340.

Agency: Bureau of Export Administration (BXA).

Title: Humanitarian License.

Agency Form Number: None but requirements are found at Section 773.5 of the Export Administration Regulations.

OMB Approval Number: 0694–0033.

Type of Request: Extension of the expiration date of a currently approved collection.

Burden: 16 hours.

Avg Hours Per Response: 1 1/2 hours for reporting requirements and 5 hours for recordkeeping.

Number of Respondents: 2.

Needs and Uses: This collection is needed to monitor the shipment and distribution of donations to meet basic human needs to embargoed destinations. The respondents are private and voluntary charitable organizations.

Affected Public: Not–for–profit institutions.

Frequency: On occasion, recordkeeping.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Don Arbuckle, (202) 395–7340.

Agency: Bureau of Export Administration (BXA).

Title of Survey: Report on Unscheduled Unloading.

Agency Form Number: None but requirements can be found at Section 786.5(c) of Export Administration Regulations.

OMB Approval Number: 0694–0040.

Burden: 1 hour.

Number of Respondents: 1.

Avg Hours Per Response: 1 hour.

Needs and Uses: This collection of information is the report required of carriers when controlled goods or technology are unloaded at destinations other than that shown on the Shipper's Export Declaration. In those cases, the carrier must inform BXA so that arrangements can be made for the controlled goods. The data collection supports BXA's mission of controlling items for national security or foreign policy reasons.

Affected Public: Business or other for–profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Don Arbuckle (202) 395–7340.

Agency: Bureau of Export Administration (BXA).

Title: Application for Transfer of Licenses to Another Party.

Agency Form Number: None.

OMB Approval Number: 0694–0051.

Type of Request: Extension of a currently approved collection.

Burden: 18 hours.

Number of Respondents: 20.

Avg Hours Per Response: Ranges between 15 minutes and 6 hours depending on the requirement.

Needs and Uses: This collection of information is necessary to approve the transfer of outstanding validated export licenses from the original licensee to another party. The primary use of this documentation is to ensure that the new licensee is aware of legal responsibilities.

Affected Public: Businesses or other for–profit organizations.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Don Arubuckle (202) 395–7340.

Copies of the above information collection proposals can be obtained by calling or writing Gerald Tache, DOC Forms Clearance Officer, (202) 482–3271, Department of Commerce, Room 5327, 14th and Constitution Avenue, N.W., Washington, D.C. 20230.

Written comments and recommendations for the proposed information collections should be sent to Don Arbuckle, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, D.C. 20503.

Dated: January 3, 1995.

Gerald Tache,

Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 95–448 Filed 1–6–95; 8:45 am]

BILLING CODE 3510–CW–F

Bureau of Export Administration

Telecommunications Equipment Technical Advisory Committee; Notice of Meeting Cancellation

This document cancels the following meeting: **Federal Register** citation of previous announcement: p. 66890, December 28, 1994.

Previously announced time of meeting: 9:30 a.m., January 24, 1995.

Dated: January 4, 1995.

Lee Ann Carpenter,

Director, Technical Advisory Committee Unit (202) 482–2583.

[FR Doc. 95–449 Filed 1–6–95; 8:45 am]

BILLING CODE 3510–DT–M

Foreign-Trade Zones Board

[Order No. 718]

Grant of Authority for Expansion and Reorganization Foreign-Trade Subzones 146A and 146B; North American Lighting, Inc., (Motor Vehicle Lighting Products); Flora, IL

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, by an Act of Congress approved June 18, 1934, an Act ''To provide for the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' as amended (19 U.S.C. 81a–81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs ports of entry;

Whereas, the Board's regulations (15 CFR Part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved;

Whereas, an application from the Bi-State Authority, grantee of Foreign-Trade Zone 146, requesting the expansion of the subzone boundaries and the level of manufacturing activity at Subzones 146A and 146B at the North American Lighting, Inc., facilities in Flora and Salem, Illinois, and redesignation of the two subzones as Subzone 146A, was filed by the Board on April 14, 1994, and notice inviting public comment was given in the **Federal Register** (FTZ Docket 16–94, 59 FR 23050, 5–4–94); and,

Whereas, the Board has found that the requirements of the FTZ Act and Board's regulations are satisfied, and that approval of the application is in the public interest;

Now, therefore, the Board hereby authorizes the expansion of the subzone boundaries and of the level of manufacturing activity at Subzones 146A and 146B at the plant sites of North American Lighting, Inc., in Flora and Salem, Illinois, and the redesignation of the two subzones as FTZ Subzone 146A, as described in the application, and subject to the FTZ Act and the Board's regulations, including § 400.28.

Signed at Washington, DC, this 27th day of December 1994.

Barbara R. Stafford,

Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

John Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 95–451 Filed 1–6–95; 8:45 am]

BILLING CODE 3510–DS–P

[Order No. 725]

Designation of New Grantee for Foreign-Trade Zone 142, Salem, New Jersey Area; Resolution and Order

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), and the Foreign-Trade Zones Board Regulations (15 CFR Part 400), the Foreign-Trade Zones Board (the Board) adopts the following Order:

After consideration of the request with supporting documents (FTZ Docket 10–94, filed 3/11/94) of the City of Salem Municipal Port Authority, grantee of Foreign-Trade Zone 142, (Salem, New Jersey Area) for reissuance of the grant of authority for said zone to the South Jersey Port Corporation, a New Jersey public corporation, which has accepted such reissuance subject to approval of the FTZ Board, the Board, finding that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations are satisfied, and that the proposal is in the public interest, approves the request and recognizes the South Jersey Port Corporation as the new grantee of Foreign-Trade Zone 142.

The approval is subject to the FTZ Act and the FTZ Board's regulations, including Section 400.28.

Signed at Washington, DC, this 27th day of December 1994.

Barbara R. Stafford,

Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 95–456 Filed 1–6–95; 8:45 am]

BILLING CODE 3510–DS–P

[Order No. 726]

Approval for Manufacturing Authority; Lear Seating Corporation (Automobile Seat Sets) Within Foreign-Trade Zone 38; Spartanburg County, SC

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, § 400.28(a)(2) of the Board's regulations, requires approval of the Board prior to commencement of new manufacturing/processing activity within existing zone facilities;

Whereas, the South Carolina States Port Authority, grantee of FTZ 38, has requested authority under § 400.32(b)(1) of the Board's regulations on behalf of the Lear Seating Corporation, for authority to manufacture automobile seat sets under zone procedures within FTZ 38, Spartanburg County, South Carolina (filed 8–31–94, FTZ Docket A(32b1)–3–94; Doc. 43–94, assigned 12–19–94);

Whereas, pursuant to § 400.32(b)(1), the Commerce Department's Assistant Secretary for Import Administration has the authority to act for the Board in making such decisions on new manufacturing/processing activity under certain circumstances, including situations where the proposed activity is similar to activity recently approved by the Board (§ 400.32(b)(1)(i)); and,

Whereas, the FTZ Staff has reviewed the proposal, taking into account the criteria of § 400.31, and the Executive Secretary has recommended approval;

Now, therefore, the Assistant Secretary for Import Administration, acting for the Board pursuant to § 400.32(b)(1), concurs in the recommendation and hereby approves the request subject to the Act and the Board's regulations, including § 400.28.

Signed at Washington, DC, this 27th day of December 1994.

Barbara R. Stafford,

Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 95–457 Filed 1–6–95; 8:45 am]

BILLING CODE 3510–DS–P

[Order No. 724]

Expansion of Foreign-Trade Zone 39; Dallas/Fort Worth, TX, Area

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, an application from the Dallas/Fort Worth International Airport Board, grantee of Foreign-Trade Zone No. 39, for authority to expand its general-purpose zone to include a site at the Grayson County Airport, Grayson County, Texas, adjacent to the Dallas/Fort Worth Customs port of entry, was filed by the Foreign-Trade Zones (FTZ) Board on January 4, 1994 (Docket 2–94, 59 FR 1926, 1/13/94);

Whereas, notice inviting public comment was given in the **Federal Register** and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board has found that the requirements of the Act and the regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The grantee is authorized to expand its zone as requested in the application, subject to the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 27th day of December 1994.

Barbara R. Stafford,

Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 95–455 Filed 1–6–95; 8:45 am]

BILLING CODE 3510–DS–P

[Order No. 728]

Approval for Manufacturing Activity (Cellular Telephones—Foreign-Trade Zone 168) Dallas, TX

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u) (the Act), the Foreign-Trade Zones Board (the Board) adopts the following order:

Whereas, pursuant to § 400.28(a)(2) of the Board's regulations, approval is required prior to commencement of new manufacturing/processing activity within existing zone facilities;

Whereas, pursuant to § 400.32(b)(1), the Commerce Department's Assistant Secretary for Import Administration has authority to act for the Board in making such decisions on new manufacturing/processing activity under certain circumstances, including situations where the proposed activity is the same as activity recently approved by the Board (§ 400.32(b)(1)(i));

Whereas, the Foreign-Trade Zone Operating Company of Texas, operator of FTZ 168, Dallas, Texas, has made application (filed 12–5–94, A(32b1)–5–94; Doc. 45–94, assigned 12/19/94) to the Board on behalf of Nokia Mobile Phones Manufacturing (U.S.A.), Inc. (Nokia), and Nokia Mobile Phones Trading (U.S.A.), Inc. (Nokia), for authority to manufacture cellular telephones within FTZ 168;

Whereas, the FTZ Staff has reviewed the proposal and finds that the criteria for processing the proposal under § 400.32(b)(1) would be met and that (taking into account the criteria in § 400.31(b)) the proposal would be in the public interest, provided full zone benefits are limited to certain components; and,

Whereas, based on the foregoing review and pursuant to § 400.32(b)(1), the Executive Secretary recommends approval of the proposal;

Now, therefore, the Assistant Secretary for Import Administration concurs in the recommendation and hereby approves the request for manufacturing at the Nokia facilities within FTZ 168, subject to the Act and the Board's Regulations, including § 400.28, and subject to a restriction requiring that privileged foreign status (19 CFR § 146.41) be elected on all foreign merchandise (subject to inverted tariff duty rates) admitted to the zone for the Nokia operation, except that non-privileged foreign status (19 CFR § 146.42) may be elected on the following components:

Component	HTSUS
Fixed capacitors	8532.21.00
Fixed capacitors	8532.23.00
Variable capacitors	8532.30.00
Liquid crystal devices	9013.80.60
Leather carrying cases	4202.91.00
Fasteners	7318.15

Signed at Washington, DC, this 28th day of December 1994, pursuant to Order of the Board.

Barbara R. Stafford,

Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 95–458 Filed 1–6–95; 8:45 am]

BILLING CODE 3510–DS–P

[Order No. 729]

Approval for Manufacturing Activity (Cellular Telephones—Foreign-Trade Zone 196); Ft. Worth, TX

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u) (the Act), the Foreign Trade Zones Board (the Board) adopts the following order:

Whereas, pursuant to § 400.28(a)(2) of the Board's regulations, approval is required prior to commencement of new manufacturing/processing activity within existing zone facilities;

Whereas, pursuant to § 400.32(b)(1), the Commerce Department's Assistant Secretary for Import Administration has authority to act for the Board in making such decisions on new manufacturing/processing activity under certain circumstances, including situations where the proposed activity is the same as activity recently approved by the Board (§ 400.32(b)(1)(i));

Whereas, Nokia Mobile Phones Trading (USA), Inc./Nokia Mobile Phones Manufacturing (USA), Inc. (Nokia), a joint operator of FTZ 196, Ft. Worth, Texas, has made application (filed 12–5–94, A(32b1)–6–94; Doc. 46–94, assigned 12/19/94) to the Board for authority to manufacture cellular telephones within FTZ 196;

Whereas, the FTZ Staff has reviewed the proposal and finds that the criteria for processing the proposal under § 400.32(b)(1) would be met and that (taking into account the criteria in § 400.31(b)) the proposal would be in the public interest, provided full zone benefits are limited to certain components; and,

Whereas, based on the foregoing review and pursuant to § 400.32(b)(1), the Executive Secretary recommends approval of the proposal;

Now, therefore, the Assistant Secretary for Import Administration concurs in the recommendation and hereby approves the request for manufacturing at the Nokia facilities within FTZ 196, subject to the Act and

the Board's Regulations, including § 400.28, and subject to a restriction requiring that privileged foreign status (19 CFR § 146.41) be elected on all foreign merchandise (subject to inverted tariff duty rates) admitted to the zone for the Nokia operation, except that non-privileged foreign status (19 CFR § 146.42) may be elected on the following components:

Component	HTSUS
Fixed capacitors	8532.21.00
Fixed capacitors	8532.23.00
Variable capacitors	8532.30.00
Liquid crystal devices	9013.80.60
Leather carrying cases	4202.91.00
Fasteners	7318.15

Signed at Washington, DC, this 28th day of December 1994, pursuant to Order of the Board.

Barbara R. Stafford,

Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 95–459 Filed 1–6–95; 8:45 am]

BILLING CODE 3510–DS–P

[Order No. 723]

Transfer of Zone Site From FTZ 168 to FTZ 39 Dallas/Fort Worth, TX; Resolution and Order

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), and the Foreign-Trade Zones Board Regulations (15 CFR Part 400), the Foreign-Trade Zones Board (the Board) adopts the following Order:

After consideration of the request with supporting documents (FTZ Docket 18–94, filed 5/9/94) of the Dallas/Fort Worth Maquila Trade Development Corporation, grantee of Foreign-Trade Zone 168, requesting the transfer of its Zone Site 1 (754 acres) located within the Southport Centre Industrial Park, Dallas, Texas, from the zone plan for FTZ 168 to the zone plan for FTZ 39, with the Dallas/Fort Worth International Airport Board as the new grantee, the Board, finding that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations are satisfied, and that the proposal is in the public interest, approves the request, redesignating the site as FTZ 39–Site 2.

The approval is subject to the FTZ Act and the FTZ Board's regulations, including Section 400.28.

Signed at Washington, DC, this 27th day of December 1994.

Barbara R. Stafford,

Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 95–454 Filed 1–6–95; 8:45 am]

BILLING CODE 3510–DS–P

[Order No. 721]

Grant of Authority for Subzone Status; Hydril Company (Inc.), (Oil Field Equipment); Houston, TX

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, by an Act of Congress approved June 18, 1934, an Act ''To provide for the establishment . . . of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' as amended (19 U.S.C. 81a–81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs ports of entry;

Whereas, the Board's regulations (15 CFR Part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved;

Whereas, an application from the Port of Houston Authority, grantee of Foreign-Trade Zone 84, for authorization for special-purpose subzone status primarily for export activity at the oil field equipment manufacturing facilities of the Hydril Company (Inc.), in Houston, Texas, was filed by the Board on March 24, 1994, and notice inviting public comment was given in the **Federal Register** (FTZ Docket 12–94, 59 FR 15372, 4–1–94); and,

Whereas, the Board has found that the requirements of the FTZ Act and Board's regulations are satisfied, and that approval of the application is in the public interest;

Now, therefore, the Board hereby authorizes the establishment of a subzone (Subzone 84M) at the plant sites of the Hydril Company (Inc.), in Houston, Texas, at the locations described in the application, subject to the FTZ Act and the Board's regulations, including § 400.28, and subject to a restriction requiring that privileged foreign status (19 CFR 146.41) shall be elected on all foreign merchandise admitted to the subzone, as indicated in the application.

Signed at Washington, DC, this 23rd day of December 1994.

Susan G. Esserman,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 95–452 Filed 1–6–95; 8:45 am]

BILLING CODE 3510–DS–P

[Order No. 722]

Grant of Authority for Subzone Status; Microwave Networks, Inc., (Microwave Radio Manufacturing Plant); Houston, TX

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, by an Act of Congress approved June 18, 1934, an Act ''To provide for the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' as amended (19 U.S.C. 81a–81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs ports of entry;

Whereas, the Board's regulations (15 CFR Part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved;

Whereas, an application from the Port of Houston Authority, grantee of Foreign-Trade Zone 84, for authorization for special-purpose subzone status primarily for export activity at the microwave radio manufacturing plant of Microwave Networks, Inc., in Houston, Texas, was filed by the Board on April 29, 1994, and notice inviting public comment was given in the **Federal Register** (FTZ Docket 17–94, 59 FR 25445, 5/16/94); and,

Whereas, the Board has found that the requirements of the FTZ Act and Board's regulations are satisfied, and that approval of the application is in the public interest;

Now, therefore, the Board hereby authorizes the establishment of a subzone (Subzone 84L) at the plant site of Microwave Networks, Inc., in

Houston, Texas, at the location described in the application, subject to the FTZ Act and the Board's regulations, including § 400.28, and subject to a restriction requiring that privileged foreign status (19 CFR 146.41) shall be elected on all foreign merchandise admitted to the subzone, as indicated in the application.

Signed at Washington, DC, this 28th day of December 1994.

Barbara R. Stafford,

Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 95–453 Filed 1–6–95; 8:45 am]

BILLING CODE 3510–DS–P

International Trade Administration

[A–201–504]

Porcelain-on-Steel Cooking Ware From Mexico; Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Results of Antidumping Duty Administrative Review.

SUMMARY: On February 11, 1994, the Department of Commerce (the Department) published the preliminary results of its administrative review of the antidumping duty order on porcelain-on-steel cooking ware (POS cooking ware) from Mexico. The review covers two manufacturers/exporters of this merchandise to the United States and the period December 1, 1990 through November 30, 1991.

Based on our analysis of the comments received and the corrections of certain clerical and computer program errors, we have changed the preliminary results.

EFFECTIVE DATE: January 9, 1995.

FOR FURTHER INFORMATION CONTACT: Lorenza Olivas or Rick Herring, Office of Countervailing Compliance, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–2786.

SUPPLEMENTARY INFORMATION:

Background

On February 11, 1994, the Department published in the **Federal Register** (59 FR 6616) the preliminary results of its administrative review of the antidumping duty order (51 FR 43415) on POS cooking ware from Mexico for the period December 1, 1990 through November 30, 1991. The review covers two manufacturers/exporters, Acero Porcelanizado, S.A. de C.V. (APSA) and CINSA, S.A. de C.V. (CINSA). The Department has now completed that administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of Review

Imports covered by this review are shipments of POS cooking ware, including tea kettles, which do not have self-contained electric heating elements. All of the foregoing are constructed of steel and are enameled or glazed with vitreous glasses. This merchandise is currently classifiable under Harmonized Tariff Schedule (HTS) item number 7323.94.00. Kitchenware currently entering under HTS item number 7323.94.00.30 is not subject to the order. The HTS item number is provided for convenience and Customs purposes. The written description remains dispositive.

Analysis of Comments Received

We gave interested parties an opportunity to comment on the preliminary results. At the request of the respondents, we held a hearing on March 28, 1994. We received comments and rebuttals from both respondents and the petitioner, General Housewares Corporation (GHC).

Comment 1: CINSA contends that the Department incorrectly calculated depreciation on a revalued cost basis. CINSA states that since the Department only uses revalued depreciation for hyperinflationary economies, and Mexico was not experiencing hyperinflation during the review period, the Department should use depreciation expenses on an historical basis.

Petitioner responds that the Department's use of depreciation expenses on a revalued basis in cases involving hyperinflationary economies does not mean that its practice is to limit the use of depreciation expenses based on a revalued basis to only those cases involving hyperinflationary economies. Petitioner furthermore argues that, since CINSA reported its depreciation on a revalued basis, as required by the Mexican Generally Accepted Accounting Principles (GAAP), for its audited financial statements, CINSA should also report cost of production (COP) and constructed value (CV) in this manner.

Department's Position: We disagree with respondent. The Department followed Mexican GAAP and adjusted CINSA's COP data to reflect the revalued depreciation. This approach coincided with CINSA's financial statements which were also prepared in accordance with Mexican GAAP. It is the Department's policy to adhere to the home market GAAP as long as the home market GAAP reasonably reflects actual costs. Thus, Commerce has determined that when a foreign country allows a company to revalue its assets, as opposed to relying upon historical cost, and when a company reflects the revalued basis in its financial statements, it is appropriate to accept the financial statements as reflecting actual cost. See, Final Determination of Sales at Less Than Fair Value: Circular Welded Nonalloy Steel Pipe From the Republic of Korea (57 FR 42942; September 17, 1992). See also, POS Cooking Ware From Mexico; Final Results of Antidumping Administrative Review (58 FR 43327; August 16, 1993) (Mexican Cooking Ware Fourth Review Final Results).

Comment 2: Assuming that the Department should continue to rely on the revalued depreciation expense as a component of fixed overhead costs, CINSA claims that the Department incorrectly calculated its preliminary COP adjustment. CINSA believes that the ''best information available'' (BIA) methodology used by the Department grossly overstates the amount of revalued depreciation expense, and is not appropriate since the Department can derive a suitable fixed overhead expense factor from available information provided in CINSA's responses of May 18, 1992 and June 18, 1993.

Petitioner, on the other hand, contends that the use of BIA for CINSA's unreported depreciation is justified and reasonable. The petitioner asserts that CINSA did not provide the Department with a complete and accurate response to the COP questionnaire.

Department's Position: The Department has reviewed the information contained in CINSA's responses and found that adequate data was available for a more accurate calculation of COP. Therefore, BIA was not required since the COP questionnaire responses provided the necessary information for calculating an appropriate fixed overhead factor. Accordingly, the Department has revised the calculation of fixed overhead based on information contained in CINSA's responses.

Comment 3: CINSA claims that the Department incorrectly increased the COP to account for mandatory profit

sharing payments made to its employees. CINSA contends that these payments are not related to the COP. CINSA explains that these payments are determined based upon the amount of profit earned by the company and, therefore, should be treated in the same manner as income taxes and excluded from COP. CINSA states that the Department's administrative precedent excludes from COP and CV non-operating expenses unrelated to the production of the subject merchandise. CINSA cites Television Receivers from Japan (56 FR 56189 (1991)) where the Department stated that ''[I]n determining the cost of the subject merchandise, the Act does not provide us with the authority to include income or expenses that are unrelated to the product's manufacture.'' CINSA further states that if the Department does include profit sharing in COP and CV, the adjustment should be based on information derived from the financial statement of CINSA's corporate parent rather than information derived from the financial statement of the operating division.

Petitioner, on the other hand, states that the Department correctly included the profit sharing payments in its calculated COP. Petitioner contends the profitability of the company is derived from production and is directly related to production efficiency. Petitioner also states that these payments are part of the total compensation paid to employees and should be treated no differently than salaries and other employee benefits that are directly related to production.

Petitioner further contends that the Department should base the profit sharing expenses on CINSA's financial statements and not on CINSA's parent company, Grupo Industrial Saltillo, S.A. de CV (GIS), since CINSA's experience more accurately reflects the profit sharing expenses of the entity producing the products. Furthermore, according to petitioner, Mexican law requires that certain companies make payments to employees based on the profit of the company. CINSA reported these payments in its financial statements, but excluded them in its COP and CV.

Department's Position: We disagree with respondent. Mexican GAAP requires that the profit sharing costs be reflected in a company's financial statement. The profit sharing payments are mandatory according to Mexican law. The payments represent compensation to employees involved in the production of the merchandise and administration of the company. Therefore, these payments are labor costs related to the product's manufacture and are part of CINSA's COP for the subject merchandise. We agree with petitioner that the calculation should be based on CINSA's financial statements and not the parent company's financial statement in order to capture the profit sharing costs most closely attributable to the subject merchandise. See, Final Determination of Sales at Less Than Fair Market Value; Certain Hot-Rolled Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada (58 FR 37099; July 9, 1993).

Comment 4: CINSA claims that the Department improperly limited CINSA's short-term interest income that was used to offset interest expense incurred by its corporate parent. CINSA contends that the Department's current administrative practice of limiting the net short-term interest expense does not reflect the economic reality of the information in the financial statement.

Petitioner argues that the Department correctly excluded net financial income from CINSA's COP and CV. The petitioner contends that interest income does not directly relate to the manufacturing cost associated with the production of the product. Petitioner further states that using CINSA's methodology results in higher margins for companies with long term investments than for companies with short-term investments.

Department's Position: We disagree with respondent. It is the Department's normal practice to allow short-term interest income to offset financing costs only up to the amount of such financing costs. See, Frozen Concentrated Orange Juice from Brazil; Final Results of Antidumping Administrative Review (55 FR 26721; June 29, 1990); Brass Sheet and Strip from Canada; Final Results of Antidumping Administrative Review (55 FR 31414; August 2, 1990); and Final Determination of Sales at less than Fair Market Value; Sweaters from Taiwan (55 FR 34585; August 23, 1990). The Department reduces interest expense by the amount of short-term income to the extent finance costs are included in COP. Using total short-term interest income in excess of interest expense to reduce production cost, as suggested by CINSA, would permit companies with large short-term investment activity to sell their products below the COP. Accordingly, we limited the amount of the offset to the amount of the expense from the related activity.

Comment 5: CINSA and APSA argue that the Department's new methodology of adjusting U.S. price and foreign market value (FMV) for home market value added tax (IVA) is contrary to law. Respondent contends that by statute, the Department is directed to add to U.S. price ''the amount of any taxes imposed in the country of exportation'' which have not been collected by reason of exportation of the merchandise to the United States. 19 U.S.C. 1677a(d)(1)(C). Furthermore, the statute expressly sets the additions and subtractions that are to be made and does not authorize additional adjustment to those adjustments. Respondents further argue that Court of International Trade (CIT) has ruled that the Department must ''add the full amount of VAT [such as IVA] paid on each sale in the home market FMV without adjustment.'' *See, Torrington Co.* v. *United States,* 824 F. Supp. 1095, 1101 (1993). Respondents also argue that an adjustment to the amount of IVA charged by CINSA on its home market sales to parallel the Department's further adjustment to the imputed IVA on the U.S. price is not a circumstance-of-sale adjustment and, therefore, is outside the scope of the circumstance-of-sale provision, which, according to respondents, is strictly limited to differences in selling terms or conditions. To support their argument, respondents cite *Zenith Electronics Corp.* v. *United States,* 988 F.2d 1573, 1581 (Fed. Cir. 1993) (*Zenith*), where the CIT held that the circumstances-of-sale adjustment does not encompass adjustments for commodity taxes specifically covered by section 1677A (d)(1)(C). Respondents contend that, although the Department claims to be following *Zenith* by applying a methodology that will not create margins where none exist, the Department's tax adjustment is nothing less than another attempt to achieve tax neutrality. Respondents suggest that the Department should not try to achieve tax neutrality and should only add to U.S. price the amount of the IVA tax rate multiplied by the U.S. price, net of discounts and rebates.

Petitioner does not oppose the Department's new methodology.

Department's Position: We disagree with respondents. Respondents' suggested methodology would lead to margin creation where none would otherwise exist. Recent case law makes it clear that there should be no margin creation where no margin would exist but for the imposition of a value added tax in the home market. *See, Federal-Mogul Corporation* v. *United States,* 813 F. Supp 856, 864–5 (1993). While the new methodology may not be specifically authorized by the Act, the Department has determined that it is neither contrary to the spirit of the case law, nor prohibited by the language of the Act. As such, the methodology is within the Department's discretion.

The Department disagrees with respondents' assertion that this methodology is contrary to *Zenith*. We have acted reasonably in adopting the methodology set forth in *Federal-Mogul*, which was found by the CIT in *Federal-Mogul* to be consistent with *Zenith*, the higher court holding. (See also, *The Torrington Co.* v. *United States* Slip Op. 94–51 (CIT March 31, 1994), wherein the CIT upheld the new methodology for the value added tax adjustment without comment). *See also, Avesta Sheffield, et al,* v. *United States,* Slip Op. 94–53 (CIT March 31, 1994).

Comment 6: CINSA states that the Department failed to properly calculate the amount of IVA in COP. CINSA claims that the Department added the IVA collected by CINSA on HM sales to cost rather than the IVA incurred by CINSA on the purchase of direct raw materials, variable overhead and packaging materials and reported in its COP response.

Petitioner does not oppose the Department's methodology but suggests that it would achieve the same objectives by comparing the home market sales with COP, exclusive of IVA, as used in the prior administrative review of this case. In the event the Department adjusts the amount of tax included in COP, petitioner notes that the difference in the tax treatment would yield a corresponding increase in CINSA's profit on home market sales. Therefore, if the Department makes the COP change requested by CINSA, the Department must also increase profit for CV to reflect CINSA's reduced COP.

Department's Position: Value added taxes are paid on inputs and, therefore, are costs incurred in production. Upon the sale of the product, value added taxes are reimbursed to CINSA by the ultimate consumer. Any amount of tax which is in excess of the amount reimbursed is payable to the Mexican government. The Department's calculations must reflect the economic reality that CINSA does not receive a benefit from collecting and paying IVA. Therefore, because COP is compared to home market price which includes the entire IVA paid, to be neutral, our calculations of COP must take into account the entire IVA paid (a portion of which is paid on the inputs, and the remainder of which is due to the government). The amount of tax is based upon information reported in the home market sales tape which includes both components. See, Mexican Cooking Ware Fourth Review Final Results.

Comment 7: CINSA argues that, in its price-to-price comparison, the Department incorrectly adjusted the U.S. price to account for the assessed countervailing duties. CINSA states that, pursuant to 19 U.S.C. 1677a(d)(1)(D), the Department must add to U.S. price any countervailing duties imposed on the subject product to offset an export subsidy. CINSA points out that for all U.S. sales made between January 1, 1991 and June 5, 1991 the applicable rate is 2.18 percent. Thus, for all U.S. sales made between those dates, the Department should add 2.18 percent to U.S. price. Instead, the Department limited the period in which that amount was assessed from January 1, 1991 to January 5, 1991.

Petitioner contends that the Department is only required to add to the U.S. price the amount of any countervailing duty ''imposed'' to offset an export subsidy. Petitioner states that there has been no countervailing duty imposed, because upon liquidation of the entries at issue, CINSA will be returned the ''assessed amount.''

Department's Position: We agree with respondent and will make the correction.

Comment 8: CINSA alleges that the Department failed to make the several corrections to information contained in CINSA's July 15, 1992, supplemental submission, which was provided in a timely fashion:

A. In its COP/CV computer file, CINSA overstated the COP of certain items by failing to divide the cost of these items by four to reflect that four items were contained in one package. CINSA states that the Department should make this division.

B. CINSA also overstated the weight of article 1065910 by a factor of four. To derive the per unit weight, CINSA asserts that the Department must divide the weight by the number of items contained in the package.

C. Further, CINSA omitted the weights in certain items reported in its home market and U.S. sales tapes. CINSA asserts that the Department should include these corrected weights in the computer tape, since the weights are necessary to calculate the freight charges attributable to both home market and U.S. sales of these items.

D. CINSA reported the incorrect number of units sold and the unit price for one home market sale of item number 1018001, and for one home market sale of item number 1061701, CINSA reported the incorrect unit price. CINSA asserts that the Department should make these corrections.

Department's Position: We agree with respondent. Since the above corrections were submitted in a timely manner, we will make those corrections where appropriate.

Comment 9: CINSA asserts that the COP data reported for item numbers 10158 and 19177 in its COP sales tape submission were based on the cost of producing two units and not based on a single cost. Therefore, CINSA stated that the Department should use the cost information included in the submission to derive the single unit COP for these items.

Petitioner argues that there is no evidence of this fact on the record to support CINSA's claim.

Department's Position: We agree with petitioner. There is no evidence in the administrative record satisfactorily demonstrating that these two items were not based on single unit costs.

Comment 10: Petitioner contends that CINSA incorrectly weight-averaged factory overhead included in the COP and CV. Petitioner states that the respondent weight-averaged using 13 months rather than the 12-month review period.

CINSA replies that the methodology employed for weight-averaging cost of certain production factors is reasonable, since any adjustment to this calculation would have a *de minimis* impact on CINSA's COP and any final antidumping margin.

Department's Position: The methodology used by the respondent is inappropriate because the review period covers 12 months, not 13. However, the required adjustments to correct cost of manufacturing would have an insignificant impact on COP and no impact on the margin. Therefore, the Department did not adjust for the miscalculation.

Comment 11: APSA claims the antidumping duty margin reported in the preliminary results published in the **Federal Register** does not accurately reflect the weighted-average margin calculation released to counsel by the Department in its disclosure documents.

Department's Position: We agree and have made the correction.

Comment 12: Petitioner contends CINSA's reported inland freight expenses should be disallowed, since it includes its factory-to-warehouse pre-sale inland freight expenses. Petitioner argues that factory-to-warehouse freight charges incurred on home market sales cannot be deducted as direct sales expenses in purchase price comparisons because those charges were incurred prior to the date of sale. Petitioner cites *The Ad Hoc Committee of AZ–NM–TX–FL Producers of Gray Portland Cement* v. *United States,* CAFC Opinion 93–1239 (Jan 5, 1994) and Gray Portland Cement and Clinker From Japan (59 FR 6614; February 11, 1994). The Court of Appeals for the Federal Circuit (CAFC)

held that the FMV value provision of the antidumping statute does not authorize a deduction from FMV for pre-sale transportation costs within the exporting country. According to petitioner, if the Department cannot separate home market direct movement expenses from the home market indirect expenses, then it must treat the entire reported amount as home market indirect expenses.

CINSA argues that petitioner misinterprets the CAFC decision in *Ad Hoc Committee,* claiming that the CAFC's decision was based solely upon the Department's stated rationale for its decision, *i.e.*; the Department's inherent authority to fill gaps in the statutory framework and to make ex-factory comparisons in order to achieve an ''apples to apples'' comparison. Thus, the CAFC's decision did not decide if any alternative authority existed under which the Department could have adjusted FMV for the pre-sale transportation expense, including the circumstance-of sale adjustment, which is specifically authorized by statute and regulation. Therefore, the Department should not simply exclude pre-sale transportation expenses from the FMV calculation as suggested by petitioner, but should be deducted from FMV because such expenses are directly related to the sale of the subject merchandise in the home market.

According to CINSA, petitioner also misstates the Department's current treatment of pre-sale selling expenses. By assuming that CINSA's pre-sale transportation expenses to the warehouses are indirect selling expenses, petitioner asserts that the entire transportation expense should be disallowed because CINSA's combined indirect and direct transportation expenses cannot be separated. According to CINSA, its reported pre-sale and post-sale transportation expenses are both directly related selling expenses and both equally qualify as a circumstance-of-sales adjustment.

Department's Position: We have concluded that, in light of the CAFC's decision in *Ad Hoc Committee,* the Department no longer can deduct home market movement charges from foreign market pursuant to its inherent power to fill in gaps in the antidumping statute. We instead will adjust for those expenses under the circumstance-of-sale provision of 19 CFR 353.56 and the exporter's selling price (ESP) offset provision of 19 CFR 353.56(b)(1) and (2), as appropriate, in the following manner.

When U.S. price is based on purchase price, we only adjust for home market movement charges through the circumstance-of-sale provision of 19 CFR 353.56. Under this adjustment, we capture only direct selling expenses, which include post-sale movement expenses. We will treat pre-sale movement expenses as direct expenses if those expenses are directly related to the home market sales of the merchandise under consideration. In order to determine whether pre-sale movement expenses are direct in this case, the Department will examine the respondent's pre-sale warehousing expenses, since the pre-sale movement charges incurred in positioning the merchandise at the warehouse are, for analytical purposes, inextricably linked to pre-sale warehousing expenses. If pre-sale warehousing constitutes an indirect expense, the expense involved in getting the merchandise to the warehouse also must be indirect. Conversely, a direct pre-sale warehousing expense necessarily implies a direct pre-sale movement expense. We note that although pre-sale warehousing expenses in most cases have been found to be indirect expenses, these expenses may be deducted from FMV as a circumstance-of-sale adjustment in a particular case if the respondent is able to demonstrate that the expenses are directly related to the sales under consideration.

When U.S. price is based on ESP, the Department uses the circumstance-of-sale adjustment in the same manner as in purchase price situations. Additionally, under the ESP offset provision set forth in 19 CFR 353.56(b)(1) and (2), we will adjust for any pre-sale movement charges which are treated as indirect selling expenses.

Therefore, we requested that respondent provide separate factory-to-warehouse transportation expenses. Based on the information provided, in the final results, we deducted only the post-sale transportation expenses in the home market from FMV, since the pre-sale warehousing and, thus, pre-sale inland freight were not shown to be directly related to the sales in question.

Final Results of the Review

As a result of our review, we determine the margins to be:

Manufacturer/ exporter	Time period	Margin (percent)
APSA	12/01/90–11/30/91	4.66
CINSA	12/01/90–11/30/91	27.96

The Department will instruct the Customs Service to assess antidumping duties on all appropriate entries. Individual differences between U.S. price and FMV may vary from the percentages stated above. The Department will issue appraisement instructions directly to the Customs Service.

Furthermore, the following deposit requirements will be effective upon publication of this notice of final results of administrative review for all shipments of the subject merchandise, entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(1) of the Act: (1) The cash deposit rate for the reviewed companies will be as outlined above; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV), but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate will be 29.52 percent, the ''all others'' rate established in the LTFV investigation. See, *Floral Trade Council* v. *United States,* Slip Op. 93–79, and *Federal Mogul Corp.* v. *United States,* Slip Op. 93–83.

These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during the review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties. This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibilities 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 administrative review and notice are in accordance with section 751(a)(1) of the Act, as amended (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: December 21, 1994.

Susan G. Esserman,

Assistant Secretary for Import Administration.

[FR Doc. 95–450 Filed 1–6–95; 8:45 am]

BILLING CODE 3510–DS–P

National Oceanic and Atmospheric Administration

[I.D. 123094A]

Mid-Atlantic Fishery Management Council; Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's Comprehensive Management Committee will hold a public workshop on January 24 and 25, 1995, at the Hyatt Regency Baltimore (at the Inner Harbor), 300 Light Street, Baltimore, MD 21202; telephone: (410) 528–1234. The workshop will take place from 10:00 a.m. until 5:00 p.m. on January 24, and from 8:30 a.m. until 12:00 noon on January 25.

The main objective of this workshop is to present a framework of the conceptual issues which must be addressed in designing a multi-species/multi-purpose fleet management plan, i.e., define the problem so that all stakeholders can discuss/debate it from a common, agreed-upon point of view.

FOR FURTHER INFORMATION CONTACT: David R. Keifer, Executive Director, Mid-Atlantic Fishery Management Council, 300 S. New Street, Dover, DE 19901; telephone: (302) 674–2331.

SUPPLEMENTARY INFORMATION: This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Joanna Davis on (302) 674–2331, at least 5 days prior to the meeting date.

Dated: January 3, 1995.

David S. Crestin,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 95–408 Filed 1–6–95; 8:45 am]

BILLING CODE 3510–22–F

COMMISSION ON IMMIGRATION REFORM

Central Texas Roundtables

AGENCY: U.S. Commission on Immigration Reform.

ACTION: Announcement of Commission Roundtables.

This notice announces two roundtables to be held by the U.S. Commission on Immigration Reform in Austin, TX on January 18, 1995. The Commission, created by Section 141 of the Immigration Act of 1990, is mandated to review the implementation and impact of U.S. immigration policy and report its findings to Congress. An interim report, U.S. Immigration Policy: Restoring Credibility, was issued on September 30, 1994; the final report is due in 1997.

The roundtable participants will include the Commissioners, researchers, government officials, representatives of local organizations, and other experts. The first roundtable will examine the economic and labor impacts of immigration on Texas, with a focus on the Austin-San Antonio area. The Commission seeks to gain greater understanding of the effects of immigrants on the region's labor market (both high- and low-skill labor), the impact of employment-based immigration on high-tech industry, and immigration in the context of NAFTA.

The second roundtable will focus on the effects of immigration on social and community relations in central Texas. Issues involving absorption of immigrants into the local community, naturalization and civic participation of immigrants, and the effect of immigrants on public services will be addressed.

DATES: January 18, 1995.

TIME: 9:00 am–12:30 pm (Economic and Labor Impacts); 2:00 pm–5:00 pm (Social and Community Relations).

ADDRESSES: Hyatt Regency Austin on Town Lake, Texas Rooms 6 and 7, 208 Baron Springs Drive, Austin, TX 78704, 512–480–2038.

FOR FURTHER INFORMATION CONTACT: Paul Donnelly (202) 673–5348.

Dated: January 3 1995.

Susan Martin,

Executive Director.

[FR Doc. 95–431 Filed 1–6–95; 8:45 am]

BILLING CODE 6820–97–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of Import Restraint Limits for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in the People's Republic of China; Correction

January 3, 1995.

In Vol. 59, No. 244 of the **Federal Register** published on December 21, 1994 announcing levels for 1995, make the following change:

On page 65761, column 3, add a sublevel in Group III for Category 224–V at a level of 3,310,294 square meters.

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 95–395 Filed 1–6–95; 8:45 am]

BILLING CODE 3510–DR–F

DEPARTMENT OF DEFENSE

Department of the Navy

CNO Executive Panel; Closed Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (5 U.S.C. App. 2), notice is hereby given that the Chief of Naval Operations (CNO) Executive Panel will meet on January 19, and 20, 1995, from 9:00 a.m. to 4:00 p.m., on each day at 4401 Ford Avenue, Alexandria, Virginia. These sessions will be closed to the public.

The purpose of the meeting is to conduct discussions on strategies for an uncertain future to include current intelligence, information warfare, and special access programs. These matters constitute classified information that is specifically authorized by Executive order to be kept secret in the interest of national defense and are, in fact, properly classified pursuant to such Executive order. Accordingly, the Secretary of the Navy has determined in writing that the public interest requires that all sessions of the meeting be closed to the public because they will be concerned with matters listed in section 552b(c)(1) of title 5, United States Code.

For further information concerning this meeting, contact: Timothy J. Galpin, Assistant for CNO Executive Panel Management, 4401 Ford Avenue, Suite 601, Alexandria, VA 22302–0268, Phone: (703) 756–1205.

Dated: January 3, 1995.

L. R. McNees,

LCDR, JAGC, USN, Federal Register Liaison Officer.

[FR Doc. 95–396 Filed 1–6–95; 8:45 am]

BILLING CODE 3810–FF–F

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Meetings

AGENCY: National Assessment Governing Board; Education.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Executive Committee of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under Section 10 (a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend.

DATES: February 7, 1995.

TIME: 4:00 P.M. (et).

LOCATION: National Assessment Governing Board, Suite 825, 800 North Capitol Street, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Mary Ann Wilmer, Operations Officer, National Assessment Governing Board, Suite 825, 800 North Capitol Street, N.W., Washington, D.C., 20002–4233, Telephone: (202) 357–6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board is established under section 412 of the National Education Statistics Act of 1994 (Title IV of the Improving America's Schools Act of 1994).

The Board is established to formulate policy guidelines for the National Assessment of Educational Progress. The Board is responsible for selecting subject areas to be assessed, developing assessment objectives, identifying appropriate achievement goals for each grade and subject tested, and establishing standards and procedures for interstate and national comparisons.

The Executive Committee of the National Assessment Governing Board will meet February 7, 1995 from 4:00 P.M. until 5:00 P.M. Because this is a teleconference meeting, facilities will be provided so the public will have access to the Committee's deliberations. The Committees will meet to conduct the following business: review and approve the March 3–4, 1995 meeting agenda; hear a report from the NAEP Planning Committee; and to hold preliminary discussions on plans for the evaluations of the NAEP Achievement Levels and the State NAEP programs.

Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, Suite 825, 800 North Capitol Street, N.W., Washington, D.C., from 8:30 A.M. to 5:00 P.M.

Dated: Jan 3, 1995.

Roy Truby,

Executive Director, National Assessment Governing Board.

[FR Doc. 94–375 Filed 1–6–94; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Bonneville Power Administration

Finding of No Significant Impact for Burlington Bottoms Wildlife Mitigation Project

AGENCY: Bonneville Power Administration (BPA), Department of Energy (DOE).

ACTION: Finding of No Significant Impact (FONSI).

SUMMARY: This notice announces BPA's proposal to fund wildlife management and enhancement activities for the Burlington Bottoms wetlands mitigation site. Acquired by BPA in 1991, wildlife habitat at Burlington Bottoms would contribute toward the goal of mitigation for wildlife losses and inundation of wildlife habitat due to the construction of Federal dams in the lower Columbia and Willamette River Basins. BPA has prepared an environmental assessment (DOE/EA–0928) evaluating the potential environmental effects of the proposed project. Alternative 1 (Proposed Action) evaluated maintenance and enhancement of the property with limited public access; Alternative 2 evaluated maintenance and enhancement of the property with no public access; and Alternative 3 evaluated the No-Action Alternative. Maintenance and enhancement under Alternative 1 would not cause significant environmental impact because: (1) There would be no adverse impacts on soils, air quality, water quality, wildlife (including no effect on endangered species), vegetation, fish, and land use; and (2) there would be no effect on cultural resources. Based on the analysis in the environmental assessment (EA), BPA has determined that the proposed action is not a major Federal action significantly affecting the quality of the human environment, within the meaning of the National Environmental Policy Act (NEPA) of 1969. Therefore, the preparation of an environmental impact statement (EIS) is not required and BPA is issuing this FONSI.

FOR FURTHER INFORMATION AND COPIES OF THE EA, CONTACT: John Taves, Bonneville Power Administration—EC–5, P.O. Box 3621, Portland, Oregon 97208–3621, phone number 503–230–4995, or Charles Craig, Bonneville Power Administration—EWP/State, P.O. Box 3621, Portland, Oregon 97208–3621, phone number 503–231–6964; or the Public Involvement and Information office voice TTY 503–230–3478 in Portland, or toll free 1–800–622–4519.

Public Availability: This FONSI will be distributed to all persons and agencies known to be interested in or affected by the proposed action or alternatives.

SUPPLEMENTARY INFORMATION: Under provisions of the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (Northwest Power Act), BPA has the authority and obligation to fund wildlife mitigation activities approved by the Northwest Power Planning Council (Council) and included in the Council's Fish and Wildlife Program (Program). The initial phase of mitigation planning for wildlife habitat losses was submitted to the Council for amendment into the Program in 1989. The Program includes a process for review of habitat losses and design of mitigation plans for each Federal hydro project in the Willamette and Columbia River Basins (Section 1002). In 1989, the Council amended the Program to include wildlife habitat losses resulting from construction and operation of Bonneville, The Dalles, John Day, and McNary Dams. Consistent with section 1003(7) of the Program's Wildlife Mitigation Rule, BPA proposes to fund projects that are intended to help reach the Council's mitigation goals. BPA funding would provide management of habitat management, recreation, hydrology, cultural resources, and public access to the area.

Under Alternative 1, the proposed action, control or eradication of non-native invasive plant species and re-establishment or enhancement of native plants would be beneficial to fish and wildlife and would not significantly impact other environmental resources.

Control of non-native fish and wildlife populations through trapping and netting would be beneficial by reducing competition with native species for resources.

Control of non-native invasive plant species at Burlington Bottoms may include the burning of vegetation (Reed canary grass) in certain areas (pasture

habitat) and at certain times of the year. This may cause, for the short term, an increase in carbon monoxide and smoke particulates. Burning would be coordinated with the Oregon Department of Environmental Quality to ensure that impacts to air quality would be minimal.

To avoid adverse impacts to fish and wildlife habitat, management of public access will include the use of interpretive signs to educate visitors on the need to stay in designated areas, using vegetation as a natural barrier to prevent off-trail use, and/or having seasonal restrictions on visitor access.

Timing and location of management activities (burning of Reed canary grass, mechanical removal of blackberries, and trapping of bullfrogs) would occur in such a manner as to minimize disturbance to native fish and wildlife, especially during such critical periods as the breeding season for waterfowl.

A cultural resource survey was performed on the Burlington Bottoms site in September of 1994. No prehistoric materials were observed, possibly due to twentieth century fill material and dense vegetation which obscure the ground surface, hindering recognition of these resources. Any ground-disturbing activities (e.g., excavations or surface leveling) related to the construction of the trail and wildlife viewing areas and the placement of interpretive signs will be monitored by an archaeologist since it is possible that unrecorded prehistoric sites exist beneath the ground surface.

Determination: Based on the information in the EA, summarized here, BPA determines that the proposed action is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, 42 U.S.C. 4321 *et seq.* Therefore, an EIS will not be prepared and BPA is issuing this FONSI.

Issued in Portland, Oregon, on December 28, 1994.

Randall W. Hardy,

Administrator and Chief Executive Officer.

[FR Doc. 95–438 Filed 1–6–94; 8:45 am]

BILLING CODE 6450–01–P–M

Federal Energy Regulatory Commission

Notice of Application

January 3, 1995.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. Type of Application: Modifying the Route of Transmission Line.

b. Project No: 6939–059.

c. Date Filed: 12/14/94.

d. Applicant: Ohio Municipal Electric Generation Agency, Joint Venture 5 (OMEGA JV5).

e. Name of Project: Belleville Hydroelectric Project.

f. Location: Located on the Ohio River, Wood County, West Virginia.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. Applicant Contact: Mr. Kenneth L. Hegemann, President, E. Leon Daggett, Executive VP, American Municipal Power-Ohio, Inc., 601 Dempsey Road, P.O. Box 549, Westerville, OH 43081, (614) 890–2805.

i. FERC Contact: Mohamad Fayyad, (202) 219–2665.

j. Comment Date: February 6, 1995.

k. Description of Amendment: Licensee proposes to modify the route of project's transmission line, which has not been constructed yet. Under the proposed route, the transmission line would be 26-mile-long, 138–Kv overhead line from Belleville Hydroelectric Project powerhouse to Ohio Power Company's Rutherland Substation. The line would consist primarily of wood pole H-frame structures with typical spans between 800 to 900 feet.

Please, note that we are currently in the process of preparing a draft environmental assessment, which we will notice for comments upon completion.

l. This notice also consists of the following standard paragraphs: B, C1, and D2.

B. Comments, Protests, or Motions to Intervene.—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

C1. Filing and Service of Responsive Documents.—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

D2. Agency Comments.—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's must also be sent to the Applicant's representatives.

Lois D. Cashell,

Secretary.

[FR Doc. 95–391 Filed 1–6–95; 8:45 am]

BILLING CODE 6717–01–M

Notice of Application

January 3, 1995.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. Type of Application: Transfer of License.

b. Project No: 2801–020.

c. Date Filed: December 19, 1994.

d. Applicant: Joseph A. Guerrieri.

e. Name of Project: Glendale.

f. Location: On the Housatonic River in Berkshire County, Massachusetts.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. Section 791(a)–825(r).

h. Applicant Contact: Joseph A. Guerrieri, 503 Beverly Road, Nework, DE 19711–5131 (302) 368–3466.

John J. Furman, President, Littleville Power Company, Inc., 36 Canal Drive, Westfield, MA 01085–5031, (413) 568–6510, (413) 568–1188 FAX.

i. FERC Contact: Diane M. Murray, (202) 219–2682.

j. Comment Date: February 13, 1995.

k. Description: Application for transfer of license for the Glendale Project from Joseph A. Guerrieri to the Littleville Power Company, Inc.

1. This notice also consists of the following standard paragraphs: B, C1, and D2.

B. Comments, Protests, or Motions to Intervene.—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but

only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

C1. Filing and Service of Responsive Documents.—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. A copy of any motion to intervene must also be served upon each representative of the Application specified in the particular application.

D2. Agency Comments.—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's must also be sent to the Applicant's representatives.

Lois D. Cashell,

Secretary.

[FR Doc. 95–393 Filed 1–6–95; 8:45 am]

BILLING CODE 6717–01–M

[Project No. 2069–000]

Arizona Public Service Co., Notice of Authorization for Continued Project Operation

January 3, 1995.

On December 18, 1992, Arizona Public Service Company, licensee for the Irving and Childs Project No. 2069, filed an application for a new or subsequent license pursuant to the Federal Power Act (FPA) and the Commission's regulations thereunder. Project No. 2069 is located on Fossil Creek and the Verde River in Yavapai and Gila Counties, Arizona.

The license for Project No. 2069 was issued for a period ending December 31, 1994. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year to year an annual license to the then licensee under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in Section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of Section 15 of the FPA, then, based on Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 2069 is issued to Arizona Public Service Company for a period effective January 1, 1995, through December 31, 1995, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before December 31, 1995, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under Section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to Section 15 of the FPA, notice is hereby given that Arizona Public Service Company is authorized to continue operation of the Irving and Childs Project No. 2069 until such time as the Commission acts on its application for subsequent license.

Louis D. Cashell,

Secretary.

[FR Doc. 94–392 Filed 1–6–94; 8:45 am]

BILLING CODE 6717–01–M

[Project No. 2705–000]

City of Seattle, Notice of Authorization for Continued Project Operation

January 3, 1995.

On September 30, 1992, the City of Seattle, licensee for the Newhalem Creek Project No. 2705, filed an application for a new or subsequent license pursuant to the Federal Power Act (FPA) and the Commission's regulations thereunder. Project No. 2705 is located on Newhalem Creek in Whatcom County, Washington.

The license for Project No. 2705 was issued for a period ending December 31, 1994. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year to year an annual license to the then licensee under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in Section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of Section 15 of the FPA, then, based on Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to Section 15 of the FPA, notice is hereby given that an annual license for Project No. 2705 is issued to the City of Seattle for a period effective January 1, 1995, through December 31, 1995, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before December 31, 1995, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under Section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to Section 15 of the FPA, notice is hereby given that the City of Seattle is authorized to continue operation of the Newhalem Creek Project No. 2705 until such time as the Commission acts on its application for subsequent license.

Lois D. Cashell

Secretary.

[FR Doc. 95–390 Filed 1–6–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP95–129–000]

Transcontinental Gas Pipe Line Corp., Notice of Abandonment

January 3, 1995.

Take notice that on December 22, 1994, Transcontinental Gas Pipe Line Corporation (Transco), P.O. Box 1396, Houston, Texas 77251, filed in Docket No. CP95–129–000 an application pursuant to Section 7(b) of the Natural Gas Act for permission and approval to abandon certain facilities, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Transco proposes to abandon certain pipelines, compression facilities, meters, dehydration units and other miscellaneous facilities, all listed in Exhibit T to the application. Transco states that gas has not flowed through the facilities for at least one year, and in many cases, longer than one year. Transco also asserts that in many cases the producer has disconnected the well(s), or the well(s) have been depleted or abandoned and there are no volumes flowing into Transco's system. Transco also asserts that the proposed abandonment would have no impact on daily design capacity, operating conditions or services rendered on Transco's system.

Any person desiring to be heard or to make any protest with reference to said application should on or before January 24, 1995, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Transco to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 95–394 Filed 1–6–95; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5134–8]

Office of Research and Development; Ambient Air Monitoring Reference and Equivalent Methods; Receipt of Application for a Reference Method Determination

Notice is hereby given that on December 5, 1994, the Environmental Protection Agency received an application from Advanced Pollution Instrumentation, Inc., 8815 Production Avenue, San Diego, California 92121–2219, to determine if their Model 100A Fluorescent Sulfur Dioxide Analyzer should be designated by the Administrator of the EPA as an equivalent method under 40 CFR Part 53. If, after appropriate technical study, the Administrator determines that this method should be so designated, notice thereof will be given in a subsequent issue of the **Federal Register.**

Joseph K. Alexandra,

Acting Assistant Administrator for Research and Development.

[FR Doc. 95–419 Filed 1–6–95; 8:45 am]

BILLING CODE 6560–50–M

[FRL–5134–7]

Science Advisory Board; Radiation Advisory Committee; Radionuclide Cleanup Standards Subcommittee; Notification of Public Advisory Committee Meeting; Open Meeting

Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the Radionuclide Cleanup Standards Subcommittee (RCSS) of the Science Advisory Board's (SAB's) Radiation Advisory Committee (RAC), will continue its review of the technical basis of the Agency's Cleanup Standards for Radionuclides. The meeting will be conducted on Wednesday, January 25 and Thursday, January 26, 1995 at the Courtyard Marriott Hotel, 2899 Jefferson Davis Highway, Arlington, VA 22202 (tel. 703–549–3435). On Wednesday, January 25, 1995 the RAC will meet at 9:00 am eastern time and adjourn no later than 6:00 pm. On Thursday, January 26, 1995 the RCSS will meet starting at 8:30 am and will adjourn no later than 4:00 pm. The RCSS formally began this review at its first public meeting on the topic on October 27 and 28, 1994 (See **Federal Register** Vol. 59, No. 191, Tuesday, October 4, 1994, pages 50600-50601). This meeting is open to the public, but seating is limited and available on a first-come basis.

The meeting will essentially be a work session by the Subcommittee, as they prepare their draft report on the topic. The draft documents that are the subject of this review are available from the originating EPA office and are not available from the SAB Office. These draft documents are: (1) ''Radiation Site Cleanup Regulations: Technical Support Document for the Development of Radionuclide Cleanup Levels for Soil,'' Review Draft, September, 1994. and (2) ''Radiation Site Cleanup regulations: Technical Support Document for the Development of Radionuclide Cleanup Levels for Soil,'' Appendices, September, 1994.

To discuss technical aspects of the draft documents, please contact Dr. Anthony B. Wolbarst, Chief, Remedial Guidance Section, Office of Radiation and Indoor Air (ORIA) (Mail Code 6603J), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. To simply obtain copies of the draft documents, please contact Ms. Virginia Stradford, Secretary, at (202) 233–9350, FAX (202) 233–9650. The background documents that support this review, as well as the draft documents listed above are available in the Agency's U.S. EPA Air and Radiation Docket. Please address written inquiries as follows: Attn: Air and Radiation Docket, Mail Stop 6102, Air Docket No. A–93–27, Room M1500, First Floor, Waterside Mall, 401 M Street, S.W., Washington, D.C. 20460. The docket may be inspected from 8:00 a.m. to 4:00 p.m., Monday through Friday, excluding federal holidays, in Room M1500. A reasonable fee may be charged for copies of docket materials. Inquiries regarding access to the public information docket should be directed to Ms. Lynn Johnson, ORIA Staff (Mail Code 6603J) at (202) 233–9383.

The charge to the SAB is as follows:

(1) Is the methodology used by the Office of Radiation and Indoor Air (ORIA) for evaluating source terms for

radioactively contaminated sites, for modeling transport to people, and for estimating risk to individuals and populations acceptable for providing a technical basis for writing a cleanup standard?

(2a) Are the assumptions for the combined residential/agricultural land use scenario, and the pathways model, reasonable and suitable for assessing risk at radioactively contaminated sites?

(2b) Are the assumptions for the combined industrial/commercial land use scenario, and the pathways model, reasonable and suitable for assessing risk at radioactively contaminated sites?

(3) Is RESRAD version 5.01 (specific reference to RESRAD may be omitted) suitable for modeling radiation risk to individuals at radioactively contaminated sites?

To Obtain More Information on or Participate in this SAB Meeting:

Members of the public who wish to make a brief oral presentation at this meeting should contact Dr. Kooyoomjian no later than January 18, 1995 in order to have time reserved on the agenda. Please contact Dr. K. Jack Kooyoomjian, the Designated Federal Official, Science Advisory Board (Mail Code 1400F), US EPA, 401 M Street, SW, Washington DC 20460, by telephone at (202) 260–6552, FAX at (202) 260–7118, or via the INTERNET at:

Kooyoomjian.Jack@EPAMAIL.EPA.GOV.

In order to obtain a copy of the draft agenda, please contact Ms. Diana L. Pozun, Secretary, Science Advisory Board, at the above address.

Providing Oral or Written Comments at SAB Meetings

The Science Advisory Board expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements. In general, opportunities for oral comment at meetings will be usually limited to five minutes per speaker and no more than thirty minutes total. Written comments (at least 35 copies) received in the SAB Staff Office sufficiently prior to a meeting date (usually one week prior to a meeting), may be mailed to the subcommittee prior to its meeting; comments received too close to the meeting date will normally be provided to the subcommittee at its meeting. Written comments may be provided up until the time of the meeting.

Dated: December 20, 1994.

A. Robert Flaak,

Acting Staff Director, Science Advisory Board.

[FR Doc. 95–418 Filed 1–6–95; 8:45 am]

BILLING CODE 6560–50–P

[FRL–5133–1]

Final NPDES General Permits for Produced Water and Produced Sand Discharges From the Oil and Gas Extraction Point Source Category to Coastal Waters in Louisiana (LAG290000) and Texas (TXG290000)

AGENCY: Environmental Protection Agency, Region 6.

ACTION: Issuance of Final NPDES Permits.

SUMMARY: Region 6 of the United States Environmental Protection Agency (EPA) today issues final NPDES General Permits regulating discharges of produced water and produced sand derived from oil and gas point source facilities. The permits prohibit the discharge of produced water and produced sand derived from Coastal Subcategory (40 CFR part 435, subpart D) to any water subject to EPA jurisdiction under the Clean Water Act. Discharges to ''coastal'' waters of Louisiana and Texas of produced water and produced sand derived from most Stripper Subcategory (40 CFR part 435, subpart F) and all Offshore Subcategory (40 CFR part 435, subpart A) facilities covered by these permits are prohibited. Under Permit TXG290000, Stripper Subcategory facilities located east of the 98th meridian whose produced water is derived from the Carrizo/Wilcox, Reklaw or Bartosh formations in Texas and whose produced water does not exceed 3000 mg/l Total Dissolved Solids may discharge produced water subject to effluent limitations on oil and grease of 25 mg/l monthly average and 35 mg/l daily maximum. TXG290000 prohibits the discharge of produced sand derived from those facilities. Produced water derived from Stripper Subcategory and Offshore Subcategory wells which discharge to the main deltaic passes of the Mississippi River or to the Atchafalaya River below Morgan City including Wax Lake Outlet, are not covered by Permit No. LAG290000, but may be regulated in future NPDES permitting actions. Permittees include commercial disposal facilities as well as oil and gas operators generating produced water and sand.

Region 6 is also issuing an administrative order requiring permittees discharging produced water from existing Coastal, Stripper or Offshore Subcategory wells which must meet the No Discharge requirement for produced water to meet that requirement no later than January 1, 1997 unless an earlier compliance date is required by the State.

DATES: These permits will become effective on February 8, 1995.

ADDRESSES: Notifications required by these permits should be sent to the Water Management Division, Enforcement Branch (6W–EA), EPA Region 6, P.O. Box 50625, Dallas, Texas 75202.

FOR FURTHER INFORMATION: Contact Ms. Ellen Caldwell, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202; telephone: (214) 665 7513.

SUPPLEMENTARY INFORMATION: EPA issues these general permits pursuant to its authority under Section 402 of the Clean Water Act, 33 U.S.C. 1342. These permits cover discharges of produced water and produced sand derived from Oil and Gas Point Source Category Facilities to coastal waters of Louisiana and Texas. Discharges regulated by these permits include those from Coastal Subcategory (40 CFR part 435, subpart D) facilities in Louisiana and Texas, discharges from the Stripper Subcategory (40 CFR part 435, subpart F) that discharge to coastal waters of Louisiana and Texas, and discharges from some Offshore Subcategory (40 CFR part 435, subpart A) to coastal waters of Louisiana and Texas. These permits do not authorize discharges from ''new sources'' as defined in 40 CFR 122.2.

Public notice of the draft permits was published in the **Federal Register** on December 22, 1992 (57 FR 60926) and in the Houston Post and New Orleans Times Picayune on January 9, 1993. As then announced, the comment period was to close on February, 9, 1993, but Region 6 subsequently extended it to March 15, 1993 because of numerous telephone and written requests for additional time. (57 FR 6968, February 3, 1993). Region 6 considered all comments it received in formulating the final permits. The Region has prepared a detailed Response to Comments, but is not publishing it in this **Federal Register** notice for practical reasons. A copy may be obtained from Ms. Caldwell at the address supplied above.

EPA Region 6 made a number of changes to the permits as a result of comments. Under Permit No. TXG290000, facilities in the Stripper Subcategory located east of the 98th meridian whose produced water comes from the Carrizo/Wilcox, Reklaw or Bartosh formations in Texas and whose produced water does not exceed 3000 mg/l Total Dissolved Solids are allowed to discharge produced water subject to an effluent limitation of 3000 mg/l for Total Dissolved Solids and oil and grease limits of 25 mg/l monthly average and 35 mg/l daily maximum. Associated

changes to the wording of Part I.A and Part II of the permits reflect these produced water discharge authorization; e.g., notices of intent to be covered and Discharge Monitoring Reports are now required for facilities allowed to discharge. In response to comments on potential ambiguities, clarifying wording changes and additions are also included in the final permits. Produced water discharges derived from Stripper Subcategory and Offshore Subcategory wells into the main deltaic passes of the Mississippi River, or to the Atchafalaya River below Morgan City including Wax Lake Outlet, have been excluded from coverage under Permit No. LAG290000 and may be the subject of future regulatory actions. These changes are discussed in greater detail in the written Response to Comments.

The Region is also issuing an administrative order requiring permittees discharging produced water from existing Coastal, Stripper or Offshore Subcategory wells which must meet the No Discharge requirement for produced water, to comply with that requirement no later than January 1, 1997 unless an earlier compliance date is required by the State. Many discharges in Louisiana are required to cease sooner than January 1, 1997. As explained in the Fact Sheet for the Draft Permits, Region 6 was not required to publish its proposed administrative order nor is the final order subject to judicial review before its enforcement. Region 6 nevertheless solicited comments on a draft order and responses proved helpful in formulating the final order.

Other Legal Requirements

A. State Certification

Under Section 401(a)(1) of the Act, EPA may not issue a NPDES permit until the State in which the discharge will occur grants or waives certification to ensure compliance with appropriate requirements of the Act and State law. The State of Louisiana, after review of the permit, has certified that the Louisiana permit will comply with applicable state water quality standards or limitations. The State of Texas has waived certification.

B. The Endangered Species Act

The Endangered Species Act (ESA), 16 USC 1536, requires Federal agencies to insure that their actions, such as permit issuance, are unlikely to jeopardize the continued existence of any listed endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. In informal consultation under ESA Section 7(a)(2), the U. S. Fish and Wildlife Service has concurred with EPA's determination that issuance of these permits is unlikely to adversely affect any federally-listed species or designated critical habitats.

C. The Coastal Zone Management Act

In accordance with Section 307(c)(3) of the Coastal Zone Management Act, the Louisiana Coastal Zone Management Division of Louisiana Department of Natural Resources has reviewed NPDES permit LAG290000 and found its issuance consistent with the Louisiana Coastal Zone Management Program.

D. The Paperwork Act

The information collection requirements of these general permits have been approved by OMB under provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et.seq. in prior submissions made for the NPDES permit program.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act requires that federal agencies prepare a regulatory flexibility analysis for regulations that will have a significant impact on a substantial number of small entities. The impact on small entities was discussed in some detail in the Fact Sheet (57 FR 60943) for the current permits. Because certain groups of wells are now allowed by these final permits to discharge produced water and, for the Louisiana permit, compliance with produced water No Discharge limits will in many cases be required by state regulations sooner than required by this permit, the impact on small entities will be even less than anticipated for the proposed permits.

NPDES Permits LAG290000 and TXG290000 are hearby issued. In addition, the General Administrative Order which applies to those permits is hereby issued and appears following NPDES Permits LAG290000 and TXG290000.

Signed this 22nd day of December, 1994.

Myron O. Knudson,

Director, Water Management Division, EPA Region 6.

In compliance with the provisions of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq: the ''Act''), these permits prohibit the discharge of produced water and produced sand derived from Oil and Gas Point Source Category facilities to ''coastal'' waters of Louisiana and Texas, as described below, in accordance with effluent limitations and other conditions set forth in Parts I and II. Facilities covered by these permits include those in the Coastal Subcategory (40 CFR part 435, subpart D), the Stripper Subcategory (40 CFR part 435, subpart F) that discharge to ''coastal'' waters of Louisiana and Texas, and the Offshore Subcategory (40 CFR part 435, subpart A) which discharge to ''coastal'' waters of Louisiana and Texas.

These permits do not apply to ''new sources'' as defined in 40 CFR 122.2.

These permits, except for certain portions listed in Part I.B., shall become effective February 8, 1995, and expire at midnight on February 8, 2000.

Part I

Section A. General Permit Coverage and Notification Requirements

1. Operations Covered

a. Facilities in the Coastal Subcategory (40 CFR part 435, subpart D) located in Louisiana and Texas. Location of a Coastal Subcategory facility is determined by the location of the wellhead associated with that facility.

b. Facilities in the Offshore Subcategory (40 CFR part 435, subpart A) and the Stripper subcategory (40 CFR part 435, subpart F) which discharge to ''coastal'' waters of Louisiana or Texas. Note that facilities in the Stripper Subcategory and the Offshore Subcategory that discharge directly to a major deltaic pass of the Mississippi River or to the Atchafalaya River, including Wax Lake Outlet, below Morgan City are not covered by Permit No. LAG290000.

c. Facilities which dispose of produced water or produced sand derived from Coastal Subcategory facilities located in Louisiana or Texas.

d. Facilities which dispose of produced water or produced sand derived from Stripper or Offshore Subcategory facilities by discharge to coastal waters of Louisiana or Texas.

2. Permittees Covered

Operators of facilities listed in Part I.A.1 of these permits.

3. Notification Requirements

a. Operators of facilities whose discharge of produced water and produced sand is prohibited by these permits are automatically covered; a written notification of intent to be covered by these permits is not required.

b. Operators of facilities whose produced water discharge is allowed (See Part I.B.2.a of these permits) are required to submit a written notification of intent to be covered by these permits.

Written notification of intent to be covered, including the legal name and address of the operator, the lease (or

lease block) number assigned by the Railroad Commission of Texas or, if none, the name commonly assigned to the lease area, the type of facilities located within the lease (or lease block), the name of the formation from which the produced water originates and the Total Dissolved Solids concentration of the produce water shall be submitted:

(1) For existing discharges of produced water, within 45 days of the effective date of this permit.

(2) For new discharges of produced water, within fourteen days prior to the commencement of discharge.

c. Because these permits cover only produced water and produced sand, discharges of other waste waters from Coastal Subcategory wells must apply to be covered by NPDES Permits LAG330000 or TXG330000, which cover the discharge of waste discharges, other than produced water and produced sand, from Coastal Subcategory production (and drilling) facilities.

4. Termination of Operations

Lease (or lease block) operators shall notify the Regional Administrator within 60 days after the permanent termination of discharges from their facilities. In addition, lease (or lease block) operators shall notify the Regional Administrator within 30 days of any transfer of ownership.

Section B. Application for NPDES Individual Permit

1. Any operator authorized by this permit may request to be excluded from the coverage of this general permit by applying for an individual permit. The operator shall submit an application together with the reasons supporting the request to the Regional Administrator.

2. When an individual NPDES permit is issued to an operator otherwise subject to this general permit, the applicability of this permit to the owner or operator is automatically terminated on the effective date of the individual permit.

Section C. General Permit Limits

1. Permit Conditions Applicable to LAG290000

a. Prohibitions

Permittees shall not discharge nor shall they cause or allow the discharge of produced water and produced sand. Operators of facilities generating pollutants regulated under this permit shall take reasonable positive steps to assure said pollutants are not unlawfully discharged to waters of the United States by third parties and shall maintain documentation of those steps for no less than three years.

b. Other Requirements

All dischargers must comply with any more stringent requirements contained in Louisiana Water Quality Regulations, LAC: 33,IX,7.708.

2. Permit Conditions Applicable to TXG290000

a. Prohibitions

Permittees shall not discharge nor shall they cause or allow the discharge of produced water or produced sand. Operators of facilities generating pollutants regulated under this permit shall take reasonable positive steps to assure said pollutants are not unlawfully discharged to waters of the United States by third parties and shall maintain documentation of those steps for no less than three years.

Exception to prohibition on discharge of produced water: Facilities in the Stripper Subcategory located east of the 98th meridian whose produced water comes from the Carrizo/Wilcox, Reklaw or Bartosh formations in Texas and whose produced water does not exceed 3000 mg/l Total Dissolved Solids shall meet the following limits and monitoring requirements:

(1) Produced water discharges must meet both a daily maximum of 35 mg/l and a monthly average of 25 mg/l for oil and grease.

(2) Monitoring for oil and grease shall be performed once per month. The sample type may be a grab, or a 24-hour composite consisting of the arithmetic average of the results of 4 grab samples taken over a 24-hour period.

(3) Produced water flow monitoring requirement: Once per month, an estimate of the flow in MGD (million gallons per day) must be made and recorded.

Part II

(Applicable to LAG290000 and TXG290000)

Section A. General Conditions

1. Introduction

In accordance with the provisions of 40 CFR 122.41 et. seq., this permit incorporates by reference ALL conditions and requirements applicable to NPDES permits set forth in the Clean Water Act, as amended (hereinafter known as the ''Act'') as well as all applicable EPA regulations.

2. Duty To Comply

The permittee must comply with all conditions of this permit. Any permit non-compliance constitutes a violation of the Clean Water Act and is grounds for enforcement action and/or for requiring a permittee to apply for and obtain an individual NPDES permit.

3. Permit Flexibility

This permit may be modified, revoked and reissued, or terminated for cause, in accordance with 40 CFR 122.62–122.64. The filing for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

4. Property Rights

This permit does not convey any property rights of any sort, or any exclusive privileges nor does it authorize any injury to private property or any invasion of personal rights, or any infringement of Federal, State or local laws or regulations.

5. Duty To Provide Information

The permittee shall furnish to the Regional Administrator, within a reasonable time, any information which the Regional Administrator may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish the Regional Administrator, upon request, copies of records required to be kept by this permit.

6. Criminal and Civil Liability

Except as provided in permit conditions on ''Bypassing'' and ''Upsets'', nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance. Any false or materially misleading representation or concealment of information required to be reported by the provisions of the permit, the Act or applicable CFR regulations which avoids or effectively defeats the regulatory purpose of the Permit may subject the permittee to criminal enforcement pursuant to 18 USC Section 1001.

7. Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee may be subject under Section 311 of the Clean Water Act.

8. State Laws

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any

applicable State law or regulation under authority preserved by Section 510 of the Clean Water Act.

9. Severability

The provisions of this permit are severable, and if any provision of this permit or the application of any provision of this permit to any circumstance is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

Section B. Proper Operation and Maintenance

1. Need To Halt or Reduce Not a Defense

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

2. Duty To Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

3. Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed and used by the permittee to achieve compliance with the conditions of this permit. This provision requires the operation of backup or auxiliary facilities of similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

4. Bypass of Facilities

a. Definitions

(1) ''Bypass'' means the intentional diversion of waste streams from any portion of a facility.

(2) ''Severe property damage'' means substantial physical damage to property, damage to the treatment facilities that causes them to be inoperable, or substantial and permanent loss of natural resources than can reasonably be expected to occur in the absence of bypass. Severe property damage does not mean economic loss caused by delays in production.

b. Notice

(1) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass.

(2) Unanticipated bypass. The permittee shall, within 24 hours, submit notice of an unanticipated bypass as required in Part II.D.2.

c. Prohibition of Bypass

(1) Bypass is prohibited, and the Regional Administrator may take enforcement action against a permittee for bypass, unless:

(a) Bypass was unavoidable to prevent loss of life, personal injury or severe property damage;

(b) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgement to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

(c) The permittee submitted notices as required by Part II.B.4.b.

(2) The Regional Administrator may approve an anticipated bypass, after considering its adverse effects, if the Regional Administrator determines that it will meet the conditions listed at Part II.B.4.c.(1).

5. Upset Conditions

a. Definition

''Upset'' means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed facilities, inadequate facilities, lack of preventive maintenance, or careless or improper operation.

b. Effects of an Upset. An upset constitutes an affirmative defense of an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of Part II.B.5.c. are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

c. Conditions necessary for a demonstration of upset. The permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous logs, or other relevant evidence that:

(1) An upset occurred and that the permittee can identify the cause(s) of the upset;

(2) The permitted facility was at the time being properly operated;

(3) The permittee submitted notice of the upset as required by Part II.D.2; and

(4) The permittee complied with Part II.B.2.

d. Burden of Proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

6. Removed Substances

Solids, sludges, filter backwash, or other pollutants removed in the course of treatment or control of waste waters shall be disposed of in a manner such as to prevent any pollution from such materials from entering waters of the United States.

Section C. Monitoring and Records

1. Inspection and Entry

The permittee shall allow the Regional Administrator or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

(a) Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

(b) Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

(c) Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

(d) Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

2. Representative Sampling

Samples and measurements taken as required herein shall be representative of the volume and nature of the monitored discharge.

3. Retention of Records

The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, and copies of all reports required by this permit, for a period of at least 3 years from the date of the sampling, measurement, or reporting. This period may be extended by request of the Regional Administrator at any time.

The operator shall maintain records at development and production facilities for 3 years, wherever practicable and at a specific shore-based site whenever not practicable. The operator is responsible for maintaining records at exploratory facilities while they are discharging under the operator's control and at a specified shore-based site for the remainder of the 3-year retention period.

4. Record Contents

Records of monitoring information shall include:

(a) The date, exact place, and time of sampling or measurements,

(b) The individual(s) who performed the sampling or measurements,

(c) The date(s) analyses were performed,

(d) The individual(s) who performed the analyses,

(e) The analytical techniques or methods used, and

(f) The results of such analyses.

5. Monitoring Procedures

Monitoring must be conducted according to test procedures approved under 40 CFR Part 136, unless other test procedures have been specified in this permit.

6. Discharge Rate/Flow Measurements

Appropriate flow measurement devices consistent with accepted practices shall be selected, maintained, and used to ensure the accuracy and reliability of measurements of the volume of monitored discharges. The devices shall be installed, calibrated, and maintained to insure that the accuracy of the measurements are consistent with the accepted capability of that type of device. Devices selected shall be capable of measuring flows with a maximum deviation of less than ±10% from true discharge rates throughout the range of expected discharge volumes.

Section D. Reporting Requirements

1. Anticipated Noncompliance

The permittee shall give advance notice to the Regional Administrator of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

2. Discharge Monitoring Reports

For facilities which are allowed to discharge and for which monitoring is required by Part I of these permits, the operator of each lease (or lease block) shall be responsible for submitting monitoring results for all facilities within that area (i.e., lease or lease block). The monitoring results for the facilities within the particular lease (or lease block) shall be summarized on the annual Discharge Monitoring Report for that lease (or lease block).

Monitoring results obtained during the previous 12 months shall be summarized and reported on a Discharge Monitoring Report (DMR) Form (EPA No. 3320–1). The highest monthly average for all activity within each lease (or lease block) shall be reported. The highest daily maximum sample taken during the reporting period shall be reported as the daily maximum concentration. (See ''Definitions'' for more detailed explanations of these terms).

If any category of waste (discharge) is not applicable for all facilities within the lease (or lease block) due to the type of operation (e.g. drilling, production), ''no discharge'' must be recorded for those categories on the DMR. If all facilities within a lease block have had no activity during the reporting period, then ''no activity'' must be written on the DMR. All pages of the DMR must be signed and certified as required by Part II.D.9 of these permits and submitted when due.

The Permittee must complete all empty blanks in the DMR unless there has been absolutely no activity or no discharge within the lease (or lease block) for the entire reporting period. In these cases, EPA Region VI will accept a listing of leases or lease blocks with no discharges or no activity, in lieu of submitting actual DMR's for these areas. This listing must specify the permittee's NPDES General Permit Number, lease or lease block description, and EPA-assigned outfall number. The listing must also include the certification statement presented in Part II.D.9 of these permits and an original signature of the designated responsible official.

Upon receipt of a notification of intent to be covered (see Part I.A.2 of these permits for facilities requiring such notification), the permittee will be notified of its specific outfall number applicable to that lease (or lease block) and will be informed of the discharge monitoring report due date.

All notices and reports required under this permit shall be sent to EPA Region 6 at the address below:

Director, Water Management Division, USEPA, Region 6, Enforcement Branch (6W-EA), P.O. Box 50625, Dallas, TX 75270

3. Additional Monitoring by the Permittee

If the permittee monitors any pollutant more frequently than required by this permit, using test procedures approved under 40 CFR Part 136 or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR. Such increased monitoring frequency shall also be indicated on the DMR.

4. Averaging of Measurements

Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Regional Administrator in the permit.

5. Twenty-four Hour Reporting

a. For facilities which are allowed to discharge produced water by Part I.B.2.a of Permit No. TXG290000, the permittee shall report any noncompliance which may endanger health or the environment (including any spill that requires oral reporting to the state regulatory authority). Information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance. The Regional Administrator may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

The following shall be included as information which must be reported within 24 hours:

(1) Any unanticipated bypass which exceeds any effluent limitation in the permit;

(2) Any upset which exceeds any effluent limitation in the permit.

(3) Violations of a maximum daily discharge limitation or daily minimum toxicity limitation for any of the pollutants listed by the Regional Administrator in Part III of the permit to be reported within 24 hours.

The reports should be made to Region 6 by telephone at (214) 665–6593. The Regional Administrator may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

b. For all facilities prohibited from discharging produced water, the permittee shall report any noncompliance with these permits, bypass or upset. Any information shall

be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or plans to reduce, eliminate, and prevent reoccurrence of the noncompliance. The 24 hour oral reporting and follow up written submission requirement in Part II.D.5.b of these permits shall become effective 60 days after the effective date of these permits.

6. Other Noncompliance

For facilities which are allowed to discharge by Part I.B.2.a of Permit No. TXG290000, the permittee shall report all instances of noncompliance not reported under Part II, Section D, paragraphs 2 and 5 at the time monitoring reports are submitted. The reports shall contain the information listed in Section D, paragraph 5.

7. Other Information

Where the permittee becomes aware that it failed to submit any relevant facts in any report to the Regional Administrator, it shall promptly submit such facts or information.

8. Changes in Discharges of Toxic Substances

The permittee shall notify the Regional Administrator as soon as it knows or has reason to believe:

a. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, or any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the ''notification levels'' described in 40 CFR 122.42(a)(l).

b. That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the ''notification levels'' described in 40 CFR 122.42(a)(2).

9. Signatory Requirements

All reports, or information submitted to the Regional Administrator shall be signed and certified as follows:

a. For a corporation. By a responsible corporate officer. For the purpose of this section, a responsible corporate officer means:

(1) A president, secretary, treasurer, or vice-president of the corporation in charge of a principle business function, or decision making functions for the corporation, or

(2) The manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

b. For a partnership or sole proprietorship. By a general partner or the proprietor, respectively.

c. For a municipality, State, Federal or other public agency. Either a principle executive office or ranking elected official. For purposes of this section, a principle executive officer of a Federal agency includes:

(1) The chief executive officer of the agency, or

(2) A senior executive officer having responsibility for the overall operations of a principle geographic unit of the agency.

d. Alternatively, all reports required by the permit and other information requested by the Regional Administrator may be signed by a person described above or by a duly authorized representative only if:

(1) the authorization is made in writing by a person described above;

(2) the authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or oil field, superintendent, or position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. A duly authorized representative may thus be either a individual or an individual occupying a named position; and

(3) the written authorization is submitted to the Regional Administrator.

e. Certification. Any person signing a document under this section shall make the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for the gathering of the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

10. Availability of Reports

Except for applications, effluent data, and other data specified in 40 CFR 122.7, any information submitted pursuant to this permit may be claimed confidential by the submitter. If no claim is made at the time of submission, information may be made available to the public without further notice.

Section E. Penalties for Violations of Permit Conditions

1. Criminal

a. Negligent Violations

The Act provides that any person who negligently violates permit conditions implementing Sections 301, 302, 306, 307 or 308 of the Act is subject to a fine of not less than $2500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or both.

b. Knowing Violations

The Act provides that any person who knowingly violates permit conditions implementing Sections 301, 302, 306, 307 or 308 of the Act is subject to a fine of not less than $5,000 per day of violation nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or both.

c. Knowing Endangerment

The Act provides that any person who knowingly violates permit conditions implementing Sections 301, 302, 306, 307 or 308 of the Act and who knows at the time that he is placing another person in imminent danger of death or serious bodily injury is subject to a fine of not more than $250,000, or by imprisonment for not more than 15 years, or both.

d. False Statements

The Act provides that any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Act or who knowingly falsifies, tampers with, or renders inaccurate, any monitoring device or method required to be maintained under the Act, shall upon conviction, be punished by a fine of not more than $10,000 per day, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such a person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not

more than 4 years, or by both (See Section 309(c)(4). of the Clean Water Act).

2. Civil Penalties

The Act provides that any person who violates a permit condition implementing Sections 301, 302, 306, 307 or 308 of the Act is subject to a civil penalty not to exceed $25,000 per day for each violation.

3. Administrative Penalties

The Act provides that any person who violates a permit condition implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a civil penalty not to exceed $25,000 per day for each violation.

a. Class I Penalty

Not to exceed $10,000 per violation nor shall the maximum amount exceed $25,000.

b. Class II Penalty

Not to exceed $10,000 per day for each day during which the violations continues nor shall the maximum amount exceed $125,000.

Section F. Definitions

All definitions in Section 502 of the Act shall apply to this permit and are incorporated herein by reference. Unless otherwise specified in this permit, additional definitions words or phrases used in this permit are as follows:

1. *Act* means the Clean Water Act (33 U.S.C. 1251 et. seq.) as amended.

2. *Applicable effluent standards and limitations* means all state and Federal effluent standards and limitations to which a discharge is subject under the Act, including, but not limited to, effluent limitations, standards of performance, toxic effluent standards and prohibitions, and pretreatment standards.

3. *Applicable water quality standards* means all water quality standards to which a discharge is subject under the Act and which have been (a) approved or permitted to remain in effect by the Administrator following submission to him/her, pursuant to Section 303(a) of the Act, or (b) promulgated by the Administrator pursuant to Section 303(b) or 303(c) of the Act.

4. *Bypass* means the intentional diversion of waste streams from any portion of a treatment facility.

5. *Coastal waters* are defined as waters of the United States (as defined at 40 CFR 122.2) located landward of the territorial seas.

6. *Daily Discharge* means the discharge of a pollutant measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limits expressed in units of measurement other than mass, the ''daily discharge'' is calculated as the average measurement of the pollutant over the sampling day. ''Daily discharge'' determination of concentration made using a composite sample shall be the concentration of the composite sample. When grab samples are used, the ''daily discharge'' determination of concentration shall be arithmetic average (weighted by flow value) of all samples collected during that sampling day.

7. *Daily Maximum* discharge limitation means the highest allowable ''daily discharge'' during the calendar month.

8. *Environmental Protection Agency* means the U.S. Environmental Protection Agency.

9. *Monthly Average* (also known as daily average) discharge limitations means the highest allowable average of ''daily discharge(s)'' over a calendar month, calculated as the sum of all ''daily discharge(s)'' measured during a calendar month divided by the number of ''daily discharge(s)'' during that month. When the permit establishes monthly average concentration effluent limitations or conditions, the monthly average concentration means the arithmetic average (weighted by flow) of all ''daily discharge(s)'' of concentration determined during the calendar month.

10. *National Pollutant Discharge Elimination System* means the national program for issuing, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under Sections 307, 318, 402 and 405 of the Act.

11. *Produced sand* means sand and other particulate matter from the producing formation and production piping (including corrosion products), as well as source sand and hydrofrac sand. Produced sand also includes sludges generated by any chemical polymer used in a produced water treatment system.

12. *Produced water* means water (brine) brought up from the hydrocarbon-bearing strata during the extraction of oil and gas, and can include formation water, injection water, and any chemicals added down hole or during the oil/water separation process.

13. *Regional Administrator* means the Administrator of the U.S. Environmental Protection Agency, Region 6.

14. *Severe property damage* means substantial physical damage to property, damage to treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of bypass. Severe property damage does not mean economic loss caused by delays in production.

15. Territorial seas refers to ''the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.''

16. *Upset* means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

Section C. Monitoring and Records

United States Environmental Protection Agency, Region 6, In Re: NPDES Permit Nos. LAG290000 and TXG290000, General Administrative Compliance Order

The following Findings are made and Order issued pursuant to the authority vested in the Administrator of the Environmental Protection Agency (EPA) by Section 309(a)(3) of the Clean Water Act (hereinafter ''the Act''), 33 U.S.C. 1319(a)(3), and duly delegated to the Regional Administrator, Region 6, and duly redelegated to the undersigned Director, Water Management Division, Region 6. Failure to comply with the interim requirements established in this Order constitutes a violation of this Order and the NPDES permits.

Findings

I

The term ''waters of the United States'' is defined at 40 C.F.R. 122.2. The term ''coastal'' is defined in NPDES Permits LAG290000 and TXG290000 and includes facilities which would be considered ''Onshore'' but for the decision in *API* v. *EPA* 661 F.2 340 (5th Cir. 1981). The term ''existing'' means spudded prior to the effective date of NPDES Permits LAG290000 and TXG290000.

II

Pursuant to the authority of Section 402(a)(1) of the Act, 33 U.S.C. § 1342,

Region 6 issued National Pollutant Discharge Elimination System (NPDES) Permits No. LAG290000 and TXG290000 with an effective date of February 8, 1995. These permits prohibit the discharge of produced water and produced sand derived from Oil and Gas Point Source Category facilities to ''coastal'' waters of Louisiana and Texas in accordance with effluent limitations and other conditions set forth in Parts I and II of these permits. Facilities covered by these permits include those in the Coastal Subcategory (40 CFR 435, Subpart D), the Stripper Subcategory (40 CFR 435, Subpart F) that discharge to ''coastal'' waters of Louisiana and Texas, and the Offshore Subcategory (40 CFR 435, Subpart A) which discharge to ''coastal'' waters of Louisiana and Texas.

III

Respondents herein are permittees subject to General NPDES Permit Nos. LAG290000 and/or TXG290000 and who:

A. Discharge produced water derived from an existing Coastal, Stripper or Offshore Subcategory well or wells to ''coastal'' waters of Texas or Louisiana on the effective date of LAG290000 or TXG290000.

B. Discharge produced water derived from an existing Coastal Subcategory well or wells located in Louisiana or Texas to waters of the United States outside Louisiana or Texas ''coastal'' waters on the effective date of LAG290000 or TXG290000.

C. Are required by Permits No. LAG290000 or TXG290000 to meet the requirement of No Discharge of produced water and are taking affirmative steps to meet that requirement.

D. Have submitted an ''Administrative Order Notice''. Such Notices shall be sent to: Enforcement Branch (6W–EA), Region 6, U. S. Environmental Protection Agency, P.O. Box 50625, Dallas TX 75270. Upon submission of such an Administrative Order Notice, a permittee shall be a Respondent under this General Administrative Order. The terms of each Administrative Order Notice submitted shall be considered terms of this Order and shall be enforceable against the Respondent submitting the Administrative Order Notice. Each Administrative Order Notice must include:

1. Identification of the facility by name and its location (by lease, lease block, field or prospect name), the name and address of its operator, and the name, address and telephone number of a contact person.

2. A certification signed by a person meeting the requirements of Part II, Section D.9 (Signatory Requirements) of Permits LAG290000 and TXG290000 stating that a Compliance Plan has been prepared for the facility in accordance with this Order. A copy of this plan shall not be included with the Administrative Order Notice, but shall be made available to EPA upon request.

3. A Compliance Plan shall include a description of the measures to be taken, along with a schedule, to cease discharge of produced water to waters of the United States as expeditiously as possible.

IV

To maintain oil and gas production and comply with the permits' prohibition on the discharge of produced water, a significant number of Respondents will have to reinject their produced water. A lack of access to the finite number of existing Class II disposal wells, state UIC permit writers, and drilling contractors may cause non-compliance for a significant number of Respondents. In addition, time will be required for some Respondents to reroute produced water collection lines to transport the produced water to injection wells.

V

Respondents may reasonably perform all actions necessary to cease their discharges of produced water no later than January 1, 1997.

Order

Based on the foregoing Findings, it is Ordered that Respondents:

A. Fully comply with all conditions of NPDES Permits No. LAG290000 and TXG290000 except for the prohibition on the discharge of produced water and except for the requirement that all discharges of produced water be reported within twenty-four hours.

B. Complete all activities necessary to attain full and continuance compliance with NPDES Permits No. LAG290000 and TXG290000 as soon as possible, but in no case later than January 1, 1997.

C. Operate and maintain all existing pollution control equipment, including existing oil/water separation equipment, in such a manner as to minimize the discharge of pollutants contained in produced water at all times until such time as respondents cease their discharges of produced water.

D. Submit notice to the Water Enforcement Branch of EPA Region 6 when produced water discharges subject to this Order have ceased.

E. Subject to NPDES Permit LAG290000 comply at all times with Part I. Section B.1.b of said permit, requiring that Respondents meet any more stringent requirements contained in Louisiana Water Quality Regulation, LAC: 33,IX,7.708.

Nothing herein shall preclude additional enforcement action.

The effective date of this Order shall be the effective date of NPDES Permits No. LAG290000 and TXG290000.

[FR Doc. 95–416 Filed 1–6–95; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Approved by Office of Management and Budget

December 30, 1994.

The Federal Communications Commission (FCC) has received Office of Management and Budget (OMB) approval for the following public information collection pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. For further information contact Shoko B. Hair, Federal Communications Commission, (202) 418–1379.

Federal Communications Commission

OMB Control No.: 3060–0626.

Title: Implementation of Sections 3(n) and 332 of the Communications Act—Third Report and Order, Gen. Docket No. 93–252.

Expiration Date: 11/30/97.

Estimated Annual Burden: 6923 total annual hours; .50 - 10 hours per response.

Description: In the Third Report and Order in Gen. Docket No. 93–252, the Commission adopted changes to its technical, operational, and licensing rules for private mobile radio service licensees to implement Sections 3(n) and 332 of the Communications Act of 1934, as amended. These rules are necessary to implement the statute and to establish regulatory symmetry among similar mobile services.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 95–373 Filed 1–6–95; 8:45 am]

BILLING CODE 6712–01–F

Public Information Collection Approved by Office of Management and Budget

December 30, 1994.

The Federal Communications Commission (FCC) has received Office

of Management and Budget (OMB) approval for the following public information collection pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. For further information contact Shoko B. Hair, Federal Communications Commission, (202) 418–1379.

Federal Communications Commission

OMB Control No.: 3060–0508.

Title: Rewrite and Update of Part 22 of the Public Mobile Service Rules (CC Docket No. 92–115).

Expiration Date: 10/31/97.

Estimated Annual Burden: 257,616 total annual hours; .25 - 600 hours per response.

Description: Title III of the Communications Act of 1934, as amended, 47 U.S.C. Sections 301 et. seq., governs the licensing of all communications services which operate through the use of radio frequencies. Part 22 of the FCC Rules contains the technical and legal requirements for mobile radio stations which are classified as common carriers. The services covered by Part 22 are: Air-Ground Radiotelephone Service; Cellular Radiotelephone Service; Offshore Radiotelephone Service; Paging and Radiotelephone Service; and Rural Radiotelephone Service. In CC Docket No. 92–115, the Commission revised in its entirety Part 22 of its rules. The revisions were made to improve the organization and clarity of the Commission's rules by eliminating outdated provisions and unnecessary information collection requirements, streamlining and expediting licensing and processing procedures, and affording licensees greater flexibility in providing services to the public.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 95–374 Filed 1–6–95; 8:45 am]

BILLING CODE 6712–01–F

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Employee Thrift Advisory Council; Open Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), a notice is hereby given of the following committee meeting:

Name: Employee Thrift Advisory Council.

Time: 10:00 A.M.

Date: January 24, 1995.

Place: Fourth Floor, Conference Room, Federal Retirement Thrift Investment Board, 1250 H Street, NW., Washington, DC.

Status: Open.

Matters to be considered:

Approval of the minutes of the June 14, 1994, meeting; report of the Executive Director on the status of the Thrift Savings Plan; legislation; nomination of Council Chairman and election of Vice-Chairman; and new business.

Any interested person may attend, appear before, or file statements with the Council. For further information contact John J. O'Meara, Committee Management Officer, on (202) 942–1660.

Dated: January 4, 1995.

Roger W. Mehle,

Executive Director, Federal Retirement Thrift Investment Board.

[FR Doc. 95–514 Filed 1–5–95; 9:32 am]

BILLING CODE 6760–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Committee to the Director, Centers for Disease Control and Prevention: Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CRC) announces the following committee meeting.

Name: Advisory Committee to the Director, CDC.

Time and date: 8:30 a.m.–3 p.m., January 27, 1995.

Place: CDC, Auditorium A, 1600 Clifton Road, NE., Atlanta, Georgia 30333.

Status: Open to the public, limited only by the space available.

Purpose: This committee advises the Director, CDC, on policy issues and broad strategies that will enable CDC, the Nation's prevention agency, to fulfill its mission of promoting health and quality of life by preventing and controlling disease, injury, and disability. The committee recommends ways to incorporate prevention activities more fully into health care. It also provides guidance to help CDC work more effectively with its various constituents, in both the private and public sectors, to make prevention a practical reality.

Matters to be discussed: The agenda will include updates from CDC Director, David Satcher, M.D., Ph.D., followed by committee discussion on health communication at CDC, reorganization of HIV/AIDS activities, the CDC foundation, and plans for a CDC museum. The remainder of the meeting will be used for a committee discussion on CDC's options for improving grant program implementation. Agenda items are subject to change as priorities dictate.

Contact person for more information: Martha F. Katz, Executive Secretary, Advisory Committee to the Director, CDC, 1600 Clifton Road, NE., Mailstop D–23, Atlanta, Georgia 30333, telephone 404/639–3243.

Dated: January 3, 1995.

William H. Gimson,

Acting Associate Director for Policy Coordination, Centers for Disease Control and Prevention (CDC).

[FR Doc. 95–399 Filed 1–6–95; 8:45 am]

BILLING CODE 4163–18–M

National Committee on Vital and Health Statistics (NCVHS) Subcommittee on Medical Classification Systems and NCVHS Subcommittee on Ambulatory and Hospital Care Statistics: Meetings

Pursuant to Pub. L. 92–463, the National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC), announces the following subcommtitee meetings.

Name: NCVHS Subcommittee on Medical Classification Systems.

Time and date: 9:30 a.m.–12:30 p.m., January 24, 1995.

Place: Room 703A, Hubert H. Humphrey Building, 200 Independence Avenue, SW, Washington, D.C. 20201.

Status: Open.

Purpose: The Subcommittee on Medical Classification Systems will discuss the International Classification of Diseases-9-Coordination Maintenance (ICD–CM) and ICD–10 issues, ICD–9–CM Volume III contract; and review the subcommittee's charge and work plan for 1995.

Name: NCVHS Subcommittee on Medical Classification Systems and NCVHS Subcommittee on Ambulatory and Hospital Care Statistics.

Time and date: 1:30 p.m.–5 p.m., January 24, 1995.

Place: Room 703A, Hubert H. Humphrey Building, 200 Independence Avenue, SW, Washington, D.C. 20201.

Status: Open.

Purpose: The Subcommittee on Medical Classification Systems and the Subcommittee on Ambulatory and Hospital Care Statistics will meet jointly to discuss the uniform core data set for the encounter and enrollment project.

Name: NCVHS Subcommittee on Ambulatory and Hospital Care Statistics.

Time and date: 9 a.m.–3:30 p.m., January 25, 1995.

Place: Room 703A, Hubert H. Humphrey Building, 200 Independence Avenue, SW, Washington, D.C. 20201.

Status: Open.

Purpose: The Subcommittee on Ambulatory and Hospital Care Statistics will discuss core data sets for ambulatory and hospital care, and consider other issues included in its charge.

Contact person for more information: Substantive program information as well as summaries of the meeting and a roster of committee members may be obtained from Gail F. Fisher, Ph.D., Executive Secretary, NCVHS, NCHS, CDC, Room 1100, Presidential Building, 6525 Belcrest Road,

Hyattsville, Maryland 20782, telephone 301/436–7050.

Dated: January 3, 1995.

William H. Gimson,

Acting Associate Director for Policy Coordination, Centers for Disease Control and Prevention (CDC).

[FR Doc. 95–397 Filed 1–6–95; 8:45 am]

BILLING CODE 4163–18–M

Health Resources and Services Administration

Program Announcement and Proposed Review Criteria for Grants for Geriatric Education Centers for Fiscal Year 1995

The Health Resources and Services Administration (HRSA) announces the acceptance of applications for fiscal year (FY) 1995, Grants for Geriatric Education Centers under the authority of section 777(a) of the Public Health Service Act, as amended by the Health Professions Education Extension Amendments of 1992, Pub. L. 102–408, dated October 13, 1992. Comments are invited on the proposed review criteria.

Approximately $6,000,000 will be available in FY 1995 for this program. Total continuation support recommended is $4,100,000. It is anticipated that $1,900,000 will be available to support 13 competing awards averaging $145,000.

Applicants should apply for direct costs of no more than $100,000 (for single institutions) and no more than $150,000 (for consortia of three of more institutions) for the first year of funding.

Eligibility

Section 777(a) of the PHS Act authorizes the award of grants to accredited health professions schools as defined by section 799(1), or programs for the training of physician assistants as defined by section 799(3), or schools of allied health as defined in section 799(4), or schools of nursing as defined by section 853(2).

Applicants must be located in the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, the Republic of Palau, the Republic of the Marshall Islands, or the Federated States of Micronesia.

To receive support, applicants must meet the requirements of regulations as set forth in 42 CFR part 57, subpart 00. The initial period of Federal support should not exceed 3 years. Projects may recompete for an additional 3 years.

Purpose

Grants may be awarded to support the development of collaborative arrangements involving several health professions schools and health care facilities. These arrangements, called Geriatric Education Centers (GECs), are established to facilitate training of health professional faculty, students, and practitioners in the diagnosis, treatment, and prevention of disease, disability, and other health problems of the aged. Health professionals include allopathic physicians, osteopathic physicians, dentists, optometrists, podiatrists, pharmacists, nurses, nurse practitioners, physician assistants, chiropractors, clinical psychologists, health administrators, and allied health professionals.

Projects supported under these grants must offer training involving four or more health professions, one of which must be allopathic or osteopathic medicine. Projects must address one or more of the statutory purposes listed below:

(a) Improve the training of health professionals in geriatrics;

(b) Develop and disseminate curricula relating to the treatment of the health problems of elderly individuals;

(c) Expand and strengthen instruction in methods of such treatment;

(d) Support the training and retraining of faculty to provide such instruction;

(e) Support continuing education of health professionals and allied health professionals who provide such treatment; and

(f) Establish new affiliations with nursing homes, chronic and acute disease hospitals, ambulatory care centers, and senior centers in order to provide students with clinical training in geriatric medicine.

Grant supported projects may be designed to accomplish the statutory purposes in a variety of ways, emphasizing interdisciplinary/multidisciplinary, and discipline-specific approaches to the development of geriatric education resources. For example:

- Health professions schools within a single academic health center, or a consortium of several educational institutions, may share their educational resources and expertise through a Geriatric Education Center to extend a broad range of multidisciplinary educational services outward to other institutions, faculty, facilities and practitioners within a geographic area defined by the applicant.
- Educational institutions that have limited geriatric education resources and which traditionally have had linkages to a geographic area where substantial geriatric education needs exist, may seek to establish a Geriatric Education Center. Such a center could be designed to enhance and expand the capability of collaborating professional schools to provide geriatric education resources in the geographic area in need.
- Projects may support the development of Geriatric Education Centers designed to focus on multidisciplinary geriatric education emphasizing high priority services and high risk groups among the elderly, minority aging, or other special concerns.

National Health Objectives for the Year 2000

The Public Health Service (PHS) urges applicants to submit work plans that address specific objectives of Healthy People 2000. Potential applicants may obtain a copy of *Healthy People 2000* (Full Report; Stock No. 017–001–00474–0) or *Healthy People 2000* (Summary Report; Stock No. 017–001–00473–1) through the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402–9325 (Telephone 202–783–3238).

Education and Service Linkage

As part of its long-range planning, HRSA will be targeting its efforts to strengthening linkages between U.S. Public Health Service supported education programs and programs which provide comprehensive primary care services to the underserved.

Smoke-Free Workplace

The Public Health Service strongly encourages all grant recipients to provide a smoke-free workplace and promote the non-use of all tobacco products. This is consistent with the PHS mission to protect and advance the physical and mental health of the American people.

Established and Proposed Review Criteria

The following review criteria have been established in 42 CFR part 57, subpart OO and will be considered in the review of applications:

(1) The degree to which the proposed project adequately provides for the project requirements;

(2) The extent to which the rationale and specific objectives of the project are based upon a needs assessment of the status of geriatrics training in the institutions to be assisted and/or the geographic area to be served;

(3) The ability of the project to achieve the project objectives within the proposed geographic area;

(4) The adequacy of educational facilities and clinical training settings to accomplish objectives;

(5) The adequacy of organizational arrangements involving professional schools and other organizations necessary to carry out the project;

(6) The adequacy of the qualifications and experience in geriatrics of the project director, staff and faculty;

(7) The administrative and managerial ability of the applicant to carry out the proposed project in a cost-effective manner, and;

(8) The potential of the project to continue on a self-sustaining basis.

In addition, the following review criteria are proposed:

(9) If applicable, the extent to which there is evidence that the institutions jointly have planned and jointly will conduct the proposed consortial activities.

(10) The potential of the project to recruit and/or retain minority faculty members and trainees for participation in long term and/or short term training experiences.

Application Requests

Application materials will be sent only to FY 1994 applicants and to those entities making a request. Requests for grant application materials and questions regarding grants policy and business management issues should be directed to:

Ms. Jacquelyn Whitaker (D–31), Grants Management Specialist, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 8C–26, 5600 Fishers Lane, Rockville, Maryland 20857, telephone: (301) 443–6857.

Completed applications should be returned to the Grants Management Branch at the above address.

If additional programmatic information is needed, please contact: Ms. Pat Dols, Geriatric Initiatives Branch, Division of Associated, Dental, and Public Health Professions, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 8–103, 5600 Fishers Lane, Rockville, Maryland 20857, telephone: (301) 443–6887.

The standard application form PHS 6025–1, HRSA Competing Training Grant Application, General Instructions and supplement for this program have been approved by the Office of Management and Budget under the Paperwork Reduction Act. The OMB clearance number is 0915–0060.

The deadline date for receipt of applications is March 3, 1995. Applications will be considered to be ''on time'' if they are either:

(1) *Received on or before* the established deadline date, or

(2) *Sent on or before* the established deadline date and received in time for orderly processing. (Applicants should request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.)

Late applications not accepted for processing will be returned to the applicant.

This program, Grants for Geriatric Education Centers, is listed at 93.969 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 30, 1994.

James A. Walsh,

Acting Administrator.

[FR Doc. 95–404 Filed 1–6–95; 8:45 am]

BILLING CODE 4160–15–P

National Institutes of Health

National Cancer Institute; Amended Notice of Meeting

Notice is hereby given of a change in the times of some of the meetings of the National Cancer Advisory Board (NCAB) and its Subcommittees, National Cancer Institute, January 9–11, 1995 at the National Institutes of Health, which was published in the Federal Register on January 4, 1995. All changes are for meetings being held on January 10.

The closed portion of the NCAB meeting will begin at 3:30 pm. The meeting of the Subcommittee on Planning and Budget will be held from 12:45 pm and to 2:00 pm. The meeting of the Subcommittee on Information and Cancer Control will be held from 1:30 pm to 3:30 pm. The Subcommittee on Clinical Investigations will begin at 2:30 pm.

Dated: December 30, 1994.

Susan K. Feldman,

Committee Management Officer.

[FR Doc. 95–536 Filed 1–6–95; 8:45 am]

BILLING CODE 4140–01–M

Public Health Service

[GN# 2292]

National Vaccine Advisory Committee; Public Meeting

AGENCY: Office of the Assistant Secretary for Health.

SUMMARY: The Department of Health and Human Services (DHHS) and the Office of the Assistant Secretary for Health are announcing the forthcoming meeting of the National Vaccine Advisory Committee.

DATES: Date, Time and Place: January 19, 1995 at 8:30 a.m.; and January 20, at 8:30 a.m.; Hubert H. Humphrey Building, room 703A, 200 Independence Avenue, SW., Washington, DC 20201. The entire meeting is open to the public.

FOR FURTHER INFORMATION CONTACT: Written requests to participate should be sent to Jeannette R. De Lawter, Committee Management Specialist, National Vaccine Advisory Committee, National Vaccine Program Office, Rockwall II Building, suite 1075, 5600 Fishers Lane, Rockville, MD 20857 (301) 594–2277.

Agenda: Open Public Hearing

Interested persons may formally present data, information, or views orally or in writing on issues pending before the Advisory Committee or on any of the duties and responsibilities of the Advisory Committee as described below. Those wishing to make presentations should notify the contact person before January 13, 1995, and submit a brief statement of the information they wish to present to the Advisory Committee. Requests should include the names and addresses of proposed participants and an indication of the approximate time required to make their comments. A maximum of 10 minutes will be allowed for a given presentation. Any person attending the meeting who does not request an opportunity to speak in advance of the meeting will be allowed to make an oral presentation at the conclusion of the meeting, if time permits, at the chairperson's discretion.

Open Advisory Committee Discussion

There will be updates on the National Vaccine Program Office, and the National Vaccine Compensation Program. There will be discussions on the one working subcommittee: Future Vaccines, and the Interagency Working Group on Pandemic Influenza. Meetings of the Advisory Committee shall be conducted, insofar as is practical, in accordance with the agenda published in the **Federal Register** notices. Changes

in the agenda will be announced at the beginning of the meeting.

Persons interested in specific agenda items may ascertain from the contact person the approximate time of discussion. A list of Advisory Committee members and the charter of the Advisory Committee will be available at the meeting. Those unable to attend the meeting may request this information from the contact person. Summary minutes of the meeting will be made available upon request from the contact person.

Dated: December 27, 1994.

Jeannette R. De Lawter,

Acting Executive Secretary, NVAC.

[FR Doc. 95–327 Filed 1–6–95; 8:45 am]

BILLING CODE 4160–17–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Administration

[Docket No. N–95–3854; FR–3785–N–02]

Notice of Submission of Proposed Information Collection to OMB

AGENCY: Office of Administration, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within thirty (30) days from the date of this Notice. Comments should refer to the proposal by name and should be sent to: Joseph F. Lackey, Jr., OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Kay F. Weaver, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–0050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Ms. Weaver.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notice lists the following information:

(1) The title of the information collection proposal;

(2) The office of the agency to collect the information;

(3) The description of the need for the information and its proposed use;

(4) The agency form number, if applicable;

(5) What members of the public will be affected by the proposal;

(6) How frequently information submissions will be required;

(7) An estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response;

(8) Whether the proposal is new or an extension, reinstatement, or revision of an information collection requirement; and

(9) The names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; Section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: December 22, 1994.

David S. Cristy,

Acting Director, Information Resources Management Policy and Management Division.

Notice of Submission of Proposed Information Collection to OMB

Proposal: Application Submission Requirements—NOFA for Service Coordinators for Public Housing (FR–3785).

Office: Public and Indian Housing.

Description of the Need for the Information and its Proposed Use: Public Housing Authorities operating low-rent conventional public housing with at least 250 or more elderly or disabled families must submit to HUD certain information in an application. The application is reviewed for certain criteria and either ''passes'' or ''fails.'' A lottery competition will be conducted by HUD to determine which PHAs in each geographical region are awarded funding.

Form Number: None.

Respondents: Not-For-Profit Institutions.

Reporting Burden:

	No. of respondents	×	Frequency of response	×	House per response	=	Burden hours
Application	400		1		6		2,400
Recordkeeping	400		1		2		800

Total Estimated Burden Hours: 3,200.

Status: New.

Contact: Bertha Jones, HUD, (202) 708–4233; Joseph F. Lackey, Jr., OMB, (202) 395–7316.

Dated: December 22, 1994.

[FR Doc. 95–389 Filed 1–6–95; 8:45 am]

BILLING CODE 4210–01–M

[Docket No. N–94–3861]

Notice of Submission of Proposed Information Collection to OMB

AGENCY: Office of Administration, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within thirty (30) days from the date of this Notice. Comments should refer to the proposal by name and should be sent to: Joseph F. Lackey, Jr., OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Kay F. Weaver, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW, Washington, DC 20410, telephone (202) 708–0050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Ms. Weaver.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notice lists the following information:

(1) The title of the information collection proposal;

(2) The Office of the agency to collect the information;

(3) The description of the need for the information and its proposed use;

(4) The description of the need for the information and its proposed use;

(5) What members of the public will be affected by the proposal;

(6) How frequently information submissions will be required;

(7) An estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response;

(8) Whether the proposal is new or an extension, rein-statement, or revision of an information collection requirement; and

(9) The names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; Section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: December 21, 1994.

David S. Cristy,

Acting Director, Information Resources Management Policy and Management Division.

Notice of Submission of Proposed Information Collection to OMB

Proposal: Public and Indian Housing: Demolition/Disposition/Conversion/Taking of Units or Property.

Office: Public and Indian Housing.

Description of the Need for the Information and its Proposed use: The purpose of the Housing Authorities request is to seek HUD approval of a change in a public housing development application from what was originally authorized under the Annual Contributions Contract.

Form Number: None.

Respondents: State, Local, or Tribal Governments.

Reporting Burden:

	No. of respondents	×	Frequency of response	×	Hours per response	=	Burden hours
Application	120		1		15.8		1,900
Recordkeeping	120		1		10		1,200

Total Estimated Burden Hours: 3,100

Status: Reinstatement, no changes.

Contact: Virginia Mathis, HUD, (202) 708–1640; Joseph F. Lackey, Jr., OMB, (202) 395–7316.

Dated: December 21, 1994.

[FR Doc. 95–388 Filed 1–6–95; 8:45 am]

BILLING CODE 4210–01–M

Office of the Assistant Secretary for Policy Development and Research

[Docket No. N–95–3836; FR–3825–C–02]

NOFA for Community Outreach Partnership Centers (COPC); Correction

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Notice of Funding Availability (NOFA) for Fiscal Year 1995; Correction.

SUMMARY: This notice corrects the application deadline for a NOFA published in the **Federal Register** on December 22, 1994 (59 FR 66124). The deadline date was not computed in the ''Dates'' section of the NOFA. This notice also corrects the application deadline contained in paragraph III.B. of the NOFA. This notice establishes the application deadline for the NOFA to be March 15, 1995.

FOR FURTHER INFORMATION CONTACT: Jane Karadbil, Office of University Partnerships in the Office of Policy Development and Research, Department of Housing and Urban Development, 451 Seventh Street, S.W., Room 8110, Washington, DC 20410. Telephone number (202) 708–1537 voice; (202) 708–1455 (TDD). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: The Fiscal Year (FY) 1995 Notice of Funding Availability (NOFA) for Community Outreach Partnership Centers (COPC) was published in the **Federal Register** on December 22, 1994 (59 FR 66124). In the ''Dates'' section of the NOFA, the application deadline was not computed. Consequently, the application deadline specified in section III.B. of the NOFA must also be corrected. This notice establishes the application deadline for the NOFA to be March 15, 1995.

Accordingly, FR Doc. 94–31419, the FY 1995 NOFA for Community Outreach Partnership Centers (COPC), published in the **Federal Register** on December 22, 1994 (59 FR 66124), is corrected as follows:

1. On page 66124, column 1, the second paragraph under the heading ''Dates'' is corrected to read as follows:

DATES: * * *

Applications must be physically received by the Office of University Partnerships, in care of the Division of Budget, Contracts, and Program Control, in Room 8230 by 4:30 p.m. eastern standard time on March 15, 1995.

* * * * *

2. On page 66127, column 2, in paragraph III.B., the first paragraph is corrected to read as follows:

III. Application Process

* * * * *

B. Application Deadline

To be considered for funding, the application package must be physically received by the Office of University Partnerships, Office of Policy Development and Research, Department of Housing and Urban Development, in care of the Division of Budget, Contracts, and Program Control, Room 8230, 451 Seventh Street, S.W., Washington, DC 20410 by 4:30 p.m. eastern standard time on March 15, 1995. * * *

Dated: December 30, 1994.

Michael A. Stegman,

Assistant Secretary for Policy Development and Research.

[FR Doc. 95–447 Filed 1–6–95; 8:45 am]

BILLING CODE 4210–62–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Reintroduction of Grizzly Bears to the Bitterroot Ecosystem of East-Central Idaho and Western Montana

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent to prepare an environmental impact statement for the reintroduction of grizzly bears to the Bitterroot ecosystem in east-central Idaho and western Montana.

SUMMARY: This notice advises the public that the Fish and Wildlife Service (Service) intends to gather information for the preparation of an Environmental Impact Statement (EIS) for the reintroduction of grizzly bears to the Bitterroot ecosystem of central Idaho and western Montana. A series of public scoping sessions pertaining to development of the EIS will be held. Notices of the dates, times, and locations of these public opportunities will be advertised in local publications prior to the event. This notice is being furnished as required by the National Environmental Policy Act (NEPA) Regulations (40 CFR 1501.7) to obtain input from other agencies and the public on the scope of issues to be addressed in the EIS. Comments and participation in this scoping process will be solicited.

DATES: Written comments should be received by February 23, 1995.

ADDRESSES: Comments should be addressed to the Grizzly Bear Recovery Coordinator, U.S. Fish and Wildlife Service, P.O. Box 5127, Missoula, Montana 59806.

FOR FURTHER INFORMATION CONTACT: For further information contact Dr. Chris Servheen, (See **ADDRESSES** section) telephone 406/329–3223.

SUPPLEMENTARY INFORMATION: A chapter has been prepared and appended to the Grizzly Bear Recovery Plan that outlines reintroduction as the proposed method for recovery. Public involvement in the drafting of the chapter identified issues that include livestock depredation, effects on big game species/hunting, human health and safety, land use policy/restrictions, the role of the grizzly bear in the ecosystem (naturalness), economics, State and Federal authorities, private property rights, illegal killing/poaching, effects of grizzly bears on other species (such as listed salmon), and the size of the recovery area.

Preliminary alternatives suggested to date by the public include no action (natural recolonization from other populations), restriction of grizzly recovery to wilderness areas, grizzly recovery should include a very broad area, reintroduction of grizzly bears as an experimental population, and reintroduction of grizzly bears as a threatened species.

A scoping brochure is being prepared that details the EIS process, background information, issues identified to date, and how to become involved. Persons who previously requested grizzly recovery information will receive copies. Other interested people can obtain copies by writing to Bitterroot Ecosystem Grizzly Bear EIS, U.S. Fish and Wildlife Service, P.O. Box 5127, Missoula, Montana 59806.

The Service, in cooperation with the Idaho Fish and Game Department, U.S. Forest Service, and the Montana Department of Fish, Wildlife and Parks, is proposing to recover grizzly bears (*Ursus arctos horribilis*) in east-central Idaho and extreme western Montana by reintroducing them to the bitterroot Mountains area of Idaho. Introduced grizzly bears and their resultant offspring would be classified as nonessential experimental under section 10(j) of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*) Proposed is the release of four to six bears per year for 5 years. All bears would be released within established wilderness boundaries in Idaho and would be comprised primarily of younger-aged animals. Bears with no previous known conflict with humans would be captured and moved to the area from either southeastern British Columbia or northwestern Montana. All released bears would be ear-tagged for individual identification and fitted with radio collars so their movements could be monitored. Bears would be located twice weekly (weather permitting) for the life of the radio collars (approximately 3 years). The current status and location of transplanted bears would be relayed weekly to the public through various media contacts. Any bear coming into conflict with people would be dealt with under protocol established by the Interagency Grizzly Bear Committee or under guidelines identified and included as special rules as stated in section 10(j) of the Act for experimental populations. Public participation in the writing of special rules that will govern both the grizzly bear and habitat management would be conducted and encouraged following NEPA guidelines. If approved, the relocation of grizzly bears should begin as early as 1996.

The grizzly bear was once a widespread inhabitant of the Bitterroot Ecosystem in central Idaho and western Montana. Grizzly bears were removed from the Bitterroot area by humans as they settled the West, primarily for the protection of livestock. The last documented grizzly bear was killed in the 1930's, although occasional, unverified reports persist. In 1975, the grizzly bear was listed as threatened in the 48 contiguous States under the Act, which directs Federal agencies to take necessary actions to recover threatened or endangered species. The recovery of grizzly bears in the Bitterroot ecosystem could potentially increase the number of grizzly bears south of Canada by 30–35 percent. In addition, it could potentially provide an important genetic link for grizzly bears between the Cabinet/Yaak, Northern Continental Divide, and Yellowstone ecosystems.

The decision to be made includes whether to implement the proposed action as described above, whether to vary the method or number of bears to be relocated, determining the status under which grizzly bears will be recovered, determine the area in which recovery will be pursued or allowed to occur, and determine which special rules will be adopted as identified through the public participation process.

The Service estimates that the draft EIS will be available for public review and comment by December 1995.

Dated: December 29, 1994.

Ralph O. Morgenweck,

Regional Director, Region 6.

[FR Doc. 95–400 Filed 1–6–95; 8:45 am]

BILLING CODE 4310–55–M

Availability of an Environmental Assessment and Receipt of an Application for an Incidental Take Permit from Mr. D. Gregory Luce, in Baldwin County, AL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: Mr. D. Gregory Luce (Applicant), has applied to the Fish and Wildlife Service (Service) for an incidental take permit pursuant to Section 10(a)(1)(B) of the Endangered Species Act (Act). The proposed permit would authorize for a period of 20 years the incidental take of an endangered species, the Alabama beach mouse *(Peromyscus polionotus ammobates)*, known to occupy lands owned by the Applicant in Gulf Shores, Baldwin County, Alabama. The Application proposed to construct and use a single family residence on a 1.21-acre privately owned lot within the Bon Secour National Wildlife Refuge. The lot is located approximately 7.5 miles west of Gulf Shores, Alabama, at Pine Beach, near the western end of Little Lagoon, between the lagoon and the Gulf shoreline.

The Service also announces the availability of an environmental assessment (EA) and habitat conservation plan (HCP) for the incidental take application. Copies of the EA or HCP may be obtained by making requests to the addresses below. The Service is soliciting data on *Peromyscus polionotus ammobates* in

order to assist in the requirement of the intra-Service consultation. This notice also advises the public that the Service has made a preliminary determination that issuing the incidental take permit is not a major Federal action significantly affecting the quality of the human environment within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969, as amended. The Finding of No Significant Impact is based on information contained in the EA and HCP. The final determination will be made no sooner than 30 days from the date of this notice. This notice is provided pursuant to Section 10(c) of the Act and National Environmental Policy Act Regulations (40 CFR 1506.6).

DATES: Written comments on the permit application, EA and HCP should be received on or before February 8, 1995.

ADDRESSES: Persons wishing to review the application may obtain a copy by writing the Service's Southeast Regional Office, Atlanta, Georgia. Persons wishing to review the EA or HCP may obtain a copy by writing the Regional Office or the Jackson, Mississippi, Field Office. Documents will also be available for public inspection, by appointment, during normal business hours at the Regional Office, or the Field Office. Written data or comments concerning the application, EA, or HCP should be submitted to the Regional Office. Please reference permit under PRT–797979 in such comments.

Regional Permit Coordinator (TE), U.S. Fish and Wildlife Service, 1875 Century Boulevard, suite 210, Atlanta, Georgia 30345, (telephone 404/679–7110, FAX 404/679–7081).

Field Supervisor, U.S. Fish and Wildlife Service, 6578 Dogwood View Parkway, suite A, Jackson, Mississippi 39213 (telephone 601/965–4900, FAX 601/965–4340).

FOR FURTHER INFORMATION CONTACT: Will McDearman at the above Jackson, Mississippi, Field Office.

SUPPLEMENTARY INFORMATION: The Alabama beach mouse (ABM), *Peromyscus polionotus ammobates,* is a subspecies of the common old-field mouse *Peromyscus polionotus* and is restricted to the dune systems of the Gulf Coast of Alabama. The know current range of ABM extends from Fort Morgan eastward to the western terminus of Alabama Highway 182, including the Perdue Unit on the Bon Secour National Wildlife Refuge. The sand dune systems inhabited by this species are not uniform; several habitat types are distinguishable. The species inhabits primary dunes, interdune areas, secondary dunes, and scrub dunes. The depth and area of these habitats from the beach inland varies. Population surveys indicate that this subspecies is usually more abundant in primary dunes than in secondary dunes, and usually more abundant in secondary dunes than in scrub dunes. Optimal habitat consists of dune systems with all dune types. Though fewer ABM inhabit scrub dunes, these high dunes can serve as refugia during devastating hurricanes that overwash, flood, and destroy or alter secondary and frontal dunes. ABM surveys have not been conducted on the Applicant's property. The ABM occupied adjacent and nearby dunes of the Bon Secour National Wildlife Refuge. Suitable habitat in the form of secondary and scrub dunes exist on the Applicant's property. These habitats are likely to be occupied by ABM. None of the Applicant's property resides in designated critical habitat for the ABM. Construction of the single family residence on about 0.1–0.2 acres of the Applicant's property may result in the death of, or injury to, ABM. Habitat alterations due to house placement and its subsequent use may reduce available habitat for food, shelter, and reproduction.

The EA considers the environmental consequences of three alternatives. The proposed action alternative is the issuance of the incidental take permit. This provided for restrictions that include house placement landward of the frontal crest of the scrub dune line, establishment of a walkover structure across that scrub dune, a prohibition against housing or keeping pet cats, scavenger-proof garbage containers, no landscaping, and the minimization and control of outdoor lighting. The HCP provides a funding source for these mitigation measures.

Dated: December 30, 1994.

John T. Brown,

Acting Regional Director.

[FR Doc. 95–422 Filed 1–6–95; 8:45 am]

BILLING CODE 4310–55–P

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 32419]

Consolidated Rail Corporation—Acquisition of Control and Merger—Pittsburgh, Chartiers & Youghiogheny Railway Company

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: The Commission, under 49 U.S.C. 10505, exempts from the prior approval requirements of 49 U.S.C. 11343, *et seq.*, the acquisition by Consolidated Rail Corporation (Conrail), of control of the Pittsburgh, Chartiers & Youghiogheny Railway Company (PC&Y) and PC&Y's merger into Conrail, subject to standard employee protective conditions.

DATES: This exemption is effective on February 8, 1995. Petitions to stay must be filed by January 24, 1995 and petitions to reopen must be filed by February 3, 1995.

ADDRESSES: Send pleadings referring to Finance Docket No. 32419 to: (1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, 1201 Constitution Avenue, N.W., Washington, DC 20423; and (2) Anne E. Treadway, 2001 Market Street, 16–A, Two Commerce Square, Philadelphia, PA 19101–1416.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon, (202) 927–5610. [TDD for the hearing impaired: (202) 927–5721].

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building, 1201 Constitution Avenue, N.W., Washington, DC 20423. Telephone: (202) 289–4357/4359. [Assistance for the hearing impaired is available through TDD services (202) 927–5721.]

Decided: December 21, 1994.

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

Vernon A. Williams,

Secretary.

[FR Doc. 95–415 Filed 1–6–95; 8:45 am]

BILLING CODE 7035–01–P

[Finance Docket No. 32651]

Eastern Maine Railway Company, J.D. Irving, Limited and New Brunswick Railway Company—Petition for Disclaimer of Jurisdiction or, Alternatively, for an Exemption From 49 U.S.C. 11343(a)(5)

AGENCY: Interstate Commerce Commission.

ACTION: Notice of Exemption.

SUMMARY: The Commission, finds jurisdiction and, under 49 U.S.C. 10505, exempts from the prior approval requirements of 49 U.S.C. 11343–11345, the continuance in control by petitioners of Eastern Maine Railway Company (Eastern Maine) upon Eastern Maine becoming a rail common carrier.

The exemption is subject to standard labor protective conditions.

DATES: This exemption will be effective on December 30, 1994. Petitions to reopen must be filed by January 19, 1995.

ADDRESSES: Send pleadings referring to Finance Docket No. 32651 to: (1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, 1201 Constitution Avenue, N.W., Washington, DC 20423; and (2) William C. Evans, 901–15th Street, N.W., Suite 700, Washington, DC 20005–2301.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon, (202) 927–5610. [TDD for the hearing impaired: (202) 927–5721].

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building, 1201 Constitution Avenue, N.W., Washington, D.C. 20423. Telephone: (202) 289–4357/4359. [Assistance for the hearing impaired is available through TDD services at (202) 927–5721].

Decided: December 30, 1994.

By the Commission, Chairman McDonald, Vice Chairman Morgan, and Commissioners Simmons and Owen. Commissioner Owen did not participate in the disposition of this proceeding.

Vernon A. Williams,

Secretary.

[FR Doc. 95–413 Filed 1–6–95; 8:45 am]

BILLING CODE 7035–01–P

[Finance Docket No. 32647]

Fieldcrest Cannon, Inc. and Downeast Securities Corporation—Continuance in Control—Canadian American Railroad Company

AGENCY: Interstate Commerce Commission.

ACTION: Notice of Exemption.

SUMMARY: The Commission, under 49 U.S.C. 10505, exempts from the prior approval requirements of 49 U.S.C. 11343–11345, the continuance in control by Fieldcrest Cannon, Inc. and Downeast Securities Corporation (collectively, petitioners) of Canadian American Railroad Company (CDAC), upon CDAC becoming a rail common carrier. Petitioners presently control Bangor and Aroostook Railroad Company. The exemption is subject to standard labor protective conditions.

DATES: This exemption will be effective on December 30, 1994. Petitions to reopen must be filed by January 19, 1995.

ADDRESSES: Send pleadings referring to Finance Docket No. 32647 to: (1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, 1201 Constitution Avenue, NW., Washington, DC 20423; and (2) James E. Howard, One International Place, Boston, MA 02110.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon, (202) 927–5610. [TDD for the hearing impaired: (202) 927–5721].

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, 1201 Constitution Avenue, NW., Washington, DC 20423. Telephone: (202) 289–4357–4359. [Assistance for the hearing impaired is available through TDD services at (202) 927–5721].

Decided: December 30, 1994.

By the Commission, Chairman McDonald, Vice Chairman Morgan, and Commissoners Simmons and Owen. Commissioner Owen did not participate in the disposition of this proceeding.

Vernon A. Williams,

Secretary.

[FR Doc. 95–412 Filed 1–6–95; 8:45 am]

BILLING CODE 7035–01–P

[Finance Docket No. 31717]

Iowa Power, Inc.—Construction Exemption—Council Bluffs, Iowa and

[Finance Docket No. 32453]

CBEC Railway, Inc.—Acquisition and Operation Exemption—Great Western Railway Company of Iowa, Inc.—Council Bluffs, IA

The Iowa Power, Inc. (Iowa Power) has petitioned the Interstate Commerce Commission (Commission) for authority to construct and operate a 3.0 mile rail line in Council Bluffs, Iowa. In a related proceeding, CBEC Railway, Inc. (CBEC) acquired an existing three mile rail line which it would rehabilitate and operate in order to carry the traffic generated from the proposed rail construction project, if approved by the Commission. The Commission's Section of Environmental Analysis (SEA) has prepared its Environmental Assessment (EA). Based on the information provided and the environmental analysis conducted to date, this EA concludes that this proposal should not significantly affect the quality of the human environment if the recommended mitigation measures set forth in the EA are implemented. Accordingly, SEA preliminarily recommends that the Commission impose on any decision approving the proposed construction and operation conditions that would implement the mitigation measures contained in the EA. The EA will be served on all parties of record as well as all appropriate Federal, state and local officials and will be made available to the public upon request. SEA will consider all comments received in response to the EA in making final environmental recommendations to the Commission. The Commission will then consider SEA's final recommendations and the environmental record in making its final decision in this proceeding.

Comments (an original and 10 copies) and any questions regarding this EA should be filed with the Commission's Section of Environmental Analysis, Office of Economic and Environmental Analysis, Room 3219, Interstate Commerce Commission, Washington, DC 20423, to the attention of Ms. Tawanna Glover-Sanders (202) 927–6203. Requests for copies of the EA should also be directed to Ms. Glover-Sanders.

Date made available to the public: January 6, 1995.

Comment due date: February 6, 1995.

By the Commission, Elaine K. Kaiser, Chief, Section of Environmental Analysis, Office of Economic and Environmental Analysis.

Vernon A. Williams,

Secretary.

[FR Doc. 95–414 Filed 1–6–95; 8:45 am]

BILLING CODE 7035–01–P

[Docket No. AB–422X]

Kelley's Creek and Northwestern Railroad Company—Abandonment Exemption—Between Mammoth and Cedar Grove, in Kanawha County, WV

The Commission, under 49 U.S.C. 10505, exempts from the prior approval requirements of 49 U.S.C. 10903–10904 the abandonment by Kelley's Creek and Northwestern Railroad Company of its entire 4.7-mile line of railroad between Donaldson Mine Company near Mammoth, WV and the barge loading facilities on the Kanawha River at Cedar Grove, WV.

Any comments must be filed with the Commission and served on: James K. Kearney, 1200 8th Street, N.W., Washington, DC 10036.

This exemption will be effective on February 8, 1995. Formal expressions of

intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2)[1] and petitions to stay must be filed by January 19, 1995. Requests for a public use condition and petitions to reopen must be filed by January 30, 1995. For further information, contact Joseph H. Dettmar (202) 927–5660.

Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., Interstate Commerce Commission Building, 1201 Constitution Avenue, N.W., Room 2229, Washington, DC 20423. Telephone: (202) 289–4357/4359. [Assistance for the hearing impaired is available through TDD services (202) 927–5271.]

Decided: December 19, 1994.

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

Vernon A. Williams,

Secretary.

[FR Doc. 95–411 Filed 1–6–95; 8:45 am]

BILLING CODE 7035–01–P

[1] See *Exempt. of Rail Abandonment—Offers of Finan. Assist.*, 4 I.C.C.2d 164 (1987).

[Docket No. AB–12 (Sub-No. 171X) and Docket No. AB–409 (Sub-No. 3X)]

Southern Pacific Transportation Company—Discontinuance of Service Exemption—in Los Angeles County, CA, and Los Angeles County Metropolitan Transportation Authority—Abandonment Exemption—in Los Angeles County, CA

The Commission, under 49 U.S.C. 10505, exempts from the prior approval requirements of 49 U.S.C. 10903–10906, the discontinuance of service by Southern Pacific Transportation Company on a 5.21-mile segment of the Burbank Branch from milepost 448.55, at or near the Canoga Park rail station, to milepost 453.76, at or near the Burbank rail station, in Los Angeles County, CA. The exemption is granted subject to standard labor protective conditions. The Commission also imposes standard labor protective conditions on the abandonment of the same line segment by the Los Angeles County Metropolitan Transit Authority.

Any comments must be filed with the Commission and served on: Gary A. Laakso, Southern Pacific Building, One Market Plaza, San Francisco, CA 94105.

This exemption is effective upon publication in the **Federal Register**. Formal expressions of intent to file an offer of financial assistance and requests for a public use condition will not be accepted. Petitions to reopen must be filed by February 3, 1995. For further information, contact Joseph H. Dettmar, (202) 927–5660.

Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write, call, or pick up in person from: Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, 1201 Constitution Avenue, NW., Washington, DC 20423. Telephone (202) 289–4357/4359. [Assistance for the hearing impaired is available through TDD services (202) 927–5721.]

Decided: December 16, 1994.

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

Vernon A. Williams,

Secretary.

[FR Doc. 95–410 Filed 1–6–95; 8:45 am]

BILLING CODE 7035–01–P

DEPARTMENT OF LABOR

Office of the Secretary

Glass Ceiling Commission; Open Meeting

SUMMARY: Pursuant to Title II of the Civil Rights Act of 1991 (Pub. L. 102–166) and Section 9 of the Federal Advisory Committee Act (FACA) (Pub. L. 92–462, 5 U.S.C. app. II) a Notice of establishment of the Glass Ceiling Commission was published in the **Federal Register** on March 30, 1992 (57 FR 10776). Pursuant to section 10(a) of FACA, this is to announce a meeting of the Commission which is to take place on Monday, January 23, 1995 and Tuesday, January 24, 1995. The purpose of the Commission is to, among other things, focus greater attention on the importance of eliminating artificial barriers to the advancement of minorities and women to management and decisionmaking positions in business. The Commission has the practical task of: (a) Conducting basic research into practices, policies, and manner in which management and decisionmaking positions in business are filled; (b) conducting comparative research of businesses and industries in which minorities and women are promoted or are not promoted; and (c) recommending measures to enhance opportunities for and the elimination of artificial barriers to the advancement of minorities and women to management and decisionmaking positions.

TIME AND PLACE: The meeting will be held on January 23, 1995, 4 p.m.–7 p.m. and again on Tuesday, January 24, 1995, 9 a.m. to 12 noon (Eastern Standard Time) in the Department of Labor, room C–5515 (Seminar Room 5).

The Commission will meet to discuss the status of the activities and tasks of the Commission.

The agenda for the meeting includes: Review of Perkins-Dole Application Process for 1995; Update on Research; Review of Report.

Individuals with disabilities should contact Ms. René A. Redwood at (202) 219–7342 no later than January 19, 1995, if special accommodations are needed.

FOR FURTHER INFORMATION CONTACT: Ms. René A. Redwood, Executive Director, Glass Ceiling Commission, U.S. Department of Labor, 200 Constitution Avenue, NW., room C–2313, Washington, DC 20210, (202) 219–7342.

Signed at Washington, DC, this 4th day of January, 1995.

Robert B. Reich,

Secretary of Labor.

[FR Doc. 95–469 Filed 1–6–95; 8:45 am]

BILLING CODE 4510–23–M

NUCLEAR REGULATORY COMMISSION

Nominations of New Members of the Advisory Committee on the Medical Uses of Isotopes

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Call for nominations.

SUMMARY: The U.S. Nuclear Regulatory Commission is inviting nominations of individuals who are qualified as medical physicists in radiation therapy, for its Advisory Committee on the Medical Uses of Isotopes (ACMUI).

DATES: Nominations are due on or before March 10, 1995.

ADDRESSES: Submit nominations to: The Office of Personnel, Attn: Jude Himmelberg, Mail Stop T2D32, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

FOR FURTHER INFORMATION CONTACT: Larry W. Camper, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: 301–415–7269.

SUPPLEMENTARY INFORMATION: The ACMUI advises NRC on policy and technical issues that arise in regulating the medical use of byproduct material for diagnosis and therapy. Responsibilities include providing guidance and comments on changes in NRC rules, regulations, and guides concerning medical use; evaluating

certain non-routine uses of byproduct material for medical use; and providing technical assistance in licensing, inspection, and enforcement cases.

Committee members possess the medical and technical skills needed to address evolving issues. Currently the membership of the ACMUI consists of five practicing physicians; a physician representing the U.S. Food and Drug Administration; one nuclear pharmacist; one medical physicist; one representative with the States' perspective; and one patients' rights and care advocate. The specialties of the physicians on the ACMUI are: nuclear cardiology (one); therapeutic radiology, with expertise in teletherapy and brachytherapy (two); nuclear medicine research (one); and nuclear medicine (one). Nominations for the position of radiation therapy technologist/medical dosimetrist are currently being evaluated. The nominee for the position of health care administrator has been approved.

NRC is soliciting nominations of persons who are qualified in medical physics, with experience in radiation therapy. Persons having the aforementioned qualifications are encouraged to apply.

Nominees must include four copies of their resume, describing their educational and professional qualifications, and provide their current address and telephone number.

All new Committee members will serve a 2-year term, with possible reappointment to two additional 2-year terms.

Nominees must be U.S. citizens and be able to devote approximately 80 hours per year to committee business. Members will be compensated and reimbursed for travel (including per diem in lieu of subsistence), secretarial, and correspondence expenses. Nominees will undergo a security background check and will be required to complete financial disclosure statements, to avoid conflict of interest issues.

Dated at Washington, DC, this 3rd day of January, 1995.

For the Nuclear Regulatory Commission.

Andrew L. Bates,

Advisory Committee Management Officer, Office of the Secretary of the Commission.

[FR Doc. 95–402 Filed 1–6–95; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–133]

Pacific Gas and Electric Company; Humboldt Bay Nuclear Power Station; Notice of Temporary Closing of Local Public Document Room

Notice is hereby given that the Humboldt County Library, Eureka, California, which serves as the local public document room (LPDR) for the Pacific Gas and Electric Company's Humboldt Bay Nuclear Power Station, will be temporarily closed for approximately six weeks due to structural damage to the library building from the December 26, 1994, earthquake.

Persons interested in using the LPDR collection during this period are asked to contact the NRC LPDR staff for assistance, at (800) 638–8081, toll-free. Every effort will be made to meet the informational needs of patrons.

Patrons outside the service area of the LPDR may address their requests for records to the NRC's Public Document Room, 2120 L Street, NW. (Lower-Level), Washington, DC 20555, telephone number (202) 634–3273.

Questions concerning the NRC's LPDR program or the availability of documents pertaining to the Humboldt Bay Nuclear Power Station should be addressed to Ms. Jona Souder, LPDR Program Manager, Freedom of Information Act/Local Public Document Room Branch, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone number (800) 638–8081.

Dated at Rockville, Maryland, this 3d day of January 1995.

For the Nuclear Regulatory Commission.

Carlton C. Kammerer,

Director, Division of Freedom of Information and Publications Services, Office of Administration.

[FR Doc. 95–403 Filed 1–6–95; 8:45 am]

BILLING CODE 7590–01–M

[Docket Nos. 50–424–OLA–3; 50–425–OLA–3; Re: License Amendment (Transfer to Southern Nuclear) ASLBP No. 96–671–01–OLA–3]

Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2); Evidentiary Hearing,

January 3, 1995.

Pursuant to 10 CFR 2.752, a public evidentiary hearing will begin at 1 pm, January 9, 1995, and continue to the 14th in Courtrooms 810 and 812 in the Russell Building, 75 Spring Street, NW., Atlanta, Georgia.

This hearing began on January 4, 1994, in Rockville, Maryland. Its purpose is to receive evidence concerning alleged misrepresentations about an alleged illegal transfer of operating authority for the Vogtle Plant.

For the Atomic Safety and Licensing Board.

Peter B. Bloch,

Chair.

[FR Doc. 95–401 Filed 1–6–95; 8:45 am]

BILLING CODE 7590–01–M

[Docket Nos. 50–327 and 50–328]

Tennessee Valley Authority Sequoyah Nuclear Plant, Units 1 and 2; Consideration of Issuance of Amendments to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License Nos. DPR–77 and DPR–79, issued to the Tennessee Valley Authority (TVA or the licensee), for operation of the Sequoyah Nuclear Plant, Units 1 and 2 located in Soddy-Daisy, Tennessee.

The proposed amendments would add a permissive statement to Surveillance Requirement 4.9.7.1 that will allow the auxiliary building bridge crane interlocks and physical stops to be defeated during implementation of the spent fuel pool (SFP) storage capacity increase modification (rerack). This modification was approved by Amendment Nos. 167 and 157 for Unit 1 and Unit 2 respectively, dated April 28, 1993.

The original request and subsequent amendments described the implementation of the SFP storage capacity increase modification in detail, but did not explicitly address the need to actually bypass the crane interlocks and remove the physical stops. This need was implied since the crane would have to be positioned above the SFP to remove and replace the racks. However, when the reracking began, a concern was raised that the inability to perform the crane interlock and physical stops surveillance test was not explicitly allowed by the amendments or the technical specifications. As a result, the reracking has been stopped at considerable expense to the utility and will result in schedule slippage. Also, the components are in an interrum configuration with equipment and tools temporarily in a standby status. Since it is desirable to complete the modification without delay in order to ensure adequate off-load capability, the amendments are being processed on an exigent basis.

Before issuance of the proposed license amendments, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

Pursuant to 10 CFR 50.91(a)(6) for amendments to be granted under exigent circumstances, the NRC staff must determine that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendments would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

TVA has evaluated the proposed technical specification (TS) charge and has determined that it does not represent a significant hazards consideration based on criteria established in 10 CFR 50.92(c). Operation of Sequoyah Nuclear Plant (SQN) in accordance with the proposed amendment will not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated.

The SQN TSs prohibit loads in excess of 2100 pounds from travel over fuel assemblies in the spent-fuel pool and require the associated crane interlocks and physical stops to be periodically demonstrated operable. During the installation process, the crane interlocks and physical stops must be defeated to allow the removal and installation of racks and associated tools to be moved over the spent-fuel pool. Additionally, administrative controls are in place to return the crane interlocks and physical stops to an operable status after each phase of crane use. It should be noted movement over fuel in the spent-fuel pool is prohibited. Therefore, the defeat of the interlocks and physical stops does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Create the possibility of a new or different kind of accident from any previously analyzed.

A fuel movement and rack change-out sequence has been developed that illustrates that it will not be necessary to carry existing or new racks over fuel in the cask loading area or any region of the pool containing fuel. A lateral-free zone clearance from stored fuel shall be maintained.

Accordingly, it can be concluded that the bypassing of the interlocks and removal of the physical stops does not create the possibility of a new or different kind of accident from any previously analyzed.

3. Involve a significant reduction in a margin of safety.

The SQN rerack project will ensure maximum emphasis to mitigate the potential load-drop accident by implementing measures to eliminate shortcomings in all aspects of the operation. Elimination of shortcomings will be accomplished by comprehensive training of the installation crew, redundancies built in lifting devices, procedures to address each phase of the project, and prohibitions of lifts over fuel assemblies in the spent-fuel pool. Therefore, defeating the crane interlock and physical stops to perform the required lifts does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposed to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 15 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendments until the expiration of the 15-day notice period. However, should circumstances change during the notice period, such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 15-day notice period, provided that its final determination is that the amendments involve no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Rules Review and Directives Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

By January 24, 1995, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC and at the local public document room located at the Chatanooga-Hamilton County Library, 1101 Broad Street, Chattanooga, Tennessee 37402. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended

petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing.

The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If the amendment is issued before the expiration of the 30-day hearing period, the Commission will make a final determination on the issue of no significant hazards consideration. If a hearing is requested, the final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. Where petitions are filed during the last 10 days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1–(800) 248–5100 (in Missouri 1–(800) 342–6700). The Western Union operator should be given Datagram Identification Number N1023 and the following message addressed to Mr. Frederick J. Hebdon: petitioner's name and telephone number, date petition was mailed, plant name, and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to General Council, Tennessee Valley Authority, ET 11H, 400 West Summit Hill Drive, Knoxville, Tennessee 37902, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated January 3, 1995, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room, located at the Chattanooga-Hamilton County Library, 1101 Broad Street, Chattanooga, Tennessee 37402.

Dated at Rockville, Maryland, this 4th day of January 1995.

For the Nuclear Regulatory Commission.

David E. LaBarge,

Sr. Project Manager, Project Directorate II–4, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 95–535 Filed 1–6–95; 8:45 am]

BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–35187; File No. SR–BSE–94–12]

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 to Proposed Rule Change Relating to its Specialist Performance Evaluation Program

December 30, 1994.

I. Introduction

On October 3, 1994, the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') submitted to the Securities and Exchange Commission (''SEC'' or ''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 extend its Specialist Performance Evaluation Program (''SPEP'' or ''Evaluation Program''), which currently incorporates objective measures of specialist performance, for an additional twelve-month period.[3] On October 6, 1994, the Exchange submitted Amendment No. 1 to the proposed rule change in order to correct certain typographical errors.

The proposed rule change, together with Amendment No. 1, was published for comment in Securities Exchange Act Release No. 34819 (October 11, 1994), 59 FR 52327 (October 17, 1994). No comments were received on the proposal. This order approves proposed rule change, including Amendment No. 1.

II. Description of the Proposal

The Exchange proposes to extend its Specialist Performance Evaluation

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1991).

[3] The Commission initially approved the BSE's SPEP pilot program in Securities Exchange Act Release No. 22993 (March 10, 1986), 51 FR 8298 (March 14, 1986) (File No. SR–BSE–84–04). The Commission subsequently extended the pilot program in Securities Exchange Act Release Nos. 26162 (October 6, 1988), 53 FR 40301 (October 14, 1988) (File No. SR–BSE–87–06); 27656 (January 30, 1990), 55 FR 4296 (February 7, 1990) (File No. SR–BSE–90–01); 28919 (February 26, 1991), 56 FR 9990 (March 8, 1991) (File No. SR–BSE–91–01); and 30401 (February 24, 1992), 57 FR 7413 (March 2, 1992) (File No. SR–BSE–92–01). The BSE was permitted to incorporate objective measures of specialist performance into its pilot program in Securities Exchange Act Release No. 31890 (February 19, 1993), 58 FR 11647 (February 26, 1993) (File No. SR–BSE–92–04) (''February 1993 Approval Order''), at which point the initial pilot program ceased to exist as a separate program. Commission approval of the BSE's current SPEP pilot program expires on December 31, 1994. *See* Securities Exchange Act Release No. 33341 (December 15, 1993), 58 FR 67875 (December 22, 1993) (File No. SR–BSE–93–16) (''December 1993 Approval Order'').

Program to incorporate objective measures of specialist performance.[4] The current pilot program uses the BEACON system [5] to assess how well a specialist handles market and marketable limit orders routed to him for execution. For each specialist, a record of all action taken on relevant BEACON orders is accumulated in a special file, from which the four calculations described below are run.

First, Turnaround Time measures the average number of seconds from the receipt of a guaranteed market or marketable limit order (*i.e.*, for 1299 shares or less) in BEACON until it is executed (in whole or in part), stopped or cancelled.[6] Time continues to accumulate if the specialist just moves an order from the auto-ex screen to the manual one, until that order is executed (in whole or in part), stopped or cancelled.

Second, Holding Orders Without Action measures the number of market and marketable limit orders which are neither executed, stopped nor cancelled within twenty-five seconds. This measure differs from Turnaround Time in that orders of all sizes (including those already counted toward Turnaround Time) are analyzed.[7]

Third, Trading Between the Quote measures the number of market and marketable limit orders that are executed between the best consolidated bid and offer where the spread is greater than 1/8th.

Fourth, Executions in Size Greater than Best Bid and Offer (''BBO'') measures the number of market and marketable limit orders which exceed, and are executed in a size larger than, BBO size.

For each of the above measures, including the revised questionnaire, the specialist receives a raw score. A ten point grading scale is then applied to ranges of raw scores. In computing the overall program score, the measures are assigned the following weights: Turnaround Time, 15%; Holding Orders Without Action, 15%; Trading Between the Quote, 25%; Executions in Size Greater than BBO, 25%; Questionnaire, 20%.

At the same time as it incorporated the objective measures described above, the Exchange also revised the conditions for performance review. For each measure, the Evaluation Program states at what score specialist performance is deemed to be adequate.[8] A specialist who is deficient in the same one objective measure, for two out of three consecutive review periods, is required to appear before the Performance Improvement Action Committee.[9] The purpose of this meeting is to discuss, informally, possible methods of improving the specialist's performance.

If the specialist does not improve in the next review period, he is referred to the Market Performance Committee. The Market Performance Committee is directed to take such actions as it deems necessary and appropriate to address the deficient score. These actions include suspending a specialist's trading account, suspending his alternate specialist account privilege,[10] or reallocating his specialty stocks.[11]

Finally, the BSE also incorporated modified relative rankings into its Evaluation Program. Exchange staff reviews the performance of any specialists whose scores place them in the bottom ten percent of all BSE units.[12] In addition, a specialist who is deficient on the overall program score, for two out of three consecutive review periods, is required to appear before the Market Performance Committee, with the same possible consequences as above.[13]

The BSE has requested a twelve-month extension of the current pilot program to enable the Exchange to evaluate further the appropriateness of the measures and their respective weights, as well as the effectiveness of the overall evaluation program. The BSE believes that the proposed rule change will promote just and equitable principles of trade and aid in the perfection of a free and open market and a national market system. The Exchange states that the SPEP results weigh heavily in stock allocation decisions and, as a result, specialists are encouraged to improve their market quality and administrative duties.

III. Discussion

The Commission believes that specialists play a crucial role in providing stability, liquidity and continuity to the trading of stocks. Among the obligations imposed upon specialists by the Exchange, and by the Act and the rules thereunder, is the maintenance of fair and orderly markets in their designated securities.[14] To ensure that specialists fulfill these obligations, it is important that the Exchange conduct effective oversight of their performance. The BSE's Specialist Performance Evaluation Program is critical to this oversight.

In its order approving the incorporation of objective measures of performance,[15] the Commission asked the Exchange to monitor the effectiveness of the amended Evaluation Program. Specifically, the Commission requested information about the number of specialists who fell below acceptable levels of performance for each objective measure, the questionnaire and the overall program; and about the specific measures in which each such specialist was deficient. The Commission also requested information about the number of specialists who, as a result of each

[4] *See* February 1993 Approval Order, *supra*, note 3. In addition to the substantive changes discussed below, SPEP was moved to Ch. XV, ¶ 2156 of the BSE Rules.

[5] BEACON is the BSE's automated order-routing and execution system. Of all incoming BEACON orders, SPEP collects data for regular buy and sell market and marketable limit orders only. Thus BEACON orders with qualifiers (*e.g.*, buy minus or sell plus, market-on-close, stop, stop limit, all or none, etc.) and crosses are excluded from analysis.

[6] Data collection starts when the stock opens on the primary market. Blocks of time are excluded in the event of trading halts, BEACON system failure, etc.

[7] The same exclusions apply for Holding Orders Without Action as for Turnaround Time. *See supra*, note 6.

[8] A specialist is deficient in any individual objective measure or the overall program if he scores below certain minimum performance levels, as set forth below. Thus for his performance to be deemed adequate, a specialist must receive the following scores:

Overall Evaluation—at or above weighted score of 5.80

Turnaround Time—below 21.0 seconds (8 points)

Holding Orders Without Action—below 21% (7 points)

Trading Between the Quote—at or above 26% (5 points)

Executions Greater than BBO—at or above 76% (6 points)

Questionnaire—at or above weighted score of 50 (4 points)

[9] In the event a specialist receives a deficient score on the questionnaire alone, the Exchange staff reviews the deficient questionnaire to determine if there is sufficient reason to warrant informing the Performance Improvement Action Committee of potential performance problems.

[10] Alternate specialists provide added liquidity to the market, by promising to trade up to a certain amount of shares, on the request of the primary specialist. A specialist must apply for the privilege of being an alternate.

[11] The possible performance improvement actions are described in the BSE Rules under SPEP's Supplemental Material. This Supplemental Material is intended to provide specialists with adequate notice of the consequences of poor performance. It does not articulate any new substantive standards.

[12] In the event a specialist ranked in the bottom ten percent does not fall below the threshold for the overall program score, the Exchange staff reviews the performance of the specialist to determine if there is sufficient reason to warrant informing the Performance Improvement Action Committee of potential performance problems.

[13] *See supra*, text accompanying notes 10–11.

[14] Rule 11b–1, 17 CFR 240.11b–1 (1991); Ch. XV, ¶ 2155.01 of the BSE Rules.

[15] For a description of the Commission's rationale for approving the incorporation of objective measures of performance into the BSE's SPEP on a pilot basis, *see* February 1993 Approval Order, *supra*, note 3. The discussion in the aforementioned order is incorporated by reference into this order.

condition for review,[16] were referred to the Performance Improvement Action Committee and/or the Market Performance Committee; and about the type of action taken with respect to each such deficient specialist.

In September 1993, and October 1994, the BSE submitted to the Commission monitoring reports regarding its amended Evaluation Program. The reports describe the BSE's experience with the pilot program during 1993 and the first two review periods of 1994. In terms of the overall scope of the Evaluation Program, the Commission continues to believe that objective measures, together with a floor broker questionnaire, should generate sufficiently detailed information to enable the Exchange to make accurate assessments of specialist performance. Based on results from several review periods, the BSE appears to have implemented its BEACON criteria and generated data to assess, in a quantitative way, how well specialists carry out certain aspects (*i.e.*, timeliness of execution, price improvement and market depth) of their responsibilities as specialists.

The Commission also has reviewed the BSE's experience with its minimum adequate performance thresholds. Based on the number of specialists who surpassed acceptable levels of performance for each measure (and on an informal comparison of the floor-wide average to the minimum threshold), it appears that these standards have been helpful in identifying some specialists with potential performance problems, as well as providing an incentive for improved market making performance.

Finally, based on the information provided in the BSE's monitoring reports, the Commission finds that the Exchange applied its conditions for review fairly and consistently. The Commission continues to believe that, taking the Evaluation Program as a whole, most potential performance problems should be brought to the attention of the appropriate committee. In terms of the BSE's response to the deficiencies it identified, the Commission notes that the monitoring reports only cover a limited time period; accordingly, it is too soon for the Commission to reach any definitive conclusion about the effectiveness of the performance improvement actions. Nevertheless, the BSE should examine its Evaluation Program to ensure that adequate corrective actions are taken with respect to each deficient specialist.

In conclusion, the Commission believes that the BSE has taken a good first step toward developing a more effective Specialist Performance Evaluation Program. Accordingly, the Commission believes that it is appropriate to extend the current pilot program for an additional twelve-month period, expiring December 31, 1995. This twelve-month period will allow the Exchange to respond to the Commission's concerns about the Evaluation Program, as set forth below. First, the Commission suggests that the BSE consider incorporating additional objective criteria, so that the Exchange can conduct and even more thorough analysis of specialist performance.[17] At the same time, the BSE should assess whether each measure, as well as the questionnaire, is assigned an appropriate weight.[18] Moreover, the Commission strongly encourages the Exchange to conduct an ongoing examination of its minimum adequate performance thresholds, in order to ensure that they continue to be set at appropriate levels. The Commission also continues to believe that relative performance rankings that subject the bottom ten percent of all specialists units to review by an Exchange committee are an important part of an effective Evaluation Program. Finally, the BSE should closely monitor the conditions for review and should take steps to ensure that all specialists whose performance is deficient and/or diverges widely from the best units will be subject to meaningful review. In the Commission's opinion, a meaningful review process would ensure that adequate corrective actions are taken with respect to each deficient specialist. The Commission would have difficulty granting permanent approval to an Evaluation Program that did not include a satisfactory response to the concerns described above.

The Commission therefore requests that the BSE submit a report to the Commission, by June 1, 1995, describing its experience with the pilot. At a minimum, this report should contain data, for the last review period of 1994 and the first review period of 1995, on (1) the number of specialists who fell below acceptable levels of performance for each objective measure,[19] the questionnaire and the overall program, and the specific measures in which each such specialist was deficient; (2) the number of specialists who, as a result of the objective measures, appeared before the Performance Improvement Action Committee for informal counseling; (3) the number of such specialists then referred to the Market Performance Committee and the type of action taken; (4) the number of specialists who, as a result of the overall program, appeared before the Market Performance Committee and the type of action taken; (5) the number of specialists who, as a result of the questionnaire or falling in the bottom ten percent, were referred by the Exchange staff to the Performance Improvement Action Committee and the type of action taken (this should include the number of specialists then referred to the Market Performance Committee and the type of action taken by that Committee); and (6) a list of stocks reallocated due to substandard performance and the particular unit involved. Any requests to modify this pilot, to extend its effectiveness or to seek permanent approval for the Evaluation Program should be submitted to the Commission by July 31, 1995, as a proposed rule change pursuant to Section 19(b) of the Act.

IV. Conclusion

For the reasons discussed above, the Commission finds that the proposed rule change is consistent with the requirements of Sections 6 and 11 of the Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission believes the proposal is consistent with the Section 6(b)(5)[20] requirement that the rules of the Exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Further, the Commission finds that the proposal is consistent with Section 11(b) of the Act,[21] and Rule 11b–1 thereunder,[22] which allow securities exchanges to promulgate rules relating to specialists in order to maintain fair and orderly markets and to remove

[16] *See supra*, notes 8–13 and accompanying text.

[17] For example, the BSE could develop additional measures of market depth, such as how often the specialist's quote exceeds 500 shares or how often the BSE quote, in size, is larger than the BBO (excluding quotes for 100 shares). Another possible objective criteria could measure quote performance (*i.e.*, how often the BSE specialist's quote, in price, is alone at or tied with the BBO).

[18] In this regard, because of the substantial overlap between Turnaround Time and Holding Orders Without Action, the Commission recommends that the BSE consider either having only one measure in this category (*i.e.*, timeliness of execution) or reducing the weights of the existing measures, which together account for the current Evaluation Program.

[19] For each objective measure, the Commission also requests that the BSE provide the mean and median scores.

[20] 15 U.S.C. 78f(b)(5) (1988).

[21] 15 U.S.C. 78k(b) (1988).

[22] 17 CFR 240.11b–1 (1991).

impediments to and perfect the mechanism of a national market system.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[23] that the proposed rule change (SR–BSE–94–12) is approved on a pilot basis until December 31, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[24]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–387 Filed 1–6–95; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–35178; File No. SR–CBOE 94–34]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 to Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to the Establishment of Uniform Listing and Trading Guidelines for Stock Index and Currency Warrants

December 29, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 29, 1994, the Chicago Board Options Exchange, Inc. (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE proposes to adopt rules governing stock index and currency warrants.[3] On December 21, 1994, the CBOE amended certain surveillance related matters addressed in the filing. (See footnote 6 *infra*.)

The text of the proposed rule change is available at the Office of the Secretary, CBOE and at the Commission.

[23] 15 U.S.C. 78s(b)(2) (1988).

[24] 17 CFR 200.30–3(a)(12) (1991).

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1991).

[3] Currency warrants, as used in this filing, may refer to warrants on individual currencies (or cross currencies) or to warrants on a specific currency index group (''currency index warrants.'')

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CBOE 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 CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On October 19, 1990, the Commission approved SR–CBOE–90–08 authorizing the Exchange to list and trade stock, warrants and other securities.[4] This filing proposes rules governing customer protection and margin requirements for stock index warrants, currency index warrants and currency warrants and position limits for stock index warrants. This filing incorporates the results of numerous communications with the Commission staff and other exchanges, including comments contained in a letter from Sharon Lawson to Joanne Moffic-Silver dated January 28, 1993 (''Lawson letter''). This filing also makes certain changes in the listing criteria for stock index and currency warrants and makes clear that certain rules applicable to currency warrants would apply equally to currency index warrants.

Position Limits. The Exchange is proposing position limits for stock index warrants that, in general, are approximately 75%, in terms of underlying dollar value, of the current position limits for index options. Existing Exchange Rule 4.13, Reports Related to Position Limits, and Rule 4.14, Liquidation of Positions, are made applicable to transactions in stock index warrants.

Customer Protection. Modifications are proposed to Exchange Rule 30.50, Doing Business With the Public, to incorporate references to proposed new Rule 30.52. In addition, Interpretation .02 is being deleted as unnecessary in that, subject to certain ''grandfather'' provisions identified below, rules applicable to domestic index warrants will apply equally to warrants on foreign indexes.

[4] Securities Exchange Act Release No. 28556, 55 FR 43233 (Oct. 26, 1990).

Proposed new Rule 30.52, Special Requirements for Stock Index Warrants, Currency Index Warrants and Currency Warrants, sets out various customer protection rules applicable to stock index, currency index and currency warrants. In addition to the rules actually set forth therein, Rule 30.52 makes the following existing options customer protection rules applicable to stock index, currency and currency index warrants.

Rule 9.2 Registration of Options Principals
Rule 9.6 Registration of Branch Offices
Rule 9.7 Account Approval Requirements
Rule 9.8 Supervision Requirements
Rule 9.9 Suitability Requirements
Rule 9.10 Discretionary Account Requirements
Rule 9.21 Requirements for Customer Communications
Rule 9.23 Record-keeping Requirements for Customer Complaints

Margin. The Exchange's proposed margin requirements for customers having positions in index warrants, currency index warrants and currency warrants are included in proposed new Rule 30.52. In general, the proposed margin requirements for long and short positions in stock index warrants and currency index warrants are the same as margin requirements for positions in stock index options and the margin requirements for long and short positions in currency warrants are the same as those for currency options. CBOE believes that such requirements are more appropriate than applying stock margin treatment to such warrants.

CBOE's proposed margin rule also follow the proposals of the other exchanges in providing spread margin offsets between offsetting warrants and between warrants and listed options on the same underlying interest and providing special margin treatment for ''covered writing positions'' (*i.e.*, ''short'' stock index warrant positions covered by positions in all the stocks comprising the index).[5] Nevertheless, CBOE believes that a broker-dealer carrying such positions must bear in mind that special characteristics of warrants—such as pricing differences, the necessity of borrowing to make

[5] Although the Exchange has conformed its proposed rule to those of other exchanges by including these provisions giving special margin treatment to covered writing positions, the Exchange strongly believes that such provisions should not be approved for any exchange unless the Commission concurrently approves the same margin treatment for covered writing of stock index call options and stock index put options.

delivery on short sales, and the issuer credit risk associated with long warrants—may cause these margin requirements to be insufficient to fully cover the risk of such positions in certain circumstances, and broker-dealers must therefore be prepared to call for additional margin when appropriate. CBOE further believes that each exchange listing stock index, currency index or currency warrants should draw the attention of its member firms to this issue in connection with the adoption of these margin rules.

In accordance with the Lawson letter, the proposed rules would be applicable only to warrants issued after the effective date of this filing. Warrants issued prior to that date would remain subject to rules then in effect.

Applicability of Other Exchange Rules. Appendix A to Chapter XXX, which is a cross-reference table to other rules of the Exchange that are applicable to securities otherwise covered in Chapter XXX, is being updated to reflect the applicability of certain options rules (*i.e.*, customer protection rules including, but not limited to, options account approval, suitability, etc.,) to stock index warrants, currency index warrants and currency warrants.

Listing Criteria. The listing criteria for stock index warrants and currency warrants are being amended to reflect the comments contained in the Lawson letter and to make clear that they apply to currency index warrants. In particular, issuers would be required to have a minimum tangible net worth in excess of $150 million. In addition, the aggregate original issue price of all of a particular issuer's warrant offerings (combined with offerings by its affiliates) that are listed on a national securities exchange or that are National Market securities traded through NASDAQ would not be permitted to exceed 25 percent of the issuer's net worth. Finally, opening prices for all U.S. traded securities will be used to determine an index's settlement value where 25 percent or more of the value of the index is represented by securities whose primary trading market is in the U.S.

Trading Halts or Suspensions. Proposed new Rule 30.36 makes the provisions in Rule 24.7 concerning trading halts or suspensions in stock index options applicable to stock index warrants.

Specific Warrant Issues. It is the Exchange's understanding that, upon approval of the foregoing amendments, no rule filing pursuant to Section 19(b) of the Act will be required in order for the Exchange to list specific issues of warrants on a board-based index that is the underlying index for warrants or standardized options that have previously been listed or approved for listing by the Commission on a national securities exchange or national securities association.

Initial and maintenance listing standards for stock index warrants will require that no more than 20% of the securities in the underlying index, by weight, may be comprised of foreign securities that are not subject to comprehensive surveillance sharing agreements between the CBOE and the primary exchange on which the foreign security (including a foreign security underlying an ADR) is traded.[6] Prior to trading stock index or currency warrants, the Exchange will distribute a circular to its membership providing guidance regarding member firm compliance responsibilities (including suitability recommendations) when handling transactions in index or currency warrants.[7]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act in general and furthers the objectives of Section 6(b)(5) in particular in that it is designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade, and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes the proposed rule change will impose no burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such other period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR–CBOE–94–34 and should be submitted by January 30, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–427 Filed 1–6–95; 8:45 am]

BILLING CODE 8010–01–M

[6] Telephone conversation between James R. McDaniel, Schiff Hardin & Waite, and Stephen M. Youhn, SEC, on December 21, 1994 (''Amendment No. 1''). The Exchange proposes that the ''20% test'' be applied in the same manner as that contained in Securities Exchange Act Release No. 34157 (June 3, 1994), 59 FR 30062 (June 10, 1994) (Commission approval order allowing the expedited trading approval of certain narrow-based index options).

[7] Telephone conversation between James R. McDaniel, Schiff Hardin & Waite, and Stephen M. Youhn, SEC, on December 22, 1994.

[8] 17 CFR 200.30–3(a)(12) (1993).

[Release No. 34–35186; File No. SR–DTC–94–16]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of a Proposed Rule Change Clarifying the Depository Trust Company's Policy on Depository-to-Depository Services and Fees

December 30, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on

[1] 15 U.S.C. 78s(b)(1) (1988).

November 29, 1994, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change (File No. SR–DTC–94–16) as described in Items I, II, and III below, which Items have been prepared primarily by DTC. 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

DTC proposes to clarify its policy regarding depository-to-depository services and fees by filing the following statement:

DTC shall make available to any other securities depository that is registered as a clearing agency under Section 17A of the Securities Exchange Act of 1934 (a ''depository'') any service that DTC makes available to its Participants generally, provided that such depository makes its services available to DTC on the same basis.

DTC shall charge such depository for the services rendered by DTC and shall pay such depository for services rendered to DTC only such fees as DTC and the depository negotiate, but if DTC and such depository do not have an agreement on fees, DTC shall (i) render book-entry delivery services to such depository without charge if and so long as such depository shall render book-entry delivery services to DTC on the same basis and (ii) charge its published fees for services relating to the physical handling of certificates rendered by DTC to such depository and pay such depository its published fees for custody-related services rendered by such depository to DTC.[2]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments that it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to state DTC's policy respecting depository-to-depository services and fees. DTC states that this policy statement reflects the practices that have been followed by DTC and the other depositories since the beginning of interdepository processing and is consistent with the Commission's expressed views concerning these matters.

From the very beginning of interdepository processing, in the mid-1970s and through the present, DTC and the other depositories have charged and paid each other for services rendered only such fees that have been negotiated. For example, in 1975, Pacific Securities Depository Trust Company (''PSDTC'') declared that it would not pay or levy charges on the other depositories. In September 1976, DTC was informed of the unilateral determination by the Midwest Securities Trust Company (''MSTC'') Board that as a matter of principle MSTC would discontinue paying DTC for services other than for physical withdrawals of certificates. In 1977, DTC, PSDTC, and MSTC formally agreed to provide most services to each other without charge (''no charge agreement'').

At the present time, DTC has an informal agreement with the Philadelphia Depository Trust Company covering custody-related services. Each depository charges the other its published fees for these services. In June 1992, DTC and MSTC entered into an agreement that provided for depository-to-depository charges for certain services. This agreement was terminated by DTC on June 1, 1994, effective August 1, 1994, in accordance with the procedure set forth in the agreement for termination by either party upon sixty days notice.[3] DTC has advised MSTC that if a new agreement is not reached between DTC and MSTC, after November 30, 1994, DTC will continue to provide services to MSTC but in the manner and on the terms described in the policy statement,[4] which is the subject of the proposed rule change.

DTC states that the Commission has been aware of and has commented in its releases on the practice followed by FTC and other depositories of paying each other only such fees as are negotiated rather than all fees charged to participants generally. DTC states that the Commission in its releases has never expressed the view that one depository, by virtue of executing a participant agreement with another depository in order to establish the legal framework for an interface relationship, thereby becomes subject to all of that other depository's published participant fees. DTC states that the Commission has expressed that belief that:

[R]egistered securities depositories are not similar to ordinary participants. Registered securities depositories are subject to special regulation that no other participants face including a specific statutory charge to cooperate with other registered securities depositories. Thus, the Commission believes that a ''no-charge'' policy with respect to interface account activity does not result in an inequitable allocation of fees.[5]

DTC believes that the proposed rule change is consistent with Section 17A(b)(3)[6] of the Act. DTC believes that implementation of the subject policy will help assure that depository interface services are available to participants of any depository thereby promoting the goal of one-account settlement. DTC also states that the policy will enable DTC to avoid paying another depository inappropriately high fees that might effect its inefficient operation and to avoid paying another depository higher per-unit fees than such depository charges its participants generally.[7] DTC believes that managing the fees paid to other depositories, which currently account for approximately 60% of DTC's total cost of providing interface services to its participants, will help reduce the fees that DTC must charge its participants to recover those costs.

(B) Self-Regulatory Organization's Statement on Burden on Competition

DTC believes that by promoting the goal of one-account settlement and by enabling DTC to control the interface costs that are paid by its participants, the proposed rule change would help

[2] This policy statement does not apply to ''linked services,'' which the Commission has described as arrangements where one depository (the ''servicing depository'') performs for another depository (the ''using depository''(the core tasks necessary to deliver the services to the using depository's participants. The Commission has cited as examples of linked services DTC's processing of ID confirmations and affirmations and DTC's fourth-party delivery service. The Commission has expressed the view that a servicing depository should be permitted to charge a using depository the same fee it charges its participants for the same or a similar service. *See* Securities Exchange Act Release No. 23083 (March 31, 1986) at 15–23.

[3] *See* letter from Richard B. Nesson, Executive Vice President and General Counsel, DTC, to Jerry W. Carpenter, Assistant Director, Division of Market Regulation, Commission (November 11, 1994).

[4] Letter from William F. Jaenike, Chairman of the Board and Chief Executive Officer, DTC, to Robert J. McGrail, Executive Vice President and Chief Operating Officer, MSTC (November 17, 1994).

[5] Securities Exchange Act Release No. 20461 (December 7, 1983) at footnote 34.

[6] 15 U.S.C. 78q–1(b)(3) (1988).

[7] DTC states that the Commission has indicated that where one depository is entitled to charge another (*e.g.*, for linked services), it expects that any offer of volume discounts to participants generally would also be made available to the other depository. Securities Exchange Act Release No. 23803 (March 31, 1986) at page 21.

promote competition among depository users.

(C) Self-Regulatory Organization's Statement on Comments on that Proposed Rule Change Received From Members, Participants, or Others

DTC has not sought or received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five 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 ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which DTC consents, the Commission will:

(a) By order approve such proposed rule change or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of DTC. All submissions should refer to the file number SR–DTC–94–16 and should be submitted by January 30, 1995.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–381 Filed 1–6–95; 8:45 am]

BILLING CODE 8010–01–M

[8] 17 CFR 200.30–3(a)(12) (1994).

[Release No. 34–35181; File No. SR–MSRB–94–18]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Fees for Subscription to the Transaction Reporting Pilot Program

December 30, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''), 15 U.S.C. 78s(b)(1), notice is hereby given that on December 16, 1994, the Municipal Securities Rulemaking Board, Inc. (''MSRB'' or ''Board'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB is filing herewith a proposed rule change to establish a fee for an annual subscription to a Service (the ''Service'') which will provide daily reports of transaction data from the Board's Transaction Reporting Pilot Program (''the Pilot Program''). The Board will charge a fee for the Service equal to a yearly rate of $15,000. The proposed fee is structured to defray the Board's cost of disseminating the transaction data and to defray, in part, the cost of collecting and compiling inter-dealer transaction data that will be used in the Pilot Program both for the Service and for a comprehensive surveillance database. The Board does not expect or intend to make a profit from the Service, and will review the fee annually to determine whether adjustments are necessary.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background and Description of the Pilot Program. On November 9, 1994, the Commission approved the Board's plan for the Pilot Program for collecting inter-dealer transaction data and the production and sale of daily transaction reports containing certain summarized data about the inter-dealer transactions.[1] Operation of the Pilot Program is planned to commence with reporting of inter-dealer trades on or after January 2, 1995.[2] As part of the Pilot Program, the Board also will make information on all inter-dealer trades in municipal securities available to the Commission and other regulatory agencies in a ''surveillance database'' to assist in inspection and enforcement of Board rules. This data on specific transactions, which will include the identity of dealers, will not be publicly available and will not be included in the Service.

The Pilot Program will collect inter-dealer transaction data by using data submitted to the automated comparison system for inter-dealer municipal securities transactions. The transaction reports will provide aggregate data about market volume on the previous business day and will provide summary price and volume data about those issues that were traded at or above a threshold number of times on that day. For each of these issues, the report will provide high, low and average prices of the transactions in the issue, along with the total par value traded and the number of trades in the issue. The average prices (but not the high and low prices) will be calculated based upon those trades in a ''band'' of $100,000 to $1 million par value. The prices and par values of individual transactions will not be included in the transaction reports, but will be available to the enforcement agencies in the surveillance database.

As part of the Service, the Board will provide the transaction reports to the

[1] *See* Securities Exchange Act Release No. 34955 (November 9, 1994), 59 FR 59810.

[2] The Pilot Program is the first phase of a system in which the Board ultimately intends to make available transaction information which is both comprehensive and contemporaneous. In other phases, information for institutional and retail customer transactions will be added to the system. In a recent letter to the Commission, the Board outlined the four-phase plan, of which the present fee filing applies to phase one. *See* letter from Robert Drysdale, Chairman, MSRB, to Arthur Levitt, Chairman, SEC, dated November 3, 1994. The Board will submit to the Commission a proposed rule change prior to the implementation of each planned phase.

subscribers for public use by approximately 6:00 a.m. on the first business day after the trade. The reports will be electronically disseminated to subscribers by computer modem.[3]

The Service will be made available to all interested persons on equal terms. In particular, the Board will ensure that interested persons are provided access to the reports on a non-discriminatory basis and in a manner that would not confer special or unfair economic benefit to any person. The Board also will encourage and facilitate the re-dissemination of the reports by private information vendors so that the widest possible spectrum of market participants can be reached.

Cost and Fees. Total system development costs, hardware and software acquisition, and other start-up expenses for the Pilot Program are estimated to be $500,000 to $600,000. These costs include the common computer system that will be used for generating and managing the daily transaction reports as well as operation of the surveillance database. Yearly operating costs, including the costs of producing and disseminating the transaction reports and the costs of operating the surveillance database are expected to approximate $500,000 to $600,000. The Board estimates that it may have 20 subscribers to the Service, which would generate $300,000 a year in revenue at the annual subscription rate of $15,000. These revenues are expected to be sufficient to pay the entire marginal costs of operating the Service, including the cost of producing the transaction reports, and should also cover a portion of the basic data processing costs for the Pilot Program, *i.e.*, the common computer hardware and software that is needed to operate both the Service and the surveillance database. The Board believes that this Plan will produce a fair allocation of Pilot Program costs.

2. Statutory Basis

The Board believes the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act, which requires, in pertinent part, that the Board's rules shall:

> Be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest. * * *[4]

The Pilot Program is designed to increase the integrity and efficiency of the municipal securities market by, among other things, helping to ensure that the price charged for an issue in the secondary market reflects all available price information about that issue. Moreover, the availability of aggregate data about market activity and certain volume and price information about municipal securities will promote investor confidence in the market and its pricing mechanisms. The Board believes that the fee for the Service is fair and reasonable in light of costs associated with compiling and disseminating the information, and that the Service is available on reasonable and non-discriminatory terms to any interested person.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Board does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, since the Service will be made available to all interested persons on an equal basis and the fee will be applied equally to all persons who wish to subscribe to the Service.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee, or other charge imposed by the MSRB and therefore has become effective pursuant to Section 19(b)(3)(A) of the Act,[5] and subparagraph (e) of Rule 19b–4 thereunder.[6] At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, 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 Room. Copies of such filing will also be available for inspection and copying at the principal office of the MSRB. All submissions should refer to File No. SR–MSRB–94–18 and should be submitted by January 30, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30–3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–426 Filed 1–6–95; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–35180; File No. SR–NASD–94–54]

Self-Regulatory Organizations; Notice of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Position and Exercise Limits for Equity Options Overlying Securities Not Subject to Standardized Options Trading

December 30, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on October 12, 1994, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') 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 NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[3] A paper copy of each transaction report will be made available in the Board's Public Access Facility, located at 1640 King Street, Suite 300, Alexandria, Virginia. There will be no charge for viewing the report. Documents in the Public Access Facility can be copied at a cost of 20 cents per page plus sales tax.

[4] 15 U.S.C. 78O–4(b)(2)(C) (1988).

[5] 15 U.S.C. 78s(b)(3)(A) (1988).

[6] 15 CFR 240.19b-4(e) (1994).

[1] 15 U.S.C. 78s(b)(1) (1988).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Propose Rule Change

The NASD proposes to amend Section 33 of the NASD's Rules of Fair Practice, the NASD's position limit rule for standardized and conventional options, to increase the position and exercise limits for certain equity securities that are not subject to standardized options trading.[2] In particular, under the proposal, if a security qualifies for a position limit of 7,500 contracts or 10,500 contracts,[3] it will be subject to that higher position limit, regardless of whether it has standardized options traded on it or not.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Currently, under NASD rules, position and exercise limits for exchange-listed options traded by access firms[4] or their customers are determined according to a ''three-tiered'' system, where, depending upon the float and trading volume of the underlying security, the position limit for options on that security is 4,500, 7,500, or 10,500 contracts.[5] For conventional equity options trading by any NASD member,[6] if the underlying security is subject to standardized options trading, the NASD's position limit for conventional options on that security is the same position limit imposed by the options exchange(s) trading the option. However, if the security underlying the option is not subject to standardized options trading, the applicable position limit for conventional options on the security is the lowest tier, *i.e.*, 4,500 contracts.

In some instances, however, a security may qualify for an options position limit of 7,500 or 10,500 contracts but it is subject to a position and exercise limit of 4,500 contracts because it does not underlie a standardized option. Given that these securities qualify for higher position limits but are not eligible for them solely because there is no standardized option traded on them in the U.S., the NASD believes its option position limit rule may be unduly restrictive for these securities and unnecessarily constrain members' legitimate hedging activity. Accordingly, the NASD proposes to amend Section 33 to provide that the position limit for options on a security shall be determined by the position limit tier the security falls under, regardless of whether the security is subject to standardized options trading.[7]

The NASD believes its proposal is warranted for the following reasons. First, if a security has sufficient trading volume and public float to satisfy the standards for a position limit of 7,500 contracts or 10,500 contracts, the NASD does not believe that raising the position and exercise limits for conventional options on the security will adversely affect the cash market for the security. In the NASD's view, if the cash market for a security is large enough to qualify for an options position limit of 7,500 contracts or 10,500 contracts, it is irrelevant whether that security is only subject to conventional options trading and not standardized options trading. The NASD believes the primary consideration governing the appropriate position limit level for options on a security should be the characteristics and size of the underlying cash market for that security, not whether the options overlying the security are standardized or conventional. Second, the NASD does not believe its members' activities in the conventional options market should be linked to or constrained by decisions of the options exchanges concerning whether or not to trade options on particular securities.

Moreover, the NASD believes that its proposal will not compromise the stability of the securities markets underlying the conventional options eligible for the higher position limits. In this regard, for those securities that will be eligible for higher position limits under the proposal, there will only be a slight increase in the percentage of their capitalization that an investor or group of investors acting in concert can control under the new position limits.

Therefore, the NASD believes the proposed rule change is consistent with Section 15A(b)(6) of the Act. Section 15A(b)(6) requires that the rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. Specifically, the NASD believes the proposal will promote the maintenance of fair and orderly markets because it will serve to facilitate the use

[2] Position limits impose a ceiling on the number of option contracts in each class on the same side of the market (*i.e.*, aggregating long calls and short puts and long puts and short calls) that can be held or written by an investor or group of investors acting in concert. Exercise limits restrict the number of options contracts which an investor or group of investors acting in concert can exercise within five consecutive business days. Under NASD Rules, exercise limits correspond to position limits, such that investors in options classes on the same side of the market are allowed to exercise, during any five consecutive business days, only the number of options contracts set fourth as the applicable position limit for those options classes. See Sections 33(b)(3) and (4) of the NASD Rules of Fair Practice.

[3] See *infra* note 4 for a description of how the position limit for a particular equity security is determined.

[4] ''Access'' firms are NASD members which conduct a business in exchange-listed options but which are not members of any of the options exchanges upon which the options are listed and traded.

[5] In this connection, the NASD's rules do not specifically govern how a specific equity option falls within one of the three position limit tiers. Rather, the NASD's position limit rule provides that the position limit established by an options exchange(s) for a particular equity option is the applicable position limit for purposes of the NASD's rule. Under the rules of each of the options exchanges, if the security underlying a standardized option has trading volume of 40,000,000 shares over the most recent six-month period or trading volume of 30,000,000 shares over the most recent six-month period and float of 120,000,000, it is subject to a position limit of 10,500 contracts; if the security underlying a standardized option has trading volume of 20,000,000 shares over the most recent six-month period or trading volume of 15,000,000 shares over the most recent six-month period and float 40,000,000, it is subject to a position limit of 7,500 contracts; and, if the underlying security is ineligible for a 10,500 or 7,500 contract position limit, it is subject to a 4,500-contract position limit. The rules of each options exchange are uniform in regard to the above. See *e.g.*, Commentary .07 to American Stock Exchange Rule 904 and Interpretation and Policy .02 to Chicago Board Options Exchange Rule 4.11.

[6] Conventional equity options are defined in Section 33(b)(2)(GG) of the NASD Rules of Fair Practice to mean ''any option contract not issued, or subject to issuance, by The Options Clearing Corporation.''

[7] To ensure that the higher position limits for conventional options overlying securities not subject to standardized options trading are only available for securities qualifying for a position limit of 7,500 or 10,500 contracts, a member must demonstrate to the NASD's Market Surveillance Department that the security satisfies the standards for such higher options position limit prior to establishing an unhedged options position on that security in excess of 4,500 contracts.

of conventional equity options by investors seeking to satisfy their legitimate hedging needs, without compromising the integrity of the underlying securities markets. In addition, to the extent that investors have greater assurance that they can hedge larger stock positions through the use of conventional options, liquidity in the underlying cash market may be enhanced by the proposal.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD believes that the proposed rule change will not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the NASD 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 in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File Number SR–NASD–94–54 and should be submitted by January 30, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–430 Filed 1–6–95; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–35185; File No. SR–OCC–94–12]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Amending By-Laws Relating to the Holiday Expiration Date for Cash-Settled Foreign Currency Options

December 30, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on December 12, 1994, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by OCC. The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons and to grant accelerated approval of the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change will amend OCC's by-laws to change the holiday expiration date for cash-settled foreign currency options.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC 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

OCC proposes to amend its by-laws to change the holiday expiration date for cash-settled foreign currency options. On December 13, 1994, the Commission approved a Philadelphia Stock Exchange (''PHLX'') rule change proposing to change the holiday expiration date for cash-settled foreign currency options.[2] Currently, cash-settled foreign currency options expire on Mondays. However, if Monday is a PHLX holiday or a designated bank holiday, the expiration date reverts to the preceding business day, which is usually Friday, but on some occasions may be Thursday.

Under PHLX's rule change, if the regular Monday expiration occurs on a PHLX holiday or a designated bank holiday, the cash-settled foreign currency options expire on the following business day rather than the preceding business day. Accordingly, when the regular Monday expiration occurs on a holiday, the expiration will usually occur on Tuesday, but on some occasions will occur on Wednesday.[3] The proposed change will allow cash-settled foreign currency option users to capture weekend risk.

To accommodate the change proposed by PHLX, OCC is proposing to modify the definition of ''Expiration Date'' contained in OCC by-laws, Article XXII, Section 1E. Under OCC's proposed change, if the regular Monday expiration occurs on an exchange designated bank holiday or a day that is not a business day, expiration will occur on the following business day rather than the preceding business day.

B. Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were not and are not intended to be solicited with respect

[8] 17 CFR 200.30–3(a)(12)(1993).

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] Securities Exchange Act Release No. 35097, (December 13, 1994) [File No. SR–PHLX–94–54] (order granting accelerated approval of proposed rule change filed by the Philadelphia Stock Exchange, Inc., relating to the holiday expiration date for cash/spot foreign currency options).

[3] For example, Monday, December 26, 1994 is a PHLX holiday (Christmas); therefore, under the proposed change, expiration will occur on Tuesday. However, Tuesday, December 27, 1994, is a designated bank holiday (Boxing Day), so expiration will occur on Wednesday, December 28, 1994.

to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Section 17A(b)(3)(F)[4] of the Act requires the rules of a clearing agency be designed to foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions. The Commission believes that OCC's proposed change is consistent with Section 17A(b)(3)(F) of the Act because it works in conjunction with the PHLX rule change to better coordinate and to promote cooperation in the issuance, clearance, and settlement of these options.

OCC has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of the filing. The Commission finds good cause for so approving the proposed rule change because accelerated approval will allow OCC to coordinate its holiday expiration dates for cash-settled foreign currency options with the holiday expiration dates for cash-settled foreign currency options with the holiday expiration dates set by the PHLX.

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 in the commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of OCC. All submissions should refer to the file No. SR–OCC–94–12 and should be submitted within January 30, 1995.

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act, particularly with Section 17A(b)(3)(F) of the Act, and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–OCC–94–12) be, and hereby is, approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–382 Filed 1–6–95; 8:45 am]

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[4] 15 U.S.C. 78q–1(b)(3)(F) (1988).

[5] 17 CFR 200.30–3(a)(12) (1994).

[Release No. 35182; File No. SR–PTC–94–07]

Self-Regulatory Organizations; Participants Trust Company; Notice of Filing of Proposed Rule Change Establishing a Daily Penalty Fee Applicable to Late Funding of Shortfalls in Participants Mandatory Deposits to the Participants Fund

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on December 14, 1994, the Participants Trust Company (''PTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change (File No. SR–PTC–94–070 as described in Items I, II, and III below, which Items have been prepared primarily by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the purposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change will establish a daily penalty fee applicable to a participant's failure to fund on a timely basis a shortfall in its mandatory deposit to the participants fund.

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 the Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to establish a daily penalty fee applicable to a participant's failure to fund on a timely basis a shortfall in its mandatory deposit to the participants fund. Pursuant to Rule 2 of Article V of PTC's rules, PTC maintains a participants fund to secure obligations of participants and limited purpose participants to PTC and to provide PTC with an additional source of cash collateral to meet its temporary financing needs. Each participant is required to maintain a mandatory deposit in the participants fund which is calculated as a percentage of its average gross debits over the previous month's three major settlement days, subjects to a minimum of $1 million and a maximum of $10 million. A limited purpose participant is required to maintain a lower mandatory deposit because of the limited nature of its activity in the depository. At least $150 thousand of the mandatory deposit must be made in cash. The remainder may be made in cash or United States Treasury obligations with a remaining maturity of one year or less.

The adequacy of each participant's mandatory deposit is evaluated monthly based on the prior month's activity. Participants are notified of any shortfall and required to fund the deficiency within five business days. The securities portion of the mandatory deposit is marked-to-market weekly, and participants are required to fund any deficiency in this portion within two business days.

The proposed rule change establishes a daily penalty fee for a participant's failure to fund a shortfall in its mandatory deposit to the participants fund by the required date in the amount of the greater of (i) $200 or (ii) an amount, calculated at an annual rate, equal to the daily average Fed Funds rate plus 250 basis points (2.5%) on the outstanding balance of the shortfall in the mandatory deposit to the participants fund.

PTC believes that because the proposed rule change provides for the equitable allocation of reasonable dues, fees, and other charges among participants, it is consistent with Section 17A of the Act and the rules and regulations thereunder applicable to PTC.

[1] 15 U.S.C. 78s(b)(1) (1988).

B. Self-Regulatory Organization's Statement on Burden on Competition

PTC does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

PTC has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five 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 ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that maybe 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, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of PTC. All submissions should refer to file number SR–PTC–94–07 and should be submitted by January 30, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–380 Filed 1–6–95; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–35176; File No. SR–Phlx–94–55]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing of a Proposed Rule Change Relating to Implementation of a Three-Day Settlement Standard

December 29, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on November 14, 1994, the Philadelphia Stock Exchange, Inc. (''PHLX'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by the PHLX. 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 purpose of this proposed rule change is to amend PHLX's rules to accommodate a three business day settlement standard for securities transactions.

II. Self-Regulatory Organization's Statements Regarding the Proposed Rule Change

In its filing with the Commission, the PHLX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The PHLX has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of and Statutory Basis for the Proposed Rule Change

In October 1993 the Commission adopted Rule 15c6–1 under the Act. The rule which will become effective June 7, 1995.[2] Rule 15c6–1 will establish three business days following the trade date (''T+3'') as the standard settlement time frame for most broker-dealer transactions. In the release adopting Rule 15c6–1, the Commission concluded that a T+3 settlement cycle, as compared to the current five-day settlement cycle (''T+5''), will reduce credit and liquidity risks and increase efficiency in broker-dealer and clearing agency operations.

The PHLX has identified those rules which require amendment to provide for operations by members within a T+3 settlement cycle. The rules are described below.

Rule 113(b) defines ''regular way'' dealings in stock as requiring delivery on the fifth business day following the day of the contract.[3] ''Fifth'' will be changed to ''third.'' Similarly, the language in Rule 113(c) defining a seller's option dealing will be changed from requiring delivery in not less than six days to in not less than four days.

Rule 114(b) defines ''regular way'' dealings in bonds (except convertible bonds and United States government securities) as requiring delivery on the fifth business day following the day of the contract. ''Fifth'' will be changed to ''third.'' Rule 114 also provides that for bonds sold for delayed delivery, delivery is due on the seventh day following contract day. ''Seventh'' will be changed to ''fifth.'' Similarly, the language in Rule 114(c) defining a seller's option dealing will be changed from requiring delivery in not less than eight days to in not less than four days.

Rule 115(b) defines ''regular way'' to require dealings in convertible bonds to require delivery on the fifth business day following the day of the contract. ''Fifth'' will be changed to ''third.'' Similarly, the language in Rule 115(b) defining seller's option dealing will be changed from requiring delivery in not less than six days to in not less than four days.

Rule 117 (a) and (b) require notice of early delivery of securities sold pursuant to seller's option or regular way delayed delivery to be submitted before 4:00 p.m. at least one day prior to delivery and may not be given until the fifth business day after the date of

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[1] 15 U.S.C. 78s(b)(1) (1988).

[2] Securities Exchange Act Release Nos. 33023 (October 6, 1993), 58 FR 52891 [order adopting Rule 15c6–1] and 34952 (November 9, 1994), 59 FR 59137 [order changing the effective date of Rule 15c6–1].

[3] As proposed, the rule will include in a T+3 environment transaction in securities exempted under Rule 15c6–1(b)(2). Specifically, under the proposal, securities sold pursuant to a firm commitment offering registered under the Securities Act of 1933 must settle within three business days.

the contract. ''Fifth'' will be changed to ''third.''

Rule 291 requires, unless otherwise agreed, securities loaned to be delivered on the fifth business day following the day of the loan. ''Fifth'' will be changed to ''third.'' Rule 294 will be amended to change the return date for securities loaned from the fifth full business day following the date the notice is given to the third full business day.

Rule 362 will require the contract price of bonds dealt in ''and interest'' and made ''regular way delayed delivery'' to include interest computed only up to but not including the third business day rather than the fifth business day following the day of the contract. Rule 371(a) states that with ''delayed delivery'' contracts in bonds dealt in ''and interest'' made prior to the fifth business day preceding the interest payment date for delivery on or after the interest payment date, there will be a cash adjustment for coupons paid. The rule will be changed to prior to the third business day preceding the interest payment date. Similarly, Rule 371(b) will require that ''seller's option'' contracts in bonds dealt in ''and interest'' made prior to the third business day, instead of the fifth business day, preceding the interest payment date for delivery on or after the payment date will have a cash adjustment for coupons paid.

Rule 431 states that transactions (except those made for ''cash'') shall be ex-dividend or ex-rights on the fourth business day preceding the record date. This will be changed to the second business day. With regard to a record date on other than a business day, the transaction shall be ex-dividend or ex-rights on the third preceding business day rather than on the fifth preceding business day. Rule 432 prescribes when ex-warrant trading will begin. The ex-warrant period will be changed from the fourth business day preceding date of expiration of warrants to the second business day. When warrant expiration occurs on a day other than a business day, the ex-warrant period will be changed from fifth business day preceding expiration date to third business day.

Rule 823 requires that all transactions effected on the PHLX will be settled pursuant to the ''five day delivery plan'' which requires regular way transactions to settle on the fifth business day after the transaction date. The proposed rule change will change all references from five to three.[4]

Rule 825(b) provides that the ex-dividend date for transactions in stock for which there exists a transfer facility in Philadelphia is the fourth business day preceding the record date. The reference to fourth business day will be changed to second business day. In the event the record date is not a business day, the ex-dividend date will be changed from the fifth preceding business day to the third preceding business day. Rule 825(c) establishes the equivalent ex-dividend record date for those stocks with transfer facilities outside Philadelphia. For these stocks, the ex-dividend date will be the second business day, instead of the fourth business day, preceding the equivalent Philadelphia record date.

The PHLX's implementation of these rule changes will be consistent with the June 1995 conversion schedule which the Stock Clearing Corporation of Philadelphia and National Securities Clearing Corporation have developed for industry use. The schedule is as follows:

Trade date	Settlement cycle	Settlement date
June 2 Friday	5 Day	June 9 Friday.
June 5 Monday ..	4 Day	June 9 Friday.
June 6 Tuesday .	4 Day	June 12 Monday.
June 7 Wednesday.	3 Day	June 12 Monday.

If the Commission determines to alter the exemptions currently provided in Rule 15c6–1, the PHLX may need to submit additional rule amendments. It is intended that the proposed rule change will become effective the same date as Commission Rule 15c6–1.

The proposed rule change is consistent with Section 6(b)(5) of the Act in that it protects investors and the public interest by reducing the risk to clearing corporations, their members, and public investors which is inherent in settling securities transactions. This is accomplished by reducing the time period for settlement of most securities transactions which will correspondingly decrease the number of unsettled trades in the clearance and settlement system at any given time.

The proposed change also is consistent with Commission Rule 15c6–1 which will require brokers or dealers to settle most securities transactions no later than the third business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.

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 thirty-five 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 ninety days or such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the PHLX 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 in the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing also will be available for inspection and copying at the principal office of the PHLX. All submissions should refer to File No. SR–Phlx–94–55 and should be submitted by January 30, 1995.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–383 Filed 1–6–95; 8:45 am]

BILLING CODE 8010–01–M

[4] Rule 823 also demonstrates the ''five day delivery plan'' by stating that a transaction that occurs on Monday will settle on the Monday of the following week. This language will be changed to be consistent with the ''three day delivery plan.''

[Release No. 34–35177; International Series Release No. 765; File No. SR–Phlx–94–42]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 1 and 2 to the Proposed Rule Change by the Philadelphia Stock Exchange, Inc., Relating to an Enhanced Parity Split for the Specialist in the Cash/Spot German Mark Foreign Currency Options

On August 15, 1994, the Philadelphia Stock Exchange, Inc., (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1994 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to provide an enhanced parity participation (''Enhanced Parity Split'') for the specialist trading cash/spot German mark (''3D'') foreign currency options (''FCOs'').[3] Notice of the Proposed rule change appeared in the **Federal Register** on October 17, 1994.[4] No comment letters were received on the proposed rule change. The Exchange subsequently filed Amendment No. 1 to the proposal on December 9, 1994,[5] and Amendment No. 2 on December 23, 1994.[6] This order approves the Exchange's proposal, as amended.

I. Description of the Proposal

The Exchange proposes to amend Exchange Rule 1014(h) to adopt an Enhanced Parity Split for the 3D FCO specialist. Specifically, the 3D FCO specialist will be entitled to receive 50% of the first 500 contracts in any trade in which the 3d FCO specialist and one or more crowd participants are on parity, as defined in Exchange Rule 1014(h), with the remaining 250 contracts allocated on a pro rata basis to the other crowd participants on parity. All contracts in excess of 500 will be allocated on a pro rata basis among the specialist and the other crowd participants on parity.[7]

The Exchange represents that customers with orders for less than 100 contracts will not be disadvantaged by this proposal. Specifically, Rule 1014(h)(i) provides that all bids/offers of customer accounts for under 100 contracts have time priority over non-customer accounts and, therefore, the Enhanced Parity Split will not apply to customer bids/offers for fewer than 100 contracts.[8]

The purpose of the proposed Enhanced Parity Split, according to the Phlx, is to encourage the 3D FCO specialist to make deeper markets in order to attract order flow to the Exchange. At the end of the first year, the Foreign Currency Option Committee (''Committee'') will conduct a review of the performance of the 3D FCO specialist and additional reviews will be conducted by the Committee every six months thereafter. If the Committee elects to terminate the Enhanced Parity Split for the 3D FCO specialist as result of one of these regular reviews, the specialist will be afforded the ability to appeal that decision to the Board of Governors of the Exchange pursuant to the procedures in Article XI, Section 11–1 of the Exchange's by-laws.[9]

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)[10] in that the proposal is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest. Specifically, the Commission finds that the proposal may serve to remove impediments to and perfect the mechanism of a free and open market by encouraging the 3D FCO specialist to maintain tight markets in order to attract order flow to the Exchange. Further, the proposed rule change provides that the Enhanced Parity Split will not disadvantage customer orders for fewer than 100 contracts that are on parity with the 3d FCO specialist.[11]

The Commission notes that several Exchange proposals implementing enhanced parity splits for equity and index option specialist have recently been approved by the Commission.[12] As discussed in connection with those approval orders, specialists, including the 3D FCO specialist, have responsibilities that other crowd participants do not share, such as the staff costs associated with continually updating and disseminating quotes.[13] As a result, the Commission believes it is reasonable for the Exchange to grant certain advantages to specialists, such as the Enhanced Parity Split proposed herein, in order to attract and retain well capitalized specialists at the Exchange. As a result, as long as these advantages do not unreasonably restrain competition and do not harm investors, the Commission believes that the granting of such benefits to specialists, in general, is within the business judgment of the Exchange. Therefore, even though the proposed rule change could arguably have some negative impact on other crowd participants, other than customers with orders for less than 100 contracts, for the reasons stated above, the Commission believes the proposal is consistent with the Act.

Furthermore, the Commission believes that: (1) The review procedures proposed by the Exchange, as discussed above, adequately ensure that the 3D FCO specialist will receive the benefit of the Enhanced Parity Split only if the specialist satisfies its obligations and responsibilities pursuant to Exchange rules; and (2) in cases where the 3D FCO specialist is found to no longer be

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1992).

[3] 3D FCOs are cash-settled, European-style, cash/spot FCO contracts on the German mark that trade in one-week and two-week expirations. *See* Securities Exchange Act Release No. 33732 (March 8, 1994), 59 FR 52337 (March 15, 1994).

[4] *See* Securities Exchange Act Release No. 34814 (October 7, 1994), 59 FR 52337 (October 17, 1994).

[5] Amendment No. 1 provides that if the 3D FCO specialist is denied the Enhanced Parity Split provided herein as a result of the periodic reviews of specialist performance by the Foreign Currency Option Committee, the specialist will be afforded the ability to appeal that decision to the Exchange's Board of Governors pursuant to the procedures in Article XI, Section 11–1 of the Exchange's by-laws. Amendment No. 1 also amends Rule 509(a) in order to make that rule consistent with Rule 1014, which was recently amended to expand the enhanced parity split applicable to equity option specialists to also include index option specialists. *See* Letter from Michele Weisbaum, Associate General Counsel, Phlx, to Brad Ritter, Senior Counsel, Office of Market Supervision (''OMS''), Division of Market Regulation (''Division''), Commission, dated December 9, 1994 (''Amendment No. 1'').

[6] In Amendment No. 2, the Exchange proposes to amend the proposed language in Rule 1014(h), as described herein, to clarify the manner in which Enhanced Parity Split will be applied. *See* Letter from Michele Weisbaum, Associate General Counsel, Phlx, to Brad Ritter, Senior Counsel, OMS, Division, Commission, dated December 23, 1994 (''Amendment No. 2'').

[7] *Id.*

[8] Phlx Rule 1014(h) does not confer time priority on customer orders (as compared to non-customer orders) for 100 or more FCO contracts. Consistent with this, the 3D FCO specialist will be entitled to receive the full Enhanced Parity Split on parity trades with customer orders for 100 or more FCO contracts. Telephone conversation between Michele Weisbaum, Associate General Counsel, Phlx, and Brad Ritter, Senior Counsel, OMS, Division, Commission, on December 8, 1994.

[9] *See* Amendment No. 1, *supra* note 5.

[10] 15 U.S.C. 78f(b)(5Z) (1988).

[11] *See supra* note 8.

[12] *See* Securities Exchange Act Release Nos. 34109 (May 25, 1994), 59 FR 28570 (June 2, 1994) (providing an enhanced parity split for new equity option specialist units trading newly listed option classes) (''Exchange Act Release No. 34109''), 34606 (August 26, 1994), 59 FR 45741 (September 2, 1994) (providing an enhanced parity split applying to equity option specialists, other than new specialist units, for certain assigned option classes), and 35028 (November 30, 1994), 59 FR 63151 (December 7, 1994) (expanding the enhanced parity split in the foregoing orders to include index option specialists as well as equity option specialists) (''Exchange Act Release No. 35028'').

[13] *See* Exchange Act Release No. 34109, *supra* note 12.

eligible for the Enhanced Parity Split, the appeals procedures proposed by the Exchange adequately protect the due process rights of the specialist. The Commission believes that these criteria balance the competing interests of the Exchange and the 3D FCO specialist by ensuring regular review of specialist performance and that the specialist's due process rights are protected in cases where the Committee makes a determination that the Enhanced Parity Split should be denied.

Finally, the Commission notes that even though the Enhanced Parity Split will have a negative impact, in certain circumstances,[14] on customer orders for more than 100 contracts, the Commission believes that this does not raise significant regulatory concerns in the context of the 3D FCO market. The FCO market, in general, is dominated by institutions and sophisticated corporate investors who typically trade in large numbers of FCO contracts, *i.e.*, 100 contracts or more at a time. The Commission believes that non-institutional investors who participate in the FCO market generally enter into transactions for far fewer contracts. The Exchange's rules, as approved by the Commission, already acknowledge this distinction by affording time priority for trades that would otherwise be on parity only for customer orders for fewer than 100 contracts.[15] As a result, because the negative impact of the rule on customers will be limited substantially to institutions and sophisticated corporate FCO investors trading 3D FCOs, the Commission believes that the benefits of the proposal discussed above outweigh the negative impact of the rule change on this class of FCO customers.

The Commission finds good cause for approving Amendment Nos. 1 and 2 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register** in order to allow the 3D FCO specialist to begin receiving the benefits of the Enhanced Parity Split without delay. The Commission notes that the appeal procedures provided in Amendment No. 1 are consistent with those available to equity and index option specialists who are denied the enhanced parity participation available to those specialists pursuant to prior Commission approval orders.[16] Further, the Commission finds that the proposal in Amendment No. 1 to Rule 503 merely makes this rule consistent with Rule 1014 and therefore does not raise any regulatory issues that were not addressed when Rule 1014 was amended.[17] Finally, Amendment No. 2 merely clarifies the manner in which the Enhanced Parity Split will be applied. Accordingly, the Commission believes that Amendment No. 2 should serve to minimize the potential for confusion regarding the application of the proposed rule change.

Based on the foregoing, the Commission believes it is consistent with Section 6(b)(5) of the Act to approve Amendment Nos. 1 and 2 to the Phlx's proposal on an accelerated basis.

Interested persons are invited to submit written data, views and arguments concerning Amendment Nos. 1 and 2. Persons making written submissions should fix 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 file 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 Phlx. All submissions should refer to the File No. SR–Phlx–94–42 and should be submitted by January 30, 1995.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[18] that the proposed rule change (SR–Phlx–94–42), as amended, is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–428 Filed 1–6–95; 8:45 am]

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[14] The Enhanced Parity Split will have a negative impact on customer orders for 100 or more contracts only where the customer is on parity with the 3D FCO specialist and one or more other crowd participants. In cases where only a customer and the 3D FCO specialist are on parity, the Enhanced Parity Split will have no effect. *See* Amendment No. 2, *supra* note 6.

[15] *See* Phlx Rule 1014 (h) (i).

[16] *See supra* note 12. The Commission notes that equity and index options traded at the Exchange are assigned to specialists by the Exchange's Allocation Committee and that the Exchange's by-laws provide specific procedures regarding appeals of decisions by the Allocation Committee. *See* Phlx By-laws, Article XI, Section 11–1(c). Under this proposal, however, the FCO Committee will be making the determination to deny the Enhanced Parity Split to the 3D FCO specialist. As a result, the appeals process pursuant to this proposal will vary, procedurally, from that available to equity and index option specialists who are denied the enhanced parity splits available to those specialists. *See* Phlx By-laws, Article XI, Section 11–1(a). Telephone conversation between Michele Weisbaum, Associate General Counsel, Phlx, and Brad Ritter, Senior Counsel, OMS, Division, Commission, on December 8, 1994. Despite the procedural differences, the Commission believes that the appeal rights available to the 3D FCO specialist, as proposed herein, provide adequate due process protection to the 3D FCO specialist.

[17] *See* Exchange Act Release No. 35028, *supra* note 12.

[18] 15 U.S.C. 78s(b)(2) (1988).

[19] 17 CFR 200.30–3(a)(12) (1993).

[Release No. 34–35183; File No. SR–Phlx–94–41]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change and Amendment No. 1 to the Proposed Rule Change by the Philadelphia Stock Exchange, Inc., Relating to an Extension of the Automated Options Market (''AUTOM'') Pilot Program

December 30, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''), 15 U.S.C. 78s(b)(1), notice is hereby given that on November 21, 1994, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared by the Exchange. The Exchange subsequently filed Amendment No. 1 to the proposal on December 1, 1994.[1] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to extend the Exchange's Automated Options Market (''AUTOM'') pilot program until December 31, 1995. The text of the proposal is available at the Office of the Secretary, the Phlx, and the Commission.

[1] In Amendment No. 1, the Exchange requested accelerated approval of the proposed rule change. *See* Letter from Edith Hallahan, Special Counsel, Phlx, to Michael Walinskas, Branch Chief, Office of Market Supervision (''OMS''), Division of Market Regulation (''Division''), Commission, dated December 1, 1994 (''Amendment No. 1'').

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

AUTOM is the Exchange's electronic order routing, delivery, execution, and reporting system for equity and index options. AUTOM is an on-line system that allows electronic delivery of options orders from member firms directly to the appropriate specialists on the Phlx options trading floor, with electronic confirmation of order executions. Certain orders are eligible for AUTOM's automatic execution feature, AUTO–X. AUTO–X orders are executed automatically at the disseminated quotation price on the Exchange and reported to the Options Price Reporting Authority (''OPRA'') and to the originating firm. Generally, the specialist is the contra-side to AUTO–X trades.[2] Those orders not eligible for AUTO–X are executed manually by the specialist, and, upon execution of the order, are entered into the Exchange's systems for reporting to OPRA and to the firm that placed the order.

The AUTOM system has operated on a pilot basis since 1988, when it was first approved by the Commission for market orders of up to five contracts for all exercise prices in the near-month covering 12 Phlx-traded equity options.[3] Since that time, AUTOM has been extended and amended several times.[4]

The purpose of the proposed rule change is to extend the AUTOM pilot program until December 31, 1995. The Phlx believes that this extension of the pilot program should provide the Exchange, as well as the Commission, with additional time to study the effectiveness of AUTOM prior to either a further extension or permanent approval of the pilot program. During this extension, the Exchange intends to monitor the implementation of certain enhancements to AUTOm as well as to codify the entire pilot program as an Exchange rule.[5]

Generally, the Exchange believes that since the last extension of the pilot program,[6] AUTOM has functioned properly and efficiently, without any material problems reported by Phlx members of AUTOM users, and without significant malfunctions or operational failures.

The Exchange believes that AUTOM provides small customer option orders with the benefits of electronic delivery and reporting, while AUTO-X provides automatic executions as well. Accordingly, the Exchange believes that AUTOM increases the speed and efficiency of order delivery, execution and reporting. This, the Exchange believes, promotes both liquidity and fair and orderly markets. For these reasons, the Phlx believes that extending the AUTOM pilot program until December 31, 1995, is consistent with Section 6 of the Act, in general, and, Section 6(b)(5), the particular, in that the proposal is designed to promote just and equitable principles of trade, and to protect investors and the public interest. In addition, the Exchange believes that the proposed rule change is consistent with Section 11A(a)(1)(B) of the Act in the that AUTOM is intended to improve, through the use of new data processing and communications techniques, the efficiency with which transactions in Phlx equity and index options are executive. Further, the Exchange believes that AUTOM fosters competition among options exchanges, which have similar systems in place.

(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 of Comments on the Proposed Rule Change Change Received From Members, Participants or Others

No written comments were either solicited or received by the Exchange.

No written comments were either solicited or received by the Exchange.

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.[7]

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 Sections 6 and 11A.[8] Specifically, the Commission continues to believe that the development and implementation of the AUTOM system provides for more efficient handling and reporting of orders in Phlx options through the use of new data processing and communications techniques, thereby improving order processing and turnaround time.[9] The Commission also

[2] *See* Securities Exchange Act Release No. 35033 (November 30, 1994), 59 FR 63152 (December 7, 1994) (order approving a ''wheel'' execution system to automatically assign the specialist and participating Registered Options traders, on a rotating basis, as the contra-side to AUTO–X trades).

[3] *See* Securities Exchange Act Release No. 25540 (March 31, 1988), 53 FR 11390 (April 6, 1988).

[4] *See* Securities Exchange Act Release Nos.: 25868 (June 30, 1988), 53 FR 25563 (July 7, 1988) (order extending the pilot program to include 25 additional equity options and extending the pilot through December 31, 1988); 26354 (December 13, 1988), 53 FR 51185 (December 20, 1988) (order extending pilot program through June 30, 1989); 26522 (February 3, 1989), 54 FR 6465 (February 10, 1989) (order extending pilot through December 31, 1989); 27599 (January 9, 1990), 55 FR 1751 (January 18, 1990) (order extending pilot through June 30, 1990); 28265 (July 26, 1990), 55 FR 31274 (August 1, 1990) (order extending pilot through December 31, 1990); 28978 (March 15, 1991), 56 FR 12050 (March 21, 1991) (order extending pilot through December 31, 1991 and approving the use of AUTO–X as part of the AUTOM pilot program); 29662 (September 9, 1991), 56 FR 46816 (September 16, 1991) (order permitting AUTO–X orders up to 20 contracts in Duracell operations only); 29782 (October 3, 1991), 56 FR 51247 (October 10, 1991) (order permitting AUTO–X for all strike prices and expiration months); 29837 (October 18, 1991), 56 FR 55146 (October 24, 1991) (order extending pilot through December 31, 1993); 32000 (March 15, 1993), 58 FR 15168 (March 19, 1993) (order approving the delivery of orders for up to 100 contracts through AUTOM and execution of orders for up to 25 contracts through AUTO–X); 32906 (September 15, 1993), 58 FR 49345) (September 22, 1993) (order permitting AUTO–X orders up to 25 contracts in all equity options); 33405 (December 30, 1993), 59 FR 790 (January 6, 1994) (order extending pilot through December 31, 1994) (''Exchange Act Release No. 33405''); and 34920 (October 31, 1994), 59 FR 55510 (November 7, 1994) (order approving use of AUTOM and AUTO–X for index option orders).

[5] Separately, the Exchange is proposing to limit the eligibility of National Over-the-Counter Index options for execution through AUTO-X. *See* File No. SR-Phlx-94-60. Additionally, the Exchange is proposing to codify the types of orders eligible for AUTOM and AUTO-X. *See* File No. SR-Phlx-94-62. *See also, supra* note 2.

[6] *See* Exchange Act Release No. 33405, *Supra* note 4.

[7] *See* Amendment No. 1, *supra* note 1.

[8] 15 U.S.C. § § 78f and 78k-1 (1988).

[9] The Commission notes that in the last extension of the pilot program, the Commission stated that prior to granting permanent approval or any further extension of the pilot, the Phlx would be required to submit a full report: (1) describing certain system modifications then in progress by the Exchange and describing the effect those modifications have subsequently had on AUTOM; and (2) updating a report submitted by the Phlx dated November 24,

Continued

believes that the extension of the pilot program until December 31, 1995, will provide the Exchange with a better opportunity to further study the operation and effectiveness of the pilot program, and the proposed modifications to be implemented during the extension,[10] prior to either a further extension or permanent approval of the pilot program.[11]

The Commission further notes that the Exchange has represented that since the last extension of the pilot program,[12] AUTOM has functioned properly and efficiently, that no material problems have been reported by Phlx members or AUTOM users, and that AUTOM has not had significant malfunctions or operational failures.[13] Finally, because the pilot program is being extended without expansion of the scope of the pilot, the Commission does not believe that the capacity of the Exchange's automated systems will be adversely effected by this extension.[14]

The Commission finds good cause for approving the proposed rule change and Amendment No. 1 thereto prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register** in order to permit the Phlx to continue the AUTOM pilot program on an uninterrupted basis. Specifically, the Commission believes that the Phlx's proposal to extend the AUTOM pilot program does not raise any new issues because it merely extends the pilot program as it is currently operating. Further, the Commission continues to believe that the pilot program is beneficial to maintaining the quality and efficiency of the Phlx's market. Finally, the Commission notes that there have been no adverse comments concerning the pilot program since its implementation. Accordingly, the Commission believes that granting accelerated approval of the proposed rule change is appropriate and consistent with Sections 6 and 11A of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR–Phlx–94–41 and should be submitted by January 30, 1995.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[15] that the proposed rule change (SR–Phlx–94–41), as amended, is approved through December 31, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–384 Filed 1–6–95; 8:45 am]

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1993; in connection with the last extension of the pilot program. *See* Exchange Act Release No. 33405, *supra* note 4. The Phlx has filed the required reports in connection with the current request for an extension of the pilot program. *See* Letter from Gerald O'Connell, First Vice President, Market Regulation and Trading Operations, Phlx, to Michael Walinskas, Branch Chief, OMS, Division, Commission, dated December 14, 1994, and letter from Jack McCarthy, Vice President, Equity Options Trading Systems, Phlx, to Michael Walinskas, Branch Chief, OMS, Division, Commission, dated December 21, 1994 (''December 21 Letter'').

[10] *See supra* note 5.

[11] Before granting permanent approval of the pilot program, the Commission expects the Phlx to submit a full report, on or before November 1, 1995, describing the operation of AUTOM during this extension and the effect of any modifications made to AUTOM system implemented during the extension. Additionally, the Phlx's AUTOM pilot report should include: (1) a description of the benefits provided by AUTOM; (2) the degree of AUTOM usage, including the number and size of the orders routed through AUTOM and the number and size of the orders executed automatically through the AUTO–X system; (3) the system capacity of AUTOM and AUTO–X; and (4) any problems the Exchange has encountered with the routing and execution features. The Commission also requests that the Phlx submit its request for either an extension or permanent approval of the pilot program on or before November 1, 1995.

[12] *See* Exchange Act Release No. 33405, *supra* note 4.

[13] Telephone conversation between Edith Hallahan, Special Counsel, Phlx, and Brad Ritter, Senior Counsel, OMS, Division, Commission, on December 29, 1994.

[14] The Commission expects the Phlx to immediately notify the Commission of any and all developments during this extension of the pilot program having a material effect on the capacity of the Phlx's automated systems. *See also,* December 21 Letter, *supra* note 9.

[15] 15 U.S.C. § 78s(b)(2) (1982).

[16] 17 CFR 200.30–3(a)(12) (1993).

[Release No. 34–35188; File No. SR–Phlx–94–46]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change Regarding a Post Primary Trading Session

January 3, 1995.

I. Introduction

On October 3, 1994 the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') submitted to the Securities and Exchange Commission (''SEC'' or ''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 extend the close of trading on the Exchange's equity trading floor from 4:00 to 4:15 p.m., creating a new Post Primary Session (''PPS''). On November 25, 1994, the Phlx submitted Amendment No. 1 to the proposed rule change.[3]

The proposed rule change, as amended, was published for comment in Securities Exchange Act Release No. 35007 (November 25, 1994), 59 FR 61915 (December 2, 1994). No comments were received on the proposal.

Pursuant to the current Phlx Rule 101 (Hours of Business), trading in any equity security on the Exchange's equity floor ends at 4:00 p.m. The PPS, however, will extend these hours for an additional fifteen minutes. Thus, the hours of the Phlx's auction trading market will be extended from the current hours of 9:30 a.m. to 4:00 p.m. to the new hours of 9:30 a.m. to 4:15 p.m.

Under the Phlx's proposal to extend its trading hours, all Exchange rules applicable to floor trading during the Exchange's regular hours[4] will continue to apply to floor trading during the PPS, except that during the PPS, (1) orders that are designated ''PPS'' are eligible for execution, and (2) GTX orders are executable after the close of the PPS (*i.e.,* GTX orders are executable after 4:15 p.m. instead of 4:00 p.m.). In order to facilitate the extension of trading, the

[1] 15 U.S.C. § 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1991).

[3] *See* letter from Gerald D. O'Connell, Vice President, Market Surveillance, Phlx, to Glen Barrentine, Senior Counsel, Commission, dated November 23, 1994.

[4] ''Regular'' hours of trading excludes the after hours trading facility for GTX orders permissible pursuant to Phlx Rule 232(c). This Rule defines a ''GTX'' order as one that is good until cancelled, eligible for primary market protection based on volume that prints on the New York Stock Exchange (''NYSE'') or American Stock Exchange (''Amex'') after-hours trading session.

Exchange is amending the following Phlx rules: Rule 101—Hours of Business; Rule 229—Philadelphia Stock Exchange Automated Communication and Execution System (''PACE''); Rule 232—Handling Orders When the Primary Market is Not Open for Free Trading (EXP, PPS, GTX Orders); and Equity Floor Procedure Advice EF–1—Designating Orders for Execution in Instances Where the Primary Market is Not Open in an Issue for which the Phlx is Open for Free Trading.

As indicated above, Phlx Rule 101 will be amended to reflect the extension of the hours of business. Second, the Exchange is amending Phlx Rule 229, governing the operation of PACE, to designate PACE as an eligible order routing system for PPS eligible orders. PACE will not, however, be available as an order execution mechanism during PPS.[5]

Third, Phlx Rule 232 currently only governs after-hours trading (crossing session) of GTX orders. The Exchange is amending it, however, so that it will specify that GTX orders are executable after the PPS close, and also encompass (1) PPS, and (2) rules governing trading on the Phlx when the primary market is not open for free trading in an issue at a time that the Phlx is open for free trading. Rather than assigning PPS a new rule number, the applicable PPS provision is being added to Phlx Rule 232 in order to group into a single rule the three Exchange provisions relating to trading on the Phlx during periods when the primary market is not open for free trading.[6]

With respect to the PPS provision, Rule 232 will: require that orders be designated PPS to be eligible for execution during the PPS; and specify that since PPS is merely an extension of the Exchange's auction market, whereby bids and offers are dynamically updated for trading under normal auction market principles, that Exchange rules applicable to floor trading during the ''regular'' session will continue to apply. In this regard, market, limit and contingent order types currently acceptable under Exchange rules will be accepted for PPS if so designated.[7] Finally, the GTX provisions will be renumbered as paragraph (c) of Phlx Rule 232.

With respect to the situation addressed in Equity Floor Procedure Advice EF–1—where the Phlx is open for trading before the primary market is open, or during a non-regulatory halt in trading on the primary market—this will be codified into Phlx Rule 232(a). In addition, the use of the yellow ticket, designating orders eligible for execution when the Phlx is open for trading in such a circumstance, will be replaced with the use of the designator ''EXP'' (meaning ex-primary) to parallel the designators ''PPS'' and ''GTX'' in Rule 232.[8]

The Commission finds that the proposed rule change to extend the Phlx's auction market trading session to 4:15 p.m. is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b).[9] In particular, the Commission believes the proposal is consistent with the Section 6(b)(5) requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, and, in general, to protect investors and the public, in that it is reasonably designed to promote just and equitable principles of trade, and, in general, perfect the mechanism of a free and open national market system.

The Commission believes that the decision to change the Exchange's trading hours does not raise any new regulatory concerns. Currently, auction market trading after 4:00 p.m. (EST) occurs on the Pacific Stock Exchange (''PSE'').[10] The Phlx system will operate in a substantially similar manner and enable the Phlx to compete with the PSE for after hours volume. Specifically, the Phlx PPS will continue to provide full transparency by disseminating quotes through the Consolidated Quotation System and reporting trades to the consolidated tape. In addition, there will continue to be complete access to the Phlx market during PPS and the usual auction market rules will continue to apply. Moreover, in order to preserve the execution quality of limit orders placed on the specialists' books during ''regular'' trading hours, such orders will not automatically migrate to the PPS, but rather will do so only if the order is so designated (*i.e.*, with an EXP indicator on the ticket). Finally, the Commission has not received any comment letters from the public or Phlx members raising any regulatory issues in connection with the extension of the Phlx auction market hours to 4:15 p.m.

The Commission notes, however, that during the proposed extension of trading hours, the PSE is the only other national securities exchange that will be operating an auction market. In this regard, the Phlx has represented to the Commission that the Intermarket Trading System (''ITS'') will be in operation as a link between the two exchanges during the PPS.[11] Thus, ITS commitments will be able to be routed back and forth, just as during the regular trading hours.

Although the NYSE is operating its Off-Hours Trading (''OHT'') facility and the Amex is operating its after-hours trading session during this time period, these sessions are limited to accepting single stock orders priced at either the NYSE or Amex closing price, respectively, or effecting portfolio trades. Because the PPS trading session will not overlap the 5:00 p.m. executions in Crossing Session I of the NYSE's OHT facility or the Amex's after-hours trading facility, the proposal being approved today does not raise market structure issues regarding the interaction between the PPS and these two after-hours systems.

Accordingly, the Commission does not believe that an extension of the Phlx's auction market trading hours to 4:15 p.m. will have an adverse effect on the maintenance of fair and orderly markets or disadvantage public customers.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[12] that the proposed rule change (SR–Phlx–94–46) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–386 Filed 1–6–95; 8:45 am]

BILLING CODE 8010–01–M

[5] Orders received by 4:00 p.m. Eastern Time as determined electronically by the PACE system are eligible for execution during regular trading hours (*i.e.*, before the PPS). *See* Phlx Rule 229 Commentary .17.

[6] With respect to equities, ''free'' trading is that which occurs after the initial opening of a security, but not during a trading halt.

[7] For example, pursuant to Phlx Rule 207, a ''GTC PPS'' (such an order is good 'til cancelled but executable during PPS, and differs from a GTX order in that the later is eligible for execution after the close of the Exchange) order will be eligible for PPS execution, and, if not executed, will be eligible for execution during ensuing days because of the GTC designation.

[8] The Phlx is also making a few minor changes to clarify that the Phlx may not be open for free trading during a regulatory trading halt on the primary market, and to reword the three-year cycle for imposing fines (*i.e.*, the fine schedule is structured such that successive violations committed during a three-year time span result in successive increased fines).

[9] 15 U.S.C. § 78f(b) (1988).

[10] *See* Securities Exchange Act Release No. 29631 (August 30, 1991), 56 FR 46025 (September 9, 1991).

[11] *See* letter from Gerald O'Connell, First Vice President, Phlx, to Amy Bilbija, Attorney, Commission, dated December 28, 1994.

[12] 15 U.S.C. § 78s(b)(2) (1988).

[13] 17 CFR 200.30–3(a)(12) (1991).

[Investment Company Act Release No. 20815; File No. 811–6244]

Muir Investment Trust; Application for Deregistration

December 30, 1994.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of Application for Deregistration Under the Investment Company Act of 1940 (the ''Act'').

APPLICANT: Muir Investment Trust.

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 on Form N–8F was filed on December 9, 1994.

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 24, 1995, 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 5th Street, NW., Washington, DC 20549. Applicant, 325 Sharon Park Drive #303, Menlo Park, California 94025.

FOR FURTHER INFORMATION CONTACT: James J. Dwyer, Staff Attorney, at (202) 942–0581, or C. David Messman, Branch Chief, at (202) 942–0564 (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.

Applicant's Representations

1. Applicant is an open-end diversified management investment company organized as a Delaware business trust. On February 26, 1991, applicant registered under the Act as an investment company, and filed a registration statement on Form N–1A under section 8(b) of the Act and the Securities Act of 1933 to register an indefinite number of shares of it series, Muir California Tax-Free Bond Fund. The registration statement became effective on June 10, 1991, and applicant's initial public offering commended on or about June 12, 1991.

2. On November 22, 1993 and December 13, 1993, applicant's board of trustees approved an agreement and plan of reorganization (the ''Plan'') whereby applicant would transfer substantially all of its assets and liabilities to Muir California Tax-Free Income Portfolio (the ''Acquiring Fund''), a new series of Working Assets Common Holdings (the ''Acquiring Company''), a Massachusetts business trust registered under the Act. Applicant's trustees stated in a combined proxy statement/prospectus dated March 30, 1994 that the reorganization would keep costs under control and gain economies of scale while maintaining applicant's strict socially responsible investment philosophy.

3. Applicant and Acquiring Fund share a common investment subadviser, GMG/Seneca Capital Management. Accordingly, applicant and Acquiring Fund may be deemed to be affiliated persons of each other. Applicant therefore relied on the exemption provided by rule 17a–8 under the Act to effect the reorganization. Consequently, in accordance with rule 17a–8, applicant's trustees determined on December 13, 1993, and the trustees of Acquiring Fund determined on January 18, 1994, that the purchase of the assets of applicant by Acquiring Fund was in the best interests of the shareholders of each investment company, and that such purchase would not result in any dilution to the interests of the existing shareholders of each company.[1]

4. Preliminary proxy materials were filed with the SEC on January 31, 1994, and mailed to applicant's shareholders on or about April 8, 1994. Applicant's shareholders voted to approve the Plan at a special meeting held on May 3, 1994. Definitive proxy materials relating to the Plan were mailed for filing with the SEC on May 23, 1994.

5. As of May 13, 1994, applicant had 1,114,801 shares outstanding, having an aggregate net asset value of $17,111,140 and a per share net asset value of $15.35. On that date, pursuant to the Plan, applicant transferred substantially all of its assets and liabilities to Acquiring Fund in exchange for a number of full and fractional shares of Acquiring Fund equal in number to applicant's outstanding shares. The net asset value of a share of Acquiring Fund was equal to the net asset value of a share of applicant. Applicant then distributed to its shareholders *pro rata* the Acquiring Fund shares it received, in complete liquidation of applicant.

6. No brokerage commissions were paid in connection with the reorganization. Pursuant to the Plan, Working Assets Capital Management, the investment adviser of Acquiring Fund, agreed to pay $10,000 towards legal fees and to pay the costs of printing, mailing, and proxy solicitation. All other expenses in connection with the reorganization were borne by Muir California Tax-Free Bond Fund or its sponsor, Sand County Securities, L.P.

7. At the time of the application, applicant had no shareholders, assets, or liabilities. To the best of its knowledge, applicant is not a party to any litigation or administrative proceeding. Applicant is not engaged in, nor does its propose to engage in, any business activities other than those necessary for the winding up of its affairs.

8. Applicant will take all action required by state law to terminate as a Delaware business trust, including filing a certificate of merger with the Delaware Secretary of State.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–429 Filed 1–6–95; 8:45 am]

BILLING CODE 8010–01–M

[1] Rule 17a–8 provides relief from the affiliated transaction prohibition of section 17(a) of the Act for a merger of investment companies that may be affiliated persons of each other solely by reason of having a common investment adviser, common directors, and/or common officers.

DEPARTMENT OF TRANSPORTATION

Coast Guard

[CGD 95–002]

Lower Mississippi River Waterway Safety Advisory Committee

AGENCY: Coast Guard, DOT.

ACTION: Notice of meeting.

SUMMARY: The Lower Mississippi River Waterway Safety Advisory Committee will meet to discuss various navigation safety matters affecting the Lower Mississippi River area. The meeting will be open to the public.

DATES: The meeting will be held from 9 a.m. to approximately 1 p.m. on Tuesday, February 7, 1995.

ADDRESSES: The meeting will be held in room 1830 of the World Trade Center, 2 Canal Street, New Orleans, Louisiana.

FOR FURTHER INFORMATION CONTACT: LTJG Dave Seris, USCG, Recording Secretary, Lower Mississippi River Waterway Safety Advisory Committee,

c/o Commander, Eighth Coast Guard District (oan), Room 1211, Hale Boggs Federal Building, 501 Magazine Street, New Orleans, LA 70130–3396, telephone (504) 589–2353.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2 Section 1 *et seq.* The meeting is open to the public. Members of the public may present written or oral statements at the meeting. The agenda for the meeting consists of the following items.

(1) Presentation of the minutes from the April 19, 1994 full Committee meeting.

(2) Discussion of previous recommendations made by the Committee. Discussions will include an update on gaming vessel issues, marking of an alternate route through Breton Sound, and an update on CH–67 VHF/FM interference.

(3) Presentation of any additional new items for consideration of the Committee.

Dated: December 30, 1994.

R.C. North,

Rear Admiral, U.S. Coast Guard Commander, Eight Coast Guard District.

[FR Doc. 94–434 Filed 1–6–94; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

December 30, 1994.

The Department of Treasury has made revisions and resubmitted 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 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Internal Revenue Service (IRS)

OMB Number: 1545–0704.

Form Number: IRS Form 5471, Schedules J, M, N, and O.

Type of Review: Resubmission.

Title: Information Return of U.S. Persons with Respect to Certain Foreign Corporations.

Description: Form 5471 and related schedules are used by U.S. persons that have an interest in a foreign corporation. The form is used to report income from the foreign corporation. The form and schedules are used to satisfy the reporting requirements of sections 6035, 6038 and 6046 and the regulations thereunder pertaining to the involvement of U.S. persons with certain foreign corporations.

Respondents: Individuals or households, Businesses or other for-profit, Small businesses or organizations.

Estimated Number of Respondents/Recordkeepers: 1,332,000.

Estimated Burden Hours Per Respondent/Recordkeeper:

Form	Recordkeeping	Learning about the law or the form	Preparing and sending the form to the IRS
5471	86 hr., 20 min	25 hr., 38 min	31 hr., 46 min.
Sch. J	3 hr., 50 min	1 hr., 6 min	1 hr., 6 min.
Sch. M	26 hr., 33 min	6 min	32 min.
Sch. N	8 hr., 22 min	8 hr., 22 min	3 hr., 2 min.
Sch. O	10 hr., 46 min	12 min	23 min.

Frequency of Response: Annually.

Estimated Total Reporting/Recordkeeping Burden: 17,533,560 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) 395–7340, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 95–376 Filed 1–6–95; 8:45 am]

BILLING CODE 4830–01–P

Public Information Collection Requirements Submitted to OMB for Review

December 30, 1994.

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 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Internal Revenue Service (IRS)

OMB Number: 1545–0002.

Form Number: IRS Form CT–2.

Type of Review: Extension.

Title: Employee Representative's Quarterly Railroad Tax Return.

Description: Employee representatives file Form CT–2 quarterly to report compensation on which railroad retirement taxes are due. IRS uses this information to insure that employee representatives have paid the correct tax. Form CT–2 also transmits the tax payment.

Respondents: Individuals or households.

Estimated Number of Respondents/Recordkeepers: 28.

Estimated Burden Hours Per Respondent/Recordkeeper:

Recordkeeping	26 min.
Learning about the law or the form.	13 min.
Preparing the form	31 min.
Copying, assembling, and sending the form to the IRS.	17 min.

Frequency of Response: Quarterly.

Estimated Total Reporting/Recordkeeping Burden: 164 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) 395–7340, Office of Management and Budget, Room 10226, New

Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 95–377 Filed 1–6–95; 8:45 am]

BILLING CODE 4830–01–P

Sunshine Act Meetings

Federal Register

Vol. 60, No. 5

Monday, January 9, 1995

This section of the FEDERAL REGISTER contains notices of meetings published under the ''Government in the Sunshine Act'' (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

TIME AND DATE: 10:00 A.M. January 17, 1995.

PLACE: 4th Floor, Conference Room, 1250 H. Street, N.W., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Approval of the minutes of the December 19, 1994, Board meeting.
2. Thrift Savings Plan activity report by the Executive Director.
3. Review of KPMG Peat Marwick audit reports:

''Pension and Welfare Benefits Administration Review of the Thrift Savings Plan Account Maintenance Subsystem at the United States Department of Agriculture, Office of Finance and Management, National Finance Center.''

''Pension and Welfare Benefits Administration Review of the Thrift Savings Plan Withdrawal and Inactive Accounts Operations at the United States Department of Agriculture, Office of Finance and Management, National Finance Center.''

''Pension and Welfare Benefits Administration Review of the Thrift Savings Plan System Enhancements and Software Change Controls at the United States Department of Agriculture, Office of Finance and Management, National Finance Center.''

CONTACT PERSON FOR MORE INFORMATION: Tom Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: January 4, 1995.

Roger W. Mehle,

Executive Director, Federal Retirement Thrift Investment Board.

[FR Doc. 95–515 Filed 1–5–95; 9:40 am]

BILLING CODE 6760–01–M

AGENCY HOLDING THE MEETING: United States International Trade Commission

TIME AND DATE: January 11, 1995 at 2:30 p.m.

PLACE: Room 101, 500 E Street S.W., Washington, DC 20436.

STATUS:

1. Agenda for future meeting
2. Minutes
3. Ratification List
4. Inv. No. 731–TA–725 (Preliminary) (Manganese Sulfate from China)—briefing and vote.
5. Outstanding action jackets: none

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: January 4, 1995.

By order of the Commission:

Donna R. Koehnke,

Secretary.

[FR Doc. 95–543 Filed 1–5–95; 2:26 pm]

BILLING CODE 7020–02–P

NATIONAL TRANSPORTATION SAFETY BOARD

TIME AND PLACE: 9:30 a.m., Wednesday, January 18, 1995.

PLACE: The Board Room, 5th Floor, 490 L'Enfant Plaza, SW., Washington, DC 20594.

STATUS: Open.

MATTERS TO BE CONSIDERED:

6511 Safety Study: Factors That Affect Fatigue in Heavy Truck Accidents.

6362A Pipeline Accident Report: Rupture of Texas Eastern Transmission Corporation's 36-inch-diameter Gas Transmission Pipeline and Subsequent Fire, Edison, New Jersey, March 23, 1994.

NEWS MEDIA CONTACT: Telephone: (202) 382–0660.

FOR MORE INFORMATION CONTACT: Bea Hardesty, (202) 382–6525.

Dated: January 5, 1995.

Bea Hardesty,

Federal Register Liaison Officer.

[FR Doc. 95–607 Filed 1–5–95; 3:45 pm]

BILLING CODE 7533–01–P

federal register

Monday
January 9, 1995

Part II

United States Sentencing Commission

Sentencing Guidelines for United States Courts; Notice of Hearing

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment. Notice of hearing.

SUMMARY: The Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. The proposed amendments and a synopsis of issues to be addressed are set forth below. The Commission may report amendments to the Congress on or before May 1, 1995. Comment is sought on all proposals, alternative proposals, and any other aspect of the sentencing guidelines, policy statements, and commentary.

DATES: The Commission has scheduled a public hearing on these proposed amendments for March 14, 1995, at 9:30 a.m. in the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, NE., Washington, DC 20002–8002.

Persons interested in attending the public hearing should contact the Commission at a later date to learn the room in which the hearing will take place. Anyone wishing to testify at the public hearing should notify Michael Courlander, Public Information Specialist, at (202) 273–4590 by February 28, 1995.

Public comment, including written testimony for the hearing, should be received by the Commission no later than March 7, 1995, to be considered by the Commission in the promulgation of amendments due to the Congress by May 1, 1995.

ADDRESSES: Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, NE., Suite 2–500, South Lobby, Washington, DC 20002–8002, Attention: Public Information.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Information Specialist, Telephone: (202) 273–4590.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission is empowered under 28 U.S.C. § 994(a) to promulgate sentencing guidelines and policy statements for federal courts. The statute further directs the Commission to review and revise periodically guidelines previously promulgated and authorizes it to submit guideline amendments to the Congress no later than the first day of May each year. See 28 U.S.C. § 994(o), (p).

Ordinarily, the Administrative Procedure Act rule-making requirements are inapplicable to judicial agencies; however, 28 U.S.C. § 994(x) makes the Administrative Procedure Act rule-making provisions of 5 U.S.C. § 553 applicable to the promulgation of sentencing guidelines by the Commission.

The proposed amendments are presented in one of three formats. First, a number of the amendments are proposed as specific revisions of a guideline, policy statement, or commentary. Second, for some amendments, the Commission has published alternative methods of addressing an issue, shown in brackets. Commentators are encouraged to state their preference among listed alternatives or to suggest a new alternative. Third, the Commission has highlighted certain issues for comment and invites suggestions for specific amendment language.

Section 1B1.10 of the United States Sentencing Commission Guidelines Manual sets forth the Commission's policy statement regarding retroactivity of amended guideline ranges. Comment is requested as to whether any of the proposed amendments should be made retroactive under this policy statement.

Although the amendments below are specifically proposed for public comment and possible submission to the Congress by May 1, 1995, the Commission emphasizes that it welcomes comment on any aspect of the sentencing guidelines, policy statements, and commentary, whether or not the subject of a proposed amendment.

Publication of a proposed amendment or issue for comment signifies only that at least three Commissioners consider the amendment or issue worthy of comment by interested groups and individuals. Publication should not be regarded as an indication that the Commission or any individual Commissioner has formed a view on the merits of the proposed amendment or issue.

Authority: 28 U.S.C. § 994(a), (o), (p), (x).

Phyllis J. Newton,

Staff Director.

I. Amendments Relating to Congressional Directives to the Commission and Other Statutory Changes

Chapter One, Part B (General Application Principles)

1. Issue for Comment: Section 40503 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to conduct a study and consider appropriate guideline amendments relating to offenses in which an HIV-infected individual engages in sexual activity with knowledge of his or her HIV infection status and with the intent through such sexual activity to expose another to HIV. A report is to be submitted to Congress by March 13, 1995. The Commission invites comment on any aspect of this issue. In addition, the Commission invites comment on whether the infectious bodily fluid of a person should be defined expressly as a ''dangerous weapon.'' The Commission further invites comment on whether the definitions relating to serious bodily injury and permanent or life-threatening bodily injury should be amended to expressly include infection by HIV-infected bodily fluid. The Commission also invites comment on whether basing enhanced penalties for willful sexual exposure to HIV will have any implications for HIV testing behavior.

Chapter Two, Part A (Offenses Against the Person)

2. Issue for Comment: Section 170201 of the Violent Crime Control and Law Enforcement Act of 1994 establishes a new offense with a five-year statutory maximum for an assault against a person under the age of 16 years that results in substantial bodily injury (18 U.S.C. § 113(a)(7)). Substantial bodily injury is defined as ''bodily injury that involves a temporary but substantial disfigurement or a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental facility.'' The Commission invites comment as to whether § 2A2.3 provides an adequate penalty for a violation of 18 U.S.C. § 113(a)(7). If not, how and to what extent should § 2A2.3 be amended? For example, should the Commission amend § 2A2.3(a)(1) by deleting ''physical contact'' and inserting ''bodily injury,'' thus providing a base offense level of six for bodily injury or weapon possession with a threat of use and a base offense level of three for other cases? Should the

Commission instead add a specific offense characteristic for bodily injury or a specific offense characteristic if the defendant is convicted of a violation of 18 U.S.C. § 113(a)(7)? Should § 2A2.3 be amended by providing a cross reference to § 2A2.2 (Aggravated Assault) to account for cases in which the underlying conduct involves serious bodily injury or use of a weapon with intent to cause bodily harm although the offense of conviction does not qualify as aggravated assault?

3. Issue for Comment: Section 320102 of the Violent Crime Control and Law Enforcement Act of 1994 increases the maximum imprisonment penalty for involuntary manslaughter from three years to six years. The proposed amendment responds to the Commission's recommendation that Congress raise the penalty in order to achieve parity with the sentencing practices of the majority of the states and to allow the guideline sentence for this offense to operate without undue constraint. Guideline 2A1.4 (Involuntary Manslaughter) applies a base offense level of level 10 (if the conduct was criminally negligent) or level 14 (if the conduct was reckless) to offenses under 18 U.S.C. § 1112. These offense levels may have reflected, in part, the previous relatively low maximum term of imprisonment authorized for this offense. The Commission invites comment on whether the base offense levels under § 2A1.4 (Involuntary Manslaughter) provide adequate punishment and, if not, to what extent they should be increased.

4. Synopsis of Proposed Amendment: The International Parental Kidnapping Crime Act of 1993 (Public Law 103–73, codified at 18 U.S.C. § 1204) makes it unlawful to remove a child from the United States with intent to obstruct the lawful exercise of parental rights. The statutorily authorized maximum term of imprisonment for this offense is three years. In contrast, other kidnapping offenses (e.g., 18 U.S.C. § 1201) have a statutory maximum sentence of life or death. Two options are shown. Option 1 references this statute to § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint) with a separate base offense level for a conviction under this statute. Option 2 references this statute to § 2J1.2 (Obstruction of Justice) because the underlying conduct involves interference with a court's child-custody order.

Proposed Amendment: [Option 1: Section § 2A4.1(a) is amended by deleting ''24'' and inserting in lieu thereof:

''(1) 24, except as provided below;

(2) 12, if the defendant was convicted under 18 U.S.C. § 1204.'';

and by inserting the following additional subsection:

''(d) Special Instruction

(1) If the base offense level is determined under subsection (a)(2), do not apply subsection (b)(4).''.

Appendix A (Statutory Index) is amended by inserting the following at the appropriate place by title and section:

''18 U.S.C. § 1204 2A4.1''.]

[Option 2: Appendix A (Statutory Index) is amended by inserting the following at the appropriate place by title and section:

''18 U.S.C. § 1204 2J1.2''.]

5. Issue for Comment: Section 40112 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to conduct a study and consider appropriate amendments to §§ 2A3.1 (Aggravated Sexual Abuse) and 2A3.2 (Sexual Abuse) to address four concerns: (1) enhancing the sentence if more than one defendant is involved in the offense; (2) reducing unwarranted disparity between defendants who are known by the victim and those who are unknown by the victim; (3) making federal penalties commensurate with state penalties; and (4) considering the general problem of recidivism, severity of the offense, and devastating effects on survivors. The provision also requires the preparation of a report to Congress analyzing federal rape sentences and obtaining comment from independent experts on: (1) comparative federal sentences between assailants who were known vs. unknown to their victims; (2) comparative federal sentences with those of states; and (3) the effect of rape sentences on Native American and U.S. military populations relative to the impact of sentences for other federal offenses on these populations. This report is to be submitted to Congress by March 13, 1995.

The Commission invites comment on any aspect of this directive or any amendment to the guidelines appropriate to address this directive. Specifically, comment is requested on whether § 2A3.1 (Criminal Sexual Abuse) should be amended to include an enhancement for more than one assailant. If such a factor is added, comment is requested as to the weight to be given to that factor and how its inclusion should affect the application of an adjustment for the defendant's role in the offense under Chapter Three, Part B. Comment is further invited as to whether the guidelines adequately account for the seriousness of the sexual abuse offense (including the effects on the victim of sexual abuse) and how any suggested changes should be applied. Currently, through specific offense characteristics and other instructions in § 2A3.1, the guidelines consider the degree of bodily injury, age of victim, sexual abuse of a person held within a correctional facility, use of a dangerous weapon, circumstances in which the defendant holds a supervisory or custodial role, circumstances in which the victim was abducted, and death of the victim. The Commission invites comment on additional factors that might appropriately be considered and the weights such factors should be given.

Chapter Two, Parts A (Offenses Against the Person); G (Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity); J (Offenses Involving the Administration of Justice); and L (Offenses Involving Immigration, Naturalization, and Passports)

6. Synopsis of Proposed Amendment: Sections 60010, 60011, 60016, 60017, and 60024 of the Violent Crime Control and Law Enforcement Act of 1994 increase the penalty for various offenses resulting in the death of a victim. It is not clear whether imposition of the penalties in the new law will require proof of the conduct by a preponderance of the evidence or beyond a reasonable doubt. For example, the ''beyond a reasonable doubt standard'' contemplated in some instances by McMillan v. United States, 477 U.S. 79 (1986), might be triggered by section 60010, which increases the six-month maximum imprisonment penalty for abusive sexual contact of a ward to a maximum sentence of death or imprisonment for any term of years or life if death results from that contact.

Two options are shown. Option 1 amends the Statutory Index to reference the new provisions to guidelines in Chapter Two, Part A, when death results from the underlying offense. Under § 1B1.2 (Applicable Guidelines), this reference will apply only if it is found beyond a reasonable doubt that death resulted from the offense. Option 2 amends the guidelines for the underlying offenses to include a cross reference to Chapter Two, Part A, if death results from the offense. Under Option 2, it need only be found by a preponderance of the evidence that death resulted from the offense for the cross reference to apply, consistent with § 1B1.3 (Relevant Conduct).

Proposed Amendment: [Option 1: Appendix A (Statutory Index) is amended in the line referenced to 8 U.S.C. § 1324(a) by inserting ''2A1.1,

2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2,'' immediately before ''2L1.1'';

In the line referenced to 18 U.S.C. § 1503 by inserting ''2A1.1, 2A1.2, 2A1.3, 2A2.1,'' immediately before ''2J1.2'';

In the line referenced to 18 U.S.C. § 1513 by inserting ''(b)'' immediately following ''1513'';

By inserting the following at the appropriate place by title and section:

''18 U.S.C. § 1513(a) 2A1.1, 2A1.2, 2A1.3, 2A2.1 (2J1.2 for offenses committed prior to September 13, 1994)'';

In the line referenced to 18 U.S.C. § 2243(a) by inserting ''2A1.1, 2A1.2, 2A1.3, 2A1.4,'' immediately before ''2A3.2'';

In the line referenced to 18 U.S.C. § 2243(b) by inserting ''2A1.1, 2A1.2, 2A1.3, 2A1.4,'' immediately before ''2A3.3'';

In the line referenced to 18 U.S.C. § 2244 by inserting ''2A1.1, 2A1.2, 2A1.3, 2A1.4,'' immediately before ''2A3.4''; and

In the lines referenced to 18 U.S.C. § 2251(a), (b) and to 18 U.S.C. § 2251(c)(1)(B) by inserting ''2A1.1, 2A1.2, 2A1.3, 2A1.4,'' immediately before ''2G2.1''.]

[Option 2: Section 2A3.2(c) is amended by inserting the following additional subdivision:

''(2) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.''.

Section 2A3.3 is amended by inserting the following additional subsection:

''(b) Cross Reference

(1) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.''.

Section 2A3.4(c) is amended by inserting the following additional subdivision:

''(3) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.''.

Section 2G2.1 is amended by redesignating subsection (c) as (d); and by inserting the following as subsection (c):

''(c) Cross Reference

(1) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.''.

Section 2J1.2(c) is amended by deleting ''Reference'' and inserting in lieu thereof ''References''; and by inserting the following additional subdivision:

''(2) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.''.

Section 2L1.1 is amended by inserting the following additional subsection:

''(c) Cross Reference

(1) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.''.

Chapter Two, Part A (Offenses Against the Person)

Chapter Four, Part A (Criminal History)

7. Synopsis of Proposed Amendment: Section 40111 of the Violent Crime Control and Law Enforcement Act of 1994 adds a new section 2247 to title 18 that doubles the statutory maximum term of imprisonment for defendants convicted of offenses under chapter 109A (Sexual Abuse) of title 18 who have been convicted previously in federal or state court of aggravated sexual abuse, sexual abuse, or aggravated sexual contact. The section also directs the Sentencing Commission to implement this provision ''by promulgating amendments, if appropriate, in the sentencing guidelines applicable to chapter 109A offenses.''

None of the Chapter Two sexual abuse guidelines currently provides for enhancement for repeat sex offenses. However, Chapter Four (Criminal History and Criminal Livelihood) does include a determination of the seriousness of the defendant's criminal record based upon prior convictions (§ 4A1.1). Guideline 4B1.1 (Career Offender) also provides enhanced penalties for offenders who engage in a crime of violence or controlled substance offense, having been sentenced previously for two or more crimes of either type. Crimes of violence include sexual abuse offenses committed with violence or force or threat of force (§ 4B1.2(1)). For cases in which a defendant is sentenced for a current sexual offense, has only one prior sexual offense, and no other prior crimes of violence or controlled substance offenses, the prior sexual offense is accounted for within the calculation of Criminal History Score. The Criminal History Score classifies prior convictions based upon type and length of prior sentence. Consequently, the sexual nature of the prior offense is not considered specifically although it may be related to the type and length of prior sentence.

Although, as noted above, the guidelines currently do not enhance specifically for one prior repeat sex crime, § 4A1.3 (Adequacy of Criminal History Category) generally provides that an upward departure may be considered ''[i]f reliable information indicates that the criminal history category does not reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes.'' The proposed amendment builds on § 4A1.3 by specifically listing as a basis for upward departure the fact that the defendant has a prior sentence for conduct similar to the instant sexual offense. This approach implements the directive to the Commission in a broader but more flexible form.

Proposed Amendment: The Commentary to § 2A3.1 captioned ''Application Notes'' is amended by inserting the following additional note:

''6. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted under § 4A1.3 (Adequacy of Criminal History Category).''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by inserting the following additional note:

''4. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted under § 4A1.3 (Adequacy of Criminal History Category).''.

The Commentary to § 2A3.3 captioned ''Application Notes'' is amended by inserting the following additional note:

''2. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted under § 4A1.3 (Adequacy of Criminal History Category).''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended by inserting the following additional note:

''5. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted under § 4A1.3 (Adequacy of Criminal History Category).''.

Section 4A1.3 is amended by inserting the following new paragraph as the third paragraph:

''An upward departure under this provision, to reflect a defendant's demonstrated pattern of particularly egregious criminal conduct, also may be warranted if all of the following apply: (A) the instant offense involves death, serious bodily injury, the attempted

infliction of death or serious bodily injury, or a forcible sexual offense; (B) the defendant's prior criminal history includes one or more sentences for conduct that is similar to the instant offense; and (C) the provisions of §§ 4A1.1 (Career Offender) or 4A1.4 (Armed Career Criminal) do not apply.''.

Additional Issue for Comment: The Commission invites comment on whether, as an alternative to the proposed amendment, it should amend the guidelines in Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse) to provide higher offense levels if the defendant has a prior conviction in federal or state court for aggravated sexual abuse, sexual abuse, or aggravated sexual contact, and, if so, how such a provision might best be drafted to account for the wide variations in offenses of conviction that may involve such underlying conduct. The Commission also invites comment on the appropriate amount of any such increase in offense levels. Note that in circumstances in which the defendant has two or more prior felony convictions of either a crime of violence (which includes forcible sex offenses) or a controlled substance offense, § 4B1.1 (Career Offender) will provide a sentence at or near the statutory maximum for the current offense.

Chapter Two, Part B (Offenses Involving Property)

Chapter Two, Part F (Offenses Involving Fraud Or Deceit)

8. Synopsis of Proposed Amendment: Section 110512 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to ''amend its sentencing guidelines to provide an appropriate enhancement of the punishment for a defendant convicted of a felony under chapter 25 (Counterfeiting and Forgery) of title 18, United States Code (sections 471–513), if the defendant used or carried a firearm (as defined in section 921(a)(3) of title 18, United States Code) during and in relation to the felony.'' The vast majority of offenses in chapter 25 are covered by §§ 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) and 2F1.1 (Fraud and Deceit; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). Neither § 2B5.1 nor § 2F1.1 provides an adjustment for possession of a firearm during and in relation to a felony. Commission data suggest that the frequency of firearm possession in such cases is very low.

Two options are shown. Option 1 amends §§ 2B5.1 and 2F1.1 to provide an adjustment for using or carrying a weapon in connection with the offense. Option 2 amends §§ 2B5.1 and 2F1.1 to recommend an upward departure in such circumstances.

Proposed Amendment: [Option 1: Section 2B5.1(b) is amended by inserting the following additional subdivision:

''(3) If a dangerous weapon (including a firearm) was possessed in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.''

The Commentary to § 2B5.1 captioned ''Background'' is amended by inserting the following additional paragraph as the second paragraph:

''Subsection (b)(3) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.''.

Section 2F1.1(b)(4) is amended by inserting ''(A)'' immediately after ''involved'' and by inserting ''or (B) possession of a dangerous weapon (including a firearm) in connection with the offense,'' immediately after ''injury,''.

The Commentary to § 2F1.1 captioned ''Background'' is amended by inserting the following additional paragraph as the next to the last paragraph:

''Subsection (b)(4)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.''.]

[Option 2: The Commentary to § 2B5.1 captioned ''Application Notes'' is amended by inserting the following additional Note:

''4. If a dangerous weapon (including a firearm) was possessed in connection with the offense, an upward departure may be warranted.''.

The Commentary to § 2F1.1 captioned ''Application Notes'' is amended by inserting the following additional Note:

''19. If a dangerous weapon (including a firearm) was possessed in connection with the offense, an upward departure may be warranted.''.]

Additional Issue for Comment: The Commission, at the request of the Department of Justice, invites comment on whether the form of any enhancement for a dangerous weapon should be that used in § 2B3.1 (Robbery) or that used in Chapter Two, Part D (Offenses Involving Drugs).

Chapter Two, Part D (Offenses Involving Drugs)

9. *Synopsis of Proposed Amendment:* Section 60008 of the Violent Crime Control and Law Enforcement Act of 1994 creates a new offense codified at 18 U.S.C. § 36 that makes it unlawful to fire a weapon into a group of two or more persons in furtherance of, or to escape detection of, a major drug offense with intent to intimidate, harass, injure, or maim, and in the course of such conduct cause grave risk to any human life or kill any person. A ''major drug offense'' is defined to mean a continuing criminal enterprise, 21 U.S.C. § 848(c), a drug distribution conspiracy under 21 U.S.C. § 846 or § 963, or an offense involving large quantities of drugs that is punishable under 21 U.S.C. § 841(b)(1)(A) or § 960(b)(1).

Two options are shown. Option 1 references this offense to § 2D1.1 in the Statutory Index. Option 2, in addition, references the applicable Chapter Two, Part A, offenses.

Proposed Amendment: [Option 1: Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

''18 U.S.C. § 36 2D1.1''.]

[Option 2: Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

''18 U.S.C. § 36 2A1.1, 2A1.2, 2A2.1, 2A2.2, 2D1.1''.]

Additional Issue for Comment: The Commission, at the request of the Department of Justice, invites comment as to whether there should be an enhancement under § 2D1.1 for reckless endangerment by firing a weapon into a group of two or more persons in a circumstance set forth in section 60008 when no injury occurs.

10(A). Issue for Comment: Section 90101 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 1791 (providing or possessing contraband in prison) to provide four different maximum penalties depending on the type of controlled substance. The Commission invites comment on the appropriate treatment of offenses under 18 U.S.C. § 1791 involving drug trafficking in correctional facilities. Specifically, should the enhanced offense level in the cross reference in § 2P1.2 (two levels plus the offense level from § 2D1.1) be expanded to apply to all drug trafficking offenses under 18 U.S.C. § 1791? Should the minimum offense level of 26 in this cross reference be applied to methamphetamine offenses to reflect that such offenses now have the same 20-year statutory maximum penalty as the other controlled substance distribution offenses to which this cross reference applies? The Commission also invites comment on the appropriate offense levels under § 2P1.2 for offenses involving the simple possession of controlled substances that occur in correctional facilities.

(B). Issue for Comment: Section 90103 of the Violent Crime and Law Enforcement Act of 1994 directs the Commission to amend the guidelines to provide an adequate enhancement for (1) an offense of simple possession of a controlled substance under 21 U.S.C. § 844 that occurs in a federal prison or detention facility, and (2) an offense under 21 U.S.C. § 841 that involves distributing a controlled substance in a federal prison or detention facility. The Commission invites comment as to the best methods of implementing this directive. With respect to distribution offenses, the Commission specifically invites comment as to whether such offenses should be referenced to § 2D1.2, which provides enhanced penalties for controlled substance distribution offenses involving protected locations. With respect to simple possession offenses, the Commission specifically invites comment as to whether an enhancement of two levels would be an appropriate enhancement, or whether a higher or lower enhancement should be used. In addition, the Commission invites comment on how the offense levels for simple possession offenses in a correctional facility under §§ 2D2.1 and 2P1.2 might better be coordinated.

11. Issue for Comment: Section 90102 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to amend the guidelines to provide ''an appropriate enhancement'' for a defendant convicted of violating 21 U.S.C. § 860. This statute prohibits drug trafficking in protected locations (e.g., near schools, playgrounds, video arcades). Guideline 2D1.2 currently contains an enhanced penalty for such offenses based on a congressional directive to the Commission in section 6454 of Public Law 100–690 (pertaining to drug offenses involving persons less than 18 years of age). The Commission seeks comment on whether the enhancement for these offenses in § 2D1.2 is adequate to account for the directive set forth in section 90102 or, if the current enhancement is not adequate, how and to what extent § 2D1.2 should be amended to provide an appropriate enhancement.

Additional Issue for Comment: The Commission, at the request of the Federal and Community Defenders, invites comment as to whether the guidelines should be amended to provide a lower base offense level if an offense is committed in a protected location selected by law enforcement or its agents. The Commission specifically invites comment on the following proposal.

Section 2D1.2(a)(4) is amended by deleting ''otherwise'' and inserting in lieu thereof:

''(A) if the offense involved a protected location and the protected location was selected by law enforcement personnel, or someone acting under the direction or control of law enforcement personnel, or (B) in any case not covered by subdivisions 1 through 3 of this subsection.''.

12. Synopsis of Proposed Amendment: Section Two of the Domestic Chemical Diversion Act of 1993 (Public Law 103–200) changes the designations of the listed chemicals from ''listed precursor chemicals'' and ''listed essential chemicals'' to ''list I chemicals'' and ''list II chemicals,'' respectively. Guideline 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) currently refers to ''listed precursor chemicals'' and ''listed essential chemicals.'' This amendment conforms § 2D1.11 to the new terminology to avoid confusion.

Section Two of the Act also adds pills containing ephedrine as a list I chemical. Ephedrine is a list I chemical under 21 U.S.C. § 802(34). Pills containing ephedrine previously were not covered by the statute and thus legally could be purchased ''over the counter.'' Purchases of these pills were sometimes made in large quantities and the pills crushed and processed to extract the ephedrine (which could be used to make methamphetamine). Unlike ephedrine, which is purchased from a chemical company and is virtually 100 percent pure, these tablets contain about 25 percent ephedrine. To avoid unwarranted disparity, this amendment adds a note to § 2D1.11 providing that only the amount of actual ephedrine contained in the pill is to be used in determining the offense level.

Section Eight of the Act removes three chemicals from the listed chemicals controlled under the Controlled Substances Act and adds two chemicals. Two of the chemicals removed from the list are not currently listed in § 2D1.11 because the Commission was aware that they were erroneously included in the statute (they are not used in the manufacture of any controlled substance). The third chemical removed from the list, d-lysergic acid, was listed both as a listed chemical in § 2D1.11 and as a controlled substance in § 2D1.1. To conform § 2D1.11 to this change, the proposed amendment deletes all references to d-lysergic acid. The two chemicals added as listed chemicals are benzaldehyde and nitroethane. Both of these chemicals are used to make methamphetamine. Base offense levels for listed chemicals in § 2D1.11 are determined by their relationship to the most common controlled substance they are used to manufacture. The proposed amendment adds these chemicals to the Chemical Quantity Table in § 2D1.11 based on information provided by the Drug Enforcement Administration regarding their use in the production of methamphetamine.

Several of the chemicals in the Chemical Quantity Table are used in the same process to make a controlled substance, such as hydriodic acid and ephedrine as well the two chemicals added above. The current note at the end of the Precursor Chemical Equivalency Table states ''[i]n cases involving both hydriodic acid and ephedrine, calculate the offense level for each separately and use the quantity that results in the greatest offense level.'' The proposed amendment expands this note to cover other chemicals that may be used together, including the two chemicals added by the statute.

Proposed Amendment: Section 2D1.11 and the commentary thereto is amended by deleting ''listed precursor'' wherever it appears and inserting in lieu thereof ''list I''; by deleting ''listed essential'' wherever it appears and inserting in lieu thereof ''list II''; and by deleting ''Precursor Chemical Equivalency Table'' wherever it appears and inserting in lieu thereof ''List I Chemical Equivalency Table''.

Section 2D1.11(d) is amended by deleting all lines referencing d-lysergic acid.

The Chemical Quantity Table in § 2D1.11(d) is amended in subdivisions (1)–(9) by adding the following list I chemicals (formerly Listed Precursor Chemicals) in the appropriate place in alphabetical order by subdivision as follows:

(1) ''17.8 KG or more of Benzaldehyde;'', ''12.56 KG or more of Nitroethane;'',

(2) ''At least 5.34 KG but less than 17.8 KG of Benzaldehyde;'', ''At least 3.768 KG but less than 12.56 KG of Nitroethane;'',

(3) ''At least 1.78 KG but less than 5.34 KG of Benzaldehyde;'', ''At least 1.256 KG but less than 3.768 KG of Nitroethane;'',

(4) ''At least 1.25 KG but less than 5.34 KG of Benzaldehyde;'', ''At least 879 G but less than 1.256 KG of Nitroethane;'',

(5) ''At least 712 G but less than 1.25 KG of Benzaldehyde;'', ''At least 502 G but less than 879 G of Nitroethane;'',

(6) ''At least 178 G but less than 712 G of Benzaldehyde;'', ''At least 126 G but less than 879 G of Nitroethane;'',

(7) ''At least 142 G but less than 178 G of Benzaldehyde;'', ''At least 100 G but less than 126 G of Nitroethane;'',

(8) ''At least 107 G but less than 142 G of Benzaldehyde;'', ''At least 75 G but less than 100 G of Nitroethane;'',

(9) ''Less than 107 G of Benzaldehyde;'', ''Less than 75 G of Nitroethane;'';

And by adding the following chemicals, in the appropriate place in alphabetical order, to the List I Chemical Equivalency Table:

''1 gm of Benzaldehyde = 1.121 gm of Ephedrine'',

''1 gm of Nitroethane = 1.6 gm of Ephedrine''.

Section 2D1.11(d) is amended in the notes following the Chemical Quantity Table by deleting Note (A) and inserting in lieu thereof:

''(A) The List I Chemical Equivalency Table provides a means for combining different precursor chemicals to obtain a single offense level. In a case involving two or more list I chemicals used to manufacture different controlled substances or to manufacture one controlled substance by different manufacturing processes, convert each to its ephedrine equivalency from the table below, add the quantities, and use the Chemical Quantity Table to determine the base offense level. In a case involving two or more list I chemicals used together to manufacture a controlled substance in the same manufacturing process, use the quantity of the single list I chemical that results in the greatest base offense level.'';

By deleting Note D and inserting in lieu thereof:

''(D) In a case involving ephedrine tablets, use the weight of the ephedrine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.''.

Section 2D1.11(d) is amended in the note following the List I Chemical Equivalency Table (formerly the Precursor Chemical Equivalency Table) designated by two asterisks by deleting ''both hydriodic acid and ephedrine'' and inserting in lieu thereof ''two or more list I chemicals used together in the same manufacturing process''.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended by deleting Note 4 in its entirety and inserting in lieu thereof:

''4. When two or more list I chemicals are used together in the same manufacturing process, calculate the offense level for each separately and use the quantity that results in the greatest base offense level. In any other case, the quantities should be added together (using the List I Chemical Equivalency Table) for the purposes of calculating the base offense level.

Examples:

(a) The defendant was in possession of five kilograms of ephedrine and three kilograms of hydriodic acid. Both of these list I chemicals are typically used together to manufacture methamphetamine. Therefore, the base offense level for each listed chemical would be calculated separately and the list I chemical with the highest base offense level would be used. Five kilograms of ephedrine result in a base offense level of 24; 300 grams of hydriodic acid result in base offense level of 14. In this case, the base offense level would be 24.

(b) The defendant was in possession of five kilograms of ephedrine and two kilograms of phenylacetic acid. Although both of these chemicals are used to manufacture methamphetamine, they are used in two different manufacturing processes and thus would not be used together. In this case, the two kilograms of phenylacetic acid would convert to two kilograms of ephedrine (see List I Chemical Equivalency Table), resulting in a total equivalency of seven kilograms of ephedrine.''.

The Commentary to § 2D1.11 captioned ''Background'' is amended in the second sentence by deleting ''Listed precursor'' and inserting in lieu thereof ''List I''; by deleting ''critical to the formation'' and inserting in lieu thereof ''important to the manufacture''; and by inserting ''usually'' immediately before ''become''.

The Commentary to § 2D1.11 captioned ''Background'' is amended in the last sentence by deleting ''Listed essential'' and inserting in lieu thereof ''List II''; by inserting ''used as'' immediately following ''generally''; and by deleting ''and do not become part of the finished product''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by deleting Note 14 in its entirety, and by renumbering the remaining notes accordingly.

13. Synopsis of Proposed Amendment: Section Three of the Domestic Chemical Diversion Act of 1993 (Public Law 103–200) broadens the prohibition in 21 U.S.C. § 843(a) to cover possessing, manufacturing, distributing, exporting, or importing three-neck round-bottom flasks, tableting machines, encapsulating machines, or gelatin capsules having reasonable cause to believe they will be used to manufacture a controlled substance. Guideline 2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy) applies to this conduct. Consistent with the treatment of similar conduct under §§ 2D1.11(b)(2) and 2D1.13(b)(2), this amendment revises § 2D1.12 to provide a three-level reduction in the offense level for cases in which the defendant had reasonable cause to believe, but not actual knowledge or belief, that the equipment was to be used to manufacture a controlled substance.

Proposed Amendment: Section 2D1.12 is amended by inserting ''(Apply the greatest)'' immediately after ''Base Offense Level''; and by deleting ''12'' and inserting in lieu thereof:

''(1) 12, if the defendant intended to manufacture a controlled substance or knew or believed the prohibited equipment was to be used to manufacture a controlled substance; or

(2) 9, if the defendant had reasonable cause to believe the prohibited equipment was to be used to manufacture a controlled substance.''.

Chapter Two, Part H (Offenses Involving Individual Rights)

Chapter Three, Part A (Victim-Related Adjustments)

14. Synopsis of Proposed Amendment: This is a three-part amendment. First, the amendment adds an additional subsection to § 3A1.1 to implement the directive contained in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994. Second, the amendment consolidates §§ 2H1.1, 2H1.3, 2H1.4, and 2H1.5, and adjusts the offense levels in these guidelines to harmonize them with each other, better reflect the seriousness of the underlying conduct, and reflect the revision of § 3A1.1. Third, the amendment references violations of 18 U.S.C. § 248 (the Freedom of Access to Clinic Entrances Act of 1994, Public Law 103–259) to the consolidated guideline.

Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to provide a minimum enhancement of three levels for offenses that the finder of fact at trial determines are hate crimes. This directive also instructs the Commission to ensure that there is reasonable consistency with other guidelines and that duplicative punishments for the same offense are avoided. The Freedom of Access to Clinic Entrances Act of 1994 makes it a crime to interfere with access to reproductive services or to interfere with certain religious activities.

Since their inception, the guidelines have provided enhanced penalties for

offenses involving individual rights (hate crimes or other offenses committed under color of law). These enhanced penalties reflect that, in such offenses, the harm includes both the underlying criminal conduct and an added civil rights component. Under the current civil rights offense guidelines, there is a two-level enhancement for hate crimes committed by a person other than a public official. There is a six-level enhancement for all offenses committed under color of law, including both hate and non-hate crimes.

The existing civil rights offense guidelines provide alternative base offense levels: (1) the offense level applicable to the underlying offense plus the additional levels for the civil rights component; and (2) a minimum or ''default'' offense level. The enhanced offense levels for civil rights offenses do not apply to hate crimes prosecuted under other statutes. Official misconduct offenses (offenses committed under color of law) prosecuted under other statutes generally receive an enhanced penalty of two levels under § 3B1.3 (Abuse of Position of Special Trust) rather than the six levels applicable under the civil rights offense guidelines.

The congressional directive in section 280003 requires that the three-level hate crimes enhancement apply where ''the finder of fact at trial determines beyond a reasonable doubt'' that the offense of conviction was a hate crime. The proposed amendment makes the enhancement applicable if either the finder of fact at trial or, in the case of a guilty or nolo contendere plea, the court at sentencing, determines that the offense was a hate crime. By broadening the applicability of the congressionally mandated enhancement, the Commission will avoid unwarranted sentencing disparity based on the mode of conviction. The Commission's authority, pursuant to 28 U.S.C. § 994, permits such a broadening of the enhancement.

The addition of a generally applicable Chapter Three hate crimes enhancement requires amendment of the civil rights offense guidelines to avoid duplicative punishments. In addition, to further the Commission's goal of simplifying the operation of the guidelines, the proposed amendment consolidates the four current civil rights offense guidelines into one guideline.

Proposed § 2H1.1 provides alternative offense levels using the greatest of the following: (1) the base offense level for the underlying offense; (2) level 10, for offenses involving the use or threatened use of force or the actual or threatened destruction of property; or (3) level 6, otherwise. In addition, two options for setting the default offense level for conspiracies involving individual rights are shown. One option sets a default level of 12 for offenses involving two or more participants. This option is two levels higher than the default offense level for substantive offenses involving force or the threat of force and six levels higher than the default offense level for substantive offenses not involving force or the threat of force. A second option sets the default offense level of 10, which is consistent with the default offense level for substantive civil rights offenses involving force or the threat of force and four levels higher than the offense level for substantive civil rights offenses not involving force or the threat of force.

Proposed § 2H1.1, working together with the proposed § 3A1.1, provides enhanced penalties for civil rights offenses. For hate crimes committed by persons who are not public officials, the enhancement is three levels under proposed § 3A1.1, one level greater than under the current guidelines. Unlike the current guidelines, however, the proposed guideline differentiates between hate crimes and non-hate crimes committed under color of law, punishing hate crimes committed by public officials more severely than non-hate crimes. Proposed § 2H1.1 provides an enhancement for non-hate crimes committed under color of law of either two, three, or four levels above the offense level for the underlying offense. A two-level enhancement would be consistent with the generally applicable enhancement under § 3B1.3 (Abuse of Position of Special Trust). A three- or four-level enhancement would be higher than the generally applicable enhancement under § 3B1.3 and arguably would reflect the greater harm done by those in positions of authority when the harm involves violations of individual rights. Because of the additional three-level hate crime enhancement under § 3A1.1, the proposed amendment would provide a combined enhancement for hate crimes committed by public officials of five, six, or seven levels.

The clinic access law, like the other criminal civil rights statutes, criminalizes a broad array of conduct, from non-violent obstruction of the entrance to a clinic to murder. The proposed amendment treats these violations in the same way as other offenses involving individual rights.

Two options are shown. Option 1 sets forth an amendment consistent with the preceding discussion. An alternative to this proposed amendment, published at the request of the Department of Justice, is set forth as Option 2.

Proposed Amendment: [Option 1: Section 3A1.1 and accompanying commentary is deleted in its entirety and the following inserted in lieu thereof:

''§ 3A1.1. Hate Crime Motivation or Vulnerable Victim

(a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels; or

(b) If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels.

Commentary

Application Notes:

1. Subsection (a) applies to offenses that are hate crimes. Note that special evidentiary requirements govern the application of this subsection.

2. Subsection (b) applies to offenses in which an unusually vulnerable victim is made a target of criminal activity by the defendant and the defendant knew or should have known of the victim's unusual vulnerability. The adjustment would apply, for example, in a fraud case where the defendant marketed an ineffective cancer cure or in a robbery where the defendant selected a handicapped victim. But it would not apply in a case where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.

3. Do not apply subsection (a) on the basis of gender in the case of a sexual offense. In such cases, this factor is taken into account by the offense level of the Chapter Two offense guideline.

4. Do not apply subsection (b) if the offense guideline specifically incorporates this factor. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection should not be applied unless the victim was unusually vulnerable for reasons unrelated to age.

5. If subsection (a) applies, do not apply subsection (b). In the case of an offense that both is a ''hate'' crime and involves an unusually vulnerable

victim, a sentence at or near the upper limit of the applicable guideline range (which will include a 3-level enhancement from subsection (a)) typically will be appropriate.

Background: Subsection (a) reflects the directive to the Commission, contained in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, to provide an enhancement of not less than three levels for an offense when the finder of fact at trial determines beyond a reasonable doubt that the defendant had a hate crime motivation (i.e., a primary motivation for the offense was the race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of the victim). To avoid unwarranted sentencing disparity based on the method of conviction, the Commission has broadened the application of this enhancement to include offenses that, in the case of a plea of guilty or nolo contendere, the court at sentencing determines are hate crimes.''.

The Introductory Commentary to Chapter Two, Part H, Subpart I and §§ 2H1.1, 2H1.3, 2H1.4, and 2H1.5 are deleted in their entirety and the following inserted in lieu thereof:

''§ 2H1.1. Offenses Involving Individual Rights

(a) Base Offense Level (Apply the greatest):

(1) the offense level from the offense guideline applicable to any underlying offense;

[(2) 10, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or (C) two or more participants; or

(3) 6, otherwise.]

[(2) 12, if the offense involved two or more participants; or

(3) 10, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or

(4) 6, otherwise.]

(b) Specific Offense Characteristics

(1) If (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law, increase by [2][3][4] levels. If the resulting offense level is less than level 10, increase to level 10.

Commentary

Statutory Provisions: 18 U.S.C. § 241, 242, 245(b), 246, 247, 248, 1091; 42 U.S.C. § 3631.

Application Notes:

1. 'Offense guideline applicable to any underlying offense' means the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law (other than an offense that is itself covered under Chapter Two, Part H, Subpart 1).

In certain cases, conduct set forth in the count of conviction may constitute more than one underlying offense (e.g., two instances of assault, or one instance of assault and one instance of arson). In such cases, determine the number and nature of underlying offenses by applying the procedure set forth in Application Note 5 of § 1B1.2 (Applicable Guidelines). If the Chapter Two offense level for any of the underlying offenses under subsection (a)(1) is the same as, or greater than, the alternative base offense level under subsection [(a)(2) or (3)] [(a)(2), (3), (4)], as applicable, use subsection (a)(1) and treat each underlying offense as if contained in a separate count of conviction. Otherwise, use subsection [(a)(2) or (3)] [(a)(2), (3), (4)], as applicable, to determine the base offense level.

2. 'Participant' is defined in the Commentary to § 3B1.1 (Aggravating Role).

3. The burning or defacement of a religious symbol with an intent to intimidate shall be deemed to involve the threat of force against a person for the purposes of subsection (a)[(2)][(3)](A).

4. If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, an additional 3-level enhancement from § 3A1.1(a) will apply.

5. If subsection (b)(1) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).''.]

[Option 2: Section 2H1.1(b) is amended by inserting the following additional subdivision:

''(2) If proof of the conspiracy requires a showing that a defendant acted for an improper purpose as defined in 18 U.S.C. §§ 245, or 247, or 42 U.S.C. § 3631, increase by [1] level.''.

Section 2H1.3(a) is amended—

(1) in subdivision (1) by deleting ''10'' and inserting in lieu thereof ''[11]'';

(2) in subdivision (2) by deleting ''15'' and inserting in lieu thereof ''[16]''; and

(3) in subdivision (3) by deleting ''2'' and inserting in lieu thereof ''[3]''.

Chapter Three, Part A, is amended by adding the following additional section:

§ 3A1.4. Hate Crime Motivation

If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by [3] levels.

Commentary

Application Notes:

1. Do not apply this adjustment if the offense guideline specifically incorporates this factor. For example, do not apply this adjustment if § 2H1.1(b)(2) or § 2H1.3 applies. Similarly, do not apply this adjustment on the basis of gender in the case of a sexual offense. In such cases, this factor is taken into account by the offense level established by the Chapter Two offense guideline.

2. Note that special evidentiary requirements govern the application of this subsection.

Background: This section reflects the directive to the Commission in section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, to provide an enhancement of not less than three levels for an offense when the finder of fact at trial determines beyond a reasonable doubt that the defendant had a hate crime motivation (i.e., that the defendant intentionally selected a victim or property as the object of the offense because of a factor listed in this section). To avoid unwarranted sentencing disparity based on the method of conviction, the Commission has broadened the application of this enhancement to include offenses that, in the case of a plea of guilty or nolo contendere, the court at sentencing determines are hate crimes.''.

Additional Issue for Comment: If Option 2 is adopted, the Commission seeks comment on how it should implement the penalty provisions of the Freedom of Access to Clinic Entrances Act of 1994.]

Chapter Two, Part K (Offenses Involving Public Safety)

15. Synopsis of Proposed Amendment: Section 110102 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 922 to add subsection (v), making it unlawful to manufacture, transfer, or possess ''semiautomatic assault weapons.'' Previously, only importation and possession (pursuant to 18 U.S.C. § 925(d)(3)) and assembly of imported parts (pursuant to 18 U.S.C. § 922(r)) of semiautomatic assault rifles

and shotguns (but not pistols) were prohibited. Section 110102 also increases the penalty for using or carrying a semiautomatic assault weapon ''during and in relation to any crime of violence or drug trafficking crime'' to a fixed, mandatory consecutive term of 10 years or, in the case of a second or subsequent conviction, 20 years. The term ''semiautomatic assault weapon'' is defined at new 18 U.S.C. § 921(a)(30).

Guideline 2K2.1 covers other firearm offenses involving semiautomatic assault weapons. For example, the base offense level for possession of an unlawfully imported semiautomatic assault weapon is level 12. Additional adjustments may apply and an upward departure is recommended if the offense involved multiple military-style assault rifles.

Proposed Amendment: Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

''18 U.S.C. § 922(v) 2K2.1''.

Additional Issue for Comment: At the request of the Department of Justice, the Commission invites comment as to whether there should be an enhanced offense level under § 2K2.1 for a conviction under 18 U.S.C. § 922(v).

16. Synopsis of Proposed Amendment: Section 110201 of the Violent Crime Control and Law Enforcement Act of 1994 adds a new provision at 18 U.S.C. § 922(x) making it unlawful, with some exceptions, to sell or transfer a handgun, or ammunition that is suitable for use only in a handgun, to a juvenile. The provision also prohibits, with some exceptions, a juvenile from possessing a handgun or ammunition. A juvenile is defined as a person who is less than eighteen years of age. The maximum imprisonment penalty for a person who violates this section is one year. However, if an adult defendant transfers a handgun or ammunition to a juvenile ''knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence,'' the maximum authorized term of imprisonment is ten years.

In addition, section 110401 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 922(d) to make it unlawful to sell or otherwise dispose of any firearm or ammunition to any person, knowing or having reasonable grounds to believe that such person ''is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child.'' This section also amends 18 U.S.C. § 922(g) to make it unlawful for a person who is subject to such a court order to possess or receive any firearm or ammunition in or affecting commerce.

Guideline 1B1.12 provides that the guidelines do not apply to a juvenile sentenced under the Juvenile Delinquency Act, 18 U.S.C. § 5031–5042. Guideline 2K2.1 typically applies a base offense level of 6 to a misdemeanor offense or to a felony recordkeeping offense. Guideline 2K2.1 provides a base offense level of 12 for the transfer of a firearm by a licensed dealer to a juvenile or to a person prohibited under 18 U.S.C. § 922(g) from possessing a firearm. The section also provides a base offense level of 14 for possession of a firearm by a prohibited person and increases the base offense level depending on the prior criminal history of the defendant. A specific offense characteristic may apply in the case of multiple firearms. A defendant who transfers a firearm knowing or having reason to believe that it may be used in connection with another felony offense is subject to the greater of a four-level adjustment with a minimum offense level of 18, or a cross reference to the guideline for the other offense.

The proposed amendment adds a person under the court order described in section 110401 to the definition of a ''prohibited person.'' In addition, three amendment options are shown regarding the offense level for transfer of a firearm to a juvenile. Option 1 would result in a base offense level of 6; Option 2 would result in a base offense level of 12; Option 3, published at the request of the Department of Justice, would result in a base offense level of 14 if the defendant transferred a firearm to an underage person or to another prohibited person. Such a defendant currently would receive a base offense level of 12 under § 2K2.1.

Proposed Amendment: The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 6 by deleting ''or (v)'' and inserting ''(v)'' in lieu thereof; and by inserting ''; or (vi) is subject to a court order that restrains the defendant from harassing, stalking, or threatening an intimate partner or child or from engaging in related conduct.'' immediately following ''States''.

[Option 1: Section § 2K2.1(a)(8) is amended by deleting ''or'' and by inserting '', or (x)'' immediately following ''(m)''.

Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

''18 U.S.C. § 922(x) 2K2.1''.]

[Option 2: Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

''18 U.S.C. § 922(x) 2K2.1''.]

[Option 3: Section 2K2.1(a)(6) is amended by inserting ''or if the transferor knew or had reasonable cause to believe that the transferee was a prohibited person or was underage'' immediately following ''prohibited person''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 6 by inserting the following at the end thereof: '''Underage,' as used in subsection (a)(6), means under the ages set forth in 18 U.S.C. § 922(b)(1).

Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

''18 U.S.C. § 922(x) 2K2.1''.]

17. Issue for Comment: Section 110501 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to provide an appropriate enhancement for a crime of violence or drug trafficking crime if a semiautomatic firearm is involved. The Commission requests comment on the most appropriate way to implement this directive. Information available to the Commission indicates that 50 to 70 percent of offenses involving a firearm involve a semiautomatic firearm; thus, offenses involving semiautomatic firearms represent the typical or ''heartland'' cases. Specifically, the Commission requests comment on how the offense level for an offense involving a semiautomatic firearm should be modified to address the directive. The Commission also requests comment on whether such an increase should apply to all semiautomatic firearms or whether the Commission should focus this enhancement on firearms that have characteristics that make them more dangerous than other firearms (e.g., semiautomatic firearms with a large magazine capacity). In addition, the Commission requests comment on whether any such enhancement should apply only to crimes of violence and drug trafficking offenses as specified in the directive or whether it should apply to other offenses such as firearms offenses covered by § 2K2.1 or to all offenses.

18. Issue for Comment: Section 110502 of the Violent Crime Control and

Law Enforcement Act of 1994 directs the Commission to ''appropriately enhance penalties for cases in which a defendant convicted under 18 U.S.C. § 844(h) has previously been convicted under that section.'' Section 320106 revises the previous fixed, mandatory consecutive 5-year penalty for a first offense under 18 U.S.C. § 844(h) to provide a range of 5 to 15 years, and changes the previous fixed, mandatory consecutive penalty for a second offense from 10 years to a range of 10 to 25 years. The Commission requests comment as to how § 2K2.4 can be amended appropriately to address this directive and statutory change. Possible approaches might include: (1) an amendment to § 2K2.4 to increase the sentence by a specific amount if the defendant previously has been convicted under 18 U.S.C. § 844(h); (2) application under § 2K2.4 of the minimum term of imprisonment required by statute, with a departure recommended when this sentence, combined with the sentence for the underlying offense, does not provide adequate punishment; or (3) an amendment to § 2K2.4 to reference the underlying offense plus an appropriate enhancement for the weapon or explosive, and a provision for apportioning the sentence imposed to avoid double counting.

19. Issue for Comment: Section 110513 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to ''appropriately enhance'' penalties (1) for cases in which a defendant convicted under 18 U.S.C. § 922(g) has one prior conviction for a violent felony (as defined in 18 U.S.C. § 924(e)(2)(B)) or a serious drug offense (as defined in 18 U.S.C. § 924(e)(2)(A)); and (2) for cases in which a defendant has two such prior convictions. The statutory maximum for the offense remains at ten years.

Guideline 2K2.1 covers violations of 18 U.S.C. § 922(g). Alternative base offense level apply depending on the number of prior convictions of one or more ''crime[s] of violence'' or ''controlled substance offense[s].'' For example, a defendant with one such prior conviction would receive a base offense level of at least 20. A defendant with two or more such prior convictions would receive a base offense level of at least 24. In addition, a four-level enhancement or a cross reference may apply if the weapon was to be used in another felony. Other enhancements may apply depending on the type and number of weapons, and whether the weapon was stolen.

The Commission's definitions of ''crime of violence'' and ''controlled substance offense'' are similar but not identical to those referenced in the directive. Guideline 2K2.1 draws its definition of ''crime of violence'' from 18 U.S.C. § 924(e) with a minor modification. Whereas the section 924(e) definition of ''violent felony'' includes any burglary, including a burglary of an abandoned commercial building, Taylor v. United States, 495 U.S. 575, 602 (1990), the definition of ''crime of violence'' in § 2K2.1 includes only burglary of a dwelling, consistent with the career offender provisions of the guidelines. United States v. Talbott, 902 F.2d 1129, 1133 (4th Cir. 1990).

Further, the § 2K2.1 definition of ''controlled substance offense,'' drawn from 18 U.S.C. § 924(c) and the career offender provisions of the guidelines, is slightly different from that in 18 U.S.C. § 924(e). The section 924(e) definition of ''serious drug offense'' requires that the drug offense (whether federal or state) have a maximum term of imprisonment of ten years or more. This narrower definition precludes, for example, counting a federal conviction under 21 U.S.C. § 843(b) (four year statutory maximum for using a communication facility to facilitate drug distribution). By contrast, the definition of ''controlled substance offense'' in § 2K2.1 includes such ''telephone counts.'' United States v. Vea-Gonzales, 999 F.2d 1326, 1329–30 (9th Cir. 1993). Moreover, where one state imposes a five-year maximum for certain drug conduct while another state imposes a ten-year maximum for the identical conduct, the section 924(e) definition would not count a defendant's conviction in the first state but would count the defendant's conviction in the second state.

The Commission invites comment on whether the current offense levels in these guidelines should be increased and, if so, by what amount. The Commission also invites comment on whether, for consistency, the definitions and counting of prior conviction of crime of violence and drug trafficking offense used in these guidelines should be the same as those used in § 4B1.1 (Career Offender).

20. Synopsis of Proposed Amendment: Section 110504 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 924 to add subsection (k) making it unlawful to steal any firearm that is moving or has moved in interstate commerce. Likewise, 18 U.S.C. § 844 is amended to add subsection (k) making it unlawful to steal any explosive that is moving or has moved in interstate commerce.

Section 110511 amends 18 U.S.C. § 922(j) to clarify that it is unlawful to receive or possess any stolen firearm that has moved in interstate commerce regardless of whether the movement occurred ''before or after it [the firearm] was stolen.''

Section 110515 amends 18 U.S.C. § 924 to add a new subsection (l) making it a federal crime to steal any firearm from a licensed importer, manufacturer, dealer, or collector. The section also amends 18 U.S.C. § 844 to add a new subsection (l) with regard to stealing explosives from licensees.

Current law also proscribes shipping a stolen firearm (18 U.S.C. § 922(i)), stealing from the person or premises of a licensee any firearm in the business inventory (18 U.S.C. § 922(u)), and shipping stolen explosives (18 U.S.C. § 842(h)). Further, the general theft statute, 18 U.S.C. § 659, provides a maximum imprisonment penalty of ten years for stealing ''goods or chattels,'' including a firearm, ''moving as or which are part of or which constitute an interstate or foreign shipment of freight, express, or other property.'' Other theft and receipt of stolen property statutes may also apply to a theft of a firearm.

Guideline 2K2.1 covers offenses involving stolen firearms. These offenses are subject to a base offense level of 12. Additional adjustments may also apply. A two-level enhancement applies if a firearm is stolen unless the only count of conviction is a stolen firearm offense. This conditional adjustment has resulted in several calls to the Commission's hotline regarding cases involving a felon in possession of a stolen firearm who may be charged either under 18 U.S.C. § 922(g) (felon in possession) or with 18 U.S.C. § 922(j) (receipt of stolen firearm). A conviction under section 922(g) will result in a total offense level of 16 (base offense level of 14 plus two-level adjustment for stolen firearm). A conviction under section 922(j) will result in a total offense level of 14 (base offense level of 14 but, per application note 12, no two-level adjustment for stolen firearm because the only offense of conviction is a stolen firearm offense). Further, the list of stolen firearm statutes has not been updated to reflect recent amendments to the code. Indeed, 18 U.S.C. § 922(u) (theft from dealer) as well as 18 U.S.C. §§ 922(s) and 922(t) (Brady bill provisions) are not listed in the Statutory Index.

Guideline 2B1.1 governs general theft offenses, including offenses of goods traveling in interstate commerce and offenses within the special federal maritime or territorial jurisdiction or within Indian territory. Guideline

2B1.1(b)(2)(A) provides for a one-level increase (to no less than level 7) if a firearm or destructive device was taken, compared with a base offense level 12 under § 2K2.1.

Two options are proposed to address the disparity in § 2B1.1 and § 2K2.1 penalties. Option 1 amends § 2B1.1 to include a cross reference to § 2K2.1. Option 2 amends § 2B1.1 to recommend an upward departure. The amendment also specifies a base offense level of 6 for convictions under 18 U.S.C. § 922 (s) or (t) and clarifies application of Note 6 only to cases in which the base offense level is determined under § 2K2.1(a)(7).

Proposed Amendment: Section 2K2.1(a)(8) is amended by deleting ''or'' and inserting in lieu thereof ''(s), or (t)''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 12 by deleting ''or (k),'' and inserting in lieu thereof ''(u), or § 924 (j) or (k),''; and by inserting ''and the base offense level is determined under § 2K2.1(a)(7),'' immediately following ''guideline,''.

[Option 1: Section 2B1.1(b) is amended by deleting subdivision (2).

Section 2B1.1 is amended by inserting the following additional subsection:

''(c) Cross Reference

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of such item was an object of the offense, or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1, § 2D2.1, § 2K1.3, or § 2K2.1, as appropriate, if the resulting offense level is greater than that determined above.''.]

[Option 2: Section 2B1.1(b) is amended by deleting subdivision (2).

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended by inserting the following additional Note:

''15. If the offense involved the unlawful taking, receipt, transportation, transfer, transmittal, or possession of a firearm, destructive device, explosive material, or controlled substance, an upward departure to an offense level comparable to that provided under § 2D1.1, § 2D2.1, § 2K1.3, or § 2K2.1, as appropriate, may be warranted.''.]

Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

''18 U.S.C. § 922(s)-(u) 2K2.1'',

''18 U.S.C. § 924(k),(l) 2K2.1''.

21. Synopsis of Proposed Amendment: Section 110518 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 924 to add a new subsection (n) to provide that ''[a] person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.'' This section also amends 18 U.S.C. § 844 to add a new subsection (m) increasing to 20 years the maximum imprisonment penalty for a conspiracy to violate 18 U.S.C. § 844(h). This section does not alter the fixed, mandatory consecutive penalty for the underlying substantive offenses of using or carrying a firearm or explosive during and in relation to a crime of violence or drug trafficking crime. Thus, identical offense conduct covered by these statutes may be subject, for example, to a fixed, mandatory five-year term to run consecutively to any underlying offense if indicted under 18 U.S.C. § 924(c), a 5-year mandatory minimum term and 15-year maximum term to run consecutively to any underlying offense if indicted under 18 U.S.C. § 844(h), a 5-year maximum term under 18 U.S.C. § 371, or a 20-year maximum term under 18 U.S.C. § 924(n).

Guideline 2K2.4 provides for the term of imprisonment required by 18 U.S.C. § 924(c). Guideline 2K2.1 applies to an offense under 18 U.S.C. § 371 involving conspiracy to violate 18 U.S.C. § 924(c) and provides for an offense level of at least 18 (base offense level 12 plus increase to an offense level of at least 18 if the firearm or ammunition was used or intended to be used in connection with another offense). Additional adjustments may apply. The explosives guideline, § 2K1.3, also provides an offense level of at least 18 for a conviction under 18 U.S.C. § 371 for conspiracy to violate 18 U.S.C. § 844(h).

Proposed Amendment: Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 371 by inserting ''2K2.1 (if a conspiracy to violate 18 U.S.C. § 924(c)),'' immediately before ''2X1.1''.

Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

''18 U.S.C. § 844(m) 2K1.3

18 U.S.C. § 924(n) 2K2.1''.

Additional Issue for Comment: At the request of the Department of Justice, the Commission invites comment as to whether a conviction for a conspiracy to violate section 924(c) should be more closely referenced to the penalty in 18 U.S.C. § 924(c) or to the guideline for the underlying offense.

Chapter Two, Part L (Offenses Involving Immigration, Naturalization, and Passports)

22(A). Issue for Comment: Section 60024 of the Violent Crime Control and Law Enforcement Act of 1994 increases the statutory penalty for bringing in or harboring an alien from five to ten years, establishes a penalty of up to 20 years imprisonment if serious bodily injury results, and establishes a penalty of imprisonment for any term of years or life, if death results. In view of these statutory penalty changes, the Commission invites comment on whether the offense levels under the applicable guideline, § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), should be increased, and if so, by what amount.

(B). Issue for Comment: Section 130001 of the Violent Crime Control and Law Enforcement Act of 1994 alters the penalties for failing to depart and for reentering the United States in violation of 8 U.S.C. §§ 1252(e) and 1326(b), respectively. This provision reduces the statutory maximum penalties for some offenses from ten years to four years, and increases the statutory maximum penalties for reentry after commission of a felony or an aggravated felony from five to ten years, and from 15 to 20 years, respectively. This provision also establishes the offense of reentry after conviction for three or more misdemeanors involving drugs, crimes against the person, or both. The Commission invites comment on whether amendment of the applicable guideline is appropriate. Specifically, are the current offense levels provided for reentry after conviction of a felony or aggravated felony appropriate, and if not, how should the guidelines be amended? Should the offense level currently applicable for reentry after deportation for a felony also be applied to deportation after conviction of three or more misdemeanors involving drugs, crimes against the person, or both?

(C). Synopsis of Proposed Amendment: This proposed amendment, published at the request of the Department of Justice, increases the base offense level for immigration offenses committed by certain means and increases the offense level if any person sustained bodily injury.

Proposed Amendment: Section 2L1.1(a) is amended by redesignating subdivision (2) as subdivision (3) and inserting the following new subdivision:

''(2) 13, if the offense was committed by means set forth in 8 U.S.C. § 1324(a)(1)(A)(i) or 1324(a)(2)(B).''.

Section 2L1.1(b) is amended by inserting the following additional subdivision:

''(4) If any person sustained bodily injury, increase the offense level according to the seriousness of the injury:

Degree of bodily Injury	Increase in level
(A) Bodily Injury	Add 2.
(B) Serious Bodily Injury	Add 4.
(C) Permanent or Life-Threatening Bodily Injury.	Add 6.
(D) If the degree of injury is between that specified in subdivisions (A) and (B).	Add 3.
(E) If the degree of injury is between that specified in subdivisions (B) and (C).	Add 5.''.

The Commentary to § 2L1.1 captioned ''Application Notes'' is amended in Note 5 by deleting ''dangerous or inhumane treatment, death or bodily injury,''.

(D). Synopsis of Proposed Amendment: This proposed amendment, published at the request of the Department of Justice, suggests an additional ground for an upward departure for certain cases under § 2L1.2.

Proposed Amendment: The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in Note 2 by deleting ''a sentence at or near the maximum of the applicable guideline range'' and inserting ''an upward departure'' in lieu thereof.

23(A). Issue for Comment: Section 130009 of the Violent Crime Control and Law Enforcement Act of 1994 increases the statutory maximum penalties for passport and visa offenses to ten years. Previously, these offenses had statutory maximum penalties of one year or five years. It also provides an increased statutory maximum penalty of 15 years if the offense is committed to facilitate a drug trafficking crime, and 20 years if the offense is committed to facilitate an act of international terrorism. Considering the existing policy statements at §§ 5K2.9 and 5K2.15 suggesting an upward departure in cases where the offense was committed to facilitate another offense or in furtherance of a terroristic action, the Commission invites comment on whether, and if so, how, the guidelines should be amended with respect to passport and visa offenses.

(B). Synopsis of Proposed Amendment: This proposed amendment, published at the request of the Department of Justice, consolidates §§ 2L2.1 and 2L2.2 and provides additional enhancements if the offense was committed to facilitate certain unlawful conduct.

Proposed Amendment: Sections 2L2.1 and 2L2.2 are deleted in their entirety and the following is inserted in lieu thereof.

''§ 2L2.1. Fraudulently Issuing, Acquiring or Improperly Using Passports or Visas; False Statements in Respect to Passports and Visas; Forging, Counterfeiting or Altering Passports or Visas; Trafficking in International Travel Documents, or Birth Certificates, Driver Licenses or Other Documents to Fraudulently Obtain Issuance of Passports or Visas; Use of Passports or Visas to Facilitate Narcotics Trafficking or International Terrorism.

(a) Base Offense Level:

(1) 26, if the offense was committed to facilitate an act of international terrorism.

(2) 20, if the offense was committed to facilitate a drug trafficking crime;

(3) 13, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involves six or more documents or passports, increase as follows:

Number of documents	Passports increase in level
(A) 6–24	Add 2.
(B) 25–99	Add 4.
(C) 100 or more	Add 6.

(2) If the defendant is an unlawful alien who has been previously deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by 2 levels.

(3) If the offense was committed to facilitate racketeering activity, increase by 3 levels.

(4) If the offense was committed to facilitate unlawful flight from justice, increase by 3 levels.

(5) If the defendant committed the offense other than for profit (except as provided in paragraph (3) or (4)), decrease by 3 levels.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (4), (5), 1325(b), (c); 18 U.S.C. §§ 911, 1015, 1028, 1423–1427, 1541–1544, 1546, 1547.

Application Notes:

1. Where it is established that multiple documents are part of a set intended for use by one person, treat the documents in the set as one document for the purposes of subsection (b).

2. If the offense involved possession of a dangerous weapon, an upward departure may be warranted.

3. 'Racketeering activity' is defined at 18 U.S.C. § 1961.

4. 'Drug trafficking crime' is defined at 18 U.S.C. § 929(a).

5. 'International terrorism' is defined at 18 U.S.C. § 2331.

6. If two or more factors warranting an upward departure as enumerated in subsection (b) apply, only the paragraph specifying the highest level will be used.

7. 'For profit' means for financial gain or commercial advantage.

8. If the offense was committed only for the purpose of concealing age, a downward departure may be warranted.

9. For the purposes of Chapter Three, Part D (Multiple Counts), a conviction for unlawfully entering or remaining in the United States (§ 2L1.2) arising from the same course of conduct is treated as a closely related count, and is therefore grouped with an offense covered by this guideline.''.

Chapter Three (Adjustments)

Chapter Five, Part K (Departures)

24. Issue for Comment: Section 120004 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to provide an appropriate enhancement for any felony that involves or is intended to promote international terrorism (unless such involvement or intent is itself an element of the crime). Considering the existing policy statement in § 5K2.15 recommending an upward departure in such cases, the Commission invites comment on whether, and if so how, the guidelines should be amended to address this directive appropriately. For example, should the Commission add an adjustment to Chapter Three that would apply to all Chapter Two offenses and that would prescribe a specific increase in offense level if the offense involved or was intended to promote terrorism? If so, what level of enhancement would be appropriate? Or, should the Commission amend § 4B1.1 (Career Offender) to enhance the sentences of such defendants under this section as if they were career offenders?

25(A). Issue for Comment: Section 140008 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to provide an enhancement applicable to a defendant 21 or older who involved a person under 18 in the offense. The directive further specifies that the Commission consider the severity of the crime, the number of minors used, the relevance of the proximity in age between the offender and the minor, and the fact that involving a minor in a crime of violence is often more serious than involving a minor in a drug offense (for which the Commission has already provided a

two-level enhancement). The Commission invites comment as to whether it should implement section 140008 by creating (1) a generally applicable departure policy statement in Chapter Five, Part K (Departures), or (2) a Chapter Three adjustment. The Commission also invites comment as to whether, if a Chapter Three adjustment is appropriate, the adjustment should be two levels, commensurate with the adjustment for abuse of position of trust, or a higher or lower number of levels.

(B). Synopsis of Proposed Amendment: This proposed amendment, published at the request of the Department of Justice, sets forth Chapter Three adjustments for using a minor to commit a crime.

Proposed Amendment: Part B of Chapter Three is amended by redesignating § 3B1.4 as § 3B1.5 and by inserting the following new section:

''§ 3B1.4. Using a Minor to Commit a Crime

(a) If a defendant 21 years of age or older used or attempted to use any person less than 18 years of age with the intent that the minor would commit an offense or assist in avoiding detection of or apprehension for an offense, increase by 2 levels.

(b) If the defendant used or attempted to use 5 or more minors, increase by 1 additional level; if the defendant used or attempted to use 15 or more minors, increase by 2 additional levels.

Commentary

Application Notes:

1. To 'use a person less than 18 years of age' includes soliciting, procuring, recruiting, counseling, encouraging, training, directing, commanding, intimidating, or otherwise using such a person.

2. Do not apply this adjustment if the offense guideline specifically incorporates this factor. However, if the adjustment under this section is greater, apply this section in lieu of the adjustment under the offense guideline.''.

26(A). Issue for Comment: Section 150001 of the Violent Crime Control and Law Enforcement Act of 1994 creates a new section, 18 U.S.C. § 521, that provides a statutory sentence enhancement of up to ten years if a person commits a specified felony controlled substance offense or crime of violence and participates in, intends to further the felonious activities of, or seeks to maintain or increase his or her position in, a criminal street gang. Section 150001 defines a ''criminal street gang'' as an ongoing group, club, organization, or association of five or more persons: (A) that has as one of its primary purposes the commission of one or more of the following offenses: a federal felony involving a controlled substance for which the maximum penalty is not less than five years, a federal felony crime of violence that has as an element the use or attempted use of physical force against another, and the corresponding conspiracies; (B) whose members engage (or have engaged during the past five years) in a continuing series of these same offenses; and (C) the activities of which affect interstate or foreign commerce.

The Commission invites comment on whether, and how, it should incorporate into the sentencing guidelines the statutory sentence enhancement described above. Specifically, the Commission invites comment as to whether it should implement section 150001 by creating a generally applicable departure policy statement in Chapter Five, Part K (Departures) providing that if the enhancement contained in 18 U.S.C. § 521 (Criminal Street Gangs) is determined to apply, the court may increase the sentence above the authorized guideline range. Alternatively, the Commission could create a Chapter Three adjustment that would apply to all Chapter Two offenses and that would provide a specific enhancement.

(B). Synopsis of Proposed Amendment: This proposed amendment is published at the request of the Department of Justice. The proposed amendment would increase the offense level provided under §§ 2K2.1 and 2K2.5 by four levels if the defendant committed the offense in connection with a criminal street gang. In addition, the amendment would increase the offense level provided under § 2K2.5 by two to seven levels, depending on the nature of the possession or use of the firearm involved in the offense. With respect to the amendment to § 2K2.1, the enhancement would apply in addition to the existing four-level enhancement for an offense involving a firearm that was used or possessed in connection with another felony offense, or with knowledge or reason to believe it would be used or possessed in such connection. If a Chapter Three adjustment is adopted that provides a general enhancement for offenses related to criminal street gangs, that amendment would replace the portion of this amendment dealing with criminal street gangs.

Proposed Amendment: Section 2K2.1(b) is amended by inserting the following additional subdivision:

''(7) If the defendant committed the offense as a member of, on behalf of, or in association with a criminal street gang, increase by 4 levels.''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended by inserting the following additional Note:

''20. 'Criminal street gang' is defined as a group, club, organization, or association of five or more persons whose members engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or controlled substance offenses as defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1).''.

Section 2K2.5(b) is amended by inserting the following additional subdivision:

''(2) If the defendant was convicted of violating 18 U.S.C. § 922(q) and (A) the firearm was discharged, increase by 7 levels; (B) the firearm was otherwise used, increase by 6 levels; (C) the firearm was brandished, increased by 5 levels; (D) the firearm was loaded, increase by 3 levels; (E) an express threat of death was made or ammunition was possessed, increase by 2 levels.

(3) If the defendant was convicted of violating 18 U.S.C. § 922(q) and committed the offense as a member of, on behalf of, or in association with a criminal street gang, increase by 4 levels.''.

The Commentary to § 2K2.5 captioned ''Application Notes'' is amended in Note 4 by deleting ''federal facility, federal court facility, or school zone'' and inserting in lieu thereof ''federal facility or federal court facility.''

The Commentary to § 2K2.5 captioned ''Application Notes'' is amended by inserting the following additional Note:

''5. 'Criminal street gang' is defined as a group, club, organization, or association of five or more persons whose members engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or controlled substance offenses as defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1).''.

Chapter Three, Part A (Victim-Related Adjustments)

27(A). Issue for Comment: Section 240002 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to ensure that the guidelines provide sufficiently stringent punishment for a defendant convicted of a ''crime of violence'' against an ''elderly victim.'' The directive requires that the guidelines: (1) provide for increasingly severe punishment commensurate with the degree of physical harm caused to the elderly victim; (2) take appropriate account of the vulnerability of the victim; and (3) provide enhanced punishment for a

subsequent conviction for a crime of violence against an elderly victim.

Currently, the guidelines account for victim harm in a number of ways. For federal offenses that are most apt to cause physical harm (e.g., assault, criminal sexual abuse, kidnapping, robbery), the guidelines expressly require a higher sentence, regardless of the victim's age, if the victim sustained bodily injury. Additionally, § 3A1.1 (Vulnerable Victim), provides a two-level upward adjustment if the defendant knew or should have known that a victim was unusually vulnerable due to, among other factors, the victim's age. Furthermore, the guidelines, both generally, through § 5K2.0 (Grounds for Departure), and specifically, through, e.g., § 5K2.8 (Extreme Conduct) (involving unusually heinous, cruel, brutal, or degrading conduct), invite courts to depart upward for circumstances that potentially involve elderly victims. The guidelines also account for the seriousness, recency, and relatedness of a defendant's prior record of criminal conduct. See Chapter Four (Criminal History and Criminal Livelihood).

The Commission invites comment on whether the guidelines provide sufficiently stringent punishment for a defendant convicted of a crime of violence against an elderly victim. If not, the Commission invites comment on how, and to what extent, existing factors might be modified as well as how, and to what extent, additional factors should be considered.

(B). Synopsis of Proposed Amendment: This proposed amendment implements the third criterion of the directive in section 240002, pertaining to enhanced punishment for a defendant with a prior conviction for a crime of violence against an elderly victim. This amendment recommends a departure under § 3A1.1 (Vulnerable Victim).

Proposed Amendment: The Commentary to § 3A1.1 captioned ''Application Notes'' is amended by inserting the following additional note:

''3. If (A) an adjustment applies under this section; and (B) the defendant's criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim, an upward departure may be warranted.''.

(C). Issue for Comment: Section 250002 of the Violent Crime Control and Law Enforcement Act of 1994 provides enhanced imprisonment penalties of up to five years when certain fraud offenses involve telemarketing conduct and enhanced imprisonment penalties of up to ten years when a telemarketing fraud offense involves victimizing ten or more persons over the age of 55 or targeting persons over the age of 55. Section 250003 directs the Commission to review and, if necessary, amend the sentencing guidelines to ensure that victim-related adjustments for fraud offenses against older victims (defined as over the age of 55) are adequate.

Violations of fraud statutes are covered under § 2F1.1 (Fraud and Deceit), which increases penalties proportionately based on a number of factors, including the amount of loss sustained by victims, the sophistication of the offense, and whether particular types of harm occurred. In addition, a two-level increase under § 3A1.1 (Vulnerable Victim) applies if the fraud exploited vulnerable victims, including victims who are vulnerable because of age.

The Commission invites comment on whether the current victim-related adjustments are adequate to address such cases or whether § 2F1.1 or § 3A1.1 should be amended. Focusing on § 3A1.1 as a possible vehicle for remedying any inadequately addressed concerns regarding older victims, the Commission specifically invites comment as to how this adjustment might best be amended. For example, should commentary be added to establish a rebuttable presumption related to age? If so, what threshold victim age should be equated with victim vulnerability (recognizing that section 250002 uses age 55 for fraud offenses while section 240002 uses age 65 for certain violent offenses)? If such a presumption for older victims is established, should there also be a counterpart presumptive age for vulnerability of young victims (e.g., victims under age 16)? In lieu of a rebuttable presumption, should § 3A1.1 be amended to require an upward adjustment in the offense level if the offense involved victim(s) older or younger than the designated threshold ages? The Commission also invites comment on whether the provisions concerning vulnerable victims should be different for telemarketing fraud than other types of fraud offenses.

Chapter Four, Part B (Career Offenders and Criminal Livelihood)

28. Issue for Comment: Section 70001 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 3559 to mandate a sentence of life imprisonment for a defendant convicted of a ''serious violent felony'' if the defendant has been convicted on separate prior occasions in federal or state court of two or more serious violent felonies or one or more serious violent felonies and one or more serious drug offenses. The Commission invites comment on how it should incorporate into the sentencing guidelines the amendments to 18 U.S.C. § 3559. In particular, the Commission invites comment as to whether the career offender guidelines should be replaced with a new guideline incorporating the current career offender provisions and the statutory requirements of section 70001. Alternatively, the Commission could add an application note to § 4B1.1 directing the court to refer to 18 U.S.C. § 3559 for offenses to which this statute applies. The Commission also invites comment as to whether no action need be taken because § 5G1.1 already provides instructions on the application of mandatory statutory penalties that conflict with the guidelines.

Chapter Five, Part C (Imprisonment)

29. Synopsis of Proposed Amendment: Section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994 (the ''Safety Valve'' provision) authorized and directed the Commission to promulgate guidelines and policy statements to implement section 80001(a), providing an exception to otherwise applicable statutory mandatory minimum sentences for certain defendants convicted of specified drug offenses. Pursuant to this provision, the Commission promulgated § 5C1.2. Under the terms of the congressionally-granted authority, this amendment is temporary unless repromulgated in the next amendment cycle under regularly applicable amendment procedures. See Pub. L. No. 100–182, § 21, set forth as an editorial note under 28 U.S.C. § 994.

Proposed Amendment: Pursuant to its ''permanent'' amendment authority under 28 U.S.C. § 994(p), the Commission proposes to repromulgate § 5C1.2, as set forth in the Guidelines Manual effective November 1, 1994. See also 59 Fed. Reg. 52210–13.

Additional Issue for Comment: The Commission also invites comment on any aspect of § 5C1.2 or other guideline that should be modified to effectuate congressional intent regarding the ''safety valve'' provision.

Chapter Five, Part E (Restitution, Fines, Assessments, Forfeitures)

30. Synopsis of Proposed Amendment: Section 40113 of the Violent Crime Control and Law Enforcement Act of 1994 requires mandatory restitution for sexual abuse and sexual exploitation of children offenses under 18 U.S.C. §§ 2241–2258. These provisions also require that compliance with a restitution order be a condition of probation or supervised release. When there is more than one

offender, the court can apportion liability for payment of the full amount of restitution. When the court finds that more than one victim has sustained a loss requiring restitution, the court must provide full restitution for each victim, but may provide different payment schedules to the victims. A victim or the offender may petition the court for modification of the restitution order in light of a change in the economic circumstances of the victim. Although the sections are termed ''mandatory restitution,'' the statutes provide for the court to order less than the full amount or no restitution at all if the court finds ''the economic circumstances of the defendant are not sufficient to satisfy the order in the foreseeable future.'' These new mandatory restitution provisions have broader definitions of loss than 18 U.S.C. § 3663, and apply ''notwithstanding section 3663, and in addition to any civil or criminal penalty authorized by law.'' Congress has also added similar mandatory restitution provisions for offenses involving telemarketing fraud (18 U.S.C. § 2327) and domestic violence (18 U.S.C. § 2264). The proposed amendment alerts the courts to the new statutory requirements and directs application of the statutory provisions if there is a conflict between the statutory provisions and the guidelines.

Proposed Amendment: The Commentary to § 5E1.1 is amended by inserting the following immediately before ''Background'':

''Application Note:

1. In the case of a conviction under certain statutes, additional requirements regarding restitution apply. See 18 U.S.C. §§ 2248 and 2259 (pertaining to convictions under 18 U.S.C. §§ 2241–2258 in connection with sexual abuse or exploitation of minors); 18 U.S.C. § 2327 (pertaining to convictions under 18 U.S.C. §§ 1028–1029, 1341–1344 in connection with telemarketing fraud); 18 U.S.C. § 2264 (pertaining to convictions under 18 U.S.C. §§ 2261–2262 in connection with domestic violence). To the extent that any of the above-noted statutory provisions conflict with the provisions of this guideline, the applicable statutory provision shall control.''.

Chapter Seven (Violations of Probation and Supervised Release)

31(A). Synopsis of Proposed Amendment: Section 110505 of the Violent Crime Control and Law Enforcement Act of 1994, a version of which was proposed by the Commission, amends 18 U.S.C. § 3583(e)(3) by specifying that a defendant whose supervised release term is revoked may not be required to serve more than five years in prison if the offense that resulted in the term of supervised release is a class A felony. The provision also amends section 3583(g) by eliminating the mandatory re-imprisonment period of at least one-third of the term of supervised release if the defendant possesses a controlled substance or a firearm, or refuses to participate in drug testing. Finally, the provision expressly authorizes the court to order an additional, limited period of supervision following revocation of supervised release and re-imprisonment. The courts of appeal were split as to whether a sentencing court had authority to reimpose a term of supervised release upon revocation of the original term of supervised release.

Chapter Seven of the Guidelines Manual contains the policy statements that must be considered by courts when determining the sentence to be imposed upon revocation of probation or supervised release. The policy statements were originally drafted under the assumption that reimposition of supervised release was possible. The proposed amendment eliminates outdated statutory references in those policy statements.

Proposed Amendment: Section 7B1.3(g)(2) is amended by deleting '', to the extent permitted by law,''.

The Commentary to § 7B1.3 captioned ''Application Notes'' is amended in Note 2 by deleting the second sentence and inserting in lieu thereof:

''This statute, as amended by Public Law 103–322, effective September 13, 1994, expressly authorizes the court to order an additional, limited period of supervision following revocation of supervised release and reimprisonment.'';

By deleting Note 3 in its entirety; and by renumbering the remaining notes accordingly.

(B). Synopsis of Proposed Amendment: Section 20414 of the Violent Crime Control and Law Enforcement Act of 1994 makes mandatory a condition of probation requiring that the defendant refrain from any unlawful use of a controlled substance. 18 U.S.C. § 3563(a)(4). The section also establishes a condition that the defendant, with certain exceptions, submit to periodic drug tests. The existing mandatory condition of probation requiring the defendant not to possess a controlled substance remains unchanged. 18 U.S.C. § 3563(a)(3). Similar requirements are made with respect to conditions of supervised release. 18 U.S.C. § 3583(d).

Section 110506 of the Violent Crime Control and Law Enforcement Act of 1994, a version of which was proposed by the Commission, mandates revocation of probation and a term of imprisonment if the defendant unlawfully possesses a controlled substance (in violation of section 3563(a)(3)), possesses a firearm, or refuses to comply with drug testing (in violation of section 3563(a)(4)). It does not require revocation in the case of use of a controlled substance (although use presumptively may establish possession). No minimum term of imprisonment is required other than a sentence that includes a ''term of imprisonment'' consistent with the sentencing guidelines and revocation policy statements. Similar requirements are made in 18 U.S.C. § 3583(g) with respect to conditions of supervised release. See discussion of section 110505, supra.

Section 20414 permits ''an exception in accordance with United States Sentencing Commission guidelines'' from the mandatory revocation provisions of section 3565(b), ''when considering any action against a defendant who fails a drug test administered in accordance with [section 3563(a)(4)].'' The exception from the mandatory revocation provisions appears limited to a defendant who fails the test and would not cover a defendant who refuses to take the test.

In at least two circuits (the Fourth and Tenth), a defendant who failed a drug test was presumed to have possessed the drugs and consequently was subject to the mandatory revocation provisions. However, in other circuits, failing a drug test was considered no more than evidence of possession and a separate finding of possession was required by the court. The apparent congressional view of the matter is that failure of a drug test may or may not be subject to mandatory revocation, as evidenced by the conditional statement ''if the results [of the drug test] are positive [and] the defendant is subject to possible imprisonment.'' 18 U.S.C. § 3563(a)(4). It is not clear whether the Fourth and Tenth Circuits will consider their view of the issue superseded by this provision.

The proposed amendment adds commentary that expressly reflects the statutory exception from mandatory revocation if the offender fails a drug test and amends the Commentary to Chapter Seven to eliminate outdated statutory references.

Proposed Amendment: The Commentary to § 7B1.4 captioned ''Application Notes'' is amended by deleting Notes 5 and 6 in their entirety

and by inserting in lieu thereof the following new notes:

''5. Under 18 U.S.C. § 3565(b), upon a finding that a defendant violated a condition of probation by being in possession of a controlled substance or firearm, or by refusing to comply with drug testing, the court is required to 'revoke the sentence of probation and resentence the defendant under subchapter A [of title 18, Chapter 227] to a sentence that includes a term of imprisonment.' Under 18 U.S.C. § 3583(g), upon a finding that a defendant violated a condition of supervised release by being in possession of a controlled substance, the court is required to 'revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under 18 U.S.C. § 3583(e)(3).'

6. Under 18 U.S.C. § 3563(a), '[t]he court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception from the rule of section 3565(b) when considering any action against a defendant who fails a drug test administered in accordance with 18 U.S.C. § 3563(a)(4).' ''.

Appendix A (Statutory Index)

32. Synopsis of Proposed Amendment: This proposed amendment makes Appendix A more comprehensive by adding new offenses enacted by the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103–322). The amendment addresses provisions found in sections 40221, 60005, 60009, 60012, 60013, 60015, 60019, 60021, 60023, 90106, 110103, 110503, 110517, 120003, 160001, 170201, 180201, 320108, 320601, 320602, 320603, 320902, of the Act. In addition, the amendment adds new offenses enacted by section 11 of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (Public Law 103–190), section 202 of the Food Stamp Program Improvements Act of 1994 (Public Law 103–225), sections 312 and 313 of the Social Security Independence and Program Improvements Act of 1994 (Public Law 103–296), and sections 3, 4, and 5 of the Domestic Chemical Diversion Act of 1993 (Public Law 103–200). Furthermore, the amendment conforms Appendix A to revisions in existing statutes made by the above Acts. Finally, the amendment revises the titles of several offense guidelines to better reflect their scope.

Proposed Amendment: Appendix A (Statutory Index) is amended by inserting the following at the appropriate place by title and section:

''7 U.S.C. § 2018(c) § 2N2.1'',
''7 U.S.C. § 6810 § 2N2.1'',
''18 U.S.C. § 37 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2A5.1, 2A5.2, 2B1.3, 2B3.1, 2K1.4'',
''18 U.S.C. § 113(a)(1) 2A2.1'',
''18 U.S.C. § 113(a)(2) 2A2.2'',
''18 U.S.C. § 113(a)(3) 2A2.2'',
''18 U.S.C. § 113(a)(5) 2A2.3'',
(Class A misdemeanor provisions only)
''18 U.S.C. § 113(a)(6) 2A2.2'',
''18 U.S.C. § 113(a)(7) 2A2.3'',
''18 U.S.C. § 333 2F1.1'',
''18 U.S.C. § 470 2B5.1, 2F1.1'',
''18 U.S.C. § 668 2B1.1'',
''18 U.S.C. § 880 2B1.1'',
''18 U.S.C. § 922(w) 2K2.1'',
''18 U.S.C. § 924(i) 2A1.1, 2A1.2'',
''18 U.S.C. § 924(j) 2K2.1'',
''18 U.S.C. § 924(m) 2K2.1'',
''18 U.S.C. § 1033 2B1.1, 2F1.1, 2J1.2'',
''18 U.S.C. § 1118 2A1.1, 2A1.2'',
''18 U.S.C. § 1119 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1'',
''18 U.S.C. § 1120 2A1.1, 2A1.2, 2A1.3, 2A1.4'',
''18 U.S.C. § 1121 2A1.1, 2A1.2'',
''18 U.S.C. § 1716D 2Q2.1'',
''18 U.S.C. § 2114(b) 2B1.1'',
''18 U.S.C. § 2332a 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A1.5, 2A2.1, 2A2.2, 2B1.3, 2K1.4'',
''18 U.S.C. § 2258(a),(b) 2G2.1, 2G2.2'',
''18 U.S.C. § 2261 2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2B3.1, 2B3.2, 2K1.4'',
''18 U.S.C. § 2262 2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2B3.1, 2B3.2, 2K1.4'',
''18 U.S.C. § 2280 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.3 2B3.1, 2B3.2, 2K1.4'',
''18 U.S.C. § 2281 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.3, 2B3.1, 2B3.2, 2K1.4'',
''18 U.S.C. § 2423(b) 2A3.1, 2A3.2, 2A3.3 [, 2G1.2],
''21 U.S.C. § 843(a)(9) 2D3.2'',
''21 U.S.C. § 843(c) § 2D3.1'',
''21 U.S.C. § 849 § 2D1.2'',
''21 U.S.C. § 960(d)(3), (4) 2D1.11'',
''21 U.S.C. § 960(d)(5) 2D1.13'',
''21 U.S.C. § 960(d)(6) 2D3.2'',
''42 U.S.C. § 1307(b) 2F1.1''.

In the line referenced to 18 U.S.C. § 113(a) by inserting ''(for offenses committed prior to September 13, 1994)'' immediately following ''2A2.1'';

In the line referenced to 18 U.S.C. § 113(b) by inserting ''(for offenses committed prior to September 13, 1994)'' immediately following ''2A2.2'';

In the line referenced to 18 U.S.C. § 113(c) by inserting ''(for offenses committed prior to September 13, 1994)'' immediately following ''2A2.2'';

In the line referenced to 18 U.S.C. § 113(f) by inserting ''(for offenses committed prior to September 13, 1994)'' immediately following ''2A2.2'';

In the line referenced to 18 U.S.C. § 1153 by inserting ''2A2.3,'' immediately before ''2A3.1'';

In the line referenced to 18 U.S.C. § 2114 by deleting ''2114'' and inserting in lieu thereof ''2114(a)'';

And in the line referenced to 18 U.S.C. § 2423 by deleting ''2423'' and by inserting in lieu thereof ''2423(a)''.

Section 2D3.1 is amended in the title by inserting at the end ''; Unlawful Advertising Relating to Schedule I Controlled Substances''.

Section 2D3.2 is amended by inserting ''or Listed Chemicals'' immediately after ''Controlled Substances''.

Section 2Q2.1 is amended by deleting the title and inserting in lieu thereof ''Offenses Involving Fish, Wildlife, and Plants''.

II. Amendments Relating to Drug Offense Guidelines and Role in the Offense

This Part contains two approaches to the revision of the guidelines for controlled substance offenses.

The premise of Approach 1 (proposed amendments 33–42) is that the type and quantity of the controlled substance involved in the offense, as adjusted by the defendant's role in the offense, is an important and appropriate measure of the seriousness of the offense, but that the Commission assigned too much weight to drug quantity in constructing its initial guidelines. Therefore, the proposed amendments in Approach 1 would compress the Drug Quantity Table; limit its impact on lower-level defendants; somewhat increase the weight given to weapons, serious bodily injury, and leadership role; and address anomalies in the offense levels assigned to ''crack'' offenses and marijuana-plant offenses compared to other drug offenses. In addition, Approach 1 contains proposed amendments, addressing narrower issues, that would improve and make fairer the operation of these guidelines. The proposed amendments are set forth separately because they address different issues and, for the most part, operate independently.

The premise of Approach 2 is that the use of drug quantity to measure the seriousness of drug trafficking offenses should be abandoned or severely limited. Amendment 43 displays this approach.

Approach 1

33. Synopsis of Proposed Amendment: In the 1994 amendment cycle, the Commission took a first step in compressing the Drug Quantity Table by eliminating levels 40 and 42 from the table. Three options for compressing the Drug Quantity Table further are shown in Attachment 1. The thrust of this proposed amendment is that although drug quantity (in conjunction with role in the offense) is an appropriate factor in assessing offense seriousness (drug quantity directly measures the scale of the offense and potential for harm) and thus should be retained, the Commission's current guidelines contain too many quantity distinctions. That is, the drug table increases too quickly for small differences in quantity, particularly at certain offense levels. Under this proposal, the Drug Quantity Table would be compressed so that its contribution to the determination of the offense level would be somewhat reduced.

Three options are shown. Although the different options reflect somewhat different rationales, the effect of each option would be to reduce the number of gradations in the Drug Quantity Table, thereby making the guidelines somewhat less sensitive to drug quantity. Note that each one-level increment in offense level changes the final guideline range by about 12 percent above level 19, and increments of more than one level are compounded (e.g., a six-level change roughly doubles or halves the final guideline range). Thus, reductions of 2, 4, or 6 levels, as shown in the various options below, can have a substantial impact on the final guideline range.

For ease of presentation, only the current and proposed offense levels for heroin offenses are shown. Because the controlled substances in the Drug Quantity Table are related by established ratios, the offense levels for the other controlled substances would be conformed accordingly.

Option A. When the Commission initially developed the Drug Quantity Table, it keyed the offense level for 1 KG of heroin (ten-year mandatory minimum) at level 32 (121–151 months for a first offender) and 100 grams of heroin (five-year mandatory minimum) at level 26 (63–78 months for a first offender) because these guideline ranges included, or were close to, the five- and ten-year mandatory minimum sentences. However, offense levels 30 (97–121 months) and 24 (51–63 months) also include the five- and ten-year mandatory minimum sentences, as do offense levels 31 (108–135 months) and 25 (57–71 months). Option A displays how the heroin offense levels would look if the Commission used the offense levels corresponding to the lowest (rather than the highest) guideline ranges that include the statutory minimum sentence. The drug table is compressed because offense levels lower than level 22 are not changed (offense levels 22 and 24 from the current Drug Quantity Table are combined).

Option B. The legislative history of the Anti-Drug Abuse Act of 1986 provides support for the proposition that the heartland of the conduct that the Congress envisioned it was addressing with the ten-year mandatory minimum was the ringleader in large scale drug offenses. Senator Byrd, then the Senate Minority Leader, explained the intent during floor debate:

> For the kingpins—the masterminds who are really running these operations—and they can be identified by the amount of drugs with which they are involved—we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years. * * * Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail—a minimum of 5 years for the first offense. 132 Cong. Rec. S. 14300 (Sept. 30, 1986).

See also 132 Cong. Rec. 22993 (Oct. 11, 1986) (statement of Rep. Lafalce) (''the bill * * * acknowledge[s] that there are differing degrees of culpability in the drug world. Thus, separate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers''); H.R. Rep. No. 9–845, 99th Cong., 2d Sess., pt. 1 at 11–17 (1986) (construing penalty provisions of a comparable bill, H.R. 5394, similarly).

The typical or heartland role adjustment for kingpins in such large scale offenses is four levels. Thus, the Commission's current drug offense levels (when applied in conjunction with the role in the offense enhancements), in effect, result in double counting. That is, although Congress envisioned a level 32 offense for a first offender, large-scale dealer with one kilogram of heroin (or level 30, see Option A), the Commission has provided a level 36 for the heartland case (level 32 from the Drug Quantity Table plus a four-level increase from § 3B1.1). Similarly, the mid-level dealer at whom the five-year mandatory minimum was aimed likely will receive a two-level enhancement for role in the offense. If so, the Commission has assigned an offense level of 28 (26 from the Drug Quantity Table plus two levels from § 3B1.1) to the heartland case for which Congress envisioned an offense level of 26 (or level 24, see discussion at Option A). Option B shows how the heroin offense levels would look if adjusted to avoid this double counting (pegging the reductions to levels 32 and 26, the highest offense levels containing the mandatory minimum penalties).

Option C. This option combines Options A and B, pegging the quantity for the ten-year mandatory minimum at level 26 (level 32 minus two levels from Option A and four levels from Option B) and the quantity for the five-year mandatory minimum at level 22 (level 26 minus two levels from Option A and two levels from Option B). It is to be noted, however, that the resulting offense level for the five-year mandatory minimum quantity minus a four-level adjustment for a minimal role and a three-level adjustment for acceptance of responsibility would produce a guideline range with a minimum of less than 24 months, thus seemingly conflicting with the recent congressional instruction in Section 80001 of the Violent Crime Control and Law Enforcement Act of 1994. In contrast, the lowest offense level provided under Options A and B for such cases has a lower limit (24 months), consistent with this congressional instruction.

Proposed Amendment: Section 2D1.1(c) is amended by revision of the quantities associated with offense level 24 and greater as shown in the following chart. Note: The amounts shown are the minimum quantities associated with each offense level offense (e.g., in the current guidelines, offense level 38 covers 30 KG or more of heroin). For simplicity of presentation, only the offense levels for heroin offenses are shown. The offense levels for other controlled substances would be adjusted accordingly (e.g., under § 2D1.1(c), 5 kg of cocaine has the same offense level as 1 kg of heroin; the proposed guideline offense levels would maintain this relationship).

Offense Levels for Heroin Distribution

OFFENSES (CURRENT GUIDELINES AND OPTIONS A, B, C)

Offense level	Current guidelines	Option A	Option B	Option C
38	30 KG	.....	.....	
36	10 KG	30 KG	.....	
34	3 KG .	10 KG	30 KG	
32	1 KG .	3 KG ..	10 KG	30 KG.

OFFENSES (CURRENT GUIDELINES AND OPTIONS A, B, C)—Continued

Offense level	Current guidelines	Option A	Option B	Option C
30	700 G	1 KG ..	3 KG ..	10 KG.
28	400 G	700 G	1 KG ..	3 KG.
26	100 G	400 G	300 G	1 KG.
24	80 G ..	100 G	100 G	300 G.
22	60 G ..	60 G ..	60 G ..	100 G.
20	40 G ..	40 G ..	40 G ..	40 G.
18	20 G ..	20 G ..	20 G ..	20 G.
16	10 G ..	10 G ..	10 G ..	10 G.
14	5 G	5 G	5 G	5 G.
12	less than 5G.	less than 5G.	less than 5G.	less than 5G.

34. Synopsis of Proposed Amendment: This proposed amendment would limit the impact of drug quantity in the case of defendants who qualify for a mitigating role adjustment under § 3B1.2 (Mitigating Role). A number of commentators have argued that the current guidelines over-punish low-level defendants when the sentence is driven in large part by the quantity of drugs involved in the offense. These commentators have recommended that, above a certain level, drug quantity should not further increase the offense level for defendants with minor or minimal roles. That is, for example, the difference between 20,000 kilos and 200,000 kilos of marijuana may be relevant to the offense level for the major actors in the offense but not relevant in determining the culpability and offense level for the deckhands or offloaders involved with that quantity. Historically, the U.S. Parole Commission limited the impact of drug quantity for low-level defendants in its parole release guidelines.

Under this proposed amendment, if the defendant qualified for a minor or minimal role, the base offense level from the Drug Quantity Table would not exceed level [28] even if the drug quantity table otherwise would have called for a higher offense level. In addition, the applicable role adjustment from § 3B1.2 (Mitigating Role) will further reduce the offense level by two or four levels.

The bracketing of offense level 28 in the proposed amendment indicates that the Commission requests comment on whether offense level 28 is the appropriate offense level for use in this amendment or whether the offense level should be higher or lower.

Proposed Amendment: Section 2D1.1(a)(3) is amended by inserting the following additional sentence at the end:

''Provided, that if the defendant qualifies for a mitigating role adjustment under § 3B1.2 (Mitigating Role), the base offense level determined under subsection (c) below shall not be greater than level [28].''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by deleting Note 16 and Inserting in lieu thereof:

''16. Subsection (a)(3) provides that if a defendant qualifies for a mitigating role adjustment under § 3B1.2 (Mitigating Role), the base offense level from subsection (c) shall not exceed level [28]. This limitation on the base offense level is in addition to, and not in lieu of, the appropriate adjustment from § 3B1.2 (Mitigating Role).''.

Additional Issue for Comment: The Commission, at the request of the Practitioners' Advisory Group, requests comment on whether this amendment should set different maximum offense levels from the Drug Quantity Table for defendants with a minor or minimal role depending upon the type of controlled substance. Specifically, should offenses involving heroin, cocaine, cocaine base, PCP, LSD, N-phenyl-N-[l-(2 phenylethyl)-4-piperidinyl] propanamide, marihuana, and methamphetamine have a different maximum offense level from the Drug Quantity Table for lower level defendants (e.g., level 28) than other controlled substance (e.g., level 22)?

35(A). Synopsis of Proposed Amendment: This is a three-part amendment to improve the operation of § 3B1.1 (Aggravating Role). First, this amendment revises § 3B1.1(b) to apply when the defendant managed or supervised at least four other participants. This formulation avoids what appears to be an anomaly in the current guideline in that a defendant who supervises only one participant in an offense with a total of five participants receives a higher offense level than a defendant who is the leader or organizer of an offense involving four participants and manages or supervises all of the participants. This formulation also is more consistent with that of 21 U.S.C. § 848 (Continuing Criminal Enterprise) (which requires the supervision of at least five other participants). Second, this amendment revises § 3B1.1(a) and (b) to delete the term ''otherwise extensive,'' a term of uncertain meaning that seems to have been intended to deal with certain non-criminally responsible participants (see current Application Note 3). This issue is addressed more directly by revised Application Note 1. Third, this amendment clarifies the interaction of §§ 3B1.1 and 3B1.2 in the case of a defendant who would qualify for a minor or minimal role but for his/her exercise of supervision over other minor or minimal participants. This interaction has been the subject of inconsistent interpretation and at least one circuit court decision, United States v. Tsai, 945 F2d. 155 (3rd Cir. 1992), has required that §§ 3B1.1 and 3B1.2 be sequentially applied to the same defendant.

Proposed Amendment: Section § 3B1.1 is amended by deleting ''follows:'' and inserting in lieu thereof ''follows (Apply the Greatest):''

Section 3B1.1(a) is amended by deleting ''a criminal activity that involved five or more participants or was otherwise extensive'' and inserting in lieu thereof ''the offense and the offense involved at least four other participants''.

Section 3B1.1(b) is amended by deleting ''(but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive'' and inserting in lieu thereof ''of at least four other participants in the offense''.

Section 3B1.1(c) is amended by deleting ''in any criminal activity other than described in (a) or (b)'' and inserting in lieu thereof ''of at least one other participant in the offense''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended in Note 1 by inserting the following additional paragraph at the end:

''In an unusual case, a person may be recruited by a criminally responsible participant for a significant role in the offense (i.e., a role that is typically held by a criminally responsible participant), but the person recruited may not be criminally responsible because the person recruited (1) is unaware that an offense is being committed, (2) has not yet reached the age of criminal responsibility, or (3) has a mental deficiency or condition that negates criminal responsibility. In such a case, an upward departure to the offense level that would have applied had such person been a criminally responsible participant may be warranted. For example, a person hired by a defendant to solicit money for a charitable organization who was unaware that the charitable organization was fraudulent, a person duped by a defendant into driving the getaway car from a bank robbery who was unaware that a robbery was being committed, or a child recruited by a defendant to assist in a theft would meet the criteria for the application of this provision.''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended in

Note 2 by inserting the Following additional paragraph at the end:

''A 'manager' or 'supervisor' means a person who managed or supervised another participant, whether directly or indirectly.''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended by deleting Note 3 and inserting in lieu thereof:

''3. In the case of a defendant who would have merited a minor or minimal role adjustment but for the defendant's supervision of other minor- or minimal-role participants, do not apply an adjustment from § 3B1.1 (Aggravating Role). For example, an increase for an aggravating role would not be appropriate for a defendant whose only function was to offload a large shipment of marihuana and who supervised other offloaders of that shipment. Instead, consider this factor in determining the appropriate reduction, if any, under § 3B1.2 (Mitigating Role). For example, in the case of a defendant who would have merited a reduction for a minimal role but for his or her supervision of other minimal-role participants, a reduction for a minor, rather than minimal, role might be appropriate. In the case of a defendant who would have merited a reduction for a minor role but for his or her supervision of other minimal- or minor-role participants, no reduction for role in the offense might be appropriate.

The interaction of §§ 3B1.1 and 3B1.2 is to be addressed in the manner described above. Thus, if an adjustment from § 3B1.1 is applied, an adjustment from § 3B1.2 may not be applied.''.

(B). Synopsis of Proposed Amendment: This proposed amendment revises § 3B1.2 (Mitigating Role) and the Introductory Commentary to Chapter Three, Part B (Role in the Offense) to provide clearer definitions of the circumstances under which a defendant qualifies for a mitigating role reduction. In addition, § 3B1.4 is deleted as unnecessary. This amendment is derived from the work of two Commission working groups that found significant problems with the clarity of the current definitions of mitigating role.

Proposed Amendment: The Introductory Commentary to Chapter Three, Part B is amended by deleting the second paragraph and inserting the following in lieu thereof:

''For § 3B1.1 (Aggravating Role) or § 3B1.2 (Mitigating Role) to apply, the offense must involve the defendant and at least one other participant, although that other participant need not be apprehended. When an offense has only one participant, neither § 3B1.1 nor § 3B1.2 will apply. In some cases, some participants may warrant an upward adjustment under § 3B1.1, other participants may warrant a downward adjustment under § 3B1.2, and still other participants may warrant no adjustment. Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply to offenses committed by any number of participants.

Sections 3B1.1 (Aggravating Role) and 3B1.2 (Mitigating Role) authorize an increase or decrease in offense level for a defendant who has an aggravating or mitigating role, respectively, in the offense conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Sections 3B1.1 and 3B1.2 are designed to work in conjunction with § 1B1.3, which focuses upon the acts and omissions in which the defendant participated (i.e., that the defendant committed, aided, abetted, counseled, commanded, induced, procured or willfully caused) and, in the case of a jointly undertaken criminal activity, the acts and omissions of others in furtherance of the jointly undertaken criminal activity that were reasonably foreseeable.

For example, in a controlled substance trafficking offense, the Chapter Two offense level for Defendant A, who arranged the importation of 1000 kilograms of marihuana and hired a number of other participants to assist him, is level 32. The same Chapter Two offense level applies to Defendant B, a hired hand whose only role was to assist in unloading the ship upon which the marihuana was imported; Defendant C, a hired hand whose only role was as a deckhand on that ship; and Defendant D, a hired hand whose only role was to act as a lookout for that unloading. Defendant E, who purchased the marihuana from Defendant A and resold it, acting alone, also receives the same Chapter Two offense level. Although the quantity of marihuana involved for each of these defendants (and thus the Chapter Two offense level) is identical, courts traditionally have distinguished among such defendants in imposing sentence to take into account their relative culpabilities (based on their respective roles). Defendant A logically would be seen as having the most culpable role because he organized the importation and recruited and managed others. Defendants B, C, and D logically would be seen as having substantially less culpable roles. Defendant E, who acted alone, would receive no role adjustment. Consistent with these principles, §§ 3B1.1 (Aggravating Role) and 3B1.2 (Mitigating Role) are designed to provide the court with the ability to make appropriate adjustments in offense levels on the basis of the defendant's role and relative culpability in the offense conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct).

The fact that the conduct of one participant warrants an upward adjustment for an aggravating role, or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating role. For example, Defendant F plans a bank robbery and hires Defendant G, who commits the robbery. Both defendants plead guilty to bank robbery, and each has a Chapter Two offense level of 24. Defendant G may be less culpable than Defendant F, who will receive an upward adjustment under § 3B1.1 for employing Defendant G. Nevertheless, Defendant G does not have a minimal or minor role in the robbery because his role is not substantially less culpable than that of a defendant who committed the same robbery acting alone.''.

Section 3B1.2(a) is amended by deleting ''in any criminal activity''.

Section 3B1.2(b) is amended by deleting ''in any criminal activity''.

Section 3B1.2 is amended by deleting ''In cases falling between (a) and (b), decrease by 3 levels.''.

The Commentary to § 3B1.2 captioned ''Application Notes'' is amended by renumbering Note 4 as Note 7; and by deleting Notes 1–3 and inserting in lieu thereof:

''1. (A) Minimal Role. For subsection (a) to apply, the defendant must—

(1) be substantially less culpable than a person who committed the same offense without the involvement of any other participant;

(2) ordinarily have all of the characteristics listed in Application Note 2(a)–(d); and

(3) not be precluded from receiving this adjustment under Application Notes 3–7.

(B) Minor Role. For subsection (b) to apply, the defendant must—

(1) be substantially less culpable than a person who committed the same offense without the involvement of any other participant;

(2) ordinarily have most of the characteristics listed in Application Note 2(a)–(d); and

(3) not be precluded from receiving this adjustment under Application Notes 3–7.

(C) The difference between a defendant with a minimal role and a minor role is one of degree, and depends upon the presence and intensity of the types of factors described in Application Note 2(a)–(d).

(D) For the purposes of this section, the 'same offense' means the offense conduct (and Chapter Two offense level) for which the defendant is accountable under § 1B1.3 (Relevant Conduct). The determination of whether a defendant is substantially less culpable than a person who committed the same offense without the involvement of any other participant requires a comparative assessment. In a drug trafficking offense, for example, the role and culpability of a defendant who was hired as a lookout for a drug transaction would be compared with the role and culpability of the seller of the same quantity of the controlled substance who acted alone. Similarly, the role and culpability of a defendant who was hired to unload a shipment of marihuana would be compared with that of an importer of the same quantity of marihuana who acted alone. 'Participant' is defined in the Commentary to § 3B1.1 (Aggravating Role).

Examples:

(1) Defendant A was hired by an unindicted participant to assist in unloading a ship carrying 1,000 kilograms of marihuana (having a Chapter Two offense level of Level 32). Defendant A had no decision-making authority, was to be paid $2,000, had no supervisory authority over another participant, and performed only unsophisticated tasks. The appropriate comparison of relative culpability is with a defendant who, acting alone, imported the same quantity of marihuana (such a defendant would receive a Chapter Two offense level of Level 32 and no aggravating or mitigating role adjustment). On the basis of this comparison, Defendant A is a substantially less culpable participant.

(2) Defendant B was hired by Defendant C to commit an assault on Defendant C's former business partner. Defendant B was told when and where to find the victim alone, was instructed how to proceed, was to be paid $3,000 to commit the offense, had no supervisory authority over another participant, and performed only unsophisticated tasks. Although Defendant B may be less culpable than Defendant C, Defendant B is not a substantially less culpable participant than a defendant who, acting alone, committed the same assault offense. Therefore, although Defendant C receives an aggravating role adjustment for employing Defendant B, Defendant B does not receive a mitigating role adjustment.

(E) Defendants who qualify as substantially less culpable participants usually will fall into one of the following categories:

(1) a defendant who facilitates the successful commission of an offense but is not essential to that offense (e.g., a lookout in a drug trafficking offense);

(2) a defendant who provides essentially manual labor that is necessary to the successful completion of an offense (e.g., a loader or unloader of contraband, or a deckhand on a ship carrying contraband); or

(3) a defendant who holds or transports contraband for the owner of the contraband (such defendants provide a buffer that reduces the likelihood of the owner being apprehended in possession of the contraband).

(F) Because the determination of whether a defendant qualifies for a mitigating (minimal or minor) role adjustment requires a comparative judgment, the Commission recognizes that it will be heavily dependent upon the facts of each case.

2. The following is a list of characteristics that ordinarily are associated with a mitigating role:

(A) the defendant had no material decision-making authority or responsibility;

(B) the total compensation or benefit to the defendant was very small in comparison to the total profit typically associated with offenses of the same type and scope;

(C) the defendant did not supervise other participant(s); and

(D) the defendant performed only unsophisticated tasks.

In addition, although not determinative, a defendant's lack of knowledge or understanding of the scope and structure of the criminal activity or of the activities of other participants may be indicative of a mitigating role.

3. If the defendant received an adjustment from § 3B1.1 (Aggravating Role), an adjustment for a minimal or minor role is not authorized.

4. With regard to offenses involving contraband (including controlled substances), a defendant who—

(A) sold, or played a substantial part in negotiating the terms of the sale of, the contraband;

(B) had an ownership interest in any portion of the contraband; or

(C) financed any aspect of the offense,

shall not receive a mitigating role adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, or owned, or for that aspect of the offense that the defendant financed because, with regard to those acts, the defendant has acted as neither a minimal nor a minor participant.

Thus, for example, a defendant who sells 100 grams of cocaine and who is held accountable under § 1B1.3 (Relevant Conduct) for only that quantity is not eligible for a mitigating role adjustment. In contrast, a defendant who sells 100 grams of cocaine, but who is held accountable under § 1B1.3 for a jointly undertaken criminal activity involving five kilograms of cocaine, if otherwise qualified, may be considered for a mitigating role adjustment in respect to that jointly undertaken criminal activity, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendant sold.

[5. A defendant who is entrusted with a quantity of contraband for purposes of transporting such contraband (e.g., a courier or mule) shall not receive a minimal role adjustment for the quantity of contraband that the defendant transported. If such a defendant otherwise qualifies for a mitigating role adjustment, consideration may be given to a minor role adjustment.]

[6. A defendant who possessed a firearm or directed or induced another participant to possess a firearm in connection with the offense shall not receive a minimal role adjustment. If such a defendant otherwise qualifies for a mitigating role adjustment, consideration may be given to a minor role adjustment.]''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended by inserting the following additional note:

''8. Consistent with the overall structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating role adjustment. In determining whether a mitigating role adjustment is warranted, the court should consider all of the available facts, including any information arising from the circumstances of the defendant's arrest that may be relevant to a determination of the defendant's role in the offense. In weighing the totality of the circumstances, a court is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.''.

The Commentary to § 3B1.2 captioned ''Background'' is amended by deleting:

''This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a) or (b) involves a determination that is heavily dependent upon the facts of the particular case.'',

And by inserting in lieu thereof:

''This section provides an adjustment for a defendant who has a minor or minimal role in the offense. To qualify for a minor or minimal role adjustment, the defendant must be substantially less culpable than a hypothetical defendant who committed the same offense without the involvement of any other indicted or unindicted participant. In a large scale offense that cannot readily be committed by one person, the above comparison would be made to a small number of equally culpable participants who committed the offense without additional assistance. In an offense involving importing, transporting, or storing contraband (including controlled substances), the defendant's relative culpability is to be assessed by comparison with a participant who owned the same type and quantity of contraband because, in an offense involving contraband that is committed without the involvement of any other participant, the person committing the offense will be the owner of the contraband.''.

Section 3B1.4 is deleted in its entirety.

36. Synopsis of Proposed Amendment: Some commentators have suggested that if the Commission moderates the weight given to drug quantity, it should also amend the guidelines to enhance the weight given to firearm use, serious bodily injury, and organizer and leaders in very large scale offenses.

Currently, under § 2D1.1, possession of a weapon carries a 2-level increase, which adds roughly 25% to the guideline range at higher offense levels but little in absolute time at very low offense levels. This amendment would address this issue by providing a minimum offense level for weapon possession and added enhancements for firearm discharge and serious bodily injury.

In addition, this amendment would provide an enhancement for organizers and leaders of very large scale offenses; e.g., offenses involving at least ten other participants. For consistency, this would apply to all offenses, not just drug offenses. Two options are shown. Option 1 would add an additional specific offense characteristic to address this issue. Option 2 would address this issue by an application note regarding the appropriate placement of the sentence within the applicable guideline range.

Proposed Amendment: Section 2D1.1(b) is amended renumbering subdivision (2) as subdivision (3); and by deleting subdivision (1) and inserting in lieu thereof:

''(1) (Apply the greater):

(A) If the offense involved the discharge of a firearm, increase by 4 levels, but if the resulting offense level is less than level 20, increase to level 20; or

(B) If the offense involved possession of a dangerous weapon (including a firearm), increase by 2 levels; but if the resulting offense level is less than level 18, increase to level 18.

(2) If a victim sustained serious bodily injury, other than that to which subsection (a)(1) or (2) applies, increase by 2 levels.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by deleting Note 3 and inserting in lieu thereof:

''3. 'Firearm,' 'dangerous weapon,' and 'serious bodily injury' are defined in the Commentary to § 1B1.1 (Application Instructions). 'Discharge of a firearm' means the discharge of a firearm with intent to injure or intimidate, or in circumstances that pose a risk a risk of death or injury to a person.

The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. If a dangerous weapon is found in the same location as the controlled substance, there shall be a rebuttable presumption that the offense involved the possession of the weapon (i.e., that the possession of the weapon facilitated, or was otherwise related to, the commission of the offense).

The enhancements in subsection (b) also apply to offenses that are referenced to § 2D1.1; see §§ 2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(b)(1), and 2D2.1(b)(1).''.

Section 2D1.11(b) is amended by renumbering subdivision (2) as (3); and by deleting subdivision (1) and inserting in lieu thereof:

''(1) (Apply the greater):

(A) If the offense involved the discharge of a firearm, increase by 4 levels, but if the resulting offense level is less than level 20, increase to level 20; or

(B) If the offense involved possession of a dangerous weapon (including a firearm), increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.

(2) If a victim sustained serious bodily injury, other than that to which subsection (a)(1) or (2) applies, increase by 2 levels.''.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended by deleting Note 1 and inserting in lieu thereof:

''1. 'Firearm,' 'dangerous weapon,' and 'serious bodily injury' are defined in the Commentary to § 1B1.1 (Application Instructions). 'Discharge of a firearm' refers to the discharge of a firearm with intent to injure or in circumstances that pose a risk a risk of death or injury to a person.

If a dangerous weapon is found in the same location as the controlled substance, there shall be a rebuttable presumption that the offense involved the possession of the weapon (i.e., that the possession of the weapon facilitated, or was otherwise related to, the commission of the offense).''.

[Option 1: Section 3B1.1 is amended by redesignating subsection (a)–(c) as (b)–(d); and by inserting the following as subsection (a):

''(a) If the defendant was an organizer or leader of the offense, and the offense involved at least ten other participants, increase by 5 levels.''.]

[Option 2: The Commentary to § 3B1.1 captioned ''Application Notes'' is amended by inserting the following additional note:

''5. If the defendant was an organizer or leader of an offense involving at least ten other participants, a sentence towards the upper limit of the applicable guideline range typically will be appropriate.''.]

Additional Issue for Comment: The Commission, at the request of the Practitioners' Advisory Group, invites comment on an alternative to the weapons portion of this enhancement in the following form:

''(1)(A) If a dangerous weapon (including a firearm) was actually possessed by the defendant, or the defendant induced or directed another participant to actually possess a dangerous weapon, increase by 2 levels.

(B) If the use of a dangerous weapon (including a firearm) was threatened by the defendant, or the defendant induced or directed another participant to threaten the use of a dangerous weapon, increase by 3 levels.

(C) If a dangerous weapon (including a firearm) was actually brandished or displayed by the defendant, or the defendant induced or directed another participant to brandish or display a dangerous weapon, increase by 4 levels.

(D) If a firearm was actually discharged by the defendant, or the defendant induced or directed another participant to actually discharge a firearm, increase by 5 levels.

2(A) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received bodily injury, or if the defendant induced or directed another participant to actually

use a dangerous weapon and someone other than that participant received bodily injury, increase by 2 levels. This increase should be applied in addition to any other specific offense characteristic called for in this subsection.

(B) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received serious bodily injury, or if the defendant induced or directed another participant to actually use a dangerous weapon and someone other than that participant received serious bodily injury, increase by 3 levels. This increase should be applied in addition to any other specific offense characteristic called for in this subsection.

(C) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received permanent or life-threatening bodily injury, or if the defendant induced or directed another participant to actually use a dangerous weapon and someone other than that participant received permanent or life-threatening bodily injury, increase by 4 levels. This increase should be applied in addition to any other specific offense characteristic called for in this subsection.''.

37. Synopsis of Proposed Amendment: For offenses involving 50 or more marihuana plants, the guidelines use an equivalency of one plant = one kilogram of marihuana. This equivalency reflects the quantities associated with the five- and ten-year mandatory minimum penalties in 21 U.S.C. § 841. For offenses involving fewer than 50 marihuana plants, the guidelines use an equivalency of one plant = 100 grams of marihuana, unless the weight of the actual marihuana is greater. The one plant = 100 grams of marihuana equivalency was selected as a reasonable approximation of average yield taking into account (1) studies reporting the actual yield of marihuana plants (37.5—412 grams depending on growing conditions), (2) that for guideline purposes all plants regardless of size are to be counted while, in reality, not all plants will actually produce useable marihuana (e.g., some plants may die of disease before maturity; when plants are grown outdoors, some plants may be eaten by animals); and (3) that male plants, which are counted for guideline purposes, are frequently culled because they do not produce the same quality of marihuana as do female plants. The one plant to one kilogram ratio used in the statute has been criticized by commentators as unrealistic. Courts have upheld this statutory ratio as a legitimate exercise of legislative authority (although not on the grounds that a marihuana plant actually produces anywhere close to one kilogram of marihuana). This amendment would detach the equivalency used in the guidelines from the one plant-one kilogram ratio used in the statute and substitute the 100 grams per marihuana plant ratio (currently used in the guidelines for cases involving fewer than 50 plants) for all cases.

Proposed Amendment: Section 2D1.1(c) is amended in the fifth note immediately following the drug quantity table by deleting ''if the offense involved (A) 50 or more marihuana plants, treat each plant as equivalent to 1 KG of marihuana; (B) fewer than 50 marihuana plants,''.

The Commentary to § 2D1.1 captioned ''Background'' is amended in the first sentence of the fourth paragraph by deleting ''In cases involving fifty or more marihuana plants, an equivalency of one plant to one kilogram of marihuana is derived from the statutory penalty provisions of 21 U.S.C. § 841(b)(1) (A), (B), and (D). In cases involving fewer than fifty plants, the statute is silent as to the equivalency. For cases involving fewer than fifty'' and inserting in lieu thereof ''For marihuana'', and in the last sentence of the fourth paragraph by deleting '', in the case of fewer than fifty marihuana plants,''.

38. Issue for Comment: The 100 to 1 ratio between crack cocaine base and cocaine used in the guidelines reflects the ratio found in 21 U.S.C. § 841(b) with respect to the amounts that require a five- or ten-year mandatory minimum sentence. This 100 to 1 ratio has been criticized by a number of commentators as unwarranted. Congress has directed the Commission to conduct a study with respect to this issue. The Commission's report to Congress is forthcoming. The Commission requests comment as to whether the guidelines should be amended with respect to the 100 to 1 ratio, and if so, whether a 1 to 1, 2 to 1, 5 to 1, 10 to 1, 20 to 1 ratio, or some other ratio, should be substituted.

39. Synopsis of Proposed Amendment: This proposed amendment would revise § 2D1.1 so that the scale of the offense is based upon the quantity of the controlled substances with which the defendant was involved in a given time period. A number of commentators have suggested that the use of such a ''snapshot'' would provide a more accurate method of distinguishing the scale of the offense than the current procedure of aggregating all the controlled substances regardless of the time period of the offense. See, e.g., proposed amendments submitted by the Practitioners' Advisory Committee and Federal Defenders in the 1993–1994 amendment cycle; see also Judge Martin's opinion in *United States* v. *Genao,* 831 F. Supp. 246 (S.D. N.Y. 1993). Use of a given time frame would reduce the sentencing impact of law enforcement decisions as to the number of ''buys'' to be made before arresting the defendant. Currently, for example, whether the defendant is arrested after two sales or ten sales may have a substantial impact on the guideline range. The legislative history of the mandatory minimum sentencing provisions in the Anti-Drug Abuse Act of 1986 (from which the offense levels in § 2D1.1 were derived) seems consistent with the use of a snapshot approach. The amounts at the ten-year mandatory minimum were chosen to be indicative of ''major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs'' and the amounts at the five-year level were chosen to be indicative of ''the managers of the retail level traffic.'' (Narcotics Penalties and Enforcement Act of 1986, H.R. Rep. No. 845, Part I, 99th Cong., 2nd Sess. 11–12 (1986)). In explaining the weights chosen for major traffickers, the House report states:

> * * * after consulting with a number of DEA agents and prosecutors about the distributions patterns for these various drugs, the Committee selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. * * * The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain. (Id.).

The above language suggests that the Congress was focusing on the amount of controlled substances possessed at one time (or within a limited time frame) rather than a cumulative amount of controlled substances possessed over an unlimited time period. Furthermore, it is noted that the Drug Enforcement Administration's investigation/prosecution priority classification scheme in effect at the time this mandatory minimum legislation was being considered graded cases by the amount of controlled substances distributed within a time period of 30 days; e.g., a Class I (major violator) was one who could be expected to distribute four kilograms of cocaine in a 30-day period; a Class II violator (mid-level violator) was one who could be

expected to distribute one kilogram in a 30-day period.

It also is to be noted that the use of a time period to limit consideration of conduct for sentencing purposes is currently contained in at least one statutory provision. Subsection (b)(2)(B) of 21 U.S.C. § 848 (Continuing Criminal Enterprise) requires the consideration of gross receipts be in relation to any 12-month period of the existence of the enterprise.

Consideration of quantity over a specified period would also eliminate cases in which courts are obligated to make extrapolations over long periods of time (with often tenuous information) in order to assess the quantity of controlled substances involved over the course of the entire offense.

Under this amendment, the guideline range would be based upon the largest amount of controlled substances with which the defendant was involved in a specified time period. Bracketed language displays four options. Options include a one-year time frame; a 180-day time frame, a 30-day time frame, and an option using the largest quantity involved at any one time.

Proposed Amendment: Section 2D1.1(c) is amended by designating the notes immediately following the Drug Quantity Table as Notes (B)-(I), respectively; and by inserting the following immediately before those notes:

''Notes to Drug Quantity Table:

[Option 1: (A) If the offense involved a number of transactions over a period of more than [12 months][180 days][30 days], the offense level from the Drug Quantity Table shall be based on the quantity of controlled substances with which the defendant was involved in any continuous [12-month][180-day][30-day] period during the course of the offense, using the quantity from the time period that results in the greatest offense level].

[Option 2: (A) If the offense involved a number of transactions over a period of time, the offense level from the Drug Quantity Table shall be determined by the quantity of controlled substances with which the defendant was involved on any one occasion, using the quantity that results in the greatest offense level].''.

40. Synopsis of Proposed Amendment: Some commentators have argued that the fact that the guidelines do not take into account drug purity can lead to unwarranted disparity in three types of cases. First, with some drugs, the purity of the drug generally increases with quantity (e.g., large quantities of heroin are generally purer than small quantities). With other drugs, purity varies less or does not vary at all (e.g., Percodan does not vary in purity because it is in pill form). The net result is that if the offense levels assigned to various controlled substances are proportional at the lower offense levels, the offense levels for the controlled substances that do not vary in purity will overpunish at the higher offense levels. For example, if Percodan and heroin offenses are aligned correctly at level 12, Percodan offenses will be substantially over-punished at higher offense levels. Second, there are a number of controlled substances that typically use large proportions of filler material in distribution. Methadone and Percodan are examples. Consequently, the offense levels for these substances tend to be inflated grossly by the weight of the filler material. This is similar to the LSD blotter paper/sugar cube issue that the Commission addressed in the 1993 amendment cycle. Third, even with drugs that generally increase in purity as quantity increases (e.g., heroin), there are some points in the distribution scheme (particularly at the lower levels) in which purity may vary substantially and thus have a significant impact on offense level. In addition, when purity is not considered, the offense level can be affected substantially by the timing of the arrest. For example, if a retail drug dealer buys ten grams of heroin at 50 percent purity in order to cut it with 100 grams of quinine and resell it, the offense level if the defendant is arrested before cutting the heroin is level 16 (ten grams). The offense level if the same defendant is arrested after cutting the quinine is level 26 (110 grams) despite the fact that the amount of actual heroin involved has always been five grams (ten grams at 50 percent purity).

Adoption of a drug table that used the actual weight of the controlled substance itself (e.g., 10 grams at 25% purity = 2.5 grams) would address these issues and eliminate inflation of offense levels based on ''filler'' material. Purity information is routinely provided on DEA Form 7 using established sampling procedures. There are, however, two potential practical problems related to drug purity that would have to be addressed satisfactorily before adoption of such a proposal. Both of these practical problems apply primarily to controlled substances that vary in purity (e.g., heroin and cocaine), rather than to legitimately manufactured pharmaceuticals that have been diverted (for which purity can readily be established) and substances that do not vary greatly in purity and thus would continue to be assessed by gross weight (e.g., marijuana). First, there is the possibility of increased litigation over purity assessments. It is noted, however, that (1) courts currently make estimates of drug quantity from information that is clearly less precise; (2) the Parole Commission has not found the use of quantity/purity to be problematic; and (3) quantity/purity currently is used for several controlled substances. For example, the instruction in § 2D1.1 to use ''300 KG of Methamphetamine or 30 KG or more of Methamphetamine (actual)'' directs the court to use the weight/purity of Methamphetamine with a conclusive presumption that the Methamphetamine is at least ten percent pure; the same instruction is contained in § 2D1.1 for PCP. Second, there is the issue of how to handle cases in which no controlled substance is seized (e.g., uncompleted offenses) and cases in which a controlled is seized but for some reason is not tested for purity.

Both of these concerns may be addressed by the adoption of a rebuttable presumption (or a set of rebuttable presumptions). For example, there could be a rebuttable presumption that the actual weight of the controlled substance was 50 percent of the weight of the mixture containing the controlled substance. In such case, the court would use a higher or lower percentage if such could be established by the government or the defense. Or, without much increase in complexity, there could be a set of rebuttable presumptions by drug type and/or gross quantity. The Parole Commission has used a chart with ''fallback'' purities as rebuttable presumptions based on the type and gross quantity of controlled substance for many years. The proposed amendment provides a set of rebuttable presumptions to address these issue.

Proposed Amendment: Section 2D1.1(c)(1) is amended by deleting:

''30 KG or more of PCP, or 3 KG or more of PCP (actual);

30 KG or more of Methamphetamine, or 3 KG or more of Methamphetamine (actual), or 3 KG or more of 'Ice';'',

And inserting in lieu thereof:

''30 KG or more of PCP;

30 KG or more of Methamphetamine''.

Section 2D1.1(c)(2) is amended by deleting:

''At least 30 KG but less than 100 KG of PCP, or at least 3 KG but less than 10 KG of PCP (actual);

At least 30 KG but less than 100 KG of Methamphetamine, or at least 3 KG but less than 10 KG of 'Ice';'',

And inserting in lieu thereof:

''At least 30 KG but less than 100 KG of PCP;

At least 30 KG but less than 100 KG of Methamphetamine;''.

Section 2D1.1(c)(3) is amended by deleting:

''At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);

At least 3 KG but less than 10 KG of Methamphetamine, or at least 300 G but less than 1 KG of Methamphetamine (actual), or at least 300 G but less than 1 KG of 'Ice';'',

And inserting in lieu thereof:

''At least 3 KG but less than 10 KG of PCP;

At least 3 KG but less than 10 KG of Methamphetamine;''.

Section 2D1.1(c)(4) is amended by deleting:

''At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);

At least 1 KG but less than 3 KG of Methamphetamine, or at least 100 G but less than 300 G of Methamphetamine (actual), or at least 100 G but less than 300 G of 'Ice';'',

And inserting in lieu thereof:

''At least 1 KG but less than 3 KG of PCP;

At least 1 KG but less than 3 KG of Methamphetamine;''.

Section 2D1.1(c)(5) is amended by deleting:

''At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);

At least 700 G but less than 1 KG of Methamphetamine, or at least 70 G but less than 100 G of Methamphetamine (actual), or at least 70 G but less than 100 G of 'Ice';'',

And inserting in lieu thereof:

''At least 700 G but less than 1 KG of PCP;

At least 700 G but less than 1 KG of Methamphetamine;''.

Section 2D1.1(c)(6) is amended by deleting:

''At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);

At least 400 G but less than 700 G of Methamphetamine, or at least 40 G but less than 70 G of Methamphetamine (actual), or at least 40 G but less than 70 G of 'Ice';'',

And inserting in lieu thereof:

''At least 400 G but less than 700 G of PCP;

At least 400 G but less than 700 G of Methamphetamine;''.

Section 2D1.1(c)(7) is amended by deleting:

''At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);

At least 100 G but less than 400 G of Methamphetamine, or at least 10 G but less than 40 G of Methamphetamine (actual), or at least 10 G but less than 40 G of 'Ice';'',

And inserting in lieu thereof:

''At least 100 G but less than 400 G of PCP;

At least 100 G but less than 400 G of Methamphetamine;''.

Section 2D1.1(c)(8) is amended by deleting:

''At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);

At least 80 G but less than 100 G of Methamphetamine, or at least 8 G but less than 10 G of Methamphetamine (actual), or at least 8 G but less than 10 G of 'Ice';'',

And inserting in lieu thereof:

''At least 80 G but less than 100 G of PCP;

At least 80 G but less than 100 G of Methamphetamine;''.

Section 2D1.1(c)(9) is amended by deleting:

''At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);

At least 60 G but less than 80 G of Methamphetamine, or at least 6 G but less than 8 G of Methamphetamine (actual), or at least 6 G but less than 8 G of 'Ice';'',

And inserting in lieu thereof:

''At least 60 G but less than 80 G of PCP;

At least 60 G but less than 80 G of Methamphetamine;''.

Section 2D1.1(c)(10) is amended by deleting:

''At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);

At least 40 G but less than 60 G of Methamphetamine, or at least 4 G but less than 6 G of Methamphetamine (actual), or at least 4 G but less than 6 G of 'Ice';'',

And inserting in lieu thereof:

''At least 40 G but less than 60 G of PCP;

At least 40 G but less than 60 G of Methamphetamine''.

Section 2D1.1(c)(11) is amended by deleting:

''At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);

At least 20 G but less than 40 G of Methamphetamine, or at least 2 G but less than 4 G of Methamphetamine (actual), or at least 2 G but less than 4 G of 'Ice';'',

And inserting in lieu thereof:

''At least 20 G but less than 40 G of PCP;

At least 20 G but less than 40 G of Methamphetamine;''.

Section 2D1.1(c)(12) is amended by deleting:

''At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);

At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of 'Ice';'',

And inserting in lieu thereof:

''At least 10 G but less than 20 G of PCP;

At least 10 G but less than 20 G of Methamphetamine;''.

Section 2D1.1(c)(13) is amended by deleting:

''At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);

At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of 'Ice';'',

And inserting in lieu thereof:

''At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);

At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of 'Ice';''.

Section 2D1.1(c)(14) is amended by deleting:

''Less than 5 G of PCP, or less than 500 MG of PCP (actual);

Less than 5 G of Methamphetamine, or less than 500 MG of Methamphetamine (actual), or less than 500 MG of 'Ice';'',

And inserting in lieu thereof:

''Less than 5 G of PCP;

Less than 5 G of Methamphetamine;''.

Section 2D1.1(c) is amended in the notes following the Drug Quantity table by deleting the first, second, third, and seventh paragraphs; and by inserting the following as the first note:

''(A) For offenses measured by the weight of the controlled substance (except marihuana, hashish, and hashish oil), use the weight of the actual controlled substance in the mixture or substance containing the controlled substance. For example, in the case of a 200 gram mixture containing heroin at 20% purity, the weight of the actual heroin is 40 grams (200 grams of mixture x 20% purity = 40 grams of heroin).

For the purposes of this determination:

(1) If the controlled substance is heroin, cocaine, 'crack,' cocaine base, or methamphetamine, and the transaction involved a mixture or substance weighing one kilogram or more, there shall be a rebuttable presumption that the purity is 75% (i.e., that the weight of the actual controlled substance is 75% of the weight of the mixture or substance containing the controlled substance);

(2) In any other case, there shall be a rebuttable presumption that the purity is 50% (i.e., that the weight of the actual controlled substance is 50% of the weight of the mixture or substance containing the controlled substance).

The applicable rebuttable presumption set forth above is to be used unless sufficient case-specific information is available to warrant a more specific determination as to the amount of the actual controlled substance.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by deleting Note 1 and inserting in lieu thereof:

''1. The rebuttable presumptions set forth in Note (A) will apply unless sufficient case-specific information is available to make a more specific determination as to the weight of the actual controlled substance.

''Generally, more specific weight/purity information will be obtained from DEA Form 7. In this form, 'total net weight' (Item 32) refers to the amount of the actual controlled substance. This is the weight to be used in calculation of the base offense level from the Drug Quantity Table.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by deleting Notes 9 and 18; and by renumbering the remaining notes accordingly.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 9 (formerly Note 10) by deleting ''sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)),'' and inserting in lieu thereof ''equivalences derived from the statute (21 U.S.C. § 841(b)(1))''; and by deleting ''of a substance containing''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 (formerly Note 11) by deleting ''total'' wherever it appears.

The Commentary to § 2D1.1 captioned ''Background'' is amended by deleting the first, second, third, seventh, and eighth paragraphs.

Additional Issue for Comment: The Commission invites comment, at the request of Families Against Mandatory Minimums, as to whether the ratio for methamphetamine relative to other controlled substances should be changed and, if so by how much.

41. Synopsis of Proposed Amendment: This proposed amendment simplifies the operation of § 2D1.1 with respect to Schedule I and II Depressants and Schedule II, IV, and V controlled substances by applying the Drug Quantity Table according to the number of pills, capsules, or tablets rather than by the gross weight of the pills, capsules, or tablets. Schedule I and II Depressants and Schedule III, IV, and V substances are almost always in pill, capsule, or tablet form. The current guidelines use the total weight of the pill, tablet, or capsule containing the controlled substance although there is no statutory requirement to do so. This method leads to anomalies because the weight of most pills is determined primarily by the filler rather than the controlled substance. Thus, heavy pills result in higher offense levels even though there is little or no connection between gross weight and the strength of the pill. Moreover, even the weight of the controlled substance in the pill itself has little connection with the strength of the pill for these offenses. Finally, because these categories contain a wide variety of controlled substances, there is little basis on which to compare the strength of different types of pills (unlike, for example, heroin and morphine that can be compared directly).

Because the offense levels for these offenses are generally lower than for other controlled substances, adoption of a more summary measure that references the number of pills, capsules, or tablets, rather than either their gross or net weight or purity, seems the most appropriate solution. Use of this method will simplify guideline application and more clearly show that the purpose of the Drug Quantity Table is as a proxy for the scale of the offense. Historically, this method (counting pills, tablets, capsules) has been used for such substances in the parole guidelines for many years. It is also noted that the sentencing guidelines currently use this method for anabolic steroids.

Proposed Amendment: Section 2D1.1(c)(10) is amended by deleting:

''20 KG or more of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids); 40,000 or more units of Anabolic Steroids.'',

And by inserting in lieu thereof:

''40,000 or more units of Schedule I or II Depressants;

40,000 or more units of Schedule III substances.''.

Section 2D1.1(c)(11) is amended by deleting:

''At least 10 KG but less than 20 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 20,000 but less than 40,000 units of Anabolic Steroids.'',

And by inserting in lieu thereof:

''At least 20,000 but less than 40,000 units of Schedule I or II Depressants;

At least 20,000 but less than 40,000 units of Schedule III substances.''.

Section 2D1.1(c)(12) is amended by deleting:

''At least 5 KG but less than 10 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 10,000 but less than 20,000 units of Anabolic Steroids.'',

And by inserting in lieu thereof:

''At least 10,000 but less than 20,000 units of Schedule I or II Depressants;

At least 10,000 but less than 20,000 units of Schedule III substances.''.

Section 2D1.1(c)(13) is amended by deleting:

''At least 2.5 KG but less than 5 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 5,000 but less than 10,000 units of Anabolic Steroids.'',

And by inserting in lieu thereof:

''At least 5,000 but less than 10,000 units of Schedule I or II Depressants;

At least 5,000 but less than 10,000 units of Schedule III substances.''.

Section 2D1.1(c)(14) is amended by deleting:

''At least 1.25 KG but less than 2.5 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 2,500 but less than 5,000 units of Anabolic Steroids;

20 KG or more of Schedule IV substances.'',

And inserting in lieu thereof:

''At least 2,500 but less than 5,000 units of Schedule I or II Depressants;

At least 2,500 but less than 5,000 units of Schedule III substances.

40,000 or more units of Schedule IV substances.''.

Section 2D1.1(c)(15) is amended by deleting:

''At least 500 G but less than 1.25 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 1,000 but less than 2,500 units of Anabolic Steroids;

At least 8 KG but less than 20 KG of Schedule IV substances.'',

And inserting in lieu thereof:

''At least 1,000 but less than 2,500 units of Schedule I or II Depressants;

At least 1,000 but less than 2,500 units of Schedule III substances;

At least 16,000 but less than 40,000 or more units of Schedule IV substances.''.

Section 2D1.1(c)(16) is amended by deleting:

''At least 125 G but less than 500 G of Secobarbital (or the equivalent

amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

At least 250 but less than 1,000 units of Anabolic Steroids;

At least 2 KG but less than 8 KG of Schedule IV substances;

20 KG or more of Schedule V substances.'',

And inserting in lieu thereof:

''At least 250 but less than 1,000 units of Schedule I or II Depressants;

At least 250 but less than 1,000 units of Schedule III substances;

At least 4,000 but less than 16,000 units of Schedule IV substances;

At least 40,000 or more units of Schedule V substances.''.

Section 2D1.1(c)(17) is amended by deleting:

''Less than 125 G of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except Anabolic Steroids);

Less than 250 units of Anabolic Steroids;

Less than 2 KG of Schedule IV substances;

Less than 20 KG of Schedule V substances.'',

And inserting in lieu thereof:

''Less than 250 units of Schedule I or II Depressants;

Less than 250 units of Schedule III substances;

Less than 4,000 units of Schedule IV substances;

Less than 40,000 units of Schedule V substances.''.

Section 2D1.1(c) is amended in the notes following the Drug Quantity Table by inserting the following additional note as the fifth note:

''In the case of Schedule I or II Depressants, Schedule III substances (except anabolic steroids), Schedule IV substances, and Schedule V substances, one 'unit' means one pill, capsule, or tablet. If the substance is in liquid form, one 'unit' means 0.5 gms.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10d by deleting ''28 kilograms'' and inserting in lieu thereof ''56,000 units''; by deleting ''50 kilograms'' and inserting in lieu thereof ''100,000 units''; and by deleting ''100 kilograms'' and inserting in lieu thereof ''200,000 units''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned ''Secobarbital and Other Schedule I or II Depressants'' by deleting:

''1 gm of Amobarbital = 2 gm of marihuana

1 gm of Glutethimide = 0.4 gm of marihuana

1 gm of Methaqualone = 0.7 gm of marihuana

1 gm of Pentobarbital = 2 gm of marihuana

1 gm of Secobarbital = 2 gm of marihuana'',

And inserting in lieu thereof:

''1 unit = 1 gm of marihuana''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned ''Schedule III Substances'' by deleting:

''1 gm of a Schedule III Substance (except anabolic steroids) = 2 gm of marihuana

1 unit of anabolic steroids = 1 gm of marihuana

1 unit = 1 gm of marihuana''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned ''Schedule IV Substances'' by deleting:

''1 gm of a Schedule IV Substance = 0.125 gm of marihuana'',

And inserting in lieu thereof:

''1 unit = 0.0625 gm of marihuana''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subsection captioned ''Schedule V Substances'' by deleting:

''1 gm of a Schedule V Substance = 0.0125 gm of marihuana'',

And inserting in lieu thereof:

''1 unit = 0.00625 gm of marihuana''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 11 in the in the ''Typical Weight Per Unit'' by deleting:

'' Depressants

Methaqualone 300 mg''.

42. Synopsis of Proposed Amendment: This is a twelve-part amendment that addresses a number of miscellaneous issues in Chapter Two, Part D (Offenses Involving Drugs).

First, this amendment adds definitions of hashish and hashish oil to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) in the notes following the Drug Quantity Table. Currently, these terms are not defined by statute or in the guidelines, leading to litigation as to which substances are to be classified as hashish or hashish oil (as opposed to marihuana). This issue has arisen in sentencing hearings, see *United States* v. *Schultz*, 810 F. Supp. 230 (S.D. Ohio 1992) and *United States* v. *Gravelle*, 819 F. Supp. 1076 (S.D. Fla. 1993), training presentations, and hotline questions. This amendment adds a note following § 2D1.1(c) to address this issue.

Second, this amendment clarifies the treatment of marihuana that has a moisture content sufficient to render it unusable without drying (e.g., a bale of marihuana left in the rain or recently harvested marihuana that had not had time to dry). In such cases, including the moisture in the weight of the marihuana can increase the offense level for a factor that bears no relationship to the scale of the offense or the marketable form of the marihuana. Prior to the effective date of the 1993 amendments, two circuits had approved weighing wet marihuana despite the fact that the marihuana was not in a usable form. *United States* v. *Garcia*, 925 F.2d 170 (7th Cir. 1991); *United States* v. *Pinedo-Montoya*, 966 F.2d 591 (10th Cir. 1992). Although Application Note 1 in the Commentary to § 2D1.1, effective November 1, 1993 (pertaining to unusable parts of a mixture or substance) should produce the appropriate result because marihuana must be dried before being used, this type of case is sufficiently distinct to warrant a specific reference in Application Note 1 to ensure correct application of the guideline.

Third, a frequently recurring issue is that of what constitutes a marihuana plant. Several circuits have confronted the issue of when a cutting from a marihuana plant becomes a ''plant.'' The appellate courts generally have held that the term ''plant'' should be defined by ''its plain and ordinary dictionary meaning * * * [A] marihuana 'plant' includes those cuttings accompanied by root balls.'' *United States* v. *Edge*, 989 F.2d 871, 878 (6th Cir. 1993) (quoting *United States* v. *Eves*, 932 F.2d 856, 860 (10th Cir. 1991)). See also *United States* v. *Malbrough*, 922 F.2d 458, 465 (8th Cir. 1990) (acquiescing in the district court's apparent determination that certain marihuana cuttings that did not have their own ''root system'' should not be counted as plants), cert. denied, 111 S. Ct. 2907; *United States* v. *Angell*, 794 F. Supp. 874, 875 (D. Minn. 1990) (refusing to count as plants marihuana cuttings that have no visible root structure); *United States* v. *Fitol*, 733 F. Supp. 1312 (D. Minn. 1990) (''individual cuttings, planted with the intent of growing full size plants, and which had grown roots, are 'plants' both within common parlance and within Section 841(b)''); United States v. Speltz, 733 F. Supp. 1311, 1312 (D. Minn. 1990) (small marijuana plants, e.g., cuttings with roots, are nonetheless still marijuana plants), aff'd. 938 F.2d 188 (8th Cir. 1991); United States v. Carlisle, 907 F.2d 94, 96 (9th Cir. 1990) (finding that cuttings were plants where each cutting had various degrees of root formation not clearly erroneous).

Because (1) this issue arises frequently, (2) not all of the circuits have ruled on this issue, and (3) the definitions necessary for courts and probation officers to apply the guidelines should be included in the Guidelines Manual, this amendment adds an application note (Note 20) to the Commentary of § 2D1.1 setting forth the definition of a plant for guidelines purposes.

Fourth, this amendment provides equivalencies for two additional controlled substances: (1) khat, and (2) levo-alpha-acetylmethadol (LAAM) in Application Note 10 of the Commentary to § 2D1.1.

Fifth, this amendment deletes the distinction between d- and l-methamphetamine in the Drug Equivalency Table in Application Note 10 of the Commentary to § 2D1.1. L-methamphetamine, which is a rather weak form of methamphetamine, is rarely seen. The usual form of methamphetamine is d-methamphetamine. Moreover, l-methamphetamine is not made intentionally, but rather it is the result of a botched attempt to produce d-methamphetamine. Under this amendment, l-methamphetamine would be treated the same as d-methamphetamine (i.e., as if an attempt to manufacture or distribute d-methamphetamine). This revision will simplify guideline application. Currently, unless the methamphetamine is specifically tested to determine its form, litigation can result over whether the methamphetamine is l-methamphetamine or d-methamphetamine. In addition, there is another form of methamphetamine (dl-methamphetamine) that is composed of 50% d-methamphetamine and 50% l-methamphetamine. Dl-methamphetamine is not listed in the Drug Equivalency Table and has a potency halfway between l-methamphetamine and d-methamphetamine. This has led to litigation as to whether dl-methamphetamine should be treated as if it were all d-methamphetamine because it contains some d-methamphetamine, or whether it should be treated as 50 percent d-methamphetamine and 50 percent l-methamphetamine. In United States v. Carroll, 6 F.3d 735 (11th Cir. 1993), cert. denied, 114 S. Ct. 1234 (1994) a case in which the Eleventh Circuit held that dl-methamphetamine should be treated as d-methamphetamine, the majority and dissenting opinions clearly point out the complexity engendered by the current distinction between d- and l-methamphetamine.

Sixth, this amendment clarifies Application Note 3 in the Commentary of § 2D1.1 with respect to the weapon possession enhancement in § 2D1.1(b)(1). Currently, this commentary provides ''The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.'' There is a circuit conflict with respect to the burden of persuasion for application of this enhancement. The First, Sixth, Seventh, Ninth, and Tenth circuits require the government to show possession during the commission of the offense; the defense then bears the burden of showing that the weapon was not connected with the offense. United States v. Corcimiglia, 967 F.2d 724 (1st Cir. 1992); United States v. McGhee, 882 F.2d 1095 (6th Cir. 1989); United States v. Durrive, 902 F.2d 1221 (7th Cir. 1990); United States v. Restrepo, 884 F.2d 1294 (9th Cir. 1989); United States v. Roberts, 980 F.2d 645 (10th Cir. 1992). In contrast, the Eighth Circuit has placed the burden of both presence and relationship to the offense on the government. United States v. Turpin, 920 F.2d 1377 (8th Cir. 1990), citing United States v. Khang, 904 F.2d 1219 (8th Cir. 1990). In addition, the phrase ''unless it is clearly improbable'' seems inconsistent with the preponderance of evidence standard that applies to other adjustments; i.e., can one find something to be clearly improbable by a preponderance of the evidence? This amendment resolves both issues by revising the Commentary to §§ 2D1.1 and 2D1.11 to state expressly that if a weapon is present, there shall be a rebuttable presumption that it is connected with the offense. Rebuttable presumptions currently are used in §§ 2B1.1 (Application Note 13) and 2T1.1 (Application Note 1).

Seventh, this amendment revises Application Note 12 in the Commentary to § 2D1.1 to provide that in a case involving negotiation for a quantity of a controlled substance, the negotiated quantity is used to determine the offense level unless the completed transaction establishes a larger quantity, or the defendant establishes that he or she was not reasonably capable of producing the negotiated amount or otherwise did not intend to produce that amount. Disputes about the interpretation about this application note have produced much litigation in the courts. See, e.g., United States v. Bradley, 917 F.2d 601 (1st Cir. 1990); United States v. Rodriguez, 975 F.2d 999 (3d Cir. 1992); United States v. Richardson, 939 F.2d 135 (4th Cir. 1991); United States v. Christian, 942 F.2d 363 (6th Cir. 1991); United States v. Ruiz, 932 F.2d 1174 (7th Cir. 1991); United States v. Smiley, 997 F.2d 475 (8th Cir. 1993); United States v. Barnes, 993 F.2d 680 (9th Cir. 1993); United States v. Tillman, Nos. 92–9198, etc. (11th Cir. Nov. 29, 1993).

Eighth, § 1B1.3 (Relevant Conduct) provides that a defendant is liable (1) for his or her own actions; and (2) for the actions of other participants that are both in furtherance of a conspiracy and reasonably forseeable. In an unusual case, the type or quantity of a controlled substance that the defendant personally transported or stored may not have been known or reasonably forseeable to the defendant. Assume, for example, that the defendant convinces the court (1) that he or she believed that he or she was transporting a small quantity of marijuana when, in fact, the substance was a large quantity of heroin and (2) that, in the circumstances, the fact that the substance was a large quantity of heroin was not reasonably forseeable. In United States v. Develasquez, 28 F.3d 2 (2d Cir. 1994), cert. denied, (U.S. Dec. 12, 1994) (No. 94–6793), the Second Circuit held that in determining the offense level under § 1B1.3(a)(1) the defendant is accountable for the controlled substance he or she actually transported even if the type or quantity was not reasonably forseeable. Whether or not a downward departure under the above noted circumstances may be warranted was not discussed. In United States v. Ivonye, No. 93–1720 (2d Cir. July 8, 1994), a similar case, the Second Circuit noted ''It is certainly possible, of course, to imagine a situation where the gap between belief and actuality was so great as to make the guideline grossly unfair in application. In such cases, downward departure may be warranted.'' This amendment adds an application note (Note 21) to provide guidance with respect to this issue.

Ninth, this amendment addresses cases involving a clandestine laboratory in which the manufacture of a controlled substance has not been completed. In such cases, the court must estimate the amount of controlled substance that would have been manufactured in order to calculate the offense level under § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy). The Drug Enforcement Administration provides an estimate of theoretical yield based on precursor chemicals on hand (Clandestine Laboratory Report—DEA 500). Theoretical yield assumes a complete chemical reaction; i.e., that all molecules that could combine with all other molecules do so. In actuality, the amount that a laboratory can produce

(actual yield) can vary from 0 percent to close to 100 percent of theoretical yield based on many factors, including the type of controlled substance being manufactured, the process used to manufacture the controlled substance, and the skill of the chemist.

The use of theoretical yield frequently will result in a higher offense level for someone who sets up a laboratory and does not produce any controlled substance than for someone who actually produces the controlled substance. This is because the theoretical yield frequently will substantially overestimate the actual (expected) yield. In order to minimize unwarranted disparity and, at the same time, prevent the need for inordinately complex factfinding, this amendment adds an application note (Note 22) to the Commentary to § 2D1.1 providing that 50 percent of the theoretical yield is to be used as a proxy for expected yield unless the government or defendant provides sufficient information to enable a more accurate estimate of the expected yield. In concept, this is similar to the proxy for tax loss used in § 2T1.1 (Tax Evasion). The Commission specifically invites comment on whether the percentage of theoretical yield used for such estimate should be a percentage higher or lower than 50 percent, whether different percentages should be developed for different controlled substances or manufacturing processes, and whether the estimate should be based on the most abundant precursor on hand, the least abundant precursor on hand, or some other method.

Tenth, the question has arisen as to how drug quantity is to be calculated under § 2D1.1 when part of the amount of the controlled substance possessed by the defendant is for sale and part is for the defendant's own use. In United States v. Kipp (9th Cir. No. 92–30302, March 4, 1993), the Ninth Circuit decided ''drugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute because they are not 'part of the same course of conduct' or 'common scheme' as drugs intended for distribution.'' This issue seems likely to reoccur. Four options to address this issue seem possible: (1) adoption of the approach of the Ninth Circuit without stating a presumption; (2) adoption of the approach of the Ninth Circuit with a rebuttable presumption stating ''when controlled substance is possessed with intent to distribute, there is a rebuttable presumption that all amounts possessed by the defendant are intended for distribution''; (3) requiring the inclusion of all amounts in the guideline calculation, but authorizing a downward departure if the offense level determined overrepresents the seriousness of the offense because part of the amount possessed was intended for personal consumption; or (4) counting all the controlled substance and not authorize a downward departure. This amendment adds an application note (Note 23) that reflects the third option. Given that information pertaining to the intended use of the controlled substance is in the possession of the defendant, placing the burden on the defendant to demonstrate the amount not intended for distribution seems reasonable. It is noted, however, that even when it can be established the defendant possessed some portion for the defendant's own use, the actual amount likely will be somewhat uncertain. Even the defendant, at the time the defendant was arrested, may not have known how much of the controlled substance the defendant would have sold or used personally. Thus, making this factor a departure consideration, the third option, seems the preferable approach.

Eleventh, this amendment adds a departure instruction to the Commentary to § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy). The issue addressed in this amendment involves the situation in which controlled substances were sold at a ''protected location,'' but the location of the drug transaction was determined by law enforcement authorities, rather than by the defendant, or otherwise does not create the enhanced risk of harm for those the guideline is designed to protect. The purpose of the amendment is to provide that, in such cases, the defendant is not penalized for the location of the sale. This issue has been noted by the Third Circuit in United States v. Rodriguez, 961 F.2d 1089 (3d Cir. 1992) (suggesting downward departure where the defendant technically qualifies for application of this section, but it is clear that the defendant's conduct did not create any increased risk for those whom the statute was intended to protect).

Twelfth, this amendment revises Application Note 1 of the Commentary to § 2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy). The word ''trafficking'' is added in the first sentence to prevent this restriction from applying solely because the defendant was a consumer of the controlled substance. The deletion of the portion of the second sentence pertaining to ''arranging for the use of the premises for the purpose of facilitating a drug transaction'' is because this phrase is unclear and, in any event, unnecessary given the next sentence. The addition of ''at the same time'' prevents this restriction from applying to a defendant who, for example, let her boyfriend use her apartment to make drug transactions during a six month period but changed apartments during that time. The word ''significantly'' is added to modify ''assisted'' to prevent a defendant from being excluded from the application of subsection (a)(2) because the defendant took an occasional telephone message. The last sentence is deleted as inconsistent with the guideline itself as well as inconsistent with the general framework of the Guidelines (prior criminal conduct is addressed in Chapter Four).

Proposed Amendment: Section 2D1.1(c) is amended in the Notes following the Drug Quantity Table by adding the following additional notes at the end:

''Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)) and (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 1 by inserting the following additional paragraph at the end:

''Similarly, in the case of marijuana having a moisture content that renders the marijuana unsuitable for consumption without drying (this might occur, for example with a bale of rain-soaked marijuana or freshly harvested marijuana that had not been dried), an approximation of the weight of the marijuana without such excess moisture content is to be used.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 3 by deleting:

''The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For

example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.'',

And inserting in lieu thereof:

''This adjustment will apply whenever the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), possessed a dangerous weapon in connection with the offense. If a weapon was present during the offense (e.g., a weapon was found at the same location as the controlled substance), there shall be a rebuttable presumption that it was possessed in connection with the offense.'';

And by deleting ''The enhancement'' and inserting in lieu thereof ''This adjustment''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Table in the subdivision captioned ''Schedule I or II Opiates'' by inserting at the end:

''1 gm of levo-alpha-acetylmethadol (LAAM)=3 kg of marijuana''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Table in the subdivision captioned ''Cocaine and Other Schedule I and II Stimulants'' by deleting:

''1 gm of L-Methamphetamine/Levo-methamphetamine/L-Desoxyephedrine=40 gm of marijuana'';

And by inserting:

''1 gm of khat=.01 gm of marijuana''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 12 by deleting:

''In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.'',

And by inserting in lieu thereof:

''In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance—actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the court finds that the defendant did not intend to produce, or was not reasonably capable of producing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that it finds the defendant did not intend to produce or was not reasonably capable of producing.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by inserting the following additional notes:

''20. For purposes of the guidelines, a 'plant' is an organism having leaves and a readily observable root formation (e.g., a marijuana cutting having roots, a rootball, or root hairs is a marijuana plant).

21. In an unusual case, the actual quantity or type of a controlled substance that the defendant possessed (and thus for which the defendant is accountable under subsection § 1B1.3(a)(1)) may have neither been known nor reasonably foreseeable to the defendant (e.g., the defendant agreed to store a parcel believing it contained a small quantity of marijuana and, under the circumstances of the particular case, it was not reasonably foreseeable that the parcel, in fact, contained a large quantity of heroin). In such a case, if the gap between the actual amount of the controlled substance and what the defendant could reasonably have foreseen is substantial, a downward departure may be warranted.

22. In a case involving a clandestine laboratory in which the manufacture of a controlled substance has not been completed it is necessary to determine the laboratory's expected yield in order to determine the appropriate offense level. The Drug Enforcement Agency usually provides an estimate of the amount of controlled substance capable of being produced (Clandestine Laboratory Report—DEA 500), based on the precursor chemicals on hand, in terms of theoretical yield. (Theoretical yield is based on the assumption that all of the precursors interact perfectly with each other, a situation that occurs only in theory.) Use [50%] of the theoretical yield for the [most] [least] precursor chemical on hand to determine the expected yield (the amount of the controlled substance actually expected from the precursors chemicals on hand), unless the government or defense provide sufficient information for a more accurate assessment of the expected yield.

23. For the purposes of this guideline, all controlled substances possessed in connection with the offense are to be included. If the defendant establishes that a portion of the amount possessed was intended for personal consumption, rather than distribution, a downward departure may be warranted to the guideline range that would have been applicable had that portion of the controlled substance not been included.''.

The Commentary to § 2D1.2 captioned ''Application Note'' is amended by deleting ''Note'' and inserting in lieu thereof ''Notes''; and by inserting the following additional note:

''2. If the offense was committed at or near a protected location, but (A) the offense did not create any increased risk for those this guideline was intended to protect; or (B) the location was determined by law enforcement agents rather than by the defendant, a downward departure (to the offense level that would have applied if the offense had not involved a protected location) may be warranted.''.

The Commentary to § 2D1.8 captioned ''Application Notes'' is amended in Note 1 by inserting ''trafficking'' immediately following ''controlled substance'' wherever the latter term appears; by deleting ''a defendant who arranged for the use of the premises for the purpose of facilitating a drug transaction,''; by inserting ''at the same time'' immediately following ''more than one premises''; by inserting ''significantly'' immediately before ''assisted''; and by deleting the last sentence.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended in Note 1 by deleting:

''The adjustment in subsection (b)(1) should be applied if the weapon was present, unless it is improbable that the weapon was connected with the offense.'',

And by inserting in lieu thereof:

''The adjustment in subsection (b)(1) will apply whenever the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), possessed a dangerous weapon in connection with the offense. If a weapon was present during the offense (e.g., a weapon was found at the same location as the controlled substance), there shall be a rebuttable presumption that it was possessed in connection with the offense.''.

Approach 2

43. Synopsis of Proposed Amendment: When Congress enacted the Anti-Drug Abuse Act of 1986, it targeted the drug kingpins and mid-level managers for stiff penalties. To effect its objective, Congress used drug quantity as a proxy for seriousness of the offense and indicia of large drug organizations. Unintended consequences resulted from such an approach, principally low-level, non-violent drug offenders were snared by the quantity net. The attached proposal attempts to address these unintended consequences by offering an alternative to the present guideline for drug trafficking, § 2D1.1. Under this proposal, sentences for drug traffickers will not be determined on the basis of drug quantity. Instead sentences will be based on the type of drug in conjunction with other important sentencing factors identified by Congress as critical, such as the use and possession of weapons, related violence, and defendant culpability.

This proposed amendment shows two options. Option 1 abandons drug quantity as the measure of offense seriousness and relies instead on an array of factors to determine appropriate sanctions for drug traffickers. Specific offense characteristics for use of a weapon, weapon type, injury, and function and culpability in the offense provide additional sentence distinctions. By removing consideration of drug quantity, this proposed amendment simplifies the application of the drug guideline as there will be no need to determine the amount of drugs trafficked, or to calculate the amount of drugs attributed to each defendant in the drug conspiracy under the provisions of the relevant conduct guideline. Drug amount will no longer be a consideration, except that extremely large or small amounts may be a factor that could warrant departure. Instead, the court will simply determine the type of drug trafficked. Furthermore, this proposal provides greater increases in offense levels for defendants who use or possess firearms or who cause bodily injury. In addition, factors distinguishing defendant culpability on the basis of the function the defendant performed in the offense will become part of the drug guideline, rather than as role consideration in Chapter Three.

The seriousness of the drug trafficking offenses is currently determined primarily on the basis of the quantity of drugs involved. The current drug guideline structure presumes that the quantity of drugs involved in the offense is a reliable indicator of offense seriousness in every case. Although quantity has the appearance of being non-subjective and easily determined, it can be significantly influenced by other factors such as the duration of the investigation, the fortuity of timing, and the plea negotiation process. For example, a distributor of cocaine could have an offense level as low as level 12 if the offense involved just one ''buy-bust,'' or as high as level 38 if the investigation continued and involved repeated distributions. Practitioners report that determining the amount of drugs that each member of a large drug conspiracy is held accountable for at sentencing can be a daunting, speculative, and time-consuming task.

This proposed amendment has three base offense levels, while the current drug guideline has seventeen. The highest base offense level is for the most serious drugs: heroin, cocaine, and cocaine base. Imbedded in the current drug guideline and the mandatory minimum penalty structure is the premise that drugs of varying types pose varying degrees of harm. These three base offense levels reflect this distinction. Most would agree that heroin, cocaine, and cocaine base pose the greatest degree of harm, and that marijuana and hashish create lesser harms. Ranking of methamphetamine, LSD, and PCP is posited with marijuana and hashish. A third level is reserved for those drugs arguably less harmful, Schedules III, IV, and V controlled substances.

This proposed amendment also provides offense level increases based upon the type and use of weapons involved in the offense: 2, 3, 4, 5, 6, or 7 levels depending on the use and type of weapon. This increase only applies, however, if the defendant committed the act of weapon possession or use, or directed or induced another participant to do so. An additional increase of two levels is provided if the weapon involved was of the type listed in 26 U.S.C. § 5845(a) (e.g., machineguns, sawed-off shotguns, silencers, destructive devices).

The role considerations found in Chapter Three are moved into the drug guideline in this proposed amendment. The size of the drug organization becomes a proxy for drug quantity. The current drug guideline uses quantity as a proxy for role and culpability, and this results in many ''false positives'' when the quantity is great but the defendant's culpability is not. This proposal addresses role and culpability directly and adds a 10- level increase for leaders of drug organizations of 30 or more participants on the premise that this size organization was able to distribute, import, or manufacture large quantities of drugs. This increase, unlike the quantity increases in the current guideline, only results for defendants who are kingpins and mid-level dealers in the offense, as Congress intended. The current aggravating role guideline contains two primary considerations, role and the number of participants in the offense. This proposal separates these factors into two specific offense characteristics for operational simplicity.

This proposed amendment provides a 2-level reduction for peripheral defendants. The term ''peripheral'' was used instead of minimal and minor because the case law interpreting these terms and the mitigating role guideline (§ 3B1.2) is not useful in the context of this guideline configuration. Without quantity to drive offense levels too high, the need to apply the mitigating role adjustment to reduce offense levels is greatly relieved. For example, the current quantity-based guideline frequently produced offense levels for couriers, mules, and street-level dealers well beyond five- and ten-year mandatory minimum sentences. Considerable pressure exists to view these defendants as having a mitigating role so their sentences could be reduced. The desired result seemed to be influencing the interpretation of who received the mitigating role reduction. Without quantity to drive offense levels up, the need to see those who actually import and distribute drugs as minor or minimal participants is eliminated.

Option 2 substitutes a limited quantity measure for the specific offense characteristic in Option 1 pertaining to the size of the organization. It does this by providing four quantity distinctions. The first distinction is built into the base offense level, and will provide for no increase unless the defendant is associated with the type and amount of drug specified in (c)(3) of the proposal's Drug Quantity Table. Two levels are added for drug amounts associated with offense levels 26 through 30 in the current Drug Quantity Table. Four levels are added for amounts associated with levels 32 and 34, and six levels for amounts associated with levels 36 and 38. Specific offense characteristic (b)(1) specifies that the increases for drug amount are based on the greatest amount of drugs that the defendant was associated with on any one occasion. By controlling the time factor, the guideline will screen more effectively for large-scale traffickers. For example, when drug amounts are aggregated over time (as with the current drug guideline) the same offense levels are added for the defendant who imports on one occasion

five kilos of cocaine as for the defendant who distributes five kilos over an extended period in fifty gram amounts. This proposal will add offense level increases for large drug quantities, while limiting the impact of drug amount aggregation over time. This structure is designed to target the mid-level dealers and kingpins associated with large amounts, as Congress intended.

Proposed Amendment: Section 2D1.1 is deleted in its entirety and the following inserted in lieu thereof:

[Option 1: ''§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) 20–28, if the substance is heroin or any other Schedule I or II opiate or opium derivative, cocaine, cocaine base, or an analogue of these; or

(2) 18–26, if the substance is marijuana, hashish, methamphetamine, PCP, LSD, or any Schedule I or II substance not described in subsection (a)(1); or

(3) 10–18, if the substance is any substance not described in subsections (a)(1) or (a)(2).

(b) Specific Offense Characteristics

(1) If the offense involved multiple drug transactions and the defendant's involvement continued for a period of more than [60] [90] days, increase by 2 levels.

(2) If the defendant (or another participant that the defendant directed or induced):

(A) discharged a firearm, increase by 7 levels;

(B) otherwise used a firearm, increase by 6 levels;

(C) brandished, displayed, or possessed a firearm, increase by 5 levels;

(D) otherwise used a dangerous weapon, increase by 4 levels;

(E) brandished, displayed, or possessed a dangerous weapon, increase by 3 levels; or

(F) made an express threat of death, increase by 2 levels.

(3) If the weapon involved was a firearm or destructive device of a type listed in 26 U.S.C. § 5845(a), increase by 2 levels.

(4) If the defendant (or another participant that the defendant directed or induced) caused any person to sustain bodily injury, increase the offense level according to the seriousness of the injury:

Degree of bodily injury	Increase in level
(A) Bodily Injury	Add 2.
(B) Serious Bodily Injury	Add 4.
(C) Permanent or Life-Threatening Bodily Injury.	Add 6.

Provided, that the cumulative adjustments from (2) and (4) shall not exceed 11 levels.

(5) If the defendant functioned in the offense as a (apply the greater):

(A) leader or organizer, increase by 4 levels; or

(B) manager or supervisor, increase by 2 levels.

(6) If the defendant qualifies for the adjustment from subsection (b)(5)(A), and the defendant committed the offense in concert with the number of other participants listed below, increase as follows (apply the greatest):

Number of participants	Increase in level
(A) 30 or more	Add 6.
(B) 15–29	Add 4.
(C) 5–14	Add 2.

(7) If the defendant functioned in the offense as a peripheral, decrease by 2 levels.

(8) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(d) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder).

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)–(3), 960(a), (b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. The base offense level is determined on the basis of the most serious drug type involved in the offense. Accordingly, types of drugs not specified in the count of conviction may be considered in determining the offense level. See § 1B1.3(a)(2) (Relevant Conduct).

2. Do not apply the adjustments for § 3B1.1 (Aggravating Role) and § 3B1.2 (Mitigating Role) because adjustments for culpability have been incorporated into specific offense characteristics in § 2D1.1.

3. 'Firearm,' 'dangerous weapon,' 'otherwise used,' 'brandished,' 'bodily injury,' 'serious bodily injury,' and 'permanent or life-threatening bodily injury' are defined in the Commentary to § 1B1.1 (Application Instructions). The term 'participant' is defined in the Commentary to § 3B1.1 (Aggravating Role).

4. Firearm or destructive device 'listed in 26 U.S.C. § 5845(a)' includes: (i) any short-barreled rifle or shotgun or any weapon made therefrom; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; or (v) any 'other weapon,' as that term is defined by 26 U.S.C. § 5845(e). A firearm listed in 26 U.S.C. § 5845(a) does not include unaltered handguns or regulation-length rifles or shotguns. For a more detailed definition, refer to 26 U.S.C. § 5845.

5. The terms 'leader' or 'organizer' as used in subsection (b)(5)(A), refer to defendants who act as the principal administrator, organizer, or leader of the criminal activity or as one of several such principal administrators, organizers, or leaders. Such defendants are distinguished by their participation in the planning and organization of the offense, the degree of control and authority exercised over others, a claimed right to a larger share of the fruits of the crime, the exercise of decision-making authority, and the recruitment of accomplices. Leaders and organizers typically would include defendants who act as:

a. high-level dealers—defendants who purchase or import drugs and distribute drugs at the wholesale level (to other high-level or mid-level drug dealers);

b. mid-level dealers—defendants who distribute at the wholesale level (to other mid-level and street-level dealers);

c. manufacturers/growers—defendants who grow, cultivate, or manufacture controlled substances for wholesale distribution and have an ownership interest in the controlled substance; and

d. financiers—defendants who provide money for purchase, importation, manufacture, cultivation, transportation, or distribution of drugs at the wholesale level.

6. The terms 'manager' and 'supervisor' as used in subsection (b)(5)(B), refer to defendants who provide material supervision or management of other participants. Such defendants have some decision-making authority, but primarily implement the

decisions and directives of the leader(s) or organizer(s). Managers and supervisors typically would include defendants who act as:

a. lieutenants—defendants who implement the decisions and directives of a leader or organizer by directing the activities of other participants.

Note: The terms 'manager' and 'supervisor' are not intended to apply to defendants who exercise limited supervision over participants with equal or lesser roles and whose overall function within the offense is not one of material supervision or management. For example, a defendant whose only function was to off-load a single large shipment of marijuana, and who supervised other off-loaders of that shipment should not be considered a 'supervisor' under this provision.

7. The term 'peripheral' as used in subsection (b)(7), refers to defendants who perform a limited, low-level function in the criminal activity. Such defendants normally are among the least culpable of those involved in the conduct of the group. 'Peripherals' typically do not have any material decision-making authority, do not own the controlled substance or finance any part of the offense, sell the controlled substance or play a substantial part in negotiating the terms of the sale. Defendants who qualify for an adjustment from subsection (b)(5), subsection (b)(8)(B), or § 3B1.3 (Abuse of a Position of Trust or Use of Special Skill) do not qualify as a 'peripheral.' Peripherals typically would include defendants who act as:

a. off-loaders, deck-hands—defendants who perform the physical labor required to put large quantities of drugs onto some form of transportation or into storage or hiding, or who act as crew members on vessels or aircraft used to transport drugs;

b. go-fers—defendants who generally have limited or no contact with drugs. These defendants run errands, answer the telephone, take messages, receive packages, and provide early warnings during meetings or drug exchanges; and

c. enablers—defendants who have a passive role in the offense, such as knowingly permitting unlawful activity to take place without acting affirmatively to further such activity. Enablers may be coerced or unduly influenced to play such a function (e.g., a parent or grandparent threatened with displacement from a home unless they permit the activity to take place), or may do so as a favor with little or no compensation.

8. The statute and guideline also apply to 'counterfeit' substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been manufactured or distributed legitimately.

9. Distribution of 'a small amount of marijuana for no remuneration,' 21 U.S.C. § 841(b)(4), is treated as simple possession, to which § 2D2.1 applies.

10. Where a mandatory minimum sentence applies, this mandatory minimum sentence may be 'waived' and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's 'substantial assistance in the investigation or prosecution of another person who has committed an offense.' See § 5K1.1 (Substantial Assistance to Authorities).

11. A defendant who used special skills in the commission of the offense may be subject to an enhancement under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. However, if subsection (b)(8)(B) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

12. In an offense involving negotiation to traffic in a controlled substance, the type of drug under negotiation in an uncompleted distribution shall be used to calculate the applicable base offense level.

13. The base offense level is determined by the type of controlled substance and the schedule of that substance as listed in 21 C.F.R. § 1308.13–15. Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13–15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13–15 is the appropriate classification.

14. The quantity of drugs in the offense, when either extremely large or extremely small, may be an appropriate factor warranting departure. When the quantity of the controlled substance is [10] [20] times greater than that listed at Title 21 U.S.C. § 841(b)(1)(A), an upward departure may be warranted. Conversely, when the quantity of controlled substance is [1/10th] [1/20th] of that listed at Title 21 U.S.C. § 841(b)(1)(B), a downward departure may be warranted.''.]

[Option 2: ''§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) [20–28], if the substance is heroin or any other Schedule I or II opiate or opium derivative, cocaine, cocaine base, or an analogue of these; or

(2) [18–26], if the substance is marihuana, hashish, methamphetamine, PCP, LSD, or any Schedule I or II substance not described in subsection (a)(1); or

(3) [10–18], if the substance is any substance not described in subsections (a)(1) or (a)(2).

(b) Specific Offense Characteristics

(1) add the offense levels specified in the Drug Quantity table set forth is subsection (c) below based on the greatest amount of drugs that the defendant was associated with on any one occasion.

(2) If the defendant (or another participant that the defendant directed or induced):

(A) discharged a firearm, increase by 7 levels;

(B) otherwise used a firearm, increase by 6 levels;

(C) brandished, displayed, or possessed firearm, increase by 5 levels;

(D) otherwise used a dangerous weapon, increase by 4 levels;

(E) brandished, displayed, or possessed a dangerous weapon, increase by 3 levels; or

(F) made an express threat of death, increase by 2 levels.

(3) If the weapon involved was a firearm or destructive device of a type listed in 26 U.S.C. § 5845(a), increase by 2 levels.

(4) If the defendant (or another participant that the defendant directed or induced) caused any person to sustain bodily injury, increase the offense level according to the seriousness of the injury:

Degree of bodily injury	Increase in level
(A) Bodily Injury	Add 2.
(B) Serious Bodily Injury	Add 4.
(C) Permanent or Life-Threatening Bodily Injury.	Add 6.

Provided, however, that the cumulative adjustments from (2) and (4) shall not exceed 11 levels.

(5) If the defendant functioned in the offense as a (apply the greater):

(A) leader or organizer, increase by 4 levels; or

(B) manager or supervisor, increase by 2 levels.

(6) If the defendant functioned in the offense as a peripheral, decrease by 2 levels.

(7) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder).

(c) DRUG QUANTITY TABLE

Controlled substances and quantity*	Offense level increase
(1) 10 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates), PCP, or Methamphetamine;. 50 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants), or [X KG]** of Cocaine Base; 100 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); 4 KG or more of Fentanyl; 1 KG or more of a Fentanyl Analogue; 10,000 KG or more of Marijuana; 2,000 KG or more of Hashish; 200 KG or more of Hashish Oil.	Add 6.
(2) At least 1 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates), PCP, or Methamphetamine;. At least 5 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants), or [X KG**] of Cocaine Base; At least 10 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 400 G but less than 4 KG of Fentanyl; At least 100 G but less than 1 KG of a Fentanyl Analogue; At least 1,000 KG but less than 10,000 KG of Marihuana; At least 200 KG but less than 2,000 KG of Hashish; At least 20 KG but less than 200 KG of Hashish Oil.	Add 4.
(3) At least 100 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates), PCP, or Methamphetamine;. At least 500 G but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants), or [X G**] of Cocaine Base; At least 1 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 40 G but less than 400 G of Fentanyl; At least 10 G but less than 100 G of a Fentanyl Analogue; At least 100 KG but less than 1,000 KG of Marihuana; At least 20 KG but less than 200 KG of Hashish; At least 2 KG but less than 20 KG of Hashish Oil.	Add 2.

* Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

** Comment is invited on the appropriate ratio of cocaine base to cocaine.

'Cocaine base,' for the purposes of this guideline, means 'crack.' 'Crack' is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

In the case of an offense involving marijuana plants treat each plant as equivalent to 100 G of marihuana. Provided, however, that if the actual weight of the marijuana is greater, use the actual weight of the marihuana.

In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)–(3), 960(a), (b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. The base offense level is determined on the basis of the most serious drug type involved in the offense. Accordingly, types of drugs not specified in the count of conviction may be considered in determining the offense level. See § 1B1.3(a)(2) (Relevant Conduct).

2. Do not apply the adjustments for § 3B1.1 (Aggravating Role) and § 3B1.2 (Mitigating Role) because adjustments for culpability have been incorporated into specific offense characteristics in § 2D1.1.

3. 'Firearm,' 'dangerous weapon,' 'otherwise used,' 'brandished,' 'bodily injury,' 'serious bodily injury,' and 'permanent or life-threatening bodily injury' are defined in the Commentary to § 1B1.1 (Application Instructions). The term 'participant' is defined in the Commentary to § 3B1.1 (Aggravating Role).

4. Firearm or destructive device 'listed in 26 U.S.C. § 5845(a)' includes: (i) any short-barreled rifle or shotgun or any weapon made therefrom; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; or (v) any 'other weapon,' as that term is defined by 26 U.S.C. § 5845(e). A firearm listed in 26 U.S.C. § 5845(a) does not include unaltered handguns or regulation-length rifles or shotguns. For a more detailed definition, refer to 26 U.S.C. § 5845.

5. The terms 'leader' or 'organizer' as used in subsection (b)(5)(A), refer to defendants who act as the principal administrator, organizer, or leader of the criminal activity or as one of several such principal administrators, organizers, or leaders. Such defendants are distinguished by their participation in the planning and organization of the offense, the degree of control and authority exercised over others, a claimed right to a larger share of the fruits of the crime, the exercise of decision-making authority, and the recruitment of accomplices. Leaders and organizers typically would include defendants who act as:

a. high-level dealers—defendants who purchase or import drugs and distribute

drugs at the wholesale level (to other high-level or mid-level drug dealers);

b. mid-level dealers—defendants who distribute at the wholesale level (to other mid-level and street-level dealers);

c. manufacturers/growers—defendants who grow, cultivate, or manufacture controlled substances for wholesale distribution and have an ownership interest in the controlled substance; and

d. financiers—defendants who provide money for purchase, importation, manufacture, cultivation, transportation, or distribution of drugs at the wholesale level.

6. The terms 'manager' and 'supervisor' as used in subsection (b)(5)(B), refer to defendants who provide material supervision or management of other participants. Such defendants have some decision-making authority, but primarily implement the decisions and directives of the leader(s) or organizer(s). Managers and supervisors typically would include defendants who act as:

a. lieutenants—defendants who implement the decisions and directives of a leader or organizer by directing the activities of other participants.

Note: The terms 'manager' and 'supervisor' are not intended to apply to defendants who exercise limited supervision over participants with equal or lesser roles and whose overall function within the offense is not one of material supervision or management. For example, a defendant whose only function was to off-load a single large shipment of marijuana, and who supervised other off-loaders of that shipment should not be considered a 'supervisor' under this provision.

7. The term 'peripheral' as used in subsection (b)(6), refers to defendants who perform a limited, low-level function in the criminal activity. Such defendants normally are among the least culpable of those involved in the conduct of the group. 'Peripherals' typically do not have any material decision-making authority, do not own the controlled substance or finance any part of the offense, sell the controlled substance or play a substantial part in negotiating the terms of the sale. Defendants who qualify for an adjustment from subsection (b)(5), subsection (b)(7)(B), or § 3B1.3 (Abuse of a Position of Trust or Use of Special Skill) do not qualify as a 'peripheral.' Peripherals typically would include defendants who act as:

a. off-loaders, deck-hands—defendants who perform the physical labor required to put large quantities of drugs onto some form of transportation or into storage or hiding, or who act as crew members on vessels or aircraft used to transport drugs;

b. go-fers—defendants who generally have limited or no contact with drugs. These defendants run errands, answer the telephone, take messages, receive packages, and provide early warnings during meetings or drug exchanges; and

c. enablers—defendants who have a passive role in the offense, such as knowingly permitting unlawful activity to take place without acting affirmatively to further such activity. Enablers may be coerced or unduly influenced to play such a function (e.g., a parent or grandparent threatened with displacement from a home unless they permit the activity to take place), or may do so as a favor with little or no compensation.

8. The statute and guideline also apply to 'counterfeit' substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been manufactured or distributed legitimately.

9. Distribution of 'a small amount of marijuana for no remuneration,' 21 U.S.C. § 841(b)(4), is treated as simple possession, to which § 2D2.1 applies.

10. Where a mandatory minimum sentence applies, this mandatory minimum sentence may be 'waived' and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's 'substantial assistance in the investigation or prosecution of another person who has committed an offense.' See § 5K1.1 (Substantial Assistance to Authorities).

11. A defendant who used special skills in the commission of the offense may be subject to an enhancement under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. However, if subsection (b)(7)(B) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

12. In an offense involving negotiation to traffic in a controlled substance, the type of drug under negotiation in an uncompleted distribution shall be used to calculate the applicable base offense level. However, where the court finds that the defendant did not intend to produce or was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the drug type or amount that it finds the defendant did not intend to produce or was not reasonably capable of producing.

13. The base offense level is determined by the type of controlled substance and the schedule of that substance as listed in 21 CFR § 1308.13–15. Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 CFR § 1308.13–15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 CFR § 1308.13–15 is the appropriate classification.'.]

III. Other Amendments

Chapter Two, Part S (Money Laundering and Monetary Transaction Reporting)

44. Synopsis of Proposed Amendment: This amendment revises the guidelines in Chapter Two, Part S (Money Laundering and Monetary Transaction Reporting). When the Commission promulgated §§ 2S1.1 and 2S1.2 to govern sentencing for the money laundering and monetary transaction offenses found at 18 U.S.C. §§ 1956 and 1957, these statutes were relatively new and, therefore, the Commission had little case experience upon which to base the guidelines. Additionally, court decisions have since construed the elements of these offenses broadly. This amendment consolidates §§ 2Sl.l and 2S1.2 for ease of application, and provides additional modifications with the aim of better assuring that the offense levels prescribed by these guidelines comport with the relative seriousness of the offense conduct.

The amendment accomplishes the latter goal chiefly by tying base offense levels more closely to the underlying conduct that was the source of the illegal proceeds. If the defendant committed the underlying offense and the offense level can be determined, subsection (a)(1) sets the base offense level equal to that for the underlying offense. In other instances, the base offense level is keyed to the value of funds involved. The amendment uses specific offense characteristics to assure greater punishment when the defendant knew or believed that the transactions were designed to conceal the criminal nature of the proceeds or when the

funds were to be used to promote further criminal activity. A further increase is provided under subsection (b)(2) if sophisticated efforts at concealment were involved.

Subsections (a)(2) and (a)(3) provide ''fallback'' offense levels that will apply primarily in cases in which the offense level for the underlying conduct cannot be determined. Subsection (a)(3), designed to apply when the funds were not known or believed to be derived from drug trafficking, provides a minimum base offense level of eight. This number corresponds to the base offense level of six provided in § 2F1.1 plus two levels for more than minimal planning. Guideline 2F1.1 is used as a point of reference because subsection (a)(3) would typically be expected to apply in cases involving funds from economic crimes which are, in turn, typically sentenced by reference to § 2F1.1. The base offense in subsection (a)(3) assumes that heartland cases would involve more than minimal planning. Subsection (a)(2) provides a minimum base offense level of 12 for cases in which the defendant knew or believed the funds were from drug trafficking. This approach is consistent with the current guideline structure which generally treats drug-related offenses as at least four levels more serious than typical economic offenses (e.g., fraud).

The base offense levels provided for in subsections (a)(2) and (a)(3) have been bracketed to signal the Commission's interest in receiving comment on possible modifications to these numbers suggested by representatives of the defense bar and the Department of Justice. Defense bar representatives have recommended that the base offense level in subsection (a)(3) not assume that more than minimal planning was involved in the underlying conduct and, accordingly, that level 6 rather than level 8 should be used. The Justice Department has recommended that the Commission consider setting base offense levels in (a)(2) and (a)(3) four levels higher (i.e., level 16 and 12, respectively). In addition, the bracketed text in subsection (a)(2) reflects a request by the Department of Justice that the Commission invite comment on whether the list of offenses under this subsection should be expanded beyond offenses involving controlled substances.

Proposed Amendment: Sections 2S1.1 and 2S1.2 are deleted in their entirety and the following is inserted in lieu thereof:

''§ 2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level (Apply the greatest):

(1) The offense level for the underlying offense from which the funds were derived, if the defendant committed the underlying offense (or otherwise would be accountable for the commission of the underlying offense under § 1B1.3 (Relevant Conduct)) and the offense level for that offense can be determined; or

(2) [12] plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of an offense involving the manufacture, importation, or distribution of controlled substances [or listed chemicals; a crime of violence; or an offense involving firearms or explosives, national security, or international terrorism]; or

(3) [8] plus the number of offense levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the funds.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that (A) the financial or monetary transactions, transfers transportation, or transmissions were designed in whole or in part to conceal or disguise the proceeds of criminal conduct, or (B) the funds were to be used to promote further criminal conduct, increase by 2 levels.

(2) If subsection (b)(1)(A) is applicable and the offense (A) involved placement of funds into, or movement of funds through or from, a company or financial institution outside the United States, or (B) otherwise involved a sophisticated form of money laundering, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1956, 1957.

Application Notes:

1. 'Value of the funds' means the value of the funds or property involved in the financial or monetary transactions, transportation, transfers, or transmissions that the defendant knew or believed (A) were criminally derived funds or property, or (B) were to be used to promote criminal conduct.

When a financial or monetary transaction, transfer, transportation, or transmission involves legitimately derived funds that have been commingled with criminally derived funds, the value of the funds is the amount of the criminally derived funds, not the total amount of the commingled funds. For example, if the defendant deposited $50,000 derived from a bribe together with $25,000 of legitimately derived funds, the value of the funds is $50,000, not $75,000.

Criminally derived funds are any funds that are derived from a criminal offense; e.g., in a drug trafficking offense, the total proceeds of the offense are criminally derived funds. In a case involving fraud, however, the loss attributable to the offense occasionally may be considerably less than the value of the criminally derived funds (e.g., the defendant fraudulently sells stock for $200,000 that is worth $120,000 and deposits the $200,000 in a bank; the value of the criminally derived funds is $200,000, but the loss is $80,000). If the defendant is able to establish that the loss, as defined in § 2F1.1 (Fraud and Deceit), was less than the value of the funds (or property) involved in the financial or monetary transactions, transfers, transportation, or transmissions, the loss from the offense shall be used as the 'value of the funds.'

2. If the defendant is to be sentenced both on a count for an offense from which the funds were derived and on a count under this guideline, the counts will be grouped together under subsection (c) of § 3D1.2 (Groups of Closely-Related Counts).

3. Subsection (b)(1)(A) is intended to provide an increase for those cases that involve actual money laundering, i.e., efforts to make criminally derived funds appear to have a legitimate source. This subsection will apply, for example, when the defendant conducted a transaction through a straw party or a front company, concealed a money-laundering transaction in a legitimate business, or used an alias or otherwise provided false information to disguise the true source or ownership of the funds.

4. In order for subsection (b)(1)(B) to apply, the defendant must have known or believed that the funds would be used to promote further criminal conduct, i.e., criminal conduct beyond the underlying acts from which the funds were derived.

5. Subsection (b)(2) is designed to provide an additional increase for those money laundering cases that are more difficult to detect because sophisticated steps were taken to conceal the origin of the money. Subsection (b)(2)(B) will apply, for example, if the offense involved the 'layering' of transactions, i.e., the creation of two or more levels of transaction that were intended to appear legitimate.

Background: The statutes covered by this guideline were enacted as part of the Anti-Drug Abuse Act of 1986. These statutes cover a wide range of conduct.

For example, they apply to large-scale operations that engage in international laundering of illegal drug proceeds. They also apply to a defendant who deposits $11,000 of fraudulently obtained funds in a bank. In order to achieve proportionality in sentencing, this guideline generally starts from a base offense level equivalent to that which would apply to the specified unlawful activity from which the funds were derived. The specific offense characteristics provide enhancements if the offense was designed to conceal or disguise the proceeds of criminal conduct and if the offense involved sophisticated money laundering.''.

Section 3D1.2(d) is amended in the second paragraph by deleting ''2S1.2,''.

Section 8C2.1(a) is amended by deleting ''2S1.2,''.

The Commentary to § 8C2.4 captioned ''Application Notes'' is amended in Note 5 by deleting ''§ 2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity);''.

Appendix A (Statutory Index) is amended in the line reference to 18 U.S.C. § 1957 by deleting ''2S1.2'' and inserting in lieu thereof ''2S1.1''.

Additional Issue for Comment: The Commission, at the recommendation of the Practitioners' Advisory Group, invites comment on the following issues. First, should proposed § 2S1.1, rather than referencing the table in § 2F1.1, use the following monetary table:

''Value (apply the greatest)	Increase in level
(A) $100,000 or less	No increase.
(B) More than $100,000	Add 1.
(C) More than $200,000	Add 2.
(D) More than $350,000	Add 3.
(E) More than $600,000	Add 4.
(F) More than $1,000,000	Add 5.
(G) More than $2,000,000	Add 6.
(H) More than $3,500,000	Add 7.
(I) More than $6,000,000	Add 8.
(J) More than $10,000,000	Add 9.
(K) More than $20,000,000	Add 10.
(L) More than $35,000,000	Add 11.
(M) More than $60,000,000	Add 12.
(N) More than $100,000,000	Add 13.''?

Second, should proposed § 2S1.1(a)(2) and (3) apply only when the offense level under subsection (a)(1) cannot be determined, rather than if the offense level under subsection (a) (2) or (3) is greater than under subsection (a)(1)?

Third, should an application note be added providing that if the offense involved an undercover sting and the court finds that the government agent influenced the value of the funds involved in the transaction in order to increase the defendant's guideline level, a downward departure may be warranted?

Chapter Five, Part D (Supervised Release)

45. Issue for Comment: The Commission, at the request of the Committee on Criminal Law of the Judicial Conference of the United States, invites comment on whether the supervised release guidelines should be amended to permit greater consideration of the individual defendant's need for supervision after imprisonment, to permit greater judicial flexibility in the imposition of supervised release, or to relieve the growing burden on judicial resources devoted to supervising defendants. Specifically, should § 5D1.1 be amended to eliminate the current requirement that supervised release be imposed in a case in which a defendant is sentenced to a term of imprisonment exceeding one year? Should § 5D1.2 be amended to reduce the terms of supervised release required to be imposed? If so, what should be the minimum term required, if any?

Chapter Five, Part G (Implementing the Total Sentence of Imprisonment)

46. Synopsis of Proposed Amendment: This amendment addresses the operation of § 5G1.3. Two options are shown. These options set forth different ways of providing additional guidance addressing this inherently complex area.

Proposed Amendment: [Option 1: Section 5G1.3(c) is deleted and the following inserted in lieu thereof:

''(c) (Policy Statement) In any other case, the sentence for the instant offense shall be imposed consecutively, concurrently, or partially concurrently to the prior unexpired term of imprisonment in order to achieve an appropriate total punishment. In determining the appropriate total punishment, the court shall consider the guideline range that would have been applicable had the instant offense and the offense for which the defendant is serving the undischarged term of imprisonment both been federal offenses for which sentences were being imposed at the same time under § 5G1.2 (Sentencing on Multiple Counts of Conviction), provided sufficient information is available to make a reasonable estimate of that guideline range. If sufficient information is not available for such estimate, the court may use any reasonable method to determine the appropriate total punishment.''.

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended in Note 2 by deleting the second paragraph and inserting in lieu thereof:

''When a sentence is imposed pursuant to subsection (b), the court should adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the instant offense if that period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons. Example: The defendant has been convicted of a federal offense charging the sale of 30 grams of cocaine. Under § 1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine that is part of the same course of conduct for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for this state offense and has served six months on this sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 10–16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the remainder of the defendant's state sentence, achieves this result. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guidelines because the defendant has been credited for guideline purposes under § 5G1.3(b) with six months served in state custody that will not be credited to the federal sentence under 18 U.S.C. § 3585(b).''.

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended by deleting Notes 3 and 4 and inserting in lieu thereof:

''3. In circumstances not covered under subsection (a) or (b), subsection (c) applies. Under subsection (c), the court shall, to the extent practicable, impose a sentence for the instant offense that results in a combined sentence that approximates the total (aggregate) punishment that would have been imposed under § 5G1.2 (Sentencing on Multiple Counts of Conviction) had all of the offenses been federal offenses for which sentences were being imposed at the same time. This determination frequently may require an

approximation because the information available about the previously sentenced offense may be limited. For example, if the undischarged term of imprisonment resulted from a state offense, the information available may permit only a rough estimate of the total punishment guideline range. If the undischarged term of imprisonment resulted from a federal offense to which the guidelines applied, the task will be somewhat more straightforward, although a precise determination may not be possible even in these cases. It is not intended that the above methodology be applied in a manner that unduly complicates or prolongs the sentencing process. If a reasonable estimate of the applicable total punishment guideline range under § 5G1.2 cannot be made from the information available, the court may use any reasonable method to determine an appropriate total punishment.

The purpose of this provision is illustrated by the following examples. Example (1): A defendant with no prior convictions robs two banks in different federal judicial districts. The first offense is a level 27 offense; the second offense is a level 24 offense. The charges are consolidated and the defendant pleads guilty and accepts responsibility for his conduct. The final offense level is 27 (the two offenses result in a level 29 under the multiple count rules, reduced by two levels for acceptance of responsibility). The defendant is in Criminal History Category I. The applicable guideline range is 70–87 months. There are no aggravating or mitigating factors sufficient to warrant a guideline departure. Example (2): The same circumstances exist as in Example (1) except that the charges are not consolidated. The defendant first pleads guilty and accepts responsibility for the level 27 offense. The guideline range is 57–71 months (final offense level 25, Criminal History Category I). The defendant is sentenced to 65 months. Shortly thereafter, the defendant pleads guilty and accepts responsibility for the level 24 offense. The guideline range is 46–57 months (final offense level 22, Criminal History Category II). The defendant has served 2 months on the first sentence at the time of sentencing on the second offense. If, in Example 2, the sentencing court imposed a sentence within the applicable guideline range for the second offense, and ordered that sentence to run consecutively to the first sentence, the aggregate term of imprisonment (between 111 and 122 months) would be substantially higher than the guideline range of 70–87 months that would have been applicable had the defendant been sentenced for both offenses at the same time. On the other hand, if such sentence were imposed to run concurrently, the aggregate term of imprisonment (65 months) would provide no additional punishment for the second offense and would be lower than the guideline range of 70–87 months that would have been applicable had the defendant been sentenced for both offenses at the same time. Subsection (c) is designed to provide a methodology to allow the court, to the extent practicable, to impose a total punishment that approximates the total punishment that would have been imposed had the sentences both been federal sentences imposed at the same time under § 5G1.2 (Sentencing on Multiple Counts of Conviction).

4. The application of subsection (c) has the following steps:

(1) the court determines the guideline range for the instant offense (as in any case);

(2) the court determines, to the extent feasible, the total punishment that it would have imposed under § 5G1.2 (Sentencing on Multiple Counts of Conviction) had all the offenses (the instant offense and any offense resulting in the undischarged term of imprisonment) been federal offenses for which sentences were being imposed at the same time. If a reasonable estimate of the total punishment guideline range cannot be made using this method, the court may use any reasonable method for determining an appropriate total punishment;

(3) the court then determines the specific sentence for the instant offense, and whether that sentence will run concurrently, partially concurrently, or consecutively to the remainder of the undischarged term of imprisonment. The objective is to impose a sentence that (i) is consistent with the guideline range for the instant offense (assuming no aggravating or mitigating factors warranting a departure), and (ii) is structured in such a way that the resulting aggregate term of imprisonment will reflect the appropriate total punishment.

The form of the sentence that will best accomplish the objectives of this provision will depend upon the length and type of the undischarged term of imprisonment and the amount of time the defendant has served on that sentence. The following examples show the application of this provision to a variety of typical cases.

Examples:

(A) The guideline range applicable to the instant offense is 24–30 months. Sufficient information is available to establish that the combined guideline range would have been 30–37 months if both the instant offense and the offense resulting in the undischarged term of imprisonment had been federal offenses that were being sentenced at the same time. The court determines that a sentence of 36 months' imprisonment would provide the appropriate total punishment. The undischarged term of imprisonment is an indeterminate sentence of imprisonment with a 60-month maximum. At the time of sentencing on the instant offense, the defendant has served 10 months on that sentence. In this case, a sentence of 26 months' imprisonment to be served concurrently with the remainder of the undischarged term of imprisonment would (1) be within the guideline range for the instant offense, and (2) achieve the appropriate total punishment.

(B) The guideline range applicable to the instant offense is 24–30 months. Sufficient information is available to establish that the combined guideline range would have been 30–37 months if both the instant offense and the offense resulting in the undischarged term of imprisonment had been federal offenses that were being sentenced at the same time. The court determines that a sentence of 36 months' imprisonment would provide the appropriate total punishment. The undischarged term of imprisonment is a six-month determinate sentence. At the time of sentencing on the instant offense, the defendant has served 3 months on that sentence. In this case, a sentence of 30 months' imprisonment to be served consecutively to the undischarged term of imprisonment would (1) be within the guideline range for the instant offense, and (2) achieve the appropriate incremental penalty.

(C) The guideline range applicable to the instant offense is 24–30 months. Sufficient information is available to establish that the combined guideline range would have been 30–37 months if both the instant offense and the offense resulting in the undischarged term of imprisonment had been federal offenses that were being sentenced at the same time. The court determines that a sentence of 36 months' imprisonment would provide the appropriate total punishment. The undischarged term of imprisonment is an indeterminate sentence with a 60-month maximum. At the time of sentencing on the instant offense (April 1, 1994), the defendant has served 2 months on that sentence. In this case, a sentence of 30 months' imprisonment to commence upon the defendant's release from imprisonment on the undischarged term of imprisonment, or on August 1, 1994,

whichever is earlier, would (1) be within the guideline range for the instant offense and (2) achieve the appropriate total penalty. Note that if the defendant was released from state custody prior to August 1, 1994, the sentence for the instant offense will be fully consecutive to the state sentence. If the defendant is still in state custody as of August 1, 1994, the sentence for the instant offense will be concurrent with the remainder of the state sentence beginning on that date. See Application Note 5 below for the procedure to use in imposing a partially concurrent sentence.

(D) The applicable guideline range for the instant offense is 24–30 months. Sufficient information is available to establish that the combined guideline range would have been 30–37 months if both the instant offense and the offense resulting in the undischarged term of imprisonment been federal offenses that were being sentenced at the same time. The court determines that a sentence of 36 months' imprisonment would provide the appropriate total punishment. The undischarged term of imprisonment is an indeterminate state sentence with a 60-month maximum. At the time of sentencing on the instant offense (April 1, 1994), the defendant has served 24 months on the state sentence. In this case, a downward departure to a sentence of 12 months' imprisonment to be served concurrently with the remainder of the undischarged term of imprisonment would be appropriate to achieve the appropriate total punishment.

(E) The guideline range applicable to the instant offense is 24–30 months. Because of a lack of information, the combined guideline range (had both the instant offense and the offense resulting in the undischarged term of imprisonment offenses been federal offenses that were being sentenced at the same time) cannot reasonably be determined from the information available. Only a rough estimate of from 30 to 63 months can be made. The court may use any reasonable method to determine the appropriate total punishment and then impose sentence using the methods set forth in Examples (A), (B), (C), or (D) above, as appropriate.

5. To impose a partially concurrent sentence, the court may provide in the Judgment and Commitment Order that the sentence for the instant offense shall commence (A) when the defendant is released from the prior undischarged sentence, or (B) on a specified date, whichever is earlier. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date. See Background Commentary.

6. If a defendant is serving an unexpired term of imprisonment in connection with a probation, parole, or supervised release violation, the revocation policy statements in Chapter Seven (Violations of Probation and Supervised Release) shall be used in determining the appropriate total punishment as if the defendant had been on federal probation or supervised release at the time of the violation (i.e., the guideline range applicable to the violation of probation, parole, or supervised release is to be added to the guideline range for the instant offense to determine the total punishment guideline range). Note that the conduct resulting in the revocation of probation, parole, or supervised release (rather than the offense that resulted in the period of probation, parole, or supervised release) is considered in determining the total punishment range. The sentence for the offense that resulted in the period of probation, parole, or supervised release is treated as prior criminal history.

7. In an unusual case, the instant offense may include a count to which subsection (a) applies and a count to which subsection (b) or (c) applies. For example, a defendant subject to an unexpired federal term of imprisonment for a drug offense may be sentenced for two additional federal offenses—one count pertaining to a drug offense committed about the same time as the drug offense for which the defendant is currently serving the unexpired term of imprisonment and one count for possession of contraband in prison during the unexpired term of imprisonment. In this case, subsection (a) will apply to the second count, and subsection (b) or (c) (depending on the specifics of the case) will apply to the first count. In such a case, in order to achieve an appropriate total punishment, the determinations under this section will need to be made separately for the counts to which subsection (a) applies and the counts to which subsections (b) and (c) apply. In the above example, subsection (a) will require that any term of imprisonment on the first count run consecutively to the unexpired term of imprisonment. Subsections (b) and (c) may call for a different result (e.g., a concurrent or partially concurrent sentence) on the second count.

8. Occasionally, a defendant may receive a sentence of imprisonment on another offense after the completion of the instant offense, yet be released from imprisonment on that sentence before sentencing on the instant offense. For example, after the completion of the instant federal offense, the defendant receives an eighteen-month term of imprisonment for a state offense. While in state custody, the defendant is convicted of the instant offense, but sentencing is not scheduled until after the defendant is released from imprisonment on the state offense. If subsection (b) would have applied but for the defendant's release from imprisonment prior to sentencing on the instant offense, subsection (b) shall continue to apply; i.e., the defendant is to be given credit for guideline purposes for the time imprisoned on the prior sentence. If subsection (c) would have applied but for the defendant's release from imprisonment prior to sentencing on the instant offense, subsection (c) shall continue to apply to guide the determination of an appropriate total punishment.''.

The Commentary to § 5G1.3 captioned ''Background'' is amended by inserting the following additional paragraphs at the end:

''Overlapping sentences, as described in Application Note 5, were not authorized in the federal system prior to the Sentencing Reform Act of 1984. The Congress, however, in enacting 28 U.S.C. § 994(l)(1), clearly contemplated that the new 18 U.S.C. § 3584 would allow the imposition of overlapping (partially concurrent) sentences in addition to fully concurrent or consecutive sentences. S. Rep. No. 225, 98th Cong., 1st Sess. 177 (1983) ('It is the Committee's intent that, to the extent feasible, the sentences for each of the multiple offenses be determined separately and the degree to which they should overlap be specified.'). Without the ability to fashion such a sentence, the instruction to the Commission to provide a reasonable incremental penalty for additional offenses in 28 U.S.C. § 994(l)(1) could not be successfully implemented, particularly if the defendant's release date on the undischarged term of imprisonment cannot readily be determined in advance (e.g., in the case of an indeterminate sentence subject to parole release).

Prior to the Sentencing Reform Act of 1984 (SRA), only the Bureau of Prisons had the authority to commence a federal sentence before the defendant's release from imprisonment on a state sentence. See, e.g., United States v. Segal, 549 F.2d 1293, 1301 (9th Cir. 1977).

Legislative history pertaining to the new 18 U.S.C. § 3584 indicates that this section was intended to allow the sentencing court the authority to determine whether the federal sentence was to run concurrently or consecutively to a state sentence of imprisonment. 'This * * * [section 3584] changes the law that now applies to a person sentenced for a Federal offense who is already serving a term of imprisonment for a state offense.' S. Rep. No. 225, supra at 127. 'Thus, it is intended that this provision be construed contrary to the holding in United States v. Segal.' Id. at 127 (n.314). See United States v. Hardesty, 958 F.2d 910, 914 (stating that, under section 3584, 'Congress has expressly granted federal judges the discretion to impose a sentence concurrent to a state prison term'), aff'd. en banc, 977 F.2d 1347 (9th Cir. 1992).''.]

[Option 2: Section 5G1.3(c) is deleted and the following inserted in lieu thereof:

''(c) If—

(1) neither subsection (a) nor subsection (b) applies;

(2) the prior undischarged term of imprisonment resulted from a federal sentence imposed pursuant to the Sentencing Reform Act; and

(3) such sentence was not a departure from the guidelines,

the applicable range shall be determined by application of the guidelines to the instant offense(s) and the federal offense(s) for which the defendant is serving an undischarged term of imprisonment as if the sentences were being imposed at the same time. A sentence under this subsection shall be imposed to run concurrently to the undischarged term of imprisonment, except to the extent a consecutive sentence is necessary to achieve the appropriate total punishment.

(d) In any other case, the court may use any reasonable method to determine whether the sentence for the instant offense should be imposed to run concurrently or consecutively to the undischarged term of imprisonment.''.

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended in Note 2 by deleting the second paragraph and inserting in lieu thereof:

''When a sentence is imposed pursuant to subsection (b) or (c), the court should adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the instant offense if that period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons. Example: The defendant has been convicted of a federal offense charging the sale of 30 grams of cocaine. Under § 1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine that is part of the same course of conduct for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for this state offense and has served six months at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 10–16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the remainder of the defendant's state sentence, achieves this result. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guidelines because the defendant has been credited for guideline purposes under § 5G1.3(b) with six months served in state custody that will not be credited to the federal sentence under 18 U.S.C. § 3585(b).''.

The Commentary to § 5G1.3 captioned ''Application Notes'' is amended by renumbering Note 4 as Note 6; and by deleting Note 3 and inserting in lieu thereof:

''3. If neither subsection (a) nor (b) applies, and the defendant is subject to an undischarged term of imprisonment resulting from a non-departure sentence for a federal offense imposed pursuant to the Sentencing Reform Act, subsection (c) applies.

Under subsection (c), the court determines the guideline range that would have been applicable had all the offenses (the instant offense and the offense(s) resulting in the undischarged term of imprisonment) been offenses for which sentences were being imposed at the same time.

The purpose of subsection (c) is illustrated by the following examples. Example (1): A defendant with no prior convictions robs two banks in different federal judicial districts. The first offense is a level 27 offense; the second offense is a level 24 offense. The charges are consolidated and the defendant pleads guilty and accepts responsibility for his conduct. The final offense level is 27 (the two offenses result in a level 29 under the multiple count rules, reduced by two levels for acceptance of responsibility). The defendant is in Criminal History Category I. The applicable guideline range is 70–87 months. There are no aggravating or mitigating factors sufficient to warrant a guideline departure. Example (2): The same circumstances exist as in Example (1) except that the charges are not consolidated. The defendant first pleads guilty and accepts responsibility for the level 27 offense. The guideline range is 57–71 months (final offense level 25, Criminal History Category I). The defendant is sentenced to 65 months. Shortly thereafter, the defendant pleads guilty and accepts responsibility for the level 24 offense. The guideline range is 46–57 months (final offense level 22, Criminal History Category II). The defendant has served 2 months on the first sentence at the time of sentencing on the second offense. If, in Example 2, the sentencing court imposed a sentence within the applicable guideline range for the second offense, and ordered that sentence to run consecutively to the first sentence, the aggregate term of imprisonment (between 111 and 122 months) would be substantially higher than the guideline range of 70–87 months that would have been applicable had the defendant been sentenced for both offenses at the same time. On the other hand, if such sentence were imposed to run concurrently, the aggregate term of imprisonment (65 months) would provide no additional punishment for the second offense and would be lower than the guideline range of 70–87 months that would have been applicable had the defendant been sentenced for both offenses at the same time. Subsection (c) is designed to provide a methodology to allow the court, to the extent practicable, to impose a total punishment that approximates the total punishment that would have been imposed had the sentences both been federal sentences imposed at the same time.

4. When determining the applicable guideline range under subsection (c), use the offense level determinations previously established for the offense resulting in the undischarged term of imprisonment. That is, this provision does not contemplate a re-examination of the offense level determinations for the offense resulting in the undischarged term of imprisonment. Note also that no criminal history points for the offense resulting in the undischarged term of imprisonment are added in determining the criminal history category under this subsection.

In the unusual case in which there is insufficient information for the court to

determine the combined guideline range (the guideline range that would have applied if all the offenses were being sentenced at the same time), it will not be possible to use subsection (c); therefore, subsection (d) will apply instead.

5. Under subsection (d), the court shall use any reasonable method to determine whether the sentence for the instant offense should be imposed to run concurrently or consecutively to the undischarged term of imprisonment. Where the court has sufficient information about the offense conduct that resulted in the undischarged term of imprisonment, the court should, to the extent practicable, impose a sentence for the instant offense that results in a combined sentence that approximates the total (aggregate) punishment that would have been imposed under § 5G1.2 (Sentencing on Multiple Counts of Conviction) had all of the offenses been federal offenses for which sentences were being imposed at the same time. If a reasonable estimate of the applicable total punishment guideline range under § 5G1.2 cannot be made from the information available, the court may use any reasonable method to determine an appropriate total punishment.''.

The Commentary to § 5G1.3 captioned Application Notes is amended in Note 6 (formerly Note 4) by deleting ''§ 7B1.3 and 7B1.4'' and inserting in lieu thereof ''Chapter Seven''.]

[FR Doc. 95–271 Filed 1–6–95; 8:45 am]

BILLING CODE 2210–40–P

federal register

Monday
January 9, 1995

Part III

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Ch. 1

Federal Acquisition Regulation; Contract Award Implementation; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[FAR Case 94–701]

Federal Acquisition Regulation; Contract Award Implementation

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: This proposed rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994 to expand the reasons for establishing or maintaining alternative sources of supplies or services, clarify approval authority for use of other than full and open competition, allow acquisition of expert services to support litigation by other than full and open competition and provide an exception to synopsis requirements, make procedures for award without discussion the same for Department of Defense and civilian agencies and clarify procedures for use of source selection evaluation factors in solicitations, require a determination that an option is likely to be exercised before providing for evaluation of options, clarify notice of award and debriefing procedures, allow nonprofit agencies for the blind or severely disabled to use Government supply sources in performing Javits-Wagner-O'Day contracts, clarify procedures for award to a source identified in a statute, and identify new Federal Procurement Data System reporting requirements.

This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: Comments should be submitted on or before March 10, 1995 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: –General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW, Room 4037, Washington, DC 20405.

Please cite FAR case 94–701 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Ms. Melissa Rider, Contract Award Team Leader, at (703) 614–1634 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501–4755. Please cite FAR case 94–701.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103–355, provides authorities that streamline the acquisition process and minimize burdensome Government-unique requirements. Major changes that can be expected in the acquisition process as a result of Federal Acquisition Streamlining Act implementation include changes in the areas of Commercial Item Acquisition, Simplified Acquisition Procedures, the Truth in Negotiations Act, and Introduction of the Federal Acquisition Computer Network.

This notice announces proposed FAR revisions developed under FAR Case 94–701, Contract Award Implementation, which implements the following sections of the Act:

—Sections 1002 and 1052 amended 10 U.S.C. 2304(b) and 41 U.S.C. 253(b) to—(1) ensure the continuous availability of a reliable source of supply; (2) satisfy projected needs based on a history of high demand; and (3) satisfy a critical need for medical, safety, or emergency supplies, as reasons for establishing or maintaining alternative sources. (Implementation at FAR 6.202.)

—Sections 1003 and 1053 amended 10 U.S.C. 2304(f)(1)(B)(i) and 41 U.S.C. 253(f)(1)(B)(i) to clarify the approval authority for use of other than full and open competition. (Implementation at FAR 6.304.)

—Sections 1005 and 1055 amended 10 U.S.C. 2304(c)(3) and 41 U.S.C. 253(c) to add the acquisition of expert services for use in any litigation or dispute involving the Federal Government as an exception to use of full and open competition. (Implementation at FAR 6.302–5.) Section 1055 also amended 41 U.S.C. 416(c) and 15 U.S.C. 637(c) to provide an exception to the publication of notices in the Commerce Business Daily for acquisition of expert services. (Implementation at FAR 5.202, 5.301, and 6.302–3.)

—Sections 1011 and 1061 amend 10 U.S.C. 2305(a) and 41 253a to (1) make procedures for award of contracts without discussion comparable in Department of Defense and civilian agencies, (2) require solicitations for competitive proposals to include all significant factors and subfactors and whether they are more important, of equal importance or less important than cost or price and (3) permit agencies to disclose numerical weights assigned to evaluation factors at their discretion. (Implementation at FAR 15.407, 15.605, 15.610, and 52.215–16.)

—Sections 1012 and 1062 amend 10 U.S.C. 2305(a) and 41 U.S.C. 253(a) to require a determination that it is likely that an option will be exercised before providing for evaluation of prices of options in solicitations for contracts awarded using sealed bid procedures. (Implementation at FAR 17.202 and 17.208.)

—Sections 1013 and 1063 amend 10 U.S.C. 2305(b) and 41 U.S.C. 253b to require, within three days of contract award, notification to unsuccessful offerors that a contract has been awarded and to allow electronic transmission of the notice. (Implementation at FAR 14.407–1, 14.408–1, 15.1001, 15.1002 and 36.304.)

—Sections 1014 and 1064 amend 10 U.S.C. 2305(b) and 41 U.S.C. 253b to (1) allow offerors to request a debriefing within three days of receipt of notice of award and requires agencies, to the maximum extent practicable, to conduct the debriefings within five days, and (2) specify minimum requirements for content of the debriefings. (Implementation at FAR 15.1003 and 36.607.)

—Section 1555 amends 40 U.S.C. 481 to allow nonprofit agencies for the blind or severely disabled providing supplies or services under a Javits-Wagner-O'Day Act contract to use Government supply sources in performing the contract. (Implementation at FAR 51.101 and 51.102.)

—Section 7203 amends 10 U.S.C. 2304 and 41 U.S.C. 253 to state Congressional policy regarding legislative requirements for award of a new contract to a specific non-Federal Government entity. (Implementation at FAR 6.302–5.)

—Section 1004 requires the Federal Procurement Data System to collect from contracts in excess of the simplified acquisition threshold data on awards to small and disadvantaged businesses using either set asides or full and open competition, awards to businesses owned and controlled by women, the number of offers received in response to a solicitation, task order contracts and contracts for the acquisition of commercial items. (Implementation at FAR 4.601.)

The FAR Council is interested in an exchange of ideas and opinions with respect to the regulatory implementation of the Act. For that reason, the Council is conducting a series of public meetings. However, the Council has not scheduled a public

meeting on this rule (FAR case 94–701) because of the clarity and non-controversial nature of the rule. If the public believes such a meeting is needed with respect to this rule, a letter requesting a public meeting and outlining the nature of the requested meeting shall be submitted to and received by the FAR Secretariat (see **ADDRESSES** caption) on or before February 8, 1995. The FAR Council will consider such requests in determining whether a public meeting on this rule should be scheduled.

B. Regulatory Flexibility Act

The proposed rule is not expected to have significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* because it affects internal operating procedures of the Federal Government. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments from small entities concerning the affected FAR subparts will also be considered in accordance with 5 U.S.C. 610 of the Act. Such comments must be submitted separately and cite 5 U.S.C. 601, *et seq.* (FAR case 94–701) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Chapter 1

Government procurement.

Dated: December 29, 1994.

Edward C. Loeb,

Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Therefore, it is proposed that 48 CFR Chapter 1 be amended as set forth below:

1. The authority citation for 48 CFR Chapter 1 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

2. Section 4.601 is amended by redesignating existing paragraph (d) as (e) and revising it; and adding a new paragraph (d) to read as follows:

4.601 Record requirements.

* * * * *–

(d) In addition to the information described in paragraphs (b) and (c) of this section, for procurements exceeding $25,000, the following information shall be accessible:

(1) Awards to small disadvantaged businesses using either set-asides or full and open competition.

(2) Awards to business concerns owned and controlled by women.

(3) The number of offers received in response to a solicitation.–

(4) Task or delivery order contracts.

(5) Contracts for the acquisition of commercial items.–

(e) This information shall be transmitted to the Federal Procurement Data System in accordance with agency procedures.

PART 5—PUBLICIZING CONTRACT ACTIONS

5.201 [Amended]–

3. Section 5.201 is amended in paragraph (a) by removing ''(15 U.S.C. 637(c))'' and inserting ''(15 U.S.C. 637(e))''.–

4. Section 5.202 is amended at the end of paragraph (a)(11) by removing '';or''; at the end of paragraph (a)(12) by removing the period and inserting ''; or''; and by adding paragraph (a)(13) to read as follows:

5.202 Exceptions.

* * * * *–

(a) * * *–

(13) The contract action is for the services of an expert to support the Federal Government in any current or anticipated litigation or dispute.

* * * * *–

5. Section 5.301 is amended at the end of paragraph (b)(5) by removing ''or''; at the end of paragraph (b)(6) by removing the period and inserting ''; or''; and by adding paragraph (b)(7) to read as follows:

5.301 General.

* * * * *–

(b) * * *–

(7) The award is for the services of an expert to support the Federal Government in any current or anticipated litigation or dispute.

* * * * *

PART 6—COMPETITION REQUIREMENTS–

6. Section 6.202 is amended by revising paragraph (a)(1); at the end of paragraph (a)(2) by removing ''or''; at the end of paragraph (a)(3) by removing the period and inserting a semicolon; adding paragraphs (a)(4) through (a)(6); and removing from paragraphs (b)(1) and (b)(3) the word ''above'' and inserting ''of this section''. The revised text reads as follows:

6.202 Establishing or maintaining alternative sources.–

(a) * * *–

(1) Increase or maintain competition and likely result in reduced overall costs for the acquisition, or for any anticipated acquisition;

* * * * *–

(4) Ensure the continuous availability of a reliable source of supplies or services;–

(5) Satisfy projected needs based on a history of high demand; or–

(6) Satisfy a critical need for medical, safety, or emergency supplies.

* * * * *–

7. Section 6.302–3 is amended by revising the heading and paragraph (a)(2); and by adding paragraph (b)(3) to read as follows:

6.302–3 Industrial mobilization; engineering, developmental, or research capability; or expert services.–

(a) * * *–

(2) Full and open competition need not be provided for when it is necessary to award the contract to a particular source or sources in order (i) to maintain a facility, producer, manufacturer, or other supplier available for furnishing supplies or services in case of a national emergency or to achieve industrial mobilization, (ii) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center, or (iii) to acquire the services of an expert for any current or anticipated litigation or dispute.–

(b) * * *–

(3) Use of the authority in paragraph (a)(2)(iii) of this subsection may be appropriate when it is necessary to acquire the services of—

(i) An expert to——

(A) Assist the Government in the analysis, presentation, or defense of any claim or request for adjustment to contract terms or conditions, whether asserted by a contractor or the Government, which is in litigation or dispute, or is anticipated to result in dispute or litigation before any court, administrative tribunal, or agency, or –

(B) Participate in any part of an alternative dispute resolution process, including but not limited to evaluators, factfinders, or witnesses, regardless of whether the expert is expected to testify; or –

(ii) A neutral person, e.g., mediators or arbitrators, to facilitate the resolution

of issues in an alternative dispute resolution process.

* * * * *

8. Section 6.302–5 is amended by revising paragraph (c)(1) and adding paragraph (c)(3) to read as follows:

6.302–5 Authorized or required by statute.

* * * * *–

(c) *Limitations.* (1) This authority shall not be used to support new awards to specified non-Federal Government entities unless a provision of law specifically refers to 10 U.S.C. 2304(j) for armed services acquisitions or section 303(h) of the Federal Property and Administrative Services Act of 1949 for civilian agency acquisitions and requires an agency to award a new contract to a named non-Federal Government entity and specifically states that award to this entity shall be made in contravention of the merit-based selection procedures in subsection 7203(b) of the Federal Acquisition Streamlining Act of 1994 (10 U.S.C. 2304(j) and section 303(h) of the Federal Property and Administrative Services Act of 1949). However, this limitation does not apply—

(i) When the work provided for in the contract is a continuation of the work performed by the specified entity under a preceding contract; or–

(ii) To any contract requiring the National Academy of Sciences to investigate, examine, or experiment upon any subject of science or art of significance to an executive agency and to report on those matters to the Congress or any agency of the Federal Government.

* * * * *–

(3) The authority in paragraph (a)(2)(ii) of this subsection may be used only for purchases of brand-name commercial items for resale through commissaries or other similar facilities. Ordinarily, these purchases will involve articles desired or preferred by customers of the selling activities (but see 6.301(d)).

9. Section 6.304 is amended by revising paragraph (a)(2) to read as follows:

6.304 Approval of the justification.

(a) * * *–

(2) For a proposed contract over $100,000 but not exceeding $1,000,000, by the competition advocate for the procuring activity designated pursuant to 6.501 or an official described in paragraphs (a)(3) and (a)(4) of this section. This authority is not delegable.

* * * * *

PART 14—SEALED BIDDING

10. Section 14.407–1 is amended by revising paragraphs (a)(1) and (d)(2) to read as follows:

14.407–1 General.

(a) * * * (1) by written or electronic notice, * * *

* * * * *

(d) * * *

(2) use of the Award portion of SF 33, SF 26, or SF 1447, does not preclude the additional use of informal documents, including telegrams or electronic transmissions, as notices of awards.

11. Section 14.408–1 is revised to read as follows:

14.408–1 Award of unclassified contracts.

(a)(1) The contracting officer shall as a minimum (subject to any restrictions in 48 CFR part 9, subpart 9.4)—

(i) Notify each unsuccessful bidder in writing or electronically within three days after contract award, that its bid was not accepted;

(ii) Extend appreciation for the interest the unsuccessful bidder has shown in submitting a bid; and

(iii) When Award is made to other than a low bidder, state the reason for rejection in the notice to each of the unsuccessful low bidders.

(2) For acquisitions subject to the Trade Agreements Act or the North American Free Trade Agreement (NAFTA) Implementation Act (see 25.405(e)), agencies shall include in notices given unsuccessful offerors from designated or NAFTA countries—

(i) The dollar amount of the successful offer; and

(ii) The name and address of the successful offeror.

(b) Information included in paragraph (a)(2) of this subsection shall be provided to any unsuccessful bidder upon request except when multiple awards have been made and furnishing information on the successful bids would require so much work as to interfere with normal operations of the contracting office. In such circumstances, only information concerning location of the abstract of offers need be given.

(c) When a request is received concerning an unclassified invitation from an inquirer who is neither a bidder nor a representative of a bidder, the contracting officer should make every effort to furnish the names of successful bidders and, if requested, the prices at which awards were made. However, when such requests require so much work as to interfere with the normal operations of the contracting office, the inquirer will be advised where a copy of the abstract of offers may be seen.

(d) Requests for records shall be governed by agency regulations implementing 48 CFR part 24, subpart 24.2.

PART 15—CONTRACTING BY NEGOTIATION

12. Section 15.407 is amended by revising paragraph (d)(4) to read as follows:

15.407 Solicitation provisions.

* * * * *

(d) * * *

(4) Insert in RFP's the provision at 52.215–16, Contract Award.

(i) If the RFP is for construction, the contracting officer shall use the provision with its Alternate I or the provision with its Alternate I or the provision with its Alternate I and Alternate II.

(ii) If the contracting officer intends to evaluate offers and make award without discussions, use the basic provision with its Alternate II.

* * * * *

13. Section 15.605 is amended by revising the heading, and paragraphs (a), (b), and (e) to read as follows:

15.605 Evaluation factors and subfactors.

(a) The factors and subfactors that will be considered in evaluating proposals shall be tailored to each acquisition and include only those factors that will have an impact on the source selection decision.

(b) The evaluation factors and subfactors that apply to an acquisition and their relative importance are within the broad discretion of agency acquisition officials. However, price or cost to the Government shall be included as an evaluation factor in every source selection. Quality also shall be addressed in every source selection. In evaluation factors, quality may be expressed in terms of technical capability, management capability, personnel qualifications, prior experience, past performance, and schedule compliance. Any other relevant factors and subfactors, such as cost realism, may also be included.

* * * * *

(e) The solicitation shall clearly state the significant evaluation factors and significant subfactors, including cost or price, cost or price-related factors and subfactors, and non-cost or non-price-related factors and subfactors, that will be considered in making the source selection and their relative importance (see 15.406–5(c)). The solicitation shall state whether all evaluation factors other than cost or price, when combined, are (1) significantly more

important than cost or price; (2) approximately equal to cost or price; or (3) significantly less important than cost or price. The solicitation may elaborate on the relative weights at the discretion of the contracting officer. The solicitation shall inform offerors of minimum requirements that apply to evaluation factors and significant subfactors. Numerical weights may be used at the discretion of the head of the agency. If numerical weights are used in proposal evaluation, they may be disclosed in the solicitation on a case-by-case basis. The solicitation may state that award will be made to the low priced offeror that meets the solicitation's minimum criteria for acceptable proposals.

* * * * *

14. Section 15.610 is amended by revising paragraphs (a) and (b) to read as follows:

15.610 Written or oral discussion.

(a) The requirement in paragraph (b) of this section for written or oral discussion need not be applied in acquisitions—

(1) In which prices are fixed by law or regulation;

(2) Of the set-aside portion of a partial set-aside; or

(3) In which the solicitation notified all offerors that the Government intends to evaluate proposals and make award without discussion unless the contracting officer determines that discussions (other than communications conducted for the purpose of minor clarification) are considered necessary (see 15.407(d)(4)). Once the Government states its intent to award without discussions, the rationale for reversal of this decision shall be documented in the contract file.

(b) Except as provided in paragraph (a) of this section, the contracting officer shall conduct written or oral discussion with all responsible offerors who submit proposals within the competitive range. The content and extent of the discussions is a matter of the contracting officer's judgment, based on the particular facts of each acquisition (but see paragraphs (c) and (d) of this section).

* * * * *

15.1001 through 15.1005 [Redesignated as 15.1002 through 15.1006]

15. Sections 15.1001 through 15.1005 are redesignated as 15.1002 through 15.1006, respectively; and a new 15.1001 is added to read as follows:

15.1001 General.

This subpart applies to the use of competitive proposals, as described in 6.102(b), and a combination of competitive procedures, as described in 6.102(d). To the extent practicable, however, the procedures and intent of this subpart, with reasonable modification, should be followed for these acquisitions: broad agency announcements, small business innovation research contracts and architect-engineer contracts.

16. Newly designated section 15.1002 is amended by revising paragraph (a), and the introductory text of paragraphs (b)(2) and (c)(1); by removing paragraph (c)(2) and redesignating paragraph (c)(3) as (c)(2); and by amending the newly designated paragraph (c)(2) by removing ''15.1001(c)(1)(i)'' and inserting ''15.1002(c)(1)(i). The revised text reads as follows:

15.1002 Notifications to unsuccessful offerors.

(a) *General.* Within three days of contract award, the contracting officer shall notify, in writing or electronically, each offeror whose proposal is determined to be unacceptable or whose offer is not selected for award.

(b) * * *

(2) In a small business set-aside (see 48 CFR part 19, subpart 19.5), upon completion of negotiations and determinations of responsibility, but prior to award, the contracting officer shall notify each unsuccessful offeror in writing or electronically of the name and location of the apparent successful offeror. The notice shall also state that * * *–

(c) *Postaward notices.* (1) After award of contracts resulting from solicitations exceeding the small purchase limitation in part 13, the contracting officer shall notify unsuccessful offerors in writing or electronically, unless preaward notice was given under paragraph (b) of this section. The notice shall include—

* * * * *

17. Newly designated section 15.1003 is amended by revising the first sentence to read as follows:

15.1003 Notification to successful offeror.

The contracting officer shall award a contract with reasonable promptness to the successful offeror (selected in accordance with 15.611(d)) by transmitting written or electronic notice of the award to that offeror (but see 15.608(b)). * * *

18. Newly designated section 15.1004 is revised to read as follows:

15.1004 Debriefing of offerors.

(a) When a contract is awarded on the basis of competitive proposals, offerors, upon their written request received by the agency within three days after the date the unsuccessful offeror receives notice of contract award, shall be debriefed and furnished the basis for the selection decision and contract award. When practicable, debriefing requests received more than three days after the offeror receives notice of contract award shall be accommodated. To the maximum extent practicable, the debriefing should occur within five days after receipt of the written request.

(b) Debriefings of successful and unsuccessful offerors may be done orally, in writing, by electronic means, or any other method mutually acceptable to both the offeror and the contracting officer.

(c) The contracting officer shall chair the debriefing session with the support of individuals actually responsible for the evaluations.

(d) At a minimum, the debriefing information shall include—

(1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal;

(2) The overall evaluated cost and technical rating of the successful and debriefed offerors;

(3) The overall ranking of all offerors when any ranking was developed by the agency during the source selection;

(4) A summary of the rationale for award;

(5) For commercial end items delivered under the contract, the make and model of the item being provided by the successful offeror; and

(6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

(e) The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, debriefing shall not reveal any information exempt from release under the Freedom of Information Act including—

(1) Trade secrets;

(2) Privileged or confidential manufacturing processes and techniques; and–

(3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information.

(f) The contracting officer shall include an official written summary of the debriefing in the contract file.

(g) If, within one year of contract award, a successful protest causes the agency to issue either a new solicitation or a new request for best and final offers on the protested contract award, the

agency shall make available to all offerors—

(1) Information provided in any debriefings conducted on the original award about the successful offeror's proposal; and

(2) Other nonproprietary information that would have been provided to the original offerors.

PART 17—SPECIAL CONTRACTING METHODS

19. Section 17.202 is amended by revising paragraph (a), and at the end of paragraph (b)(1)(ii) by removing ''; or'' and inserting a period. The revised text reads as follows:

17.202 Use of options.–

(a) Subject to the limitations of paragraphs (b) and (c) of this section, for both sealed bidding and contracting by negotiation the contracting officer may include options in contracts when it is in the Government's interest. When using sealed bids, the contracting officer shall make a written determination that there is a reasonable likelihood that the options will be exercised before including the clause at 52.217–5, Evaluation of Options, in the solicitation. (See 17.207(f) with regard to the exercise of options.)

* * * * *

20. Section 17.208 is amended by revising paragraphs (b) and (c)(4) to read as follows:

17.208 Solicitation provisions and contract clauses.

* * * * *

(b) The contracting officer shall insert a provision substantially the same as the provision at 52.217–4, Evaluation of Options Exercised at Time of Contract Award, in solicitations when the solicitation includes an option clause, the contracting officer has determined that there is a reasonable likelihood that the option will be exercised, and the option may be exercised at the time of contract award.

(c) * * *

(4) The contracting officer has determined that there is a reasonable likelihood that the option will be exercised. For sealed bids, the determination shall be in writing.

* * * * *

PART 25—FOREIGN ACQUISITION

21. Section 25.405 is amended by revising paragraph (e) to read as follows:

25.405 Procedures.

* * * * *

(e) Within three days after a contract award for an eligible product, agencies shall give unsuccessful offerors from designated or NAFTA countries notice in accordance with 14.408–1 and 15.1002.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

22. Section 36.304 is amended by revising the introductory text to read as follows:

36.304 Notice of award.

When a notice of award is issued, it shall be done in writing or electronically, within three days of contract award, shall contain information required by 14.407 and shall—

* * * * *

23. Section 36.607 is amended by designating the existing text as paragraph (a) and adding paragraph (b) to read as follows:

36.607 Release of information on firm selection.

* * * * *

(b) Debriefings of successful and unsuccessful firms will be held after final selection has taken place and will be conducted in accordance with 15.1003(b) through (g). Note that 15.1003(d)(2) through (d)(5) does not apply to architect-engineer contracts.

PART 51—USE OF GOVERNMENT SOURCES BY CONTRACTORS

24. Section 51.101 is amended at the end of paragraph (a)(1) by removing ''or'' and at the end of paragraph (a)(2) by removing the period and inserting ''; or'' and by adding paragraph (a)(3) to read as follows:

51.101 Policy.–

(a) * * *

(3) A contract under the Javits-Wagner-O'Day Act (41 U.S.C. 46 *et seq.*) if (i) the nonprofit agency requesting use of the supplies and services is providing a commodity or service to the Federal Government, and (ii) the supplies or services received are directly used in making or providing a commodity or service approved by the Committee for Purchase From People Who Are Blind or Severely Disabled to the Federal Government (See 48 CFR part 8, subpart 8.7).

* * * * *

25. Section 51.102 is amended in paragraph (a) by revising the last sentence to read as follows:

51.102 Authorization to use Government supply sources.

(a) * * * Except for findings under 51.101(a)(3), the determination shall be based on, but not limited to, considerations of the following factors:

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

26. Section 52.215–16 is amended by revising the date in the clause heading and paragraph (c); adding paragraph (h); by removing from Alternate I ''15.407(d)(4)(ii)'' and inserting ''15.407(d)(4)(i)''; by removing Alternate II; and by redesignating Alternate III as II and revising it. The revisions read as follows:

52.215–16 Contract Award.

* * * * *

Contract Award (Date)

* * * * *

(c) The Government intends to evaluate proposals and award a contract after conducting written or oral discussions with all responsible offerors whose proposals have been determined to be within the competitive range. However, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint.

* * * * *

(h) The Government may disclose the following information in post-award debriefings to other offerors: (1) The overall evaluated cost and technical rating of the successful offeror; (2) The overall ranking of all offerors, if one was performed during the source selection; and (3) for acquisitions of commercial items, the make and model of the item being provided by the successful offeror.

* * * * *

Alternate II (Date). As prescribed in 15.407(d)(4)(ii), substitute the following paragraph (c) for paragraph (c) of the basic provision:

(c) The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary.

[FR Doc. 95–296 Filed 1–6–95; 8:45 am]

BILLING CODE 6820–34–P

federal register

Monday
January 9, 1995

Part IV

Department of Education

Submission of Data by State Educational Agencies; Notice

DEPARTMENT OF EDUCATION

Submission of Data by State Educational Agencies

AGENCY: Department of Education.

ACTION: Notice of dates for submission of State revenue and expenditure reports for fiscal year 1994 and of revisions to those reports.

SUMMARY: The Secretary of Education announces a date for the submission by State educational agencies (SEAs) of preliminary expenditure and revenue data and average daily attendance statistics for fiscal year (FY) 1994 and establishes a deadline for any revisions to that information. The Secretary sets these dates to ensure that data are available for timely distribution of Federal funds. The U.S. Bureau of the Census is the collection agency for the Department's National Center for Education Statistics (NCES). The data will be published by NCES and will be used by the Secretary in the calculation of allocations for FY 1996 appropriated funds.

DATES: The suggested date for submission of preliminary data is March 15, 1995. The mandatory deadline for submission of final data, including revisions to preliminary data, is September 5, 1995.

ADDRESSES: SEAs are urged to mail or hand deliver ED Form 2447 (The National Public Education Financial Survey—Fiscal Year 1994) by the first date specified in this notice. SEAs must mail or hand deliver final data and any revisions to preliminary data on or before the mandatory deadline date to—Bureau of the Census, Attn: Governments Division, Washington, D.C. 20233–0001.

An SEA may hand deliver any revisions to—Bureau of the Census, Governments Division, Room 508, 8905 Presidential Parkway, Washington Plaza II, Upper Marlboro, Maryland, 20772 by 4:00 p.m. (Washington, D.C. time) on or before the mandatory deadline date.

If an SEA's submission is received by the Bureau of the Census after the mandatory deadline date, in order for the submission to be accepted, the SEA must show one of the following as proof that the submission was mailed on or before the mandatory deadline date:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary.

If the SEA mails ED Form 2447 through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an SEA should check with its local post office.

FOR FURTHER INFORMATION CONTACT: Mr. Lawrence R. MacDonald, Chief, Governments Division, at the Maryland address specified above or by telephone: (301) 457–1563. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Under the authority of section 404 of the Improving America's Schools Act, P.L. 103–382; 108 Stat. 3518 (1994), which authorizes NCES to gather data from States on the financing of elementary and secondary education, NCES collects data annually from SEAs through ED Form 2447. The report from SEAs includes attendance, revenue, and expenditure data from which NCES determines the average State per pupil expenditure (SPPE) for elementary and secondary education.

In addition to using SPPE data as useful statistics on the financing of elementary and secondary education, the Secretary uses them directly in calculating allocations for certain formula grant programs, including Title I of the Elementary and Secondary Education Act of 1965, as amended by the Improving America's Schools Act of 1994, Impact Aid, and Indian Education. Other programs such as The Education for Homeless Children and Youth Program under Title VII of the Stewart B. McKinney Homeless Assistance Act, the Dwight D. Eisenhower Professional Development program, and the Safe and Drug-Free Schools and Communities Act make use of SPPE data indirectly because their formulas are based, in whole or in part, on State Title 1 allocations.

In January 1995, the Bureau of the Census, acting as the collection agent for NCES, will mail to SEAs ED Form 2447 with instructions and request that SEAs submit initial data to the Department by March 15, 1995. If an SEA does not submit initial FY 1994 data on ED Form 2447 on or about March 15, 1995, it should inform Census, in writing, of the delay and the date by which it will submit FY 1994 data. Submissions by SEAs to the Bureau of the Census are edited and returned to each SEA for verification. NCES acknowledges that data submitted prior to September 5, 1995, may be preliminary and are subject to revision by an SEA not later than September 5, 1995.

To ensure timely distribution of Federal education funds based on the best, most accurate data available, NCES establishes, for allocation purposes, a final date by which ED Form 2447 must be submitted. However, if an SEA submits revised data after the final deadline that results in a lower SPPE figure, its allocations may be adjusted downward or the Department may request the SEA to return funds. SEAs should be aware that all of these data are subject to audit and that, if any inaccuracies are discovered in the audit process, the Department may seek recovery of overpayments for the applicable programs.

Authority: Section 404 of the Improving America's Schools Act, P.L. 103–382; 108 Stat. 3518 (1994).

Dated: December 30, 1994.

Sharon P. Robinson,

Assistant Secretary for Educational Research and Improvement.

[FR Doc. 95–379 Filed 1–6–95; 8:45 am]

BILLING CODE 4000–01–P

federal register

Monday
January 9, 1995

Part V

Department of the Interior

Bureau of Indian Affairs

Plan for the Use of the Pueblo of Nambe Indian Judgement Funds in Docket No. 358 Before the United States Court of Federal Claims; Notice

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Plan for the Use of the Pueblo of Nambe Indian Judgment Funds in Docket No. 358 Before the United States Court of Federal Claims

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

EFFECTIVE DATE: This plan was effective as of September 28, 1994.

FOR FURTHER INFORMATION CONTACT: Terry Lamb, Historian, Bureau of Indian Affairs, Division of Tribal Government Services, MS 2611–MIB, 1849 C Street, N.W., Washington, D.C. 20240.

SUPPLEMENTARY INFORMATION: The Act of October 19, 1973, (Pub.L. 93–134, 87 Stat. 466), as amended, requires that a plan be prepared and submitted to Congress for the use and distribution of funds appropriated to pay a judgment of the Indian Claims Commission or Court of Claims to any Indian tribe. Funds were appropriated on March 31, 1994, in satisfaction of the award granted to the Pueblo of Nambe before the United States Court of Federal Claims in Docket 358. The plan for the use of the funds was submitted to Congress with a letter dated June 21, 1994, and was received (as recorded in the Congressional Record) by the Senate on June 30, 1994, and by the House of Representatives on June 24, 1994. The plan became effective September 28, 1994, as provided by the 1973 Act, as amended by Pub.L. 97–458, since a joint resolution disapproving it was not enacted. The plan reads as follows: Plan for the Use of Judgment Funds Awarded to the Pueblo of Nambe in Docket No. 358 before the United States Court of Federal Claims

The funds appropriated March 31, 1994, in satisfaction of the award granted to the Pueblo of Nambe in Docket 358 before the U.S. Court of Federal Claims, less attorney fees, litigation and related expenses, and including all interest and investment income accrued, shall be used to pay outstanding debts for legal services provided to the Pueblo which are authorized by the Tribal Council. The remainder of the funds shall be used for tribal social, recreational, and economic development programs including, but not limited to, land purchases, which are authorized by the Tribal Council.

All trust responsibility of the United States for the investment or use of the judgment funds after their transfer to the Pueblo shall cease at the time the funds are transferred to the Pueblo of Nambe.

None of the funds shall be distributed as per capita or dividend payments.

Ada E. Deer,

Assistant Secretary—Indian Affairs.

[FR Doc. 95–405 Filed 1–6–95; 8:45 am]

BILLING CODE 4310–02–P

federal register

Monday
January 9, 1995

Part VI

Department of Transportation

Coast Guard

46 CFR Part 25 and 160

Hybrid Inflatable Personal Flotation Devices; Establishment of Approval Requirements; Final Rule

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Parts 25 and 160

[CGD 78–174]

RIN 2116–AA29

Hybrid PFDs; Establishment of Approval Requirements

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: This final rule amends the structural and performance standards and procedures for approval of hybrid inflatable personal flotation devices (hybrid PFDs). Hybrid PFDs are designed to have a minimum amount of inherent flotation to ensure that a wearer will surface after falling in the water and to have a mechanism to inflate the PFD to provide additional buoyancy, and thereby greater clearance from the water, while a wearer awaits rescue. This rule also allows for approval of hybrid PFDs for youths and small children. The changes are intended to make hybrid PFDs more affordable and attractive to recreational boaters by lowering production costs and reducing required production testing. It is the Coast Guard's position that increased use of hybrid PFDs may save lives.

EFFECTIVE DATE: February 8, 1995.

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

FOR FURTHER INFORMATION CONTACT: Mr. Samuel E. Wehr, Office of Marine Safety, Security, and Environmental Protection, (G–MVI–3/14), 2100 Second St. SW., Washington, DC 20593–0001, (202) 267–1444.

SUPPLEMENTARY INFORMATION:

Drafting Information

The principal persons involved in drafting this document are Lieutenant Junior Grade Roger A. Smith and Mr. Samuel E. Wehr, Office of Marine Safety, Security, and Environmental Protection and Ms. Helen G. Boutrous, Project Counsel, Office of Chief Counsel.

Regulatory History

On January 18, 1994, the Coast Guard published a supplemental notice of proposed rulemaking (SNPRM) entitled Hybrid PFDs; Establishment of Approval Requirements in the **Federal Register** (59 FR 2578). On February 16, 1994, the Coast Guard published a correction to the supplemental notice of proposed rulemaking in the **Federal Register** (59 FR 7668). The Coast Guard received three letters commenting on the SNPRM. No public hearing was requested, and none was held.

Background and Purpose

On August 22, 1985 the Coast Guard published an interim final rule (IFR) in the **Federal Register** (50 FR 33923) which established structural and performance standards and procedures for approval of hybrid inflatable personal flotation devices (PFD). That IFR allowed for the approval of several hybrid PFDs but not enough devices were made and sold to make a significant difference in the number of lives saved by this superior performing and more comfortable PFD. On January 18, 1994, the Coast Guard published a supplemental notice of proposed rulemaking (SNPRM) in the **Federal Register** (59 FR 2575) proposing changes to make hybrid PFDs more affordable and a procedure for the approval of hybrid PFDs for youths and small children. This final rule adopts those proposed changes. The provisions adopted by this rule will: Lower production costs by reducing the amount of repetitive testing required; reduce manufacturing costs for commercial devices by providing for single chamber construction; and increase buoyancy of hybrid PFDs. With these revisions, the Coast Guard intends to increase use of hybrid PFDs to potentially save more lives.

Discussion of Comments and Changes

The three letters commenting on the SNPRM were received from an interested individual, a PFD manufacturer, and Underwriters Laboratories, Inc. (UL). The individual that commented encouraged approval of hybrid PFDs for use by adults and children. The letter stated that a more comfortable and attractive flotation device will be worn more often than the current bulky, but effective, PFD Types and that this increase in use can only be beneficial to the boating public in creating a safer boating environment. The Coast Guard agrees with this comment. The other two comments raised many issues regarding the approval of hybrid PFDs. These issues are discussed below.

Manufacturer's Comments

1. The PFD manufacturer confirmed that sales of hybrid PFDs have been limited due to their relatively high cost and the requirement that they be worn to fulfill carriage requirements. The PFD manufacturer asserted that the value of hybrids will be further eroded by the anticipated approval of fully inflatable PFDs, particularly if inflatable products are not required to be worn to fulfill carriage requirements.

The Coast Guard agrees in part. The use of hybrid PFDs has been limited due to high prices as a result of high production costs, and the requirement that they be worn to fulfill carriage requirements. The intent of the revisions adopted by this final rule is to make hybrid PFDs a more viable option by reducing production costs and removing the requirement that hybrid PFDs be worn and marked ''REQUIRED TO BE WORN'' to satisfy carriage requirements. However, the Coast Guard does not agree that future approval of inflatable PFDs would necessarily erode the value and use of hybrid PFDs. Inflatable PFDs are not proposed to be approved for children in the near future and a totally inflatable device may cost much more than an equivalent type of hybrid PFD. Therefore, it is the Coast Guard's position that there will be a market for hybrid PFDs despite any possible future action to approve inflatable PFDs.

2. The PFD manufacturer asserted that the proposal to increase the inherent buoyancy minimum from 33 N to 40 N (7.5 lb to 9.0 lb), for an adult recreational hybrid device would be counter to the purpose for which these devices are purchased, which is to have PFDs that are less bulky than inherently buoyant products. However, the minimum inherent buoyancy for an adult recreational Type II hybrid PFD, as proposed in the SNPRM and adopted without change by this final rule, is 45 N (10 lb), rather than 40 N (9 lb) as stated by the comment. The lowest buoyancy of a non-hybrid, adult device is 70 N (15.5 lb).

This final rule allows for the carriage of Type I, II, and III hybrid PFDs without restriction. The increased buoyancies for adult and youth Type I PFDs and adult, youth, and small child Type II and III recreational hybrid PFDs are based on the minimum level of safety required when boaters are not alerted to special precautions to compensate for reduced inherent flotation. This issue is discussed further in paragraph number 4.

While the increase from 33 N to 45 N may not be desirable to some boaters the

Coast Guard is not increasing the amount of buoyancy for adult recreational hybrid Type V PFDs. Thus the presently approved recreational hybrid PFDs with a minimum buoyancy of 33 N (7.5 lb) will still be an available option. Under this rulemaking, these devices can maintain their 33 N minimum inherent buoyancy and remain approved as Type V—''REQUIRED TO BE WORN.''

3. The PFD manufacturer also asserted that one of the currently approved hybrid devices has proven to be a reliable lifesaving device, and that therefore, the currently approved device should be acceptable as a Type II hybrid. In addition, the device should no longer be ''REQUIRED TO BE WORN.''

The Coast Guard does not object to reclassifying an approved device's Type. However, limited retesting must be conducted to demonstrate that all of the necessary criteria have been met. To qualify for limited testing, the minimum deflated and inflated buoyancies must meet those given in Table § 160.077–15(b)(13) and buoyancy distribution must remain the same as when the device was originally tested.

UL's Comments

4. UL asserted that the Coast Guard NPRM justified its proposal to increase the buoyancy standards by stating that the proposed standard would be closer to the buoyancy requirements of the International Standards Organization (ISO). UL then stated that the proposed Coast Guard standard is nearly twice as stringent as the ISO standards which UL cited as 50 N (11.1 lb) of buoyancy for inherently buoyant, fully inflatable, and inflated hybrid PFDs.

Although there are no ISO standards at present, the European Committee for Standardization (CEN) standards have been proposed for ISO discussion. The Coast Guard assumes the comment refers to the CEN standards. The CEN standards are for voluntary carriage and use, and are intended for selective use according to local conditions. The CEN standards assume that an inflatable PFD and the inflatable portion of a hybrid PFD will work. However, a study by Boat/U.S. Foundation for Boating Safety, a non-profit organization for boating safety, education and research, demonstrates that there is a nearly 20% failure rate on inflatable PFDs due to boaters not rearming the inflation mechanisms or the malfunctioning of the inflation mechanisms. A copy of this study is available in the rulemaking docket. Under this final rule, Type I, II, and III hybrid PFDs may be carried to meet PFD carriage requirements without restriction. To ensure a sufficient level of safety without including a carriage restriction, the required level of inherent buoyancy is based on the performance provided by the PFD if the inflatable portion of the PFD were to fail or if the user is not able to inflate the PFD. The Coast Guard selected the minimum buoyancy that would provide the safety necessary for authorizing unrestricted use of hybrid PFDs, while maintaining the attractiveness of hybrid PFDs that the Coast Guard hopes will lead to wider PFD use.

5. UL stated that it would be impossible to make the insert pad covers for the reference vests to meet the requirements of § 160.077–2(j) without adversely affecting the performance or comfort of the devices and that the revisions do not allow for changes in the collar buoyant inserts or fabric patterns.

The Coast Guard agrees that changes are needed regarding the collar buoyant inserts and back/collar fabric envelope. Accordingly, the final rule is revised to allow the collar inserts and fabric envelopes to be enlarged to accommodate the required youth and child-size device buoyancies. In § 160.077–2(j), the SNPRM proposed to require higher kapok weights and displacements than prescribed by existing § 160.047–1(b) for both front and back inserts. It also proposed to allow the front pad insert coverings to be larger than the dimensions prescribed by existing § 160.047–1(b). Allowances for outer fabric envelope changes to make the fronts larger also were addressed in the SNPRM. Although it proposed to require higher back volume displacements, the SNPRM neglected to allow a commensurately larger back outer fabric envelope specification to allow for an increased back insert pad size. Accordingly, this final rule adopts changes to both the front and back fabric envelope requirements to correct this error.

The Coast Guard has in fact constructed vests meeting the requirements in this rule using inserts meeting the kapok weight and volume displacement values given in § 160.077–2(j). During performance tests conducted at UL, using these prototype reference vests made with envelopes modified as allowed in § 160.077–2(j) of this rule, superior results were obtained compared to existing standard designs. In these tests, foam inserts of the same general shape were tested with similar results, and therefore this final rule adopts a modification to § 160.077–2(j) from that proposed in the SNPRM to permit foam inserts as an option to kapok inserts.

6. UL also indicates that there are some inconsistencies between the buoyancies of the new small child reference vests compared to the existing standard child life preserver design.

The Coast Guard acknowledges the difference between the required buoyancy of the small child reference vest and the standard child life preserver and has determined that these differences are unavoidable. Of the four new reference vests adopted, three have equal or greater buoyancy than those presently required. Only the new small child, Type I reference vest has less buoyancy. The Coast Guard has recognized that the smaller size and disproportionate anatomy of the intended users results in marginal performance of the existing subpart 160.002 vest on small children. Even though its overall buoyancy is less, tests have demonstrated that, as a result of its distribution, the new reference vest is far superior to the subpart 160.002 vest.

To obtain buoyancy distributions similar to the requirements of § 160.47–4(c)(2) for youths, and the reference vests for the small child-size PFDs, this final rule adopts modifications to the displacements (buoyancies) proposed in Table 160.077–2(j) by the SNPRM. The changes in the front and back insert displacements result in a total displacement decrease for the small child Type II reference vest of 1 N (.25 lb) and an increase for both youth-size devices of 4.5 N (1 lb) total.

7. UL also suggested that existing reference vests constructed directly in accordance with published Coast Guard regulations should be used rather than inventing new, unproven designs as proposed in the SNPRM. UL supports its suggestion by noting that the proposed new reference vests have not been manufactured and consequently have not been subjected to preliminary tests to determine if they provide the level of performance warranted for hybrid PFDs.

The Coast Guard's objective in approving hybrid PFDs with increased buoyancy is to provide boaters with the option of choosing PFDs that perform at an enhanced level. While the performance provided by existing child-size vests described in subparts 160.002 and 160.047–4(c)(2) is adequate, they do not perform to the enhanced level of inflated hybrid PFDs described by this final rule.

As discussed above in paragraph 5, using these prototype reference vests, made with envelopes modified as allowed in § 160.077–2(j) of this rule, superior results were obtained during performance tests conducted at UL.

8. In addition, UL suggested that the Coast Guard abandon the use of reference vests and establish performance based requirements for all the Types and sizes of PFDs.

Except for the very highest performing PFDs (Type I PFDs) this suggestion would require that the characteristics of the test subjects be more precisely controlled, so that one design is not subjected to a less rigorous test than another because of an ''easier'' subject pool. When the necessary subject specifications are developed or a suitable manikin and analytical methods available, the Coast Guard will consider revising the regulations to either allow direct performance testing as an alternative or as the sole means of approval testing for these devices.

However, as a result of this comment, the Coast Guard is eliminating the new adult Type I reference vest. Compared to lower performing devices, testing for Type I PFD performance is not as dependent on the characteristics of the subject pool. Where all subjects are required to be turned face up, as with Type I PFDs, test subject differences from one test to another have made little difference in performance. Therefore, the Coast Guard has determined that it is appropriate to eliminate the new adult Type I reference vest. This issue is discussed further in paragraph 12.

9. Alternatively, UL suggested selecting a single reference vest (for each size), such as the Type I specified by subpart 160.002 and establishing a reduced level of requirements in comparison to it for Type II, III or V performance. It was suggested that adoption of this recommendation would make it easier to approve candidate devices which fell short of the criteria for one type but met the criteria of the next lower type. For example, if a candidate device fails the Type I criteria during testing, but meets the Type II criteria, it could be rated a Type II device without further testing.

The Coast Guard disagrees with this recommendation based on the lack of a suitable, existing reference vest for either the youth or child small sizes as demonstrated by the test results discussed above in paragraph 5.

10. UL also suggested eliminating Youth Type I Hybrids, asserting that manufacturers would not go through the expense of producing a hybrid that is required to have the same amount of inherent buoyancy as a child size Type I currently approved under subpart 160.055.

The Coast Guard does not adopt this suggestion. Although there may not be a demand for hybrids at this time, it is foreseeable that future markets may demand such performance for youth devices when adult inflatable devices, with equivalent performance, come into wide use. These regulations will provide specifications for future markets.

11. UL asserted that details of the testing procedures for youth and small child size devices were missing from the regulations.

In this final rule, the Coast Guard incorporates UL standard 1517, which provides testing procedures for adult devices, by reference, and adds provisions in § 160.077–21(c) which allow for the testing procedures of UL standard 1517 to be used for youth and small child size devices. The procedures require that each candidate device and the appropriate size reference vest be tested using the same procedures as an adult candidate device and reference vest to ensure that the candidate provides as good or better performance than the reference. As a result of the possible confusion noted by the comment, § 160.077–21(c)(1), (2), (4)(i), and (4)(ii) are revised and § 160.077–21(c)(5) is added to clarify that the test procedure of UL 1517 is to be performed using the reference vests specified by this rule.

12. UL recommended the elimination of the recreational Type I category, noting that the only difference between the proposed recreational and commercial Type I Hybrid PFDs is body strength.

The Coast Guard agrees with this comment. In the SNPRM, the required body strength for recreational Type I Hybrid PFDs was 2,000 N (450 lb) as opposed to 3,200 N (720 lb) for commercial Type I hybrid PFDs. The final rule eliminates the recreational Type I category and allows for the use of one body strap of 3,200 N or two body straps of 2,000 N on a commercial Type I hybrid PFD whether the PFD is used for recreational or commercial purposes.

With the elimination of the recreational Type I category and the Type I reference vest as discussed in paragraph 8, the Coast Guard had to determine appropriate performance requirements for Type I hybrid PFDs. The Coast Guard determined that application of the more stringent requirements in § 160.176–13(d) (2) through (5) for Type I in-water performance is appropriate for adult Type I devices. This final rule does not change the in-water performance requirements from those proposed in the SNPRM for youth and small child-size devices. However, as discussed in paragraph 11, revisions were made to clarify the testing procedures.

In order to implement these changes, conforming revisions have been made as discussed below. As a result of eliminating the Recreational Type I hybrid PFD, the proposed regulatory text at § 160.077–15(b)(13) is deleted and proposed § 160.077–15(b)(14) and (15) are renumbered accordingly. A new § 160.077–17(b)(9) is added to ensure that the body strap(s) on Type I hybrid PFDs meet minimum strength requirements. Proposed § 160.077–17(b)(9) and (10) are renumbered accordingly. Section 160.077–21(c)(4) is revised to specify the test procedures for adult-size Type I and V hybrid PFDs and § 160.077–21(c)(5) is added to specify test procedures for the youth and child-size hybrid PFDs, using the reference vests adopted in this rule. Sections § 160.077–29(b) and (f)(2) are revised to require that Type I PFDs intended for recreational use meet the requirements of § 160.077–29(c). The statement ''A pamphlet and owner's manual must be provided with this PFD'' is added to the text of § 160.077–31(d). Section 160.077–31(j)(1) is revised to show that a commercial hybrid Type I PFD can be used on all recreational boats, as well as uninspected commercial vessels to meet carriage requirements. The following sections are revised to remove references to Type I recreational PFDs: Tables 160.077–2(j) and redesignated Table 160.077–15(b)(13), Section 160.077–15(a)(2)(ii), § 160.077–27(e), § 160.077–29(b), (c), (e) and (f)(2), and § 160.077–31(c). Section 160.077–21(d)(3)(i) is changed to indicate that all Type I adult hybrid PFDs must provide 100 mm (4 inches) of freeboard. Section 160.077–13, § 160.077–17, Table 160.077–17(b)(10), § 160.077–21, and § 160.077–31(d) and (k) are modified to include Type I PFDs intended for recreational use.

In making these revisions, the Coast Guard noted that the SNPRM inadvertently applied the Inflated Flotation Stability Tests in UL 1517, section S8 to Type I devices. This final rule clarifies that the tests apply to commercial Type V devices only.

13. UL stated that the final rule should not be adopted because the Flotation Stability Tests from UL 1517 have not yet been proposed.

The SNPRM proposed adopting changes made by UL to UL 1517 if those changes were made in a timely manner. These changes have not yet been made. The Coast Guard has elected to go forward with the final rule. As discussed in paragraph 11, the Coast Guard has adopted a provision which utilizes the Type II and III Flotation Stability Tests in UL 1517, section 15

with procedures to be followed when conducting the test with children. As discussed in paragraph number 12 above, for commercial Type I Hybrid PFDs, the Inflated Flotation Stability Tests in UL 1517, section S8, are no longer required.

14. Finally, UL suggested that § 160.077–31 be revised to reflect the requirements proposed in UL's bulletin dated October 7, 1994, regarding standardized PFD labels. The Coast Guard agrees with this suggestion and has revised the label text to more closely resemble the label criteria proposed by UL.

Editorial and Clarifying Changes

Sections 160.077–19(b)(6)(i), 160.077–27(e)(3) and (f)(2) under the text describing a Type V hybrid, 160.077–27(f)(3), and 160.077–29(c)(10) are revised to reflect the redesignation of Table 160.077–15(b)(13). Other sections were revised to add detail or clarification. The terminology in the required pamphlet text of § 160.077–27 is simplified. Also, § 160.077–27 is shortened by combining paragraphs (e) and (f) which contained the same pamphlet text.

Regulatory Evaluation

This final rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of costs and benefits under section 6(a)(3) of that order. It has not been reviewed by the Office of Management and Budget under that order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040, February 26, 1979). A regulatory evaluation was originally placed in the rulemaking docket in 1985, reviewed in May 1991 with regard to inflatable lifejackets, and reconsidered in April 1993, concerning hybrid PFDs in association with the SNPRM for this rule. The regulatory evaluation, despite the lapse of time, is still accurate.

The total approval costs per design are expected to be approximately $12,000 for hybrid inflatable PFDs. Costs to approve other types of PFDs are approximately $6,000. The additional cost to approve hybrid PFDs could easily be absorbed in the cost of the units produced. The cost increase per device would be small considering the number of devices produced under authorization of each approval certificate. The Coast Guard anticipates that, within the first year after issuing this final rule, one or two designs will be approved.

Production inspection costs imposed by these regulations will be approximately $1,000 for the largest size lot of inflatable PFDs permitted. This cost is similar to that incurred for other types of approved PFDs.

The retail cost, per device, is expected to be $80–$200 for hybrid PFDs. Currently approved PFDs range in price from $7–$200. Type I devices that could be replaced by hybrid PFDs have an average cost of about $40.

Small Entities

There were no comments on this section. Hybrid PFDs are approved as an option to existing approved devices. This final rule will result in no increased costs. Therefore, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this rule will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This rule contains collection-of-information requirements. The Coast Guard has submitted the requirements to the Office of Management and Budget (OMB) for review under section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), and OMB has approved them. The section numbers and the corresponding OMB approval numbers are:

Paperwork requirements	OMB control No.
a. § 160.077–6	2115–0141
b. § 160.077–7	2115–0141
c. § 160.077–11	2115–0141
d. § 160.077–25	2115–0141
f. § 160.077–29	2115–0576
g. § 160.077–31	2115–0577

Federalism

The Coast Guard has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 12612 and has determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. This rulemaking revises established safety standards for hybrid inflatable personal flotation devices (PFDs). The authority to establish regulations for PFDs is committed to the Coast Guard by statute. Furthermore, since PFDs are manufactured and used in the national marketplace, safety standards for PFDs should be of national scope to avoid unreasonably burdensome variances. Therefore, the Coast Guard intends this final rule to preempt State action addressing the same subject matter. There were no comments on this section.

Environment

The Coast Guard considered the environmental impact of this final rule and concluded that under section 2.B.2. of Commandant Instruction M16475.1B, this final rule is categorically excluded from further environmental documentation. This final rule is expected to have no significant effect on the environment. A Categorical Exclusion Determination statement has been prepared and has been placed in the rulemaking docket. There were no comments on this section.

List of Subjects

46 CFR Part 25

Fire prevention, Marine safety, Reporting and recordkeeping requirements.

46 CFR Part 160

Marine safety, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Coast Guard amends 46 CFR parts 25 and 160 as follows:

PART 25—REQUIREMENTS

1. The authority citation for part 25 is revised to read as follows:

Authority: 33 U.S.C. 1903(b), 46 U.S.C. 3306, and 4302; 49 CFR 1.46.

Subpart 25.25—Life Preservers and Other Lifesaving Equipment

2. In § 25.25–5, paragraph (f) is revised to read as follows:

§ 25.25–5 Life preservers and other lifesaving equipment required.

* * * * *

(f) On each vessel, regardless of length and regardless of whether carrying passengers for hire, an approved commercial hybrid PFD may be substituted for a life preserver, buoyant vest, or marine buoyant device required under paragraphs (b) or (c) of this section if it is—

(1) Used in accordance with the conditions marked on the PFD and in the owner's manual;

(2) Labeled for use on commercial vessels; and

(3) In the case of a Type V commercial hybrid PFD, worn when the vessel is underway and the intended wearer is not within an enclosed space.

PART 160—LIFESAVING EQUIPMENT

3. The authority citation for part 160 is revised to read as follows:

Authority: 46 U.S.C. 3306, 3703, and 4302; E.O. 12234, 45 FR 58801, 3 CFR, 1980 Comp., p. 277; 49 CFR 1.46.

Subpart 160.077—Hybrid Inflatable Personal Flotation Devices

4. In § 160.077–1, paragraphs (b), (c) introductory text, and (d) are revised to read as follows:

§ 160.077–1 Scope.

* * * * *

(b) Under this chapter and 33 CFR part 175, certain commercial vessels and recreational boats may carry Type I, II, or III hybrid PFDs to meet carriage requirements. Type V hybrid PFDs may be substituted for other required PFDs if they are worn under conditions prescribed in their manual as required by § 160.077–29 and on their marking as prescribed in § 160.077–31. For recreational boats or boaters involved in a special activity, hybrid PFD approval may also be limited to that activity.

(c) Unless approved as a Type I SOLAS Lifejacket, a hybrid PFD on an inspected commercial vessel will be approved only—

* * * * *

(d) A hybrid PFD may be approved for adults, weighing over 40 kg (90 lb); youths, weighing 23–40 kg (50–90 lb); small children, weighing 14–23 kg (30–50 lb); or for the size range of persons for which the design has been tested, as indicated on the PFD's label.

* * * * *

5. Section 160.077–3 is redesignated as § 160.077–2, and in newly redesignated § 160.077–2, paragraphs (a), (h), and (j) are revised, and paragraph (l) is added to read as follows.

§ 160.077–2 Definitions

* * * * *

(a) *Commandant* means the Chief of the Survival Systems Branch, U.S. Coast Guard, Office of Marine Safety, Security and Environmental Protection. Address: Commandant (G–MVI–3/14), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593–0001.

* * * * *

(h) *Recreational hybrid PFD* means a hybrid PFD approved for use on a recreational boat as defined in 33 CFR 175.3.

* * * * *

(j) *Reference vest* means a model AK–1, adult PFD; model CKM–1, child medium PFD; or model CKS–2, child small PFD, meeting the requirements of subpart 160.047 of this chapter, except that, in lieu of the weight and displacement values prescribed in Tables 160.047–4(c)(2) and 160.047–4(c)(4), each insert must have the minimum weight of kapok and displacement as shown in Table 160.077–2(j). To achieve the specified volume displacement, front and back insert pad coverings may be larger than the dimensions prescribed by § 160.047–1(b) and the width of the front fabric envelope and height of the back fabric envelope may be increased to accommodate a circumference no greater than 1/4″ larger than the filled insert circumference. As an alternative, unicellular plastic foam inserts of the specified displacement and of an equivalent shape, as accepted by the Commandant, may be substituted for kapok inserts.

TABLE 160.077–2(j).—REFERENCE VEST MINIMUM KAPOK WEIGHT AND VOLUME DISPLACEMENT

Reference PFD type	Front insert (2 each)		Back insert	
	Minimum kapok weight g (oz)	Volume displacement N (lb)	Minimum kapok weight g (oz)	Volume displacement N (lb)
Devices for adults, weight over 40 kg (90 lb):				
Type II, III, and V Recreational	234 (8.25)	40±1 (9.0±0.25)	156 (5.5)	27±1 (6.0±0.25)
Devices for youths, weighing 23–40 kg (50–90 lb):				
Type I	184 (6.5)	31±1 (7.0±0.25)	170 (6.0)	30±1 (6.5±0.25)
Type II, III, and V [1]	156 (5.5)	26±1 (5.75±0.25)	149 (5.25)	24±1 (5.5±0.l25)
Devices for small children, weighing 14–23 kg (30–50 lb):				
Type I	128 (4.5)	21±1 (4.75±0.25)	156 (5.5)	30±1 (6.5±0.25)
Type II	100 (3.5)	17±1 (3.75±0.25)	135 (4.75)	22±1 (5.0±0.25)

[1] Both Recreational and Commercial.

* * * * *

(l) *SOLAS lifejacket,* in the case of a hybrid inflatable PFD, means a PFD approved as meeting the requirements for lifejackets in the 1983 Amendments to the International Convention for the Safety of Life at Sea, 1974 (SOLAS 74/83), in addition to the requirements of this subpart.

6. Section 160.077–5 is redesignated as § 160.077–3 and in newly redesignated § 160.077–3 paragraphs (a), (c)(1), and (c)(2) are revised to read as follows:

§ 160.077–3 Required to be worn.

(a) A Type V hybrid PFD may be used to meet the Coast Guard PFD carriage requirements of subpart 25.25 of this chapter, and 33 CFR part 175, only if the PFD is used in accordance with any requirements on the approval label. PFDs marked ''REQUIRED TO BE WORN'' must be worn whenever the vessel is underway and the intended wearer is not within an enclosed space.

* * * * *

(c) * * *

(1) Each Type V recreational hybrid PFD.

(2) Each Type V commercial hybrid PFD.

7. Section 160.077–7 is redesignated as § 160.077–4 and is revised to read as follows:

§ 160.077–4 Type.

(a) A hybrid PFD that successfully passes all applicable tests may be approved as a Type I, II, III, or V for various size ranges of persons weighing over 23 kg (50 lb), as Type I or II for persons weighing 14–23 kg (30–50 lb) or as Type I or II for other sizes. A Type V PFD has limitations on its approval.

(b) The approval tests in this subpart require each Type V hybrid PFD to have at least the same performance as a Type I, II, or III PFD for adult and youth sizes or Type I or II PFD for child sizes.

(c) A hybrid PFD may be approved for use on recreational boats, commercial vessels or both if the applicable requirements are met.

§ 160.077–9 [Redesignated]

8. Section 160.077–9 is redesignated as § 160.077–5.

9. Section 160.077–11 is amended by revising paragraph (b)(1)(iii) and the heading of paragraph (j) to read as follows:

§ 160.077–11 Materials—Recreational Hybrid PFD.

* * * * *

(b) * * *

(1) * * *

(iii) UL 1191 and having a V factor of 89 except that foam with a lower V factor may be used if it provides buoyancy which, after a normal service life, is at least equal to that of a PFD made with material having a V factor of 89 and the required minimum inherent buoyancy when new; or

* * * * *

(j) *Kapok pad covering.* * * *

* * * * *

10. In § 160.077–13, the heading is revised, and paragraph (d) is removed to read as follows:

§ 160.077–13 Materials—Type I and Commercial Hybrid PFD.

* * * * *

11. In § 160.077–15, the heading is revised, paragraphs (a)(2)(ii), (b)(3), (c)(2)(ii), and (d)(3) are revised; (b) (13) is redesignated as (b)(14) and revised; and a new paragraph (b)(13) and Table 160.077–15(b)(13) are added to read as follows:

§ 160.077–15 Construction and Performance—Recreational Hybrid PFD.

* * * * *

(a) * * *

(2) * * *

(ii) If it is to be marked as Type II or Type V providing Type I or II performance, not require second stage donning to achieve that performance;

* * * * *

(b) * * *

(3) Have at least one automatic inflation mechanism that inflates at least one chamber, if marked as providing Type I or II performance;

* * * * *

(13) Provide the minimum buoyancies specified in Table 160.077–15(b)(13).

TABLE 160.077–15(b)(13).—BUOYANCY FOR RECREATIONAL HYBRID PFDS

	Adult	Youth	Small child
Inherent buoyancy (deflated condition):			
Type II	45 N (10 lb)	40 N (9 lb)	30 N (7 lb)
Type III	45 N (10 lb)	40 N (9 lb)	N/A
Type V	33 N (7.5 lb)	34 N (7.5 lb)	N/A
Total buoyancy (inflated condition):			
Type II	100 N (22 lb)	67 N (15 lb)	53 N (12 lb)
Type III	100 N (22 lb)	67 N (15 lb)	N/A
Type V	100 N (22 lb)	67 N (15 lb)	N/A

(14) Meet any additional requirements that the Commandant may prescribe, if necessary, to approve unique or novel designs.

(c) * * *

(2) * * *

(ii) Not be capable of locking in the open or closed position except that, a friction-fit dust cap that only locks in the closed position may be used; and

* * * * *

(d) * * *

(3) The deflation mechanism may be the oral inflation mechanism.

* * * * *

12. In § 160.077–17, the heading and paragraph (b)(4) are revised, and paragraphs (b)(8), (b)(9), (b)(10), (b)(11), and Table 160.077–17(b)(11) are added to read as follows:

§ 160.077–17 Construction and Performance—Type I and Commercial Hybrid PFD.

* * * * *

(b) * * *

(4) Have at least one inflation chamber, except that a hybrid PFD approved as a SOLAS lifejacket must have at least two inflation chambers;

* * * * *

(8) If approved for adults, be universally sized as specified in § 160.077–15(b)(7).

(9) Commercial hybrid PFDs employing closures with less than 1600 N (360 lb) strength, must have at least two closures that meet UL 1517, Section 22.1.

(10) Each commercial hybrid PFD must have an attachment for a PFD light securely fastened to the front shoulder area. The location should be such that if the light is attached it will not damage or impair the performance of the PFD.

(11) In the deflated and the inflated condition, provide buoyancies of at least the values in Table 160.077–17(b)(11).

TABLE 160.077–17(b)(11).—MINIMUM BUOYANCY OF TYPE I AND COMMERCIAL HYBRID PFDS

	Adult	Youth	Small child
Inherent buoyancy (deflated condition):			
Type I	70 N (15.5 lb)	50 N (11 lb)	40 N (9 lb)
Type V	60 N (13 lb)	34 N (7.5 lb)	N/A
Total buoyancy (inflated condition):			
Type I	130 N (30 lb)	80 N (18 lb)	67 N (15 lb)
Type V	100 N (22 lb)	67 N (15 lb)	N/A

* * * * *

13. In § 160.077–19, paragraphs (b)(3)(iii), (b)(6), and (e) are revised to read as follows:

§ 160.077–19 Approval Testing—Recreational Hybrid PFD.

* * * * *

(b) * * *

(3) * * *

(iii) *Inflated flotation stability,* UL 1517, section 15, for Type II and Type III performance except comparisons are to be made to the appropriate size and Type reference vest as defined in § 160.077–2(j).

* * * * *

(6) *Buoyancy, buoyancy distribution, and inflation medium retention test,* UL 1517, sections 18 and 19, except:

(i) Recreational hybrid inflatables must provide minimum buoyancy as specified in Table 160.077–15(b)(13):

(ii) The buoyancy and volume displacement of kapok buoyant inserts must be tested in accordance with the procedures prescribed in § 160.047–4(c)(4) and § 160.047–5(e)(1) in lieu of the procedures in UL 1517, section 18 and 19.

* * * * *

(e) The Commandant may prescribe additional tests, if necessary, to approve unique or novel designs.

14. In § 160.077–21, the heading, paragraphs (c)(1), (c)(2), and (c)(3), (c)(4)(i) and (c)(4)(ii), and (g) are revised and paragraphs (c)(5) and (d)(3) are added to read as follows:

§ 160.077–21 Approval Testing—Type I and Commercial Hybrid PFD.

* * * * *

(c) * * *

(1) *Jump test,* UL 1517, section S6 for Adult size. Youth and Small Child sizes are exempt from this test.

(2) *In-water removal,* UL 1517, section S9 for Adult and Youth sizes. The Small Child size is exempt from this test.

(3) *Buoyancy and inflation medium retention test,* UL 1517, Section S10, except the minimum buoyancies must be as specified in the Table 160.077–17(b)(11):

(4) *Flotation stability—adults.*

(i) *Uninflated flotation stability,* UL 1517, section S7, except that for Type I devices the requirements of paragraph S7.1.A apply to all subjects regardless of their in-water weight. For Type V adult-size devices the requirements of paragraph S7.1.A apply to all adult subjects having an in-water weight of 13 lb or less, and the requirements of paragraph S.7.1.B apply to all other adult subjects.

(ii) *Righting action test,* 46 CFR 160.176–13(d)(2) through (d)(5) for Type I hybrid PFDs. UL 1517, Section S8, for Type V hybrid PFDs.

(5) *Flotation stability—youths and small children.*

(i) *Uninflated flotation stability,* UL 1517, section S7, except that the requirements of paragraph S7.1.A apply to all subjects regardless of their in-water weight.

* * * * *

(ii) *Righting action test,* UL 1517, Section 15.3 through 15.13, for Youth and Small Child hybrid PFDs except comparisons are to be made to the appropriate size and type reference vest as defined in § 160.077–2(j).

(d) * * *

(3) Each adult test subject must have a freeboard of at least:

(i) 100 mm (4 inches) if the PFD being tested is to be approved as a Type I hybrid PFD; or

(ii) 120 mm (4.75 inches) if the PFD being tested is to be approved as a SOLAS lifejacket.

* * * * *

(g) The Commandant may prescribe additional tests, if necessary, to approve unique or novel designs.

* * * * *

15. In § 160.077–23, paragraphs (a)(2), (b)(1)(i), (b)(2)(ii), (b)(2)(iv), (d)(4), (g)(2), (g)(3)(iii), (h)(4), (h)(5), (j)(4)(iii), (k)(1), (k)(2), and notes (2) and (3) to Table 160.077–23B are revised, and paragraphs (b)(2)(v), (d)(5), and (g)(3)(x) are added to read as follows:

§ 160.077–23 Production tests and inspections.

(a) * * *

(2) The Commandant may prescribe additional production tests and inspections if needed to maintain quality control and check for compliance with the requirements of this subpart.

(b) * * *

(1) * * *

(i) Perform all required tests and examinations on each PFD lot before the independent laboratory inspector tests and inspects the lot, except as provided in § 160.077–23(d)(5);

* * * * *

(2) * * *

(ii) Except as specified in paragraph (b)(2)(v) of this section, an inspector must perform or supervise testing and inspection of at least one PFD lot in each five lots produced.

(iii) * * *

(iv) Except as specified in paragraph (b)(2)(v) of this section, at least once each calendar quarter, the inspector must, as a check on the manufacturer's compliance with this section, examine the manufacturer's records required by § 160.077–25 and observe the manufacturer perform each of the tests required by paragraph (h) of this section.

(v) If less than six lots are produced during any calendar year, only one lot inspection in accordance with paragraph (b)(2)(ii) of this section, and one records examination and test performance observation in accordance with paragraph (b)(2)(iv) of this section is required during that year. Each lot tested and inspected must be within seven lots of the previous lot inspected.

* * * * *

(d) * * *

(4) The number of samples selected per lot must be at least the number listed in Table 160.077–23A or Table 160.077–23B, as applicable, except as allowed in paragraph (d)(5) of this section.

(5) If the total production for any five consecutive lots does not exceed 250 devices, the manufacturer's and inspector's tests can be run on the same sample(s) at the same time.

* * * * *

Table 160.077–23B Inspector's Sampling

* * * * *

Notes to Table:

* * * * *

(2) This test may be omitted if the manufacturer has previously conducted it and the inspector has conducted the test on a previous lot within the past year.

(3) One sample of each means of marking on each type of fabric or finish used in PFD construction must be tested whenever a new lot of materials is used or at least every six months regardless of whether a new lot of materials was used within the past six months.

* * * * *

(g) * * *

(2) *Calibration.* The manufacturer must have the calibration of all test equipment checked at least annually by a weights and measures agency or the equipment manufacturer, distributor, or dealer.

(3) * * *

(iii) *A Scale* that has sufficient capacity to weigh a submerged sample basket. The scale must be sensitive to 14 g (0.5 oz) and must not have an error exceeding ±14 g (0.5 oz).

* * * * *

(x) *Inflation chamber materials test equipment.* If the required tests in paragraph (h)(2) of this section are performed by the PFD manufacturer, test equipment suitable for conducting Grab Breaking Strength, Tear Strength, Permeability, and Seam Strength tests must be available at the PFD manufacturer's facility.

* * * * *

(h) * * *

(4) *Over-pressure.* Each sample must be tested according to and meet UL 1517, section 28. Test samples may be prestressed by inflating them to a greater pressure than the required test pressure prior to initiating the test at the specified values.

(5) *Air Retention.* Each sample must be tested according to and meet UL 1517, section 36. Prior to initiating the test at the specified values, test samples may be prestressed by inflating to a pressure greater than the design pressure, but not exceeding 50 percent of the required pressure for the tests in

paragraph (h)(4) of this section. Any alternate test method that decreases the length of the test must be accepted by the Commandant and must require a proportionately lower allowable pressure loss and the same percentage sensitivity and accuracy as the standard allowable loss measured with the standard instrumentation.

* * * * *

(j) * * *

(4) * * *

(iii) If the inspector rejects a lot, the inspector shall notify the Commandant immediately.

(k) * * *

(1) A rejected PFD lot may be resubmitted for testing, examination, or inspection if the manufacturer first removes and destroys each PFD having the same type of defect or, if authorized by the Commandant or an authorized representative of the Commandant, reworks the lot to correct the defect.

(2) Any PFD rejected in a final lot examination or inspection may be resubmitted for examination or inspection if all defects have been corrected and reexamination or reinspection is authorized by the Commandant or an authorized representative of the Commandant.

* * * * *

16. In § 160.077–27, paragraph (a) is revised and paragraphs (d) and (e) are added to read as follows:

§ 160.077–27 Pamphlet.

(a) Each recreational hybrid PFD sold or offered for sale must be provided with a pamphlet that a prospective purchaser can read prior to purchase. The required pamphlet text must be printed verbatim and in the sequence set out in paragraph (e) of this section. Additional information, instructions, or illustrations must not be included within the required text. The type size shall be no smaller than 8-point.

* * * * *

(d) The text specified in paragraphs (e)(2) of this section must be accompanied by illustrations of the types of devices being described. The illustrations provided must be either photographs or drawings of the manufacturer's own products or illustrations of other Coast Guard-approved PFDs.

(e) For a Type I hybrid PFD intended for recreational use or a Type II, III, or V recreational hybrid PFD, the pamphlet contents must be as follows:

(1) The text in UL 1517, Section 39, item A;

(2) The following text and illustrations:

There Are Five Types of Personal Flotation Devices

This is a Type [insert approved Type] Hybrid Inflatable PFD.

Note: The following types of PFDs are designed to perform as described in calm water and when the wearer is not wearing any other flotation material (such as a wetsuit).

Type I—A Type I PFD has the greatest required inherent buoyancy and turns most unconscious persons in the water from a face down position to a vertical and slightly backward position, therefore greatly increasing one's chances of survival. The Type I PFD is suitable for all waters, especially for cruising on waters where rescue may be slow coming, such as large bodies of water where it is not likely that boats will be nearby. This type PFD is the most effective of all types in rough water. It is reversible and available in only two sizes—Adult (over 40 kg (90 lb)) and child (less than 40 kg (90 lb)) which are universal sizes (designed for all persons in the appropriate category).

[Insert illustration of Type I PFD]

Type II—A Type II PFD turns most wearers to a vertical and slightly backward position in the water. The turning action of a Type II PFD is less noticeable than the turning action of a Type I PFD and the Type II PFD will not turn as many persons under the same conditions as the Type I. The Type II PFD is usually more comfortable to wear than the Type I. This type of PFD is designed to fit a wide range of people for easy emergency use, and is available in the following sizes: Adult (over 40 kg (90 lb)), Medium Child (23–40 kg (50–90 lb)), and two categories of Small Child (less than 23 kg (50 lb) or less than 14 kg (30 lb). Additionally, some models are sized by chest sizes. You may prefer to use the Type II where there is a good chance of fast rescue, such as areas where it is common for other persons to be engaged in boating, fishing and other water activities.

[Insert illustration of Type II PFD]

Type III—The Type III PFD allows the wearer to tilt backwards in the water, and the device will maintain the wearer in that position and will not turn the wearer face down. It is not designed to turn the wearer face up. A Type III is generally more comfortable than a Type II, comes in a variety of styles which should be matched to the individual use, and is often the best choice for water sports, such as skiing, hunting, fishing, canoeing, and kayaking. This type PFD normally comes in many chest sizes and weight ranges; however, some universal sizes are available. You may also prefer to use the Type III where there is a probability of quick rescue such as areas where it is common for other persons to be engaged in boating, fishing, and other water activities.

[Insert illustration of Type III PFD]

Hybrid Inflatable Type I, II, or III—A Type I, II, or III Hybrid PFD is an inflatable device which is the most comfortable PFD to wear and has a minimal amount of buoyancy when deflated and significantly increased buoyancy when inflated (See accompanying table for actual buoyancy for your Type of hybrid). When inflated it turns the wearer with the action of a Type I, II, or III PFD as indicated on its label. Boaters taking advantage of the extra comfort of hybrid inflatable PFDs must take additional care in the use of these devices. Boaters should test their hybrid PFDs in the water, under safe, controlled conditions to know how well the devices float them with limited buoyancy. Approximately 90 percent of boaters will float while wearing a Type II or III hybrid inflatable PFD when it is not inflated. However, hybrid inflatable PFDs are not recommended for non-swimmers unless worn with enough additional inflation to float the wearer. Almost all boaters will float while wearing a Type I hybrid inflatable PFD that is not inflated. The PFD's 'performance type' indicates whether it should be used only where help is nearby, or if it also may be used where help may be slow coming. Type I hybrids are suitable where rescue may be slow coming, while Types II and III are good only when there is a chance of fast rescue. Type I hybrids are approved in three weight ranges, adult, for persons weighing over 40 kg (90 lb); youth, for persons weighing 23–40 kg (50–90 lb); and small child, for persons weighing 14–23 kg (30–50 lb). Type II hybrid PFDs are approved in the same size ranges as Type I hybrids but may be available in a number of chest sizes and in universal adult sizes. Type III hybrids are only approved in adult and youth sizes but may also be available in a number of chest sizes and in universal adult sizes.

[*For a pamphlet provided with a Type I, II or III hybrid PFD, insert illustration of the Type Hybrid PFD being sold*]

Type IV—A Type IV PFD is normally thrown or tossed to a person who has fallen overboard so that the person can grasp and hold the device until rescued. Until May 15, 1995 (or May 1, 1996 at commercial liveries), the Type IV is acceptable in place of a wearable device in certain instances. However, this type is suitable only where there is a good chance of quick rescue, such as areas where it is common for other persons to be nearby engaged in boating, fishing, and other water activities. It is not recommended for use by non-swimmers and children.

[Insert illustration of Type IV PFD]

Type V (General)—A Type V PFD is a PFD approved for restricted uses or activities such as boardsailing, or commercial white water rafting. These PFDs are not suitable for other boating activities. The label on the PFD indicates the kinds of activities for which the PFD may be used and whether there are limitations on how it may be used.

Type V Hybrid—A Type V Hybrid PFD is an inflatable device which can be the most comfortable and has very little buoyancy when it is not inflated, and considerably more buoyancy when it is inflated. In order for the device to count toward carriage requirements on recreational boats, it must be worn except when the boat is not underway or when the user is below deck. When inflated it turns the wearer similar to the action provided by a Type I, II, or III PFD (the type of performance is indicated on the label). This type of PFD is more comfortable because it is less bulky when it is not inflated. Boaters taking advantage of the extra comfort of hybrid inflatable PFDs must take

additional care in the use of these devices. Boaters should test their hybrid PFDs in the water, under safe, controlled conditions to know how well the devices float them with limited buoyancy. Approximately 70 percent of boaters will float while wearing a Type V hybrid PFD when the device is not inflated. Therefore, it is not recommended for non-swimmers unless worn with enough additional inflation to float the wearer. The PFD's ''performance type'' indicates whether it should be used only where help is nearby, or if it may also be used where help may be slow coming. This type of PFD is approved in two sizes, adult, for persons weighing over 40 kg (90 lb); and youth, for persons weighing 23–40 kg (50–90 lb), and may be available in a number of chest sizes and in universal adult sizes.

[*For a pamphlet provided with a Type V hybrid PFD, insert illustration of TYPE V Hybrid PFD*]

(3) A table with the applicable PFD Type, size, and buoyancy values from Table 160.077–15(b)(13) or 160.077–17(b)(11), as applicable; and

(4) The text in UL 1517, Section 39, items D, E, and F.

17. In § 160.077–29, paragraphs (b) and (c) are revised, and paragraphs (d) and (e) are added to read as follows:

§ 160.077–29 PFD manuals.

* * * * *

(b) *Required Manuals.* An owner's manual must be provided with each recreational and commercial hybrid PFD sold or offered for sale as follows:

(1) The manual text for a recreational hybrid PFD must be printed verbatim and in the sequence set out in paragraph (c) or (d) of this section, as applicable.

(2) The manual for a commercial hybrid PFD must meet the requirements of paragraph (f) of this section except that the manual for a commercial Type I PFD which is also labeled for recreational use must meet the requirements of paragraph (c) of this section.

(3) Additional information, instructions, or illustrations may be included within the specified text of the manuals required by this section if there is no contradiction to the required information.

(c) *Type I, II or III Hybrid PFD.* For a Type I, II and III hybrid PFD the manual contents must be as follows:

(1) The following text:

Hybrid Limitations

This PFD has limited inherent buoyancy which means YOU MAY HAVE TO INFLATE THIS PFD TO FLOAT, and its inflatable portion requires maintenance. While these PFDs are not required to be worn, if you have an accident or fall overboard, you are much more likely to survive if you are already wearing a PFD.

There is only one way to find out if you will float while wearing the PFD when it is not inflated. That is to try this PFD in the water as explained in [*insert reference to the section of the manual that discusses how to test the PFD*]. If you have not tested this device in accordance with these guidelines, the Coast Guard does not recommend its use.

(2) Instructions on use including instructions on donning, inflation, replenishing inflation mechanisms, and recommended practice operation;

(3) Instructions on how to properly inspect and maintain the PFD, and recommendations concerning frequency of inspection;

(4) Instructions on how to get the PFD repaired;

(5) The text in UL 1517, Section 40, items B and D;

(6) The following text:

Why Do You Need a PFD?

A PFD provides buoyancy to help keep your head above water and to help you stay face up. The average in-water-weight of an adult is only about 5 to 10 pounds. The buoyancy provided by most PFDs will support that weight in water. However, the hybrid Type I, II, or III PFD may be an exception. The uninflated buoyancy provided by this PFD may only float 90 percent of the boating public. This is because the inherent buoyancy has been reduced to make it more comfortable to wear. So, you may not float adequately without inflating the device. Once the device is inflated you will have a minimum of 22 lb of buoyancy for adult sizes, which should be more than enough to float everyone. (See table above [below] for the actual minimum buoyancy for different Types of hybrids.) Your body weight alone does not determine your in-water-weight. Since there is no simple method of determining your weight in water, you should try the device in the water in both its deflated and inflated condition.

(7) The text in UL 1517, Section 40, item G;

(8) The following text:

Wear Your PFD

Your PFD won't help you if you don't have it on. It is well-known that most boating accidents occur on calm water during a clear sunny day. It is also true that in approximately 80 percent of all boating accident fatalities, the victim did not use a PFD. Don't wait until it's too late. Non-swimmers and children especially should wear their PFD at all times when on or near the water. Hybrid Type I, II, III or V PFDs are not recommended for non-swimmers unless inflated enough to float the wearer.

(9) The text in UL 1517, Section 40, items I, J, K, and L; and

(10) A table with the applicable PFD Type, size, and buoyancy values from Table 160.077–15(b)(13) or 160.077–17(b)(11), as applicable, or provide a reference to appropriate pamphlet table, if the pamphlet is combined with the manual.

(d) *Type V Recreational Hybrid PFD.* For a Type V recreational hybrid PFD the manual contents must be as follows:

(1) The text in UL 1517, Section 40, item A;

(2) Instructions on use including instructions on donning, inflation, replenishing inflation mechanisms, and recommended practice operation;

(3) Instructions on how to properly inspect and maintain the PFD, and recommendations concerning frequency of inspection;

(4) Instructions on how to get the PFD repaired; and

(5) The text in UL 1517, section 40, that is not included under paragraph (d)(1) of this section.

(e) *Commercial Hybrid PFD.* (1) For a commercial hybrid PFD that is ''REQUIRED TO BE WORN'' the manual must meet the requirements of paragraph (d) of this section.

(2) For a commercial hybrid PFD approved as a ''Work Vest Only'' or Type I PFD the manual must meet the requirements of either paragraphs (e)(3) and (4) or of paragraph (c) of this section. The manual for a commercial Type I hybrid PFD which is also labeled for use on recreational boats must meet the requirements of paragraph (c) of this section.

(3) Each commercial hybrid PFD approved with special purpose limitation must have a user's manual that—

(i) Explains in detail the proper care, maintenance, stowage, and use of the PFD; and

(ii) Includes any other safety information as prescribed by the approval certificate.

(4) If the manual required in paragraph (e)(3) of this section calls for inspection or service by vessel personnel, the manual must—

(i) Specify personnel training or qualifications needed;

(ii) Explain how to identify the PFDs that need to be inspected; and

(iii) Provide a log in which inspections and servicing may be recorded.

(5) If a PFD light approved under subpart 161.012 is not provided at time of sale, the manual must specify the recommended type of light to be used.

(6) Notwithstanding the requirements of paragraph (b) of this section, manufacturers that make shipments to purchasers that do not redistribute the PFDs, must provide at least one manual in each carton of PFDs shipped.

18. Section 160.077–30 is revised to read as follows:

§ 160.077–30 Spare operating components and temporary marking.

(a) *Spare operating components.* Each recreational and commercial hybrid PFD must—

(1) If it has a manual or automatic inflation mechanism and is packaged and sold with one inflation medium cartridge loaded into the inflation mechanism, have at least two additional spare inflation cartridges packaged with it. If it is sold without an inflation medium cartridge loaded into the inflation mechanism, it must be packaged and sold with at least three cartridges; and

(2) If it has an automatic inflation mechanism and is packaged and sold with one water sensitive element loaded into the inflation mechanism, have at least two additional spare water sensitive elements packaged with it. If it is sold without a water sensitive element loaded into the inflation mechanism, it must be packaged and sold with at least three water sensitive elements.

(b) *Temporary marking.* Each recreational and commercial hybrid PFD which is sold—

(1) In a ready-to-use condition but which has covers or restraints to inhibit tampering with the inflation mechanism prior to sale, must have any such covers or restraints conspicuously marked ''REMOVE IMMEDIATELY AFTER PURCHASE.''; or

(2) Without an inflation medium cartridge, a water sensitive element, or both pre-loaded into the inflation mechanism, must include the markings required in § 160.077–15(c)(3)(ii).

19. In § 160.077–31, paragraphs (c), (d), (g), (h), (j), introductory text, and (j)(1) are revised, paragraphs (j)(2) and (3) are redesignated as (j)(3) and (4) respectively and revised, new paragraphs (j)(2) and (l) are added, and paragraph (e)(5) is removed and paragraph (e)(6) is redesignated as paragraph (e)(5) to read as follows:

§ 160.077–31 PFD Marking.

* * * * *

(c) *Recreational Hybrid PFD.* Each recreational hybrid PFD must be marked with the following text using capital letters where shown and be presented in the exact order shown:

Type [*II, III, or V, as applicable*] PFD

[*See paragraph (k) of this section for exact text to be used here*]

Recreational hybrid inflatable—Approved for use only on recreational boats. [*For Type V only*] REQUIRED TO BE WORN to meet Coast Guard carriage requirements (except for persons in enclosed spaces as explained in owner's manual).

[*For Type V only*] When inflated this PFD provides performance equivalent to a [*see paragraph (h) of this section for exact test to be used here*].

A Pamphlet and Owner's Manual must be provided with this PFD.

WARNING—TO REDUCE THE RISK OF DEATH BY DROWNING

—YOU MAY HAVE TO INFLATE THIS PFD TO FLOAT.
—TRY THIS PFD IN THE WATER EACH SEASON TO SEE IF IT WILL FLOAT YOU WITHOUT INFLATION.
—CHOOSE THE RIGHT SIZE PFD AND WEAR IT—FASTEN ALL CLOSURES AND ADJUST FOR SNUG FIT.
—THIS PFD REQUIRES MAINTENANCE. FOLLOW MANUFACTURER'S USE AND CARE INSTRUCTIONS.
—REMOVE HEAVY OBJECTS FROM POCKETS IN AN EMERGENCY.
—[*Unless impact tested at high speed as noted on the approval certificate*] DO NOT USE IN HIGH-SPEED ACTIVITIES.
—DO NOT DRINK ALCOHOL WHILE BOATING.

(d) *Type I and Commercial Hybrid PFD.* Each Type I hybrid PFD intended for recreational use and each commercial hybrid PFD must be marked with the following text using capital letters where shown and be presented in the exact order shown:

Type [*''I'', ''V'', or ''V Work Vest Only'', as applicable*] PFD

[*See paragraph (k) of this section for exact text to be used here*]

Commercial hybrid inflatable—Approved for use on [*see paragraph (j) of this section for exact text to be used here*].

[*For Type V only*] When inflated this PFD provides performance equivalent to a [*see paragraph (h) of this section for exact test to be used here*].

[*For Type I devices intended for recreational use*] A Pamphlet and Owner's Manual must be provided with this PFD.

WARNING—TO REDUCE THE RISK OF DEATH BY DROWNING

—YOU MAY HAVE TO INFLATE THIS PFD TO FLOAT.
—TRY THIS PFD IN THE WATER EACH SEASON TO SEE IF IT WILL FLOAT YOU WITHOUT INFLATION.
—[*For Type I devices intended for recreational use*] CHOOSE THE RIGHT SIZE PFD AND WEAR IT.
—FASTEN ALL CLOSURES AND ADJUST FOR SNUG FIT.
—THIS PFD MUST BE MAINTAINED, STOWED, AND USED ONLY IN ACCORDANCE WITH THE OWNER'S MANUAL.
—REMOVE HEAVY OBJECTS FROM POCKETS IN AN EMERGENCY.
—*[Unless impact tested at high speed as noted on the approval certificate For Type I devices intended for recreational use]* DO NOT USE IN HIGH-SPEED ACTIVITIES.
—*[For Type I devices intended for recreational use]* DO NOT DRINK ALCOHOL WHILE BOATING.

* * * * *

(g) *Flotation material buoyancy loss.* When kapok flotation material is used, the statement ''—REPLACE PFD IF PADS BECOME STIFF OR WATERLOGGED.'' must follow the warning ''—TRY THIS PFD IN THE WATER EACH SEASON TO SEE IF IT WILL FLOAT YOU WITHOUT INFLATION.'' required by paragraph (c) or (d) of this section.

(h) *Type equivalence.* The exact text to be inserted for Type V hybrid PFDs will be one of the following type equivalents as noted on the Approval Certificate.

* * * * *

(j) *Approved use.* Unless the Commandant has authorized omitting the display of approved use, the exact text to be inserted will be one or more of the following statements as noted on the approval certificate:

(1) ''all recreational boats and on uninspected commercial vessels''

(2) ''all recreational boats and on uninspected commercial vessels. REQUIRED TO BE WORN to meet Coast Guard carriage requirements (except for persons in enclosed spaces as explained in owner's manual)''

(3) ''inspected commercial vessels as a WORK VEST only.''

(4) ''*[Insert exact text of special purpose or limitation and vessel(s) or vessel type(s), noted on approval certificate].*''

* * * * *

(l) *Size Ranges.* The exact text to be inserted will be one of the following statements as noted on the approval certificate:

(1) ADULT—For persons weighing more than 40 kg (90 lb).

(2) YOUTH—For persons weighing 23–40 kg (50–90 lb).

(3) CHILD SMALL—For persons weighing 14–23 kg (30–50 lb).

(4) ''[*Other text noted on approval certificate*].''

20. Section 160.077–33 is redesignated as § 160.077–6, and in newly redesignated § 160.077–6 paragraphs (b), introductory text, and (c)(1) are revised, and paragraph (a)(3)(vi) is added to read as follows:

§ 160.077–6 Approval Procedures.

(a) * * *

(3) * * *

(vi) The size range of wearers that the device is intended to fit.

* * * * *

(b) *Waiver of tests.* If a manufacturer requests that any test in this subpart be waived, one of the following must be provided to the Commandant as justification for the waiver:

* * * * *

(c) * * *

(1) Meets other requirements prescribed by the Commandant in place of or in addition to requirements in this subpart; and

* * * * *

21. Section 160.077–35 is redesignated as § 160.077–7 and is revised to read as follows:

§ 160.077–7 Procedure for approval of design or material revision.

(a) Each change in design, material, or construction of an approved PFD must be approved by the Commandant before being used in any production of PFDs.

(b) Determinations of equivalence of design, construction, and materials may be made only by the Commandant.

22. Section 160.077–37 is redesignated as § 160.077–9 and is revised to read as follows:

§ 160.077–9 Independent laboratories.

A list of independent laboratories which have been accepted by the Commandant for conducting or supervising the tests and inspections required by this subpart, and for making material certifications required by § 160.077–11, may be obtained from the Commandant.

Dated: December 27, 1994.

J.C. Card,

Rear Admiral, U.S. Coast Guard, Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 95–433 Filed 1–6–95; 8:45 am]

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[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period Apr. 1, 1990 to Mar. 31, 1994. The CFR volume issued April 1, 1990, should be retained.

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